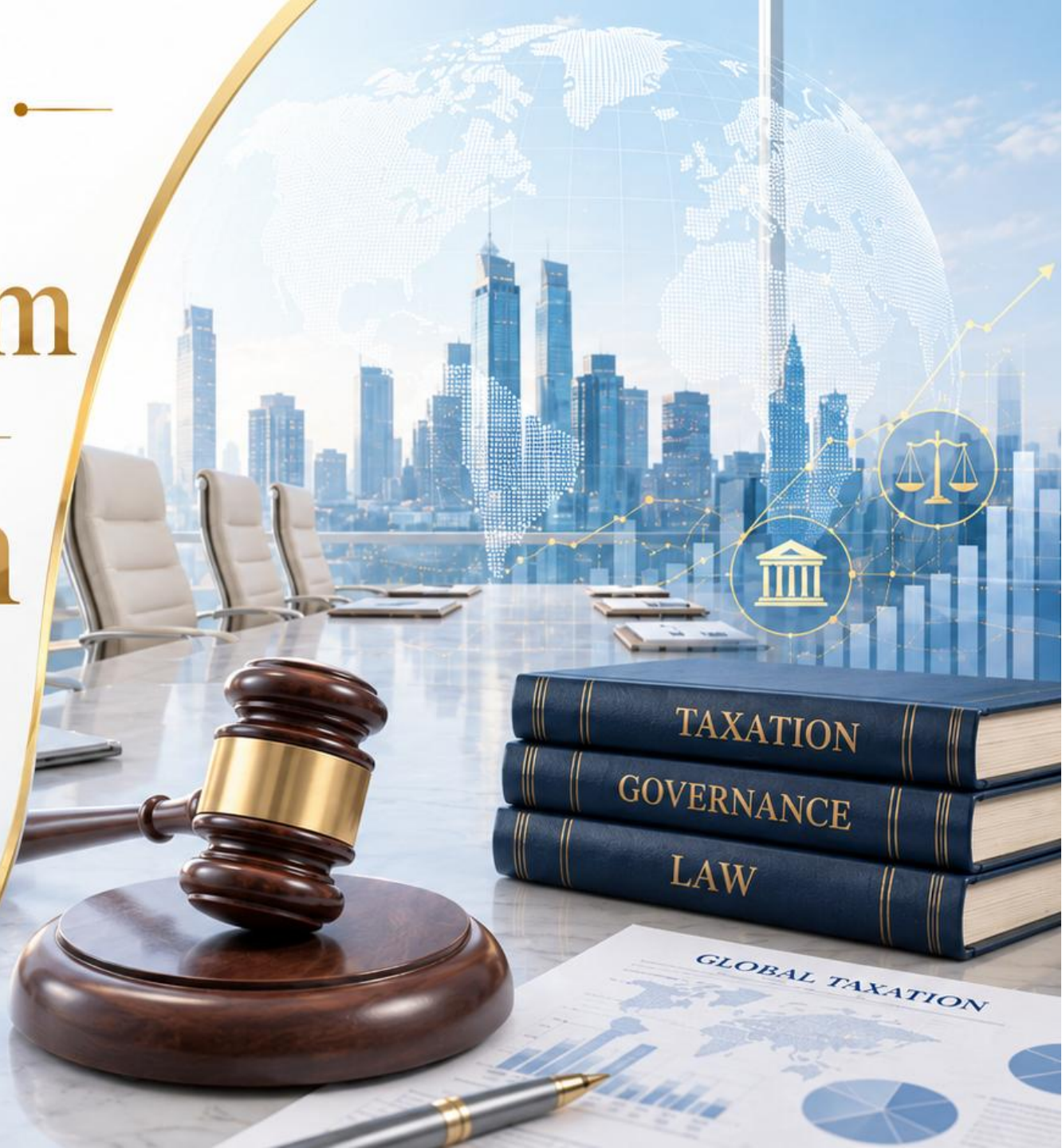
ICAI – Eastern India Regional Council

From Courtroom to Boardroom

Jurisprudence of Global Taxation & Governance including the Vodafone Verdict



CA Ameya Kunte

7th June 2026

About Me

A tax professional, chartered accountant, **23 years of tax consulting experience,** entrepreneur, technology enthusiast

Founder of **Globeview Advisors, a boutique tax consulting** specialized in restructuring advisory, cross-border transactions, merger and acquisition, and family office consulting

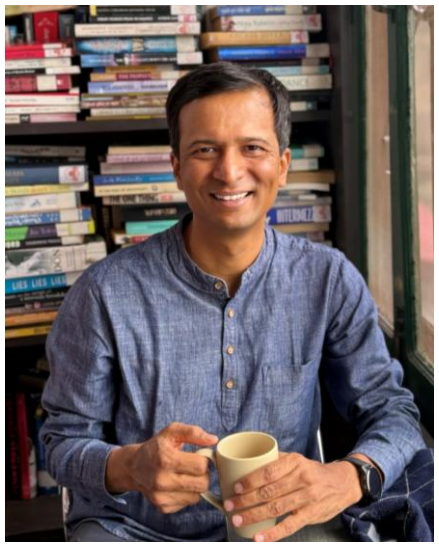
Co-founder of **Produc8ive**, a tech startup focusing on developing **customized AI solutions for finance** team members in corporates and AI led solutions for accountants and lawyers

Board Member for an automotive engineering company and a hospitality fine dining restaurant business

Member of managing council for Chamber of Tax Consultants and active contributor at BCAS, ICAI, and IFA

Professional badminton player and an avid trekker and a traveller.

Actively supporting an NGO called Doorstep school, which brings the education to over 10,000 kids across the city of Pune.



Globeview

Thank you to my colleagues Vasudevan, Pranav and Manasvi

Evolution of India's Indirect Transfer Regime

Vodafone (2012) to Tiger Global (2026)

Evolution of India's Indirect Transfer Regime

Key Judicial & Legislative Milestones (2007 – 2026)

2007 – Vodafone Acquisition

Offshore Cayman Islands entity transfer resulted in indirect acquisition of Hutchison Essar (India) by Vodafone

2012 – Vodafone

SC held offshore share transfers not taxable, no "look through" via judicial interpretation

2012 - Retrospective Amendment - Finance Act 2012

To tax Indirect transfers of Indian assets via transfer of foreign company shares

2012 – Shome Committee

reviewed retrospective amendments post-Vodafone and recommended safeguards

2013 - Sanofi SA

AP HC held foreign share transfers non-taxable absent sham; DTAA prevails over ITA, 1961

2015 – Circular No 4/2015 – CBDT

Clarified dividends from foreign companies are not taxable in India under indirect transfer provisions.

2017 – Finance Act

exempted certain indirect transfers involving FPIs/FIIs from Indian taxation, providing relief to specified foreign investors.

2017 – GAAR came into effect

GAAR come into effect from 1st April 2017.

2021 - Rollback

Government withdrew retrospective demands, effectively shifting toward tax certainty.

