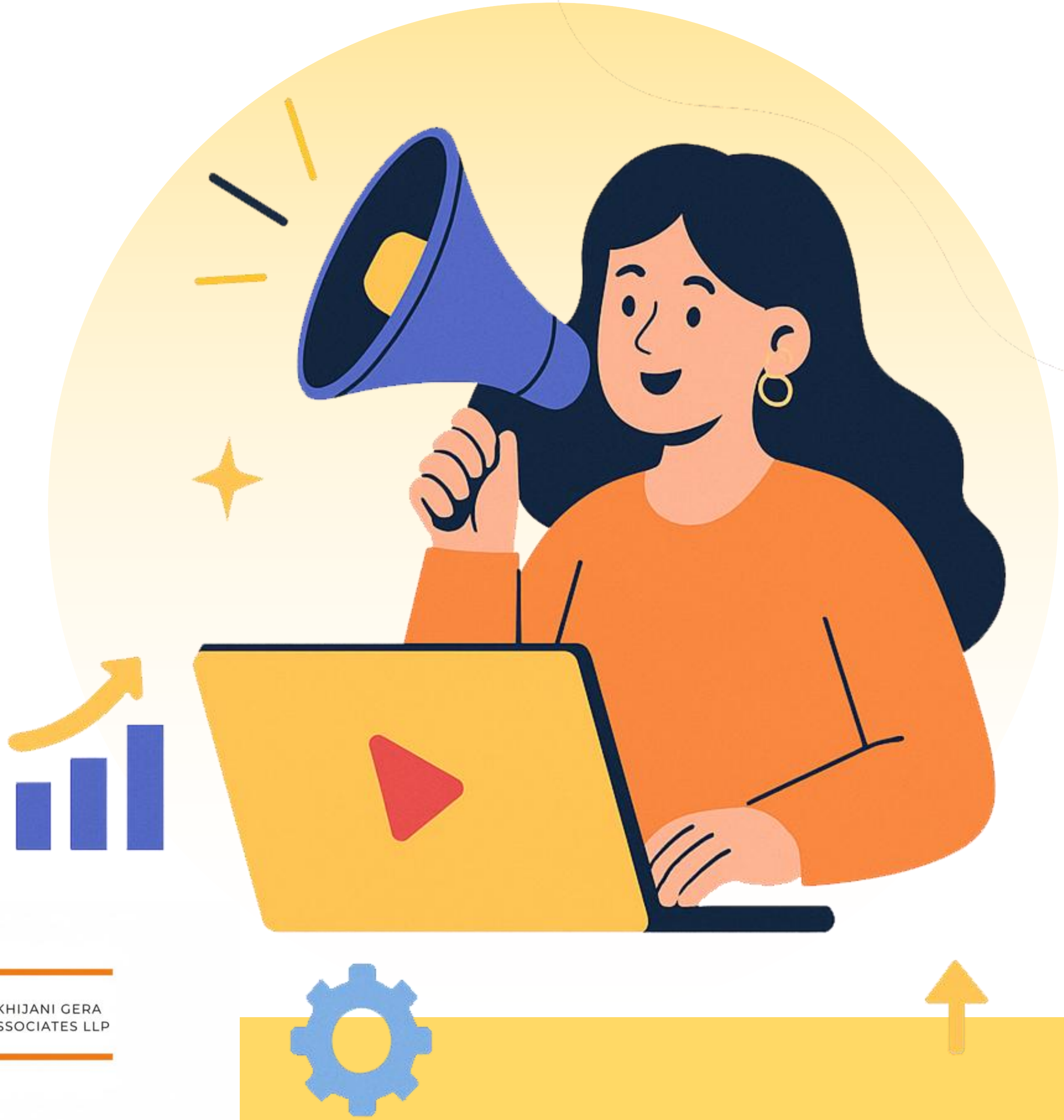
Supreme Court Ruling in Tiger Global – Overview & Thoughts



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Facts

Tiger Global was a Mauritian company which had held shares in **Flipkart Singapore**.

Flipkart Singapore derived substantial value (>50%) from assets (shares of Indian company)

Shares were acquired before 1 April 2017, before the amendment of India-Mauritius Tax Treaty and General Anti Avoidance Rule (GAAR) was made applicable.

