

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI**

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
and
SHRIS.RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.339/DEL/2022
(Assessment Year: 2012-13)**

Essar Com Limited,
10, Frere Felix De Valois Street,
Post Louis, Mauritius.
(PAN :AABCE6655R)

vs.

ACIT, Circle 1(2)(2),
New Delhi.

**ITA No.340/DEL/2022
(Assessment Year: 2012-13)**

Essar Communications Limited,
10, Frere Felix De Valois Street,
Post Louis, Mauritius.
(PAN : AABCE7190F)

vs.

ACIT, Circle 1(2)(2),
New Delhi.

(APPELLANT)

(RESPONDENT)

ASSEESSEE BY :Shri Percy Pardiwala, Sr. Advocate
Shri Nishant Thakkar, Advocate
Shri Hiten Thakkar, Advocate
Shri Anand Jain, CA

REVENUE BY :Shri N. Venkatraman, ASG
Shri Vipul Agarwal, CIT DR
Smt. Rini Handa, JCIT
Smt. Aditi Gupta, DCIT

Date of Hearing : 08.05.2025

Date of Order : 30.06.2025

ORDER

PER S. RIFAUR RAHMAN, ACCOUNTANT MEMBER :

1. The assessees, Essar Com Ltd. and Essar Communications Ltd., have filed the appeals against the order of the Learned Commissioner of Income Tax (Appeals)-42, New Delhi ["Ld. CIT(A)", for short]dated23.12.2021for the Assessment Year 2012-13.

2. Since the issues are common and the appeals are connected, hence the same are heard together and are being disposed off by this common order. We take ITA No.340/Del/2022 for AY 2012-13 in the case of Essar Communications Ltd. as lead case.
3. The assessee, Essar Communications Ltd., has raised the following grounds of appeal in ITA No.340/Del/2022 for AY 2012-13 :-

“Based on the facts and circumstances of the case, and in law, ECL respectfully craves leave to prefer an appeal under Section 253 of the Income-tax Act, 1961 (the Act) against the order dated 23 December 2021 passed by Commissioner of Income (Appeals) - 42, New Delhi [CIT(A)] under section 250 of the Act, on the following grounds:

On the facts, in law and in circumstances of the case, the learned CIT(A):

General

1. erred in holding that the capital gains earned by the Appellant on the sale of Vodafone Essar Limited (VEL) shares by the Appellant to Euro Pacific Securities Limited ('EPSL') are taxable in India;

Holding that the Appellant was tax resident of India and that its control and management is situated wholly in India

2. erred in treating the Appellant as tax resident of India under the provisions of section 6(3) of the Act;
3. erred in disregarding the settled law with respect to tax residency of a foreign company under the provisions of section 6(3) of the Act as established through various judicial precedents on this aspect as well as provisions of memorandum of Finance Bill, 2015 introducing the provisions of place of effective management;
4. was not justified in ignoring the fact that control and management of the Appellant was with the board of directors of the Appellant, that all the decisions concerning the affairs of the Appellant have been taken by its board of directors outside India and in ignoring the supporting documentary evidence and justifications filed before the learned CIT(A) in this regard including letters from Mauritian government authorities;

5. erred in disregarding the settled principle of law that the test of tax residence is to be applied based on the facts of the relevant year alone, as upheld by various judicial precedents;

Denying the benefits of Article 13(4) of India-Mauritius tax treaty (tax treaty') to the Appellant

6. erred in holding that the Appellant was not entitled to the benefits of Article 13(4) of the tax treaty on the sale of VEL shares by the Appellant to EPSL;
7. erred in ignoring the facts that the Appellant was incorporated in Mauritius, holds tax residence certificates, global business license etc and that the Appellant was entitled to the benefits of Article 13(4) of the tax treaty;
8. erred in disregarding settled law based on various judicial precedents in this regard;
9. erred in not following the Central Board of Direct Taxes (CBDT)) Circular No 789 which is squarely applicable to the Appellant's case and erred in relying upon inapplicable Circular 1 of 2003 issued by the CBDT and on Article 4(3) of the tax treaty to hold that treaty benefits are not available to the Appellant
10. erred in holding that the capital gains earned by the Appellant on the sale of VEL shares were related to assets located in India in telecommunication sector which derived its value based on the economic activity and value creation in India, without appreciating that this is not a criterion to determine taxability of the gains from the sale of shares under the tax treaty

Holding that the Appellant was a conduit company set up for availing tax benefits and for avoidance of tax

11. erred in holding that the acquisition of 6,56,34,887 VEL shares by the Appellant by way of liquidation is without any commercial purpose and is incontrovertibly a colourable device for avoidance of capital gain tax in India
12. erred in holding that the Appellant had contrived to devise a scheme to show that the control and management vests in Mauritius with the sole purpose of claim of exemption from capital gains taxation in India under Article 13(4) of the tax treaty on the transfer of shares in VEL

13. erred in relying on findings/ observations in the order dated 10 October 2019 passed by the Authority of Advance Rulings which was non-binding in nature:
14. erred in rejecting the without prejudice argument of the Appellant that if it is alleged that Essar Communications (Mauritius) Ltd (ECML) was the decision maker and the beneficial owner of the VEL shares, the consequence would be that the capital gains on sale of VEL shares would belong to ECML and further erred in holding that whether it is the Appellant who is liable for taxation on capital gains was not an issue to be decided in the appeal before the learned CIT(A).