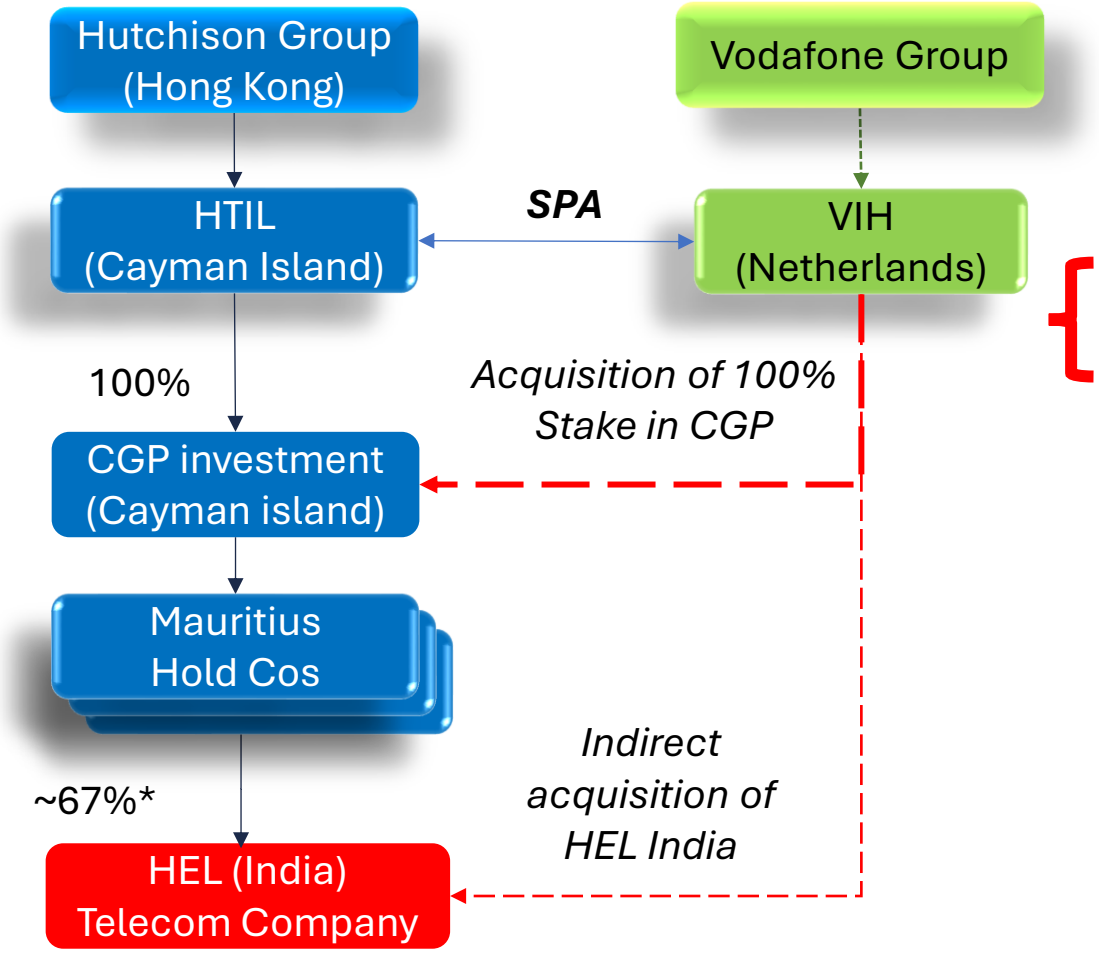
2026 – Tiger Global SC denied treaty benefits

where offshore structure which lacks commercial substance under GAAR

Vodafone International Holdings B.V v. UOI

(2012) 341 ITR 1 (SC)

Vodafone - Group structure and Sequence of Events



**CGP held 42.34% in HEL through 100% wholly owned subsidiaries [Mauritius companies], 9.62% indirectly through Telecom Investment India Pvt. Ltd. [TII] and Omega Telecom [i.e. pro rata route], and 15.03% through Global Services Private Limited [GSPL] route*

- **Since 1992** - Hutchison Holding (Group) via a layered offshore structure held ~67% controlling interest in HEL India, mainly via holding Companies in Mauritius
- **2006** - HTIL (Cayman Islands) received offer from Vodafone for Hutchison Group's 67% economic interest in HEL (India)
- **2007** - VIH (Netherland) acquired CGP (Cayman Island) shares from HTIL (indirect acquisition of HEL India)
- **2007** - FIPB (Foreign Investment Promotion Board) granted FDI clearance to the transaction
- **2007 - Income-tax Dept.** Issued notices alleging VIH (Netherland) failed to withheld taxes on payment of sale consideration to HTIL
  - HEL (India) was proposed to be treated as representative assessee and VIH as assessee-in-default.
- **2010** - **Revenue** - passed a detailed order u/s 201/201(1A) asserting taxability and nexus with India.
- **2010 - Bombay HC –** held transaction is taxable in India
- **2012** – **Supreme Court** – reversed the Bombay HC judgment and held transaction is **not taxable** in India.

Vodafone – Key principles by Supreme Court

1. Situs of Share transferred not in India Transfer Matters

Situs of the transferred share determines taxability, not location of underlying assets. The Situs in this case was outside India - shares of Cayman Island entity were sold

2. Section 9 is not a look-through provision

Section 9 only taxes the assets situated in India, thus, Indirect transfer not covered. Courts cannot apply a look-through approach **unless expressly legislated.**

3. Separate Legal Entity

SPVs, and intermediary entities in foreign investments are legitimate commercial arrangements that cannot be disregarded merely because they save taxes.

4. Piercing of corporate veil – sham transactions

Substance-over-form and veil piercing apply only where **sham, fraud or abuse** is established. An entity interposed without commercial substance can be disregarded.

5. Courts to not adopt dissecting approach

Revenue cannot start with whether transaction is resulting in tax deferment / tax saving. Genuine tax planning allowed.

6. CGP had a commercial purpose

CGP was an investment vehicle. Acquisition of interest through CGP allowed rights in other agreements etc., hence commercial sense to acquire through CGP.

Supreme Court upheld that acquisition of HEL through Cayman Island Company was not taxable in India, since Section 9 did not provide for taxation of indirect transfers.

Key events post Vodafone Ruling by Supreme Court

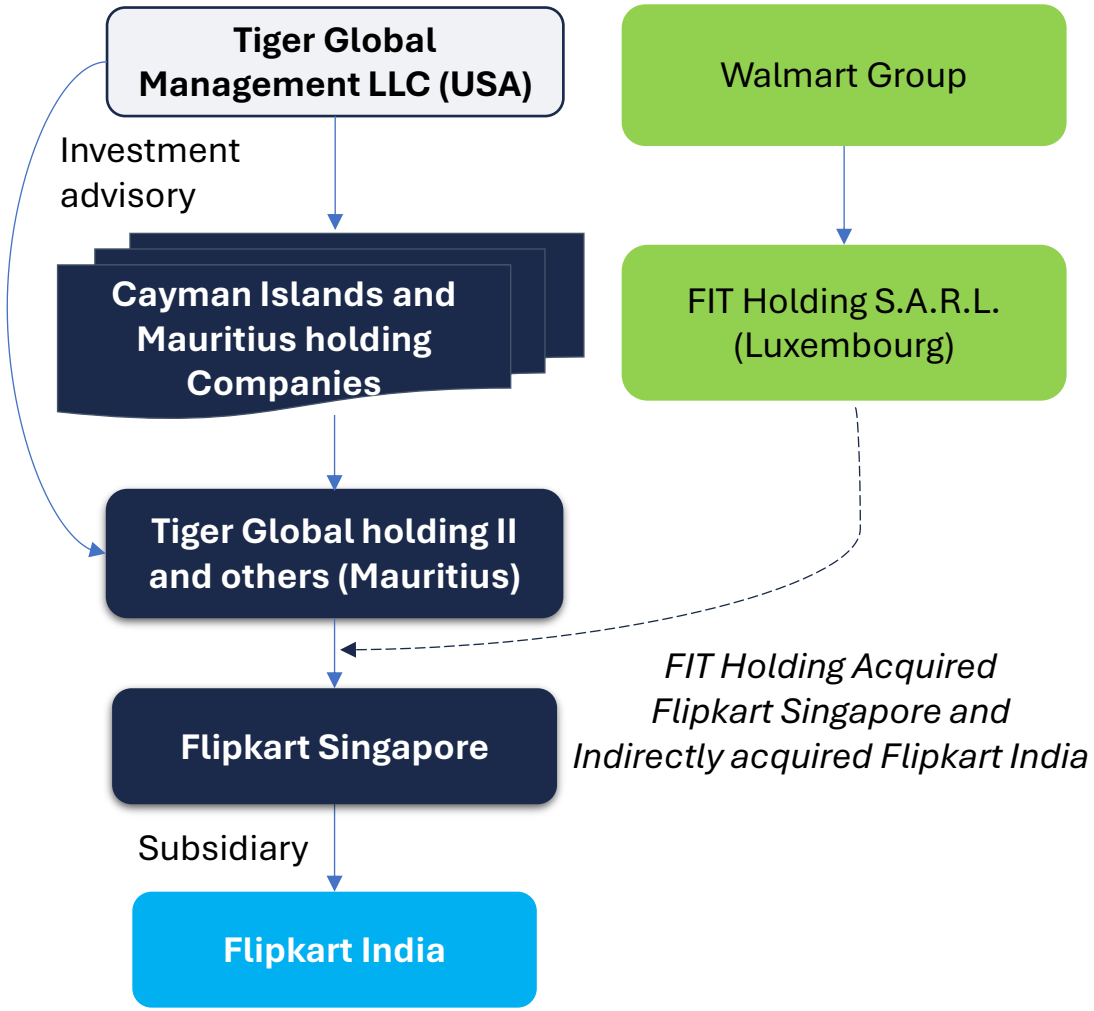
- Finance Act, 2012 enacted retrospective amendments to tax indirect transfers involving shares of an Indian entity.
- The indirect transfer provisions applies where the shares of a foreign entity which is transferred, derived is value substantially from the assets located in India. In such cases, the shares of the foreign entity are deemed to be located in India.
- **Shome Committee** was constituted for guidance on GAAR provisions.
- GAAR provisions were enacted in the Income-tax Act, 1961 effective from 01st April 2017.
- Vodafone and Cairn initiated Investment Treaty Arbitration against India regarding tax demand arising from retrospective taxation.
- India lost the Investment treaty arbitration in both cases.
- **Rollback:** In 2021, Government has rolled back the retrospective application of the amendments which introduced taxation of indirect transfers.