Singapore Company shares held by Tiger Global Mauritius was sold (in mid of 2018) to Walmart Inc.' group companies

Taxpayer's Position

Obtained a TRC from Mauritius Tax Authorities; Investment was held like this for almost a decade

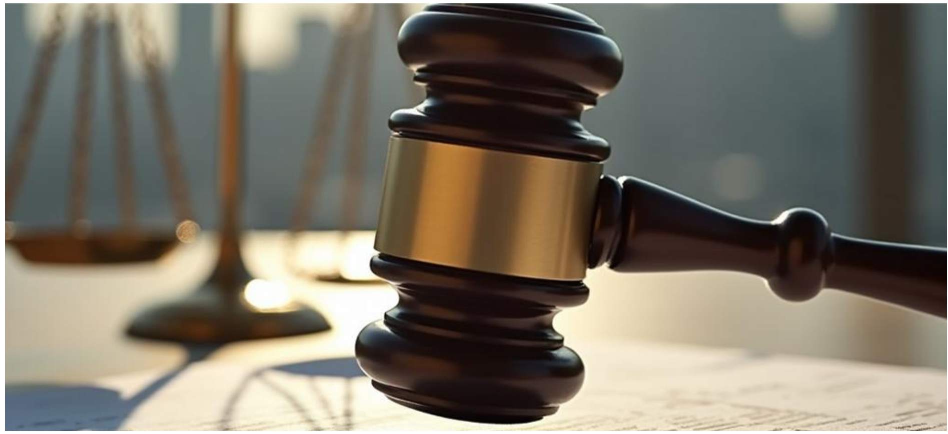
Not a fly by night entity, had office employees and conducted all board meetings in Mauritius.

Indirect transfer not subjected to tax as per Article 13(4) of the India-Mauritius Tax Treaty

Tax Authority Position

Noted that directors in Mauritius did not have any power, gave example of US based UBO having power to sign cheque worth more than USD 250,000.

As per GAAR, transaction structured for avoidance of tax was to be disregarded; will override Tax Treaty as well.



Supreme Court Ruling

01 Transaction structure in question lacked commercial substance; amounted to an impermissible tax-avoidance arrangement

02 Post 2017, GAAR empower India to override treaty benefits in cases of abusive arrangements.

03 Protection under the grandfathering clause does not extend to transfers conducted via offshore interposed companies; tax treaty does not protect indirect transfer

04 GAAR applies if tax benefit arises after 1 April 2017 even if the investments were made before this date

05 Certain arrangements may still be subjected to Judicial Anti Avoidance Rules (JAAR), even if one could technically argue that GAAR does not apply.

06 TRC necessary but not conclusive for treaty entitlement, treaty entitlement can be denied if the holding entity is found to be a conduit without real operations.

07 In nutshell, treaty benefits depend on substance, not merely residency certificates or the form of the structure.

08 Earlier circulars no longer hold good after the statutory amendments.

Our Comments (Personal Viewpoints)

It is reasonable to say the commercial substance is critical.

But how to prove commercial substance is not clear.
Singapore with LOB clause may not suffice ?

Supreme Court made a remark that 13(4) does not cover indirect transfer case. OECD view appears to be different; not discussed.

What is the fate of all indirect transfer ?

The Supreme Court also remarked that transaction not taxable outside India could be viewed as not protected by Tax Treaty.

BEPS discussion to which India is a signatory was to counter such situation with multilateral approach.
Does this change ?

GAAR applicability can be understood but can it be applied without the committee ?

GAAR Committee relevance and how will it function

How about this case ?

