

Tiger Global - A Case for Substance “in” Form

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Preamble

1. The Tiger Global ('TG') case first gained attention when the Authority for Advance Rulings (AAR) ruled against the petitioners, Mauritius-based investment funds^[1] (collectively called 'the TG Funds'), denying them exemption on capital gains under the India-Mauritius Double Taxation Avoidance Agreement ('DTAA'). The AAR argued that the TG Funds were mere conduits for their U.S.-based parent, Tiger Global Management LLC, and lacked the necessary economic substance in Mauritius to avail of the tax benefits. In 'appeal' against this ruling, the TG Funds filed a writ petitions^[2] in the Delhi High Court ('Delhi HC') .

2. The TG Funds case [\[TS-624-HC-2024 \(Del\)\]](#) is the latest addition in the long trend of international tax jurisprudence which discuss economic substance and treaty abuse and the 'substance over form' principle.

On maintainability

3. The Revenue objected to the maintainability of the writ petition against the AAR order on the basis that an AAR order is merely a prima facie opinion. The Delhi HC dismissed these objections. The Delhi HC stated that the view as expressed by the AAR neither appears to be tentative nor one formed on a preliminary examination - they 'appear to be imbued with trappings of finality and conclusive determination'.

4. What is interesting to note is the Revenue's motivation in raising such an objection when the Supreme Court in Columbia Sportswear Company (346 ITR 161) has held that the AAR is a Tribunal, and hence, is amenable to writs of certiorari and prohibition under article 226 of the Constitution. The point that the AAR ruling is a prima facie opinion and hence not appealable, appears to be an alternative albeit incorrect strategy to 'bypass' the SC ruling in Columbia Sportswear Company (supra). While this is an interesting legal nicety from the Revenue, it was bound to be futile.

On merits and settled principles

5. Importantly, the Delhi HC held that Mauritius and TG Funds domiciled in that nation are neither liable to be viewed on a negative plane nor are they obliged to satisfy a separate standard of legitimacy^[3].

Further, the establishment of an investment vehicle in a tax friendly destination, in today's time, is neither considered to be an anathema nor does it, ipso facto, give rise to a presumption of tax evasion or treaty abuse^[4]. Corporate structuring which enables businesses to access jurisdictions and markets is today accepted as the global norm^[5]. Further, Mauritius has placed a favourable foundation for businesses to base themselves in that island nation. With this, the Delhi HC held that the Revenue would be clearly obliged to meet a high standard of proof when alleging avoidance and abuse. Subsidiaries are ordained by law to have a distinct and independent legal persona and which is liable to be ignored only in rare contingencies^[6]. Absent apparent and evident attempts at sustaining or perpetuating fraud, camouflaging sham transactions, shroud an illegality, the said precept is not liable to be readily or lightly invoked^[7].

Consistency and detailing in factual evidence

6. The TG Funds presented the corporate set-up and ownership lineages, financial statements, and its consistency across documentation, including financial statements. This consistency was maintained in the corporate setup, the flow of investments, and the representation of ownership structures, highlighting that the TG Funds were not merely conduit entities. This factual backdrop 'exposed' as incorrect numerous factual submissions of the Revenue.

7. These documents helped prove that the TG Funds were not artificial structures but had real business purposes. In line with the Delhi HC's reasoning, the TG Funds provided evidence that demonstrated that they conducted genuine business activities, such as:

- Independent investment decisions made by the Board of Directors in Mauritius, including major investments like Flipkart.
- The TG Funds' role in managing significant capital contributions from multiple global investors, further demonstrating their operational independence from the U.S.-based parent company.

8. Consistency in documentation showed that the TG Funds had control over their income and were not contractually obligated to pass on that income to another person, undermining the Revenue's claim that the TG Funds were merely conduits for the U.S.-based company.

Corporate Veil & Ownership

9. The Delhi HC noted that the substance in the TG Funds should not be lightly regarded. The TG Funds made substantial investments in Flipkart Singapore between the years 2011 to 2015. The transfer of holding took place in 2018 as part of a larger takeover scheme spearheaded by Walmart Inc. The TG Funds were entrusted with funds provided by as many as 500 individual investor TG Funds situate in 30 jurisdictions across the globe. The placement of those funds clearly comes across as a prudent commercial decision since it enabled the TG Funds to deploy those funds and make capital investments rather than its shareholders/investors making individual forays. This articulation appears to contradict, albeit rightly, the blinkered approach in section 97(4) of the Act.

10. The Delhi HC held that extent and quantum of investments made by the TG Funds, the period for which those investments were held, the expenditure incurred in Mauritius when considered cumulatively clearly dispels any assumption of they lacking in economic substance. This backdrop was also used by the Delhi HC to underline that the TG Funds had a history of independent operations, including receiving capital and loans from multiple investors and independently making investment decisions. The Board of Directors of the TG Funds in Mauritius had independent authority to make decisions. The Delhi HC considered the board resolutions and minutes, as key evidence to accept that the Board controlled significant financial actions, such as the declaration of dividends and management of investments, without direction from the U.S.-based parent company. The fact that the resolutions required the co-signature of Mauritian directors for large financial transactions, further reinforced the Board's autonomy. The absence of contractual obligations to transfer income to the parent company underscored the Board's independent decision-making authority, countering the Revenue's claim that the TG Funds were mere conduits.