Globeview

AAR v. Tiger Global International Holdings

(2026) 485 ITR 214 (SC)

Tiger Global – Structure and sequent of events



- **2011-2015** - Tiger Global Group invested into Flipkart Singapore structure, via Mauritius-based investment companies holding Category 1 Global Business Licences with valid Mauritius TRCs and claiming benefits under the India–Mauritius DTAA.
- **2016** - India–Mauritius treaty amendment - Capital gains exemption modified prospectively; grandfathering of investment upto 01 April 2017 issue became relevant
- **2018 -** Tiger sold Flipkart Singapore shares to Walmart Group's Company, Fit Holdings S.A.R.L., Luxembourg for **~ USD 2.08 billion equivalent to ~INR 14,440.23 crores.**
- **2018 - Application for Nil withholding tax certificate under Section 197 –** The tax authorities rejected nil withholding and noted that respondents were ineligible for DTAA benefits, issuing withholding certificates at 6.05% to 8.47
- **2020 - AAR** ruled against the assessee and held arrangement was prima facie designed for tax avoidance.
- **2024 – Delhi High Court** in writ petition, quashed AAR order and held assessee was entitled for treaty benefits.
- **2026 - Supreme Court –** Denied treaty benefits and held the sale of shares by Mauritius entities, taxable in India.

Key facts observed by SC

- The Tiger Global entities in Mauritius were set-up with primary objective of undertaking investment activities with the intention of earning long-term capital appreciation and investment income.
- These entities were regulated by Financial Services Commission in Mauritius and were granted Category I Global Business License.
- The Board consisted of 2 Mauritius residents and 1 US resident.
- The entities held TRC issued by Mauritius authorities and also held Indian PAN.

Revenue's Key Contentions: U.S. Control Behind Mauritius Entities (submissions before AAR and HC)

- Mauritius entities functioned primarily as investment holding vehicles within the Tiger Global structure. It was alleged that the Mauritius entities were only for tax benefits.
- Key investment decisions were allegedly driven by senior U.S. based Tiger Global Management LLC (TGM LLC).
- Mr. Coleman, resident in the US was named as the beneficial owner of one of the Mauritius entity.
- Mr. Coleman and other senior employees of TGM LLC controlled the bank accounts, had signing authorities, while they were not part of the Board of directors.
- The Meetings of the Board meetings did not show deliberations by the Board, but a mere noting / ratification of investment proposals.

India-Mauritius DTAA – Article 13

1. Gains from the alienation of immovable property....

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment ...

3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft ....

3A. Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.

3B. However, the tax rate on the gains referred to in paragraph 3A of this Article and arising during the period beginning on 1st April, 2017 and ending on 31st March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated;

4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident.

5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States.

Tiger Global – Key principles by Supreme Court

1. Article 13(4) exemption applicable to direct holding

Treaty benefits under exclusion clause of Article 13(4) applicable where shares are directly held by the seller entity. Indirect transfer not exempted under this Article.

2. Commercial Substance & Control Can Be Examined

Revenue/AAR may examine the centre of management **and determine residence for claiming treaty benefits.**

3. TRC Is Relevant but Not Automatically Determinative

TRC supports treaty residence but not conclusive. It cannot prevent enquiry if the interposed entity was a device to avoid tax.

4. GAAR overrides DTAA

Sequence of application – (i) Section 9(1)(i); (ii) Treaty relief contested with POEM not in Mauritius; (iii) GAAR and in alternative JAAR to deny treaty benefits

5. Actual taxability in other state for treaty benefit

The treaty benefits can be availed only when the transaction is actually taxable in the other contracting state.

6. Rule 10U safeguard

Grandfathering protection under Rule 10U applies to investments made before 1 April 2017 but does not automatically immunise transaction if tax benefit is arising from an avoidance transaction.

In the present case, the Court held that the Revenue proved the transactions in this case are impermissible tax-avoidance arrangements, and not eligible for treaty benefits.

Rule 10U & Rule 128 Amendment

Tiger Global SC

Grandfathering Overridden –

- SC held Rule 10U(2) overrides Rule 10U(1)(d), despite '***without prejudice***' language
- Before 1-Apr-2017 investments could be exposed to GAAR if arrangement is an impermissible avoidance arrangements
- Created significant uncertainty for investors

Stakeholder Concerns

Investor Expectation Of Protection –

- Govt. press release (14 Jan 2013) and CBDT Circular No. 19/2015 assured that investments up to31 Mar 2017 will be protected from GAAR.
- CBDT Circular clarified that treaty grandfathering is outside scope of PPT and governed by treaty provisions

March 2026 – Amendment

Clarity Restored –

- CBDT Notifications amend Rule 10U (ITR 1962) and Rule 128 (ITR 2026).
- GAAR shall **NOT apply** to income from transfer of investments made before 1 Apr 2017.
- Other income (e.g. dividend, interest) from such investments may still be tested under GAAR

EFFECTIVE DATE	IT Rules 1962: From 31 March 2026. IT Rules 2026: From 1 April 2026.
OBJECTIVE	To restore certainty and align the law with the original intent of grandfathering for pre-1 April 2017 investments, while safeguarding the anti-avoidance objective of GAAR.

Evolution of Interpretation of DTAA and TRC

Particulars	Azadi Bachao Andolan (2003)	Vodafone (2012)	Tiger Global (2026)
Tax Residency Certificate	Absolute and binding on the tax department; forecloses further residency enquiry	Confirmed as sufficient proof of residence and beneficial interest/ownership	Rebuttable; merely satisfies a preliminary eligibility condition
Anti-Abuse Framework	Limited and rejected general anti-judicial avoidance doctrines	Permitted piercing the veil only in narrow cases of fraud, sham, or round-tripping.	Held that GAAR applied along-side JAAR in alternative.

TRC - Earlier Position

Earlier rulings like Azadi Bachao Andolan and Vodafone International Holdings BV treated a valid TRC as strong proof of treaty eligibility, restricting deeper scrutiny by tax authorities.

TRC - after Tiger Global

However, SC in case of Tiger Global, held that a TRC is only a preliminary requirement, allowing authorities to examine the real control, management, and commercial substance of the structure before granting treaty benefits.

Impact of Tiger Global judgment

- In light of the amendments to Rule 128 and the treaty changes effective from 1 April 2017:
  - Investments and **exits completed prior to 1 April 2017** should, in principle, continue to benefit from the **grandfathering protection** contemplated under the amended treaty framework.
  - However, where exits occur **after 1 April 2017**, the Tiger Global judgment is likely to encourage the tax authorities to undertake significantly greater scrutiny of treaty-based holding structures. However, for investment made before 1 April 2017, benefits to continue.

- Mere availability of a **Tax Residency Certificate (TRC)** may no longer be considered sufficient to defend treaty entitlement where larger anti-abuse concerns are alleged.

- Investment structures routed through traditional offshore jurisdictions such as Mauritius or Singapore may therefore face heightened litigation and compliance risk.

- From an M&A and transaction execution perspective, the judgment is also likely to impact deal negotiations and SPA protections.

- Buyers may increasingly seek larger escrow arrangements; extended tax indemnity survival periods; purchase price holdbacks; and specific indemnities for indirect transfer tax exposure.