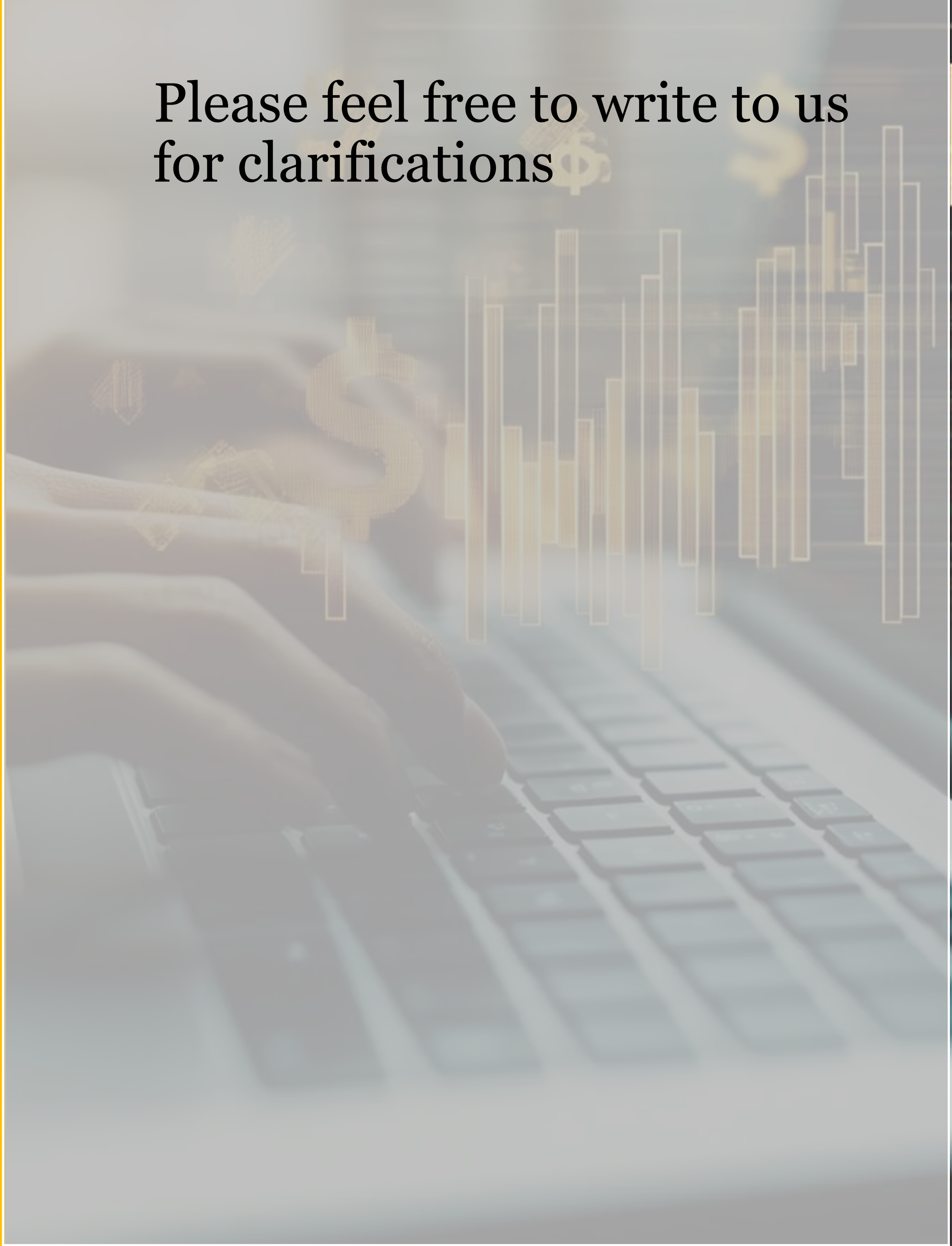
Example : A German family-owned business group (with genuine commercial substance) carries out an internal restructuring that is tax-exempt in Germany. One entity is merger into another entity, and this entity has significant value derived from India

In this case

- Transaction is not subject to tax in Germany – does this makes a case to disallow tax treaty benefit
- Indirect transfer within the group become taxable under the India-Germany Tax Treaty;
- When the language of the Treaty is based on OECD Model Convention and OECD Commentary provides a view which another sovereign country (Germany) has relied upon while signing could be disregarded now ? This is especially the case where Germany has allowed in its Tax Treaty to ax income on services; as per German law – income from services is not subject to tax in Germany – does this mean Indian entity is not eligible for tax treaty benefit ?

Conclusion

There are many questions which requires clarity – government should set-up a team (maybe Niti Ayog should have a look); examine these observations in light of international practice and recommend to the government to provide clarity on these issues. Clear understanding of taxes even if little high, (when investor can earn profit from India) would be better than lower but unclear tax



Please feel free to write to us for clarifications

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