11. Considering independent constitution and control, the Delhi HC rejected the Revenue's attempts to pierce the corporate veil. Further, the TG Funds had amply demonstrated that the income belonged to

them alone and they alone had the right to dispose of it as they saw fit. Thus, the refuted the Revenue's claim of parent's beneficial ownership.

Tax Residency Certificate (TRC)

12. The TG Funds relied on the TRCs issued by Mauritius authorities, alongside compliance with the LOB provisions, as proof of tax residency and treaty eligibility. The TRCs were further supported by financial documents that highlighted the TG Funds' compliance with Mauritian laws and business regulations.

13. The Delhi HC discussing several juridical precedents, ruled that a TRC should not be disregarded unless there is evidence of fraud or sham. The TRC serves as prima facie evidence of residency and eligibility for treaty benefits. The court emphasized that the TRC and LOB provisions comprehensively address concerns about treaty abuse, blocking the Revenue's attempt to impose additional standards. However, the LOB provisions and TRC must be complemented with robust documentation of actual business activity to withstand anti-avoidance scrutiny under GAAR provisions.

Economic Activity in Substance

14. As stated earlier, the TG Funds provided substantial evidence of economic activity, including their incorporation in Mauritius in 2011, aggregation of funds from over 500 investors across 30 jurisdictions, and the holding of a Category 1 Global Business License (GBL) under the Financial Services Act of 2007. Further, the TG Funds had invested capital contributions and provided bridge loans. The financial documents also reflected expenditure on business operations and salaries for employees, further establishing that the Mauritius TG Funds were not passive vehicles but actively managed businesses. The August 2018 decision on dividend declaration and the decision of May 2018 to sell Flipkart SG shares underline the economic substance at the TG Funds.

Board and Profile of Directors

15. The Board of Directors was based in Mauritius, and minutes from board meetings reflected that the key decisions related to investments were made independently by the Board, including Mauritius-based directors. These decisions included investments in Flipkart and subsequent management of those shares. Select directors were also signatories to the Charter documents and historical associated further added to the genuineness of the role. The Delhi HC explicitly stated that merely because two of the members of the Board also happened to be connected with the larger conglomerate would not result in the TG Funds being mere puppets^[8].

16. The Delhi HC quoted the SC that even if the subsidiary were to comply with requests of the parent company, the same would be clearly justifiable and would not compel one to assume that the subsidiary had become wholly subservient. The Delhi HC thereby acknowledged the independent functioning of the Board of Directors and the business expenditure and management of investments. With this, the Delhi HC held that there is real substance behind the legal form. The TG Funds also established that the Board had full control over the income and investment decisions, negating the Revenue's claim that beneficial ownership lay with the parent.

Shifting the Onus to the Revenue

17. The TG Funds demonstrated independent decision-making and economic substance with robust evidence. However, thinking aloud, the Revenue could have explored beneficial ownership and control dynamics more deeply – particularly the flow of income to determine whether, despite the absence of contractual obligations, the Mauritius TG Funds were effectively routing income to the parent. A pattern-based analysis of transactions might have revealed operational realities and could have challenged the TG Funds' submissions of autonomy. Similarly, the Revenue could have explored the control dynamics more thoroughly by investigating internal communications between the TG Funds and their parent. This would have involved analyzing email correspondence or decision-making trails to determine whether the TG Funds were genuinely independent or following directives from the parent.

Conclusion

18. What is tragic for the Indian professional and citizen is that, for nearly 25 years now^[9], there appears to be a disconnect between the following two teams at the Government – the team that has been engaged in Treaty discussions with Mauritius and the Income-tax Department and its legal team in the courts. Courts have consistently interpreted the treaty documentation driven by the former and consistently dismissed (albeit in very peculiar cases) the understanding of these documents by the latter.

19. Taking this further, starting from Circular 789 in 2000 to Azadi Bachao Andolan (263 ITR 706) and thereafter Sanofi and more recently TG Funds, there appears to be a consistent dichotomy manifest in the Government’s articulation and understanding of these documents and the recent developments in the Mauritius DTAA as well.

20. The outcome of all this, whoever the winning side, is the continued labelling of India as a country where the ‘rule of law’ is a hostage to policy paralysis. Also held hostage is India’s role as a nation that can lead world opinion on the delicate sovereignty issue inherent in foreign capital and its repatriation and between enforcing the rule of law and protecting legitimate national interests.

21. Despite this lack of clarity, in all likelihood, the Revenue will rush to the Supreme Court against this order. Whether the Revenue can present new facts (which itself is not permitted before the Supreme Court) to make its case within the now-settled framework reiterated by the Delhi High Court or regurgitate earlier submissions needs to be seen.

The views expressed are those of the authors and are personal.

[1] Tiger Global International III Holdings [\[TS-624-HC-2024\(DEL\)\]](#), Tiger Global International IV Holdings (W.P.(C) 6766/2020 & CM APPL. 23483/2020) and Tiger Global International II Holdings (W.P.(C) 6765/2020 & CM APPL. 23481/2020).

[2] See supra FN 1

[3] Para 247

[4] Para 248

[5] Para 249

[6] Para 250

[7] Para 254

[8] Para 262

[9] Starting with issuance of Circular No. 789 in 2000 and the first Azadi Bachao Andolan litigation in the very same Delhi HC in 2000.