Considerations for the Management

- The **commercial rationale** to a structure
- The operations and management of the entity
- Role of group headquarters
- Documentation of commercial rationale
- Deal – Tax risk allocation ?
- M&A deal – tax insurance ?

Emerging PE Risks for MNCs –

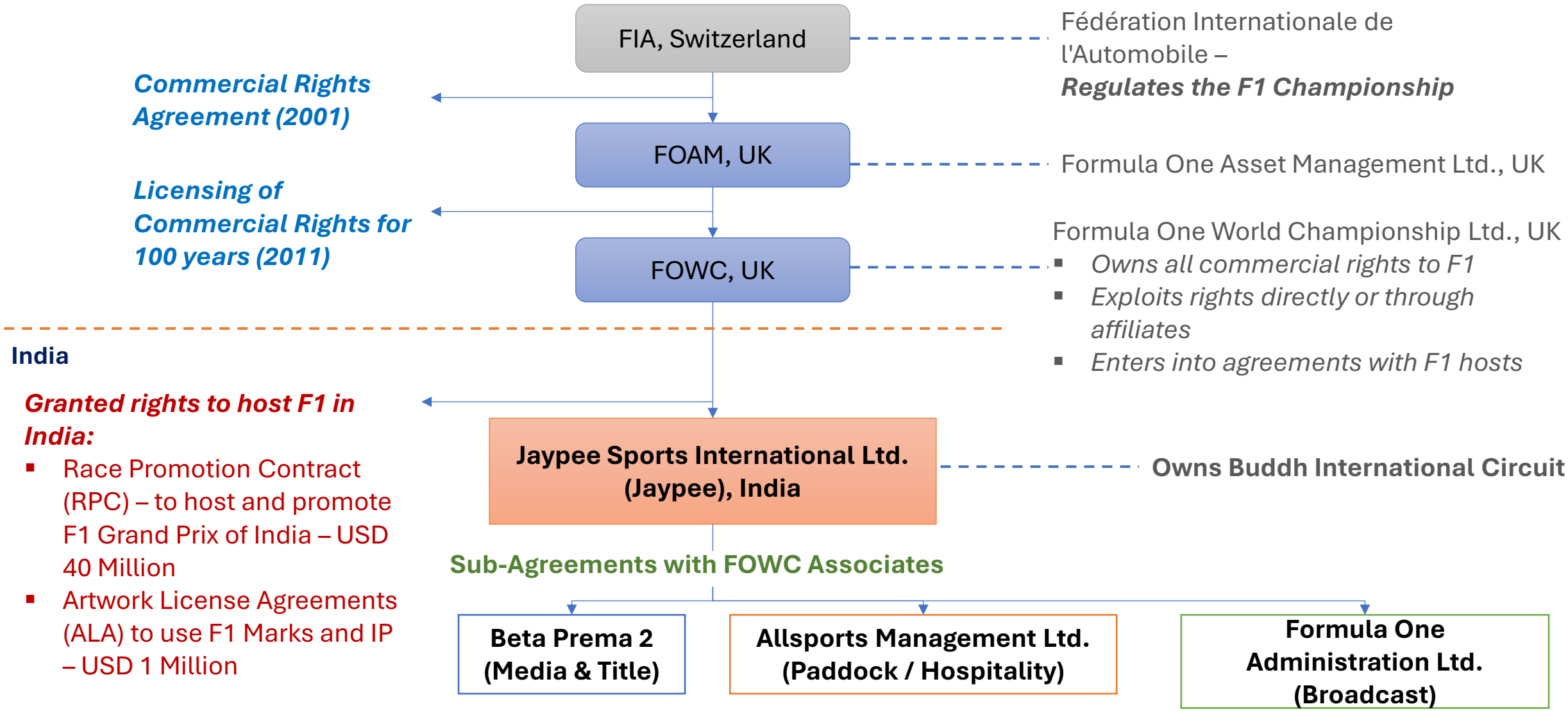
Formula One to Hyatt

Globeview

Formula One World Championship Ltd.

(2017) 394 ITR 80 (SC)

F1 - Group and Transaction Structure



F1 - Sequence of events

Sequence of events:

- **2011 –** FOWC and Jaypee (India) entered into a Race Promotion Contract (**RPC**) which granted Jaypee rights to host, stage and promote (F1). Simultaneously, FOWC and Jaypee entered into an Artwork Licence Agreement **(ALA)** allowing limited use of Formula One trademarks and intellectual property.
- **2011-2013** - Formula One races were conducted at the Buddh International Circuit, Greater Noida pursuant to the contractual arrangements between FOWC, Jaypee and Formula One affiliates.
- **2011- AAR** - FOWC and Jaypee approached the AAR seeking ruling on following issues:
  - whether payments under RPC constituted **royalty**;
  - whether FOWC had a **Permanent Establishment (PE)** in India under Article 5 of the India–UK DTAA; and
  - whether **Section 195 withholding** applied.
- **2011 - AAR**:
  - Payments under RPC were royalty and subject to TDS u/s 195;
  - However, FOWC did not have a PE in India and was not carrying on business through a fixed place in India.
- **2016 - Delhi High Court:**
  - RPC payments were not royalty;
  - However, FOWC had a PE in India at the Buddh International Circuit; and consequently, Jaypee to deduct tax.
- **2017 - Supreme Court –** Payments under RPC was not Royalty; however FOWC constituted a PE in India.

F1 – Factual findings

1. FOWC Controlled the Circuit During Event Period

Though Jaypee owned the circuit, FOWC had exclusive access and effective control over the venue and operational areas during the event period.

2. Substantial rights and control with FOWC

Through RPC (Race Promotion Contract) and affiliate agreements, FOWC controlled the race, teams, paddock, broadcasting and commercial exploitation. Even entry passes, filming, broadcasting, advertising, television feed and IP generated during the event belonged to FOWC or required FOWC's approval for use.

3. Access to Circuit Was Restricted and Controlled

Entry, use and access to circuit and related facilities were regulated under FOWC contractual framework. Jaypee was promoter and land owner, but its powers were largely limited by FOWC-controlled contractual terms.

4. FOWC Personnel and Operations Were Physically Present

Teams, officials and operational personnel worked from circuit during race arrangements. They carried out their business from the premises during the race period.

5. Presence Was Temporary but Commercially continuing

FOWC had access not merely for the race days, but for **two weeks before and one week after**, under a **5-year recurring arrangement**; hence presence was not fleeting.

6. Race Could Not Be Conducted Without FOWC Approval

FOWC retained ultimate authority over whether and how Formula One event would be conducted.

F1 – Key principles by Supreme Court

1. ‘At the disposal’ Test for PE

A fixed place PE exists where a foreign enterprise has a **specific location at its disposal and exercises sufficient control** over that place for conducting business. Ownership or lease is irrelevant.

2. Duration not a conclusive test

The duration of access is not determinative; even access for a limited period can constitute a fixed place PE, provided the access is exclusive, repetitive, and sufficient for the conduct of the enterprise's business.

3. Commercial Substance and Economic Reality Prevail

PE determination depends on **real commercial substance and actual conduct of business**, rather than merely legal ownership or contractual labels.

4. Mere Presence Is Insufficient

PE arises only where the enterprise actually conducts its business operations through the location and not merely through preparatory, auxiliary or incidental activities.

5. Attributes of PE defined by jurists, upheld

A PE must have three characteristics as per Philip Baker's commentary on OECD Model: (i) stability, (ii) productivity, and (iii) dependence. All of these tests were found to be satisfied in the present case.

6. PE Taxability and Section 195 Depends on Attribution

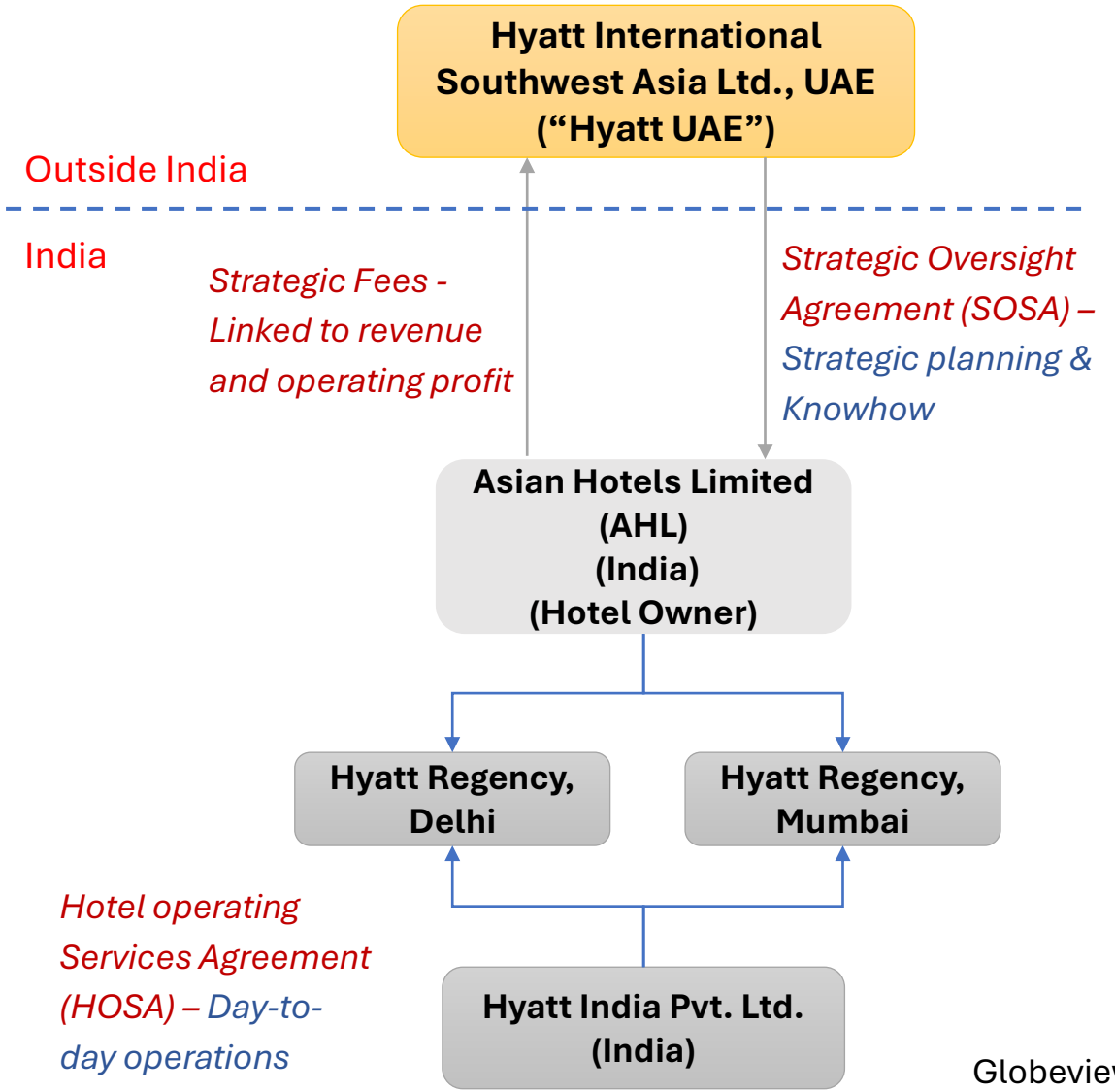
Even where PE exists, only **profits attributable to the PE** are taxable in India, and withholding under Section 195 follows only to that extent.

Formula One established that a fixed place PE may arise where a foreign enterprise has a place at its disposal with effective control in India and carries on its core business activities through that place. The duration of such control is immaterial.

Hyatt International Southwest Asia Ltd.

(2025) 478 ITR 238 (SC)

Hyatt – Group structure and Sequence of Events



- **2008** – Hyatt UAE entered into Strategic Oversight Services Agreement **(SOSA)** with Asian Hotels Limited (**AHL)**, India for strategic and operational oversight over Hyatt hotels in Delhi and Mumbai.
- **2010 – AO** issued initiated scrutiny proceedings. HISA argued that income not taxable in India due to absence of PE and absence of FTS clause under the India–UAE DTAA.
- **2011 – AO** concluded Hyatt UAE had business connection and PE in India. Additionally, receipts were taxable as Royalty / FTS under the Act and DTAA.
- **2012 – DRP** rejected Hyatt UAE's objections and upheld AO's order.
- **2022 – ITAT** dismissed Hyatt UAE's appeals and upheld AO's PE findings.
- **2023 – Delhi HC** held that Hyatt UAE had a Fixed Place PE in India, relying on the extent of control and rights exercised under SOSA
- **2025 – Supreme Court** ultimately upheld Revenue's position and affirmed existence of Fixed Place PE for Hyatt UAE in India.

Hyatt – Factual findings in this case

1. Hyatt UAE had a continuing and enforceable right to implement policies and ensure compliance
The degree of control and supervision transcended mere advisory capacity

2. The consideration was a revenue share
The consideration was not a fixed fee, instead, was calculated as a percentage of room revenue and other income – indicating active commercial involvement

3. Long-term control and supervision on activities
The SOSA was for a period of 20 years, with continuous and functional presence of Hyatt UAE.

4. Nature of functions not 'auxiliary'
The functions performed by Hyatt UAE were not just limited to setting up a pattern of activities for the hotel, but were core and essential functions, clearly establishing control over day-to day operations of the hotel.

5. Frequent and regular visits by personnel
The personnel of Hyatt UAE regularly visited to oversee operations and implement SOSA. There was a continuous and coordinated engagement, though no single individual exceeded the 9-month stay threshold.

6. Control on property hypothecation
The hotel-owner seeking to obtain borrowings on the collateral of the hotel premises, had to obtain non-disturbance and attornment agreement from the lender, which must be acceptable to Hyatt UAE.

Hyatt – Key principles by Supreme Court

1. "At Disposal" + Control Test for Fixed Place PE
The "At disposal" test for constituting PE should also consider the degree of control and supervision exercised

2. The Disposal Test over Ownership
Ownership or exclusive possession of premises is not necessary; even shared or temporary use can constitute PE if business is carried on through that space.

3. Commercial and Functional Reality
Commercial substance and actual business realities prevail over the legal form or contractual wording adopted by the parties. Extensive strategic and operational rights demonstrate the foreign enterprise is carrying on business through Indian premises

4. Fact specific Enquiry – essential for Fixed place PE
Existence of Fixed Place PE involve a fact-specific inquiry, including – (i) the enterprise's right of disposal over the premises, (ii) the degree of control and supervision exercised; and (iii) *Presence of ownership, management and operational authority.*

5. Formula One Principles - Stability, Productivity and degree of dependence – Satisfied
Satisfied in this case due to the period of agreement and the nature of oversight and control.

6. Income under SOSA attributable to PE
Passing reference was made to Delhi HC larger bench judgment of the taxpayer (472 ITR 53), holding that profit to be attributed irrespective of global profitability.

Hyatt expands the practical application of Formula One by holding that sustained operational and strategic control over Indian business premises may create a Fixed Place PE even without ownership or continuous physical control.

Considerations for the Management

- PE constitution - transcends beyond mere duration ?
- Extent of control exercised - physical, or operational control
- PE versus Royalty/WHT tax risks
- Profit attribution and transfer pricing
- Growing tendency of applying Significant Economic Presence principles to PE

DDT v. DTAA – Colorcon Asia Pvt Ltd.

AN INDIA TAX PERSPECTIVE

History of Dividend Taxation – Domestic Tax Law

Sr No	Year	Tax on Shareholder	Tax on Company	Remarks
1	01 Apr 1962 – 31 May 1997	✓	✗	Dividends taxable in the hands of shareholders.
2	1 June 1997 – 31 Mar 2002	✗	✓	DDT introduced. Dividend tax shifted to companies.
3	1 Apr 2002 – 31 Mar 2003	✓	✗	DDT abolished. Dividend tax reverted to shareholders
4	1 Apr 2003 – 30 Sept 2014	✗	✓	DDT reintroduced
5	1 Oct 2014 – 31 Mar 2020	✗	✓	Gross-up amendment introduced. DDT payable on grossed-up amount
6	1 Apr 2020 – Present	✓	✗	DDT abolished. Dividend tax back to shareholders.

No change in Tax Treaty on Dividend taxation

DDT: Legislative Evolution and Litigation

2003 – DDT Re-introduced | Reinstated with amendments. Gross-up provisions later introduced in 2016.

The Issue | Non-resident shareholders were unable to avail the beneficial tax rate provided in applicable tax treaties for dividend income, leading to significant litigation.

1 Apr 2020 – DDT Abolished | DDT removed. Dividends now taxed directly in the hands of shareholders. However, disputes over pre-abolition DDT liability continued.

13 Oct 2020 – Ruling for Taxpayer[1] – Delhi ITAT – DDT payable by an Indian company should not exceed the rate specified in the applicable tax treaty.

20 Apr 2023 – Ruling Against Taxpayer[2] – Mumbai ITAT (Special Bench) - DDT falls outside the scope of the treaty as it is not included in the definition of "taxes covered" under the India-France treaty.

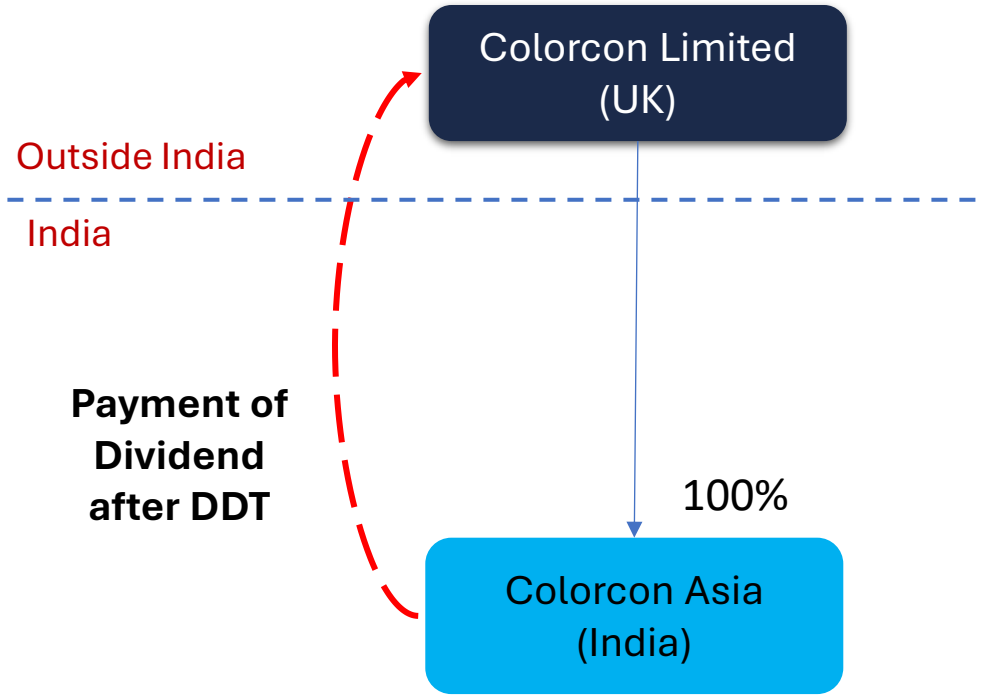
2025 – Bombay High Court Goa Bench (Colorcon)
DDT paid on dividends to UK parent is subject to the concessional 10% rate under Article 11 of the India-UK DTAA. The court reaffirmed that DTAA provisions prevail over conflicting domestic law per Section 90(2), and that excess DDT collection would violate Article 265 of the Constitution.

2026– Bombay High Court Mumbai Bench (Foseco)
Doubted the decision of the coordinate bench of Bombay High Court and referred to larger bench.

2026– Supreme Court
The Supreme Court has admitted SLP against the Bombay HC judgment and has framed questions of law for decision.

1.Giesecke & Devrient v. Addl CIT (ITA No. 7075/DEL/2017)
2.DCIT v. Total Oil India Pvt Ltd (2023) 104 ITR(T) 1 (ITAT Mumbai - Special Bench)

Colorcon – Group structure and Sequence of Events



- Colorcon Asia Private Limited (**Colorcon**) is wholly owned Indian subsidiary of Colorcon Limited, UK (**Colorcon UK).**
- **During various AYs –** Colorcon distributed dividends to UK parent and paid DDT under Section 115-O.
- **2024 - BFAR / AAR –** Assessee sought ruling that dividend tax should be restricted to 10% under Article 11 of India–UK DTAA. BFAR/AAR rejected the claim and held that DDT is outside treaty scope.
- **2025** – **Bombay HC (Goa)** reversed BFAR decision and allowed treaty benefits:
  - DDT is tax on dividend income of shareholder;
  - Covered within Article 2 of DTAA;
  - Dividend covered under Article 11 - tax capped at 10%
- **2026 - Foseco India** - Bombay HC Coordinate bench doubted correctness of *Colorcon* and referred issue to Larger Bench.
- **2026 - Supreme Court** - Noted wider ramifications and pending disputes, allowed interventions and directed circulation to all HCs. Currently, matter directed to be listed for further hearing; meanwhile SC observed that High Courts may consider **staying similar matters.**

Colorcon 1 – Key principles by Bombay HC

Colorcon Asia (P.) Ltd. v. JCIT (2026) 486 ITR 476 (Bom HC)

1. DDT is Substantively a Tax on Shareholder's Income
DDT under Section 115-O is, in substance, a tax on dividend income of the shareholder, though collected from the distributing company.

2. DDT falls under "income-tax" of DTAA
DDT falls within the scope of "income-tax" covered under Article 2 of the India–UK DTAA.

3. DDTA over Domestic Tax law
Once a DTAA applies, treaty provisions override domestic law to the extent more beneficial to the taxpayer. Domestic charging provisions, including additional income-tax, remain subject to treaty limitations.

4. Treaty Interpretation Requires Substance-Based Analysis
Treaty application cannot be denied merely because domestic law adopts a particular payment mechanism. The Court favoured **substantive treaty characterisation** over formal domestic labels.

5. Legislative Intent of DDT
The legislative scheme of Sections 115-O and 10(34) shows only a shift in incidence from shareholder to company for administrative convenience.
Tata Tea Co. Ltd. 398 ITR 260 (SC) confirms that DDT is a tax on dividend income and falls within Entry 82 of List I.

6. Dividend taxation under Article 11 of DTAA
Under Article 11(2), India's taxing right on dividend income is restricted to 10%. Treaty applicability depends on the nature of income (being dividend), and not on the person from whom tax is collected

Current Position – DDT v. DTAA Controversy

Colourcon 2 - Foseco India Ltd (Bom HC)]- Contrary View Taken (2026)

- DDT is tax on the domestic company declaring the dividends, not on shareholders.
- Section 115-O does not indicate that the levy is subject to, or restricted by, the applicable DTAA
- Once DDT is paid, dividend is exempt to shareholders under Section 10(34); therefore, treaty provisions should not apply
- Court relied heavily on *Godrej & Boyce Mfg. Co. Ltd.*, affirmed by the Supreme Court, where DDT was characterised as charge on company's distributed profits
- The Colorcon Asia ruling was considered inconsistent with binding precedent of Bom HC and potentially per incuriam.
- In view of conflicting rulings, the matter cx been referred to a Larger Bench of the Bombay High Court.

Foseco view: No treaty protection — DDT is a tax on the company's distributed profits

Colorcon 3 – SLP admitted in Supreme court

- The Supreme Court has admitted the SLP, considering the wider implications of the issue.
- Substantial Questions of Law:
  i. Whether tax under Section 115-O on any amount declared, distributed or paid by a company by way of dividends is in the nature of tax on distributed profits or tax on dividends?
  ii. Whether DDT paid on dividend to a UK resident can be restricted at a rate higher than permitted under the India–UK DTAA?
  iii. Whether DDT, being income-tax or identical / substantially similar tax, is governed by India–UK DTAA?

Colorcon view: Treaty protection available — DDT is, in substance, a tax on dividend income

ISSUE PENDING for FINAL RESOLUTION BEFORE SUPREME COURT

The MFN Journey in India

From Steria to Nestlé: How Treaty Interpretation Changed

Timeline – Evolution of India's MFN Clause Controversy

TAXPAYER–FRIENDLY ERA (2016–2021) | **REVENUE PUSHBACK (2022)** | **SUPREME COURT RESOLUTION (2023 ONWARDS)**

1993–95
MFN Clauses Introduced

India signs DTAAs with Netherlands, France and Switzerland containing MFN clauses in Protocols.

2005–11
Newer Treaties with Beneficial Provisions

India signs DTAAs with Slovenia, Lithuania and Colombia providing more beneficial rates / scopes.

2010+
OECD Accession

Slovenia (2010) and later Lithuania (2018) and Colombia (2020) join OECD.

2016
Steria (India) Ltd. v. CIT (Delhi HC)

Holds that protocol provisions form an integral part of the treaty and may be invoked without separate notification.

April 2021
Concentrix (HC) & Optum (HC)

Delhi HC grants MFN benefit to Dutch residents; later OECD membership held to trigger MFN benefits.

3 Feb 2022
CBDT Circular No. 3/2022

Revenue issues circular rejecting Delhi HC view and laying down 4 key conditions for MFN benefit.

19 Oct 2023
Nestlé SA (SC) (Clubbed with Concentrix, Optum & other matters)

Supreme Court reverses Delhi HC decisions. MFN not automatic; notification and OECD membership at treaty–signing date required.

2025+
Suspension of MFN by Switzerland

Switzerland announces suspension / withdrawal of MFN treatment for Indian residents under Indo–Swiss treaty from 1 Jan 2025.

23 Feb 2026
India–France Amending Protocol Signed

India and France sign amending protocol. MFN clause removed. Dividend tax changed from a single 10% rate to 5% for holdings of at least 10% capital and 15% in other cases.

CURRENT STATUS (June 2026)

- Nestlé (SC, 2023) is binding law.
- Separate notification under Section 90 is required before MFN benefits can be applied.
- Third country must be an OECD member at the time of signing treaty with India.
- Delhi HC rulings in Concentrix, Optum and related cases are effectively overruled.
- India–France protocol signed: MFN clause removed; qualifying dividend rate reduced to 5%.

India-Netherland DTAA Protocol - language

At the moment of signing the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, this day concluded between the Kingdom of the Netherlands and the Republic of India, the undersigned have agreed that the following provisions shall form an integral part of the Convention.

...

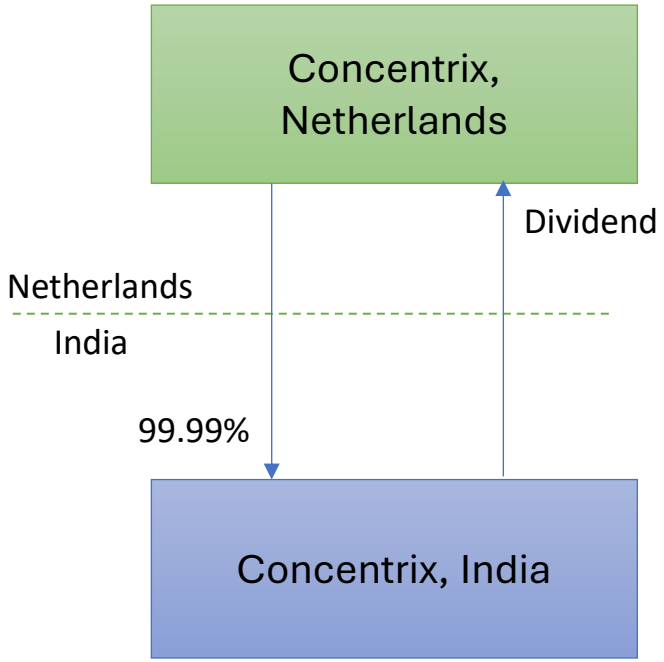
IV. Ad Articles 10, 11 and 12 (dividend, interest, Royalty & FTS)

1. Where tax has been levied at source in excess of the amount of tax chargeable under the provisions of Article 10, 11 or 12, applications for the refund of the excess amount of tax have to be lodged with the competent authority of the State having levied the tax, within a period of three years after the expiration of the calendar year in which the tax has been levied.

***"2.** If after the signature of this Convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."*

Concentrix Services – Delhi HC

Concentrix Services Netherlands B.V. v. ITO (2021) 434 ITR 516 (Del)



- **21-1-1989** – India entered into the DTAA with the Kingdom of Netherlands. Amended by a subsequent notification dated 30-8-1999.
- Assessee is a parent company holding 99.99% shares in Indian Company.
- Concentrix India is a Wholly owned subsidiary of Concentrix Netherland. **Concentrix Netherland** received dividends from Indian company.
- The tax withholding rate as per India – Netherland DTAA is 10%.
- **29-7-2020** – Concentric Netherland applied for lower withholding tax (WHT) rate @ 5% invoking MFN clause, seeking benefit of DTAA with Slovenia, Lithuania and Columbia
- **16-9-2020** – The WHT certificate was issued for 10% and not 5%
- **2021** – Concentrix Netherlands challenged the higher withholding tax rate prescribed in the tax certificate through a writ petition, arguing that DTAA benefits were available to it.
- Multiple other similar cases of auto application of MFN clause – Steria India (2016) 386 ITR 390 (Del HC); *Nestle SA v. ACIT* [WP(C) No. 3243 of 2021, dated 15-3-2021] (Del HC).

Concentrix – Key principles by Delhi HC

1. **Protocol Forms Part of DTAA**

Protocol forms an integral part of the DTAA and has the same binding effect as the treaty provisions. Therefore, benefits available under the Protocol, including through an MFN clause, can be imported into the treaty without a separate notification.

2. Conditions to apply MFN

MFN eligibility is to be determined when the taxpayer claims the benefit. Therefore, subsequent treaty developments may be considered, and the analysis is not confined to the position prevailing when the DTAA was originally signed.

3. Interpretation

The word "is" used in the Protocol language describes state of affairs that should exists not necessarily at the time when the subject DTAA was executed but when a request is made by the taxpayer or deductee for issuance of a lower rate withholding tax certificate under section 197.

4. Principles of Interpretation

Applying the principle of "Common Interpretation", reference could be made to the interpretation adopted by Netherlands through Decree dated 28.02.2012 issued by the Kingdom of Netherlands [No. IFZ 2012/54M, Tax Treaties, India], applying benefit of lower tax rate

Delhi High Court allowed the benefit of 5% WHT on dividend to the foreign entity applying MFN clause.

CBDT Circular No. 3/2022 dated 03.02.2022

Conditions to be complied for MFN clause to apply –

1. • **Unilateral decrees or notifications cannot establish a shared treaty interpretation. India has communicated its contrary position to the Swiss Confederation, demonstrating a lack of mutual consensus on the MFN clause.**
2. • **As these countries were not OECD members when their DTAAs with India were signed, MFN benefits arising from those treaties could not be imported into other DTAAs.**
3. • **Concessional rate/ restricted scope from date of entry into force from DTAA with the third state and not from the date when the become member of OECD.**
4. • **Importation of benefits under the MFN clause requires a separate domestic notification amending or operationalising the DTAA. In the absence of such notification, the treaty benefits available under another DTAA cannot be automatically extended.**

Nestle SA (2023) 458 ITR 756 [Supreme Court] – key principles

1. Treaties Must Be Domestically Incorporated

Treaty provisions and Protocols negotiated by the Executive do not confer enforceable rights unless incorporated into domestic law through the prescribed legal mechanism. A Notification under Section 90 is mandatory to give effect to amendments in the treaty arising from a Protocol.

2. Indian Notification Practice Relevant for DTAA

India's consistent practice of issuing notifications to operationalise MFN benefits constitutes a relevant subsequent practice for treaty interpretation.

MFN clause in a Treaty Protocol does not apply automatically. A separate Notification is mandatory.

3. Foreign Unilateral Interpretations Not Binding

Decrees, circulars or interpretations issued by the tax authorities of the Netherlands, France or Switzerland cannot determine the interpretation of Indian treaties.

4. OECD Membership Must Exist on DTAA Signing Date

For the MFN clause, the third country must be an OECD member at the time it enters into the DTAA with India; subsequent OECD membership is insufficient.

The Supreme Court's judgment had the effect of overturning years of interpretation of Treaty and MFN clauses, allowing treaty benefits.

Events Post MFN SC Judgement

1

Swiss Response to the Nestlé Judgment –

Citing a lack of reciprocity and disagreeing with the Supreme Court's interpretation, Switzerland officially suspended the MFN clause in its DTAA with India

2

India- France treaty amendment–

The Protocol for amendment of bilateral treaty between India and France has been signed. The Protocol provides a 5% rate for dividend, with MFN clause being removed.

The Protocol is yet to be Notified.

3

India- Spain treaty Notification–

Applying the benefit of MFN clause, India Notified the application of 10% WHT for Royalty and FTS in India-Spain DTAA.

[Notifiction No. 33/2024 dt. 19.03.2024]

Swing of Pendulum

- MFN for royalty and FTS taxation was accepted by Revenue and also approved by various Tribunals and Courts over the years
  - DCIT v. ITC Ltd. (2002) 82 ITD 239 (Kol.)
  - Rajinder Kumar Aggarwal (HUF) (2022) 192 ITD 1 (ITAT Delhi)
  - Perfetti Van Melle ICT & BV v. ACIT (2022) 195 ITD 63 (ITAT Delhi)
  - Sandvik AB v. DCIT (2021) 187 ITD 638 (ITAT Pune)

- MFN for dividend taxation – an aggressive double edged sword?

- Tax risk for past MFN positions on royalty and FTS

Software Taxation – Royalty or Income from Business

Taxation of Software license – Royalty / Business Income

Does the purchase of software from Non-resident suppliers involve payment of consideration for right to use Copyright or for sale of copyrighted article?

- Section 9 of the Income-tax Act, 1961 (and 2025 Act) wide enough to cover all software license payments under ambit of Royalty.
- Views that prevailed on software license payments – under DTAA:

1. Sale of Copyrighted article – Business Income

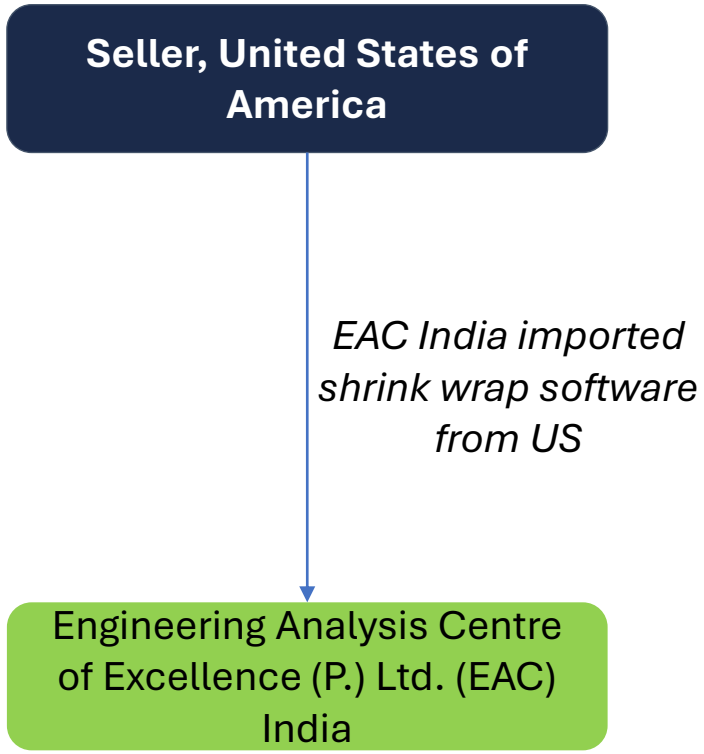
- No right in the nature of Copyright is provided to the User. Copyrights are retained by Supplier / software licensor. Limited right to only use the software
- Considered as sale of a licensed product
- Not Royalty – since not paid for use of Copyright.
- Consideration is business Income, not taxable in India, unless non-resident has a PE in India.
- No TDS
- Illustrative cases (before Engineering analysis):
  - *Dassault Systems K.K (2010) 322 ITR 125 (AAR – New Delhi)*
  - *DIT v. Ericsson A.B. (2011) 343 ITR 470 (Delhi HC)*

2. Use / Right to use Copyright - Royalty

- Transfer of copyright since software license grants the right to use the copyright in the literary work
- Reproduction/creation of a copy of the software is allowed, hence Copyrights acquired.
- TDS applicable
- Illustrative cases (before Engineering analysis):
  - *CIT v. Samsung Electronics Co. Ltd (2012) 345 ITR 494 (Kar. HC)*
  - *Citrix Systems Asia Pacific Pty Ltd., In re (2012) 343 ITR 1 (AAR- Delhi)*

SC – Software license fees not Royalty

Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT (2021) 432 ITR 471 (SC)



- **Assessee** – Engineering Analysis centre is a resident Indian end-user of shrink-wrapped computer software, directly imported from the USA.
- **2002** – AO held that software payments made by EAC to the US entity constituted "royalty" under Article 12(3) of the India–USA DTAA and section 9(1)(vi), on the ground that copyright rights were transferred; accordingly treated EAC as assessee-in-default for failure to deduct TDS and raised demand along with interest
- **2004 - CIT(A)** – dismissed the appeal filed by EAC and upheld the order of the AO.
- **2005 - ITAT Bangalore** – allowed the appeal of EAC and followed its earlier decision holding that the payment did not give rise to withholding tax liability in the manner alleged by the Revenue.
- **2012 - Karnataka HC –** held that payment for software license amounts to Royalty.
- Supreme Court heard the appeal against the Karnataka High Court order.

Engineering Analysis – Supreme Court

Transaction Types Examined By Supreme Court –

1. Direct Purchase by Indian End-Users

2. Resale by Foreign Distributors

3. Resale by Indian Distributors

4. Software Embedded in Hardware

1. EULAs does not transfer copyright
End User Licence Agreements (EULAs) only grant limited right to use software with restrictions on reproduction, reverse engineering, etc. There is no transfer of copyright.
Hence, the condition under Article 12(3) is not satisfied.
Consideration would not be considered as Royalty.

2. Copyright v. Copyrighted Article
A copyrighted article is distinguishable from copyright. A Copyrighted article does not provide any rights to the user / buyer.

3. DTAA prevails over Income-tax Act –
DTAA provisions prevail over domestic law if beneficial to the taxpayer under Section 90(2).

4. Application of Section 195
For the purposes of withholding taxes, the provisions of the Treaty shall be considered.
A retrospective amendment cannot impose a liability for withholding on past transactions due to impossibility.

Revenue's Review Petition before the Supreme Court against the Engineering Analysis judgments have been dismissed.

Judicial developments post Engineering Analysis

The principles enumerated in Engineering Analysis regarding Shrink wrap software, have been applied to contemporary forms for software applications and online services. Some examples are discussed below:

Type of Services	Case Name	Forum
Online Advertisement revenue	CIT v. Urban Ladder Home Decor Solutions [TS-113-HC-2025(KAR)]	Karnataka HC
	CRITEO Singapore Pte. Ltd v. ACIT [TS-926-ITAT-2024(DEL)]	Delhi ITAT
	International Air Transport Association v. ACIT [2025] 171 taxmann.com 136 (Mumbai ITAT)	Mumbai ITAT
Technology ecosystem for member firms	EY Global Services Ltd. v. ACIT: 441 ITR 54 (Delhi HC)	Delhi HC
Cloud computing services	Amazon Web Services Inc. v. ACIT [2023] 153 taxmann.com 45 (Bangalore ITAT)	Delhi ITAT
TV channel distribution	Discovery Networks Asia Pacific Pte Ltd. V. ACIT [2025] 170 taxmann.com 545 (Delhi - Trib.)	Delhi ITAT
Database and manuals	CIT v. RELX Inc. [2024] 160 taxmann.com 109 (Delhi)	Delhi ITAT

Most of the above online services provided by Non-residents were subject to Equalisation Levy @ 2%. However, the Equalisation levy provisions were abolished w.e.f. 01 August 2024.

Concluding Thoughts

1. International tax – assertion of source based taxation rights
2. OECD framework on digital taxes not meeting the desired output – greater risk to digital taxation
3. Trade war and impact on the corporate income tax
4. India's tax collection needs, growth and taxing the foreign businesses
5. India Outbound taxation
6. Bilateral investment treaties – not a shield
7. Change in Court's approach to tax law interpretation

Thank you

Ameya Kunte
Mobile + 91 9823038088
Email – ameya.kunte@globeviewadvisors.com

Globeview Advisors LLP

202, Estonia Building, Gulwani Maharaj Road, Above Kotak Mahindra Bank, Erandwane, Pune 411 004, India