Others

15. erred in drawing adverse inferences/ reaching conclusions without any evidence or material and only based on suspicion, conjecture and irrelevant, factually incorrect considerations and without appreciating the correct nature of various events, transactions, facts on records, the context thereof, including non-tax commercial aspects involved therein even though the same were explained and demonstrated to the learned CIT(A) in detail by the Appellant (for the sake of brevity a few instances are illustratively summarised hereunder):
 - the Mauritian directors of the Appellant were for name sake only and the directors had no control over its affairs;
 - the affairs of the Appellant and all the decisions were taken by the senior executives of Essar Group in India;
 - agreements and financial statements show that the Ruia family had a significant role to play in the affairs of the Appellant,
 - business of the Appellant is run by way of written resolutions without any discussion or deliberations; there are discrepancies in board minutes; the board minutes submitted by the Appellant for Financial Years 2010-11 and 2011-12 are of doubtful authenticity;
 - analysis of financial statements of the Appellant clearly shows that the Appellant was only a paper company without any substance as it was not involved in any significant business activities and its income/ expenditure was minimal in quantum and also as per the terms of the loan agreement and put option agreement the Appellant was restricted from carrying on any business activity;
 - all the benefits on account of the loan facility and also on account of sale of VEL shares have immediately gone for the repayment of loan taken for the benefit of the group companies
 - the Appellant has not exercised/ discharged any shareholder functions with respect to VEL shares,
 - frequent changes in holding structure of upstream and downstream companies / internal restructuring of ownership of VEL shares

were to finally shift the situs of shares to Mauritius which show that it was a colorable device for the purpose of availing exemption under Article 13(4) of the tax treaty:

- VEL shares have been transferred before the expiry of lock in period as specified in Unified Access Service (UAS) license regulations which substantiates that the Appellant did not have a distinct identity and has been used by the Essar Group in India for availing of exemption under Article 13(4) of the tax treaty:

16. erred in failing to consider explanations / submissions made by the Appellant from time to time before the learned CIT(A) that ought to have been considered (for the sake of brevity a few instances are illustratively summarised hereunder):

- Essar has its presence in Mauritius since 1992 and that Essar group sector holding companies majorly operate from Mauritius and accordingly, the Appellant was not incorporated in Mauritius to avail treaty benefits on sale of VEL shares;
- the directors of the Appellant always comprised of people with significant qualifications and experience (as reflected by their profiles submitted), who were non-residents of India, except the nominee director appointed by lenders;
- the board minutes of the Appellant for FYs 2010-11 and 2011-12 had been contemporaneously maintained and shared with BLC Chambers and the report of BLC Chambers which was provided to the Mauritius Revenue Authority;
- the investment in VEL was made through the Appellant for legitimate commercial / business reasons;
- Liquidation cannot be a device to avoid taxation in India since, if taxability was the motive, ECML could have sold shares in the Appellant without undertaking liquidation of Essar Telecom Investments Ltd (ETIL) or the Appellant could have sold shares in ETIL and the benefits of the tax treaty inter alia would have been available and consequently the capital gains would not have been taxable in India on such sale of shares;
- the explanation as to how the Appellant's case satisfies the tests/parameters laid down by the Hon'ble Supreme Court in Vodafone International Holdings BV v UOI (341 ITR 1) (SC) for investment participation in India.

17. erred in incorrectly stating that the Appellant has made general submissions and that the Appellant has not disputed the facts brought on record and erred in incorrectly stating that the Appellant has failed to rebut various specific findings made by the AO;

18. erred in holding that the Appellant has not filed certain information and erred in drawing an inference that the Appellant had something to

hide which is inconvenient to its claim for seeking exemption of capital gains from taxation, without appreciating all the details and submissions filed before the CIT(A) during the course of the appellate proceedings;

Taxing worldwide income

19. erred in upholding the taxability of interest income earned by the Appellant during the subject AY.

Each of the above grounds is independent and without prejudice to one another.”

I. Brief Facts of the case:

4. The Assessee is a company which was incorporated in Mauritius on 13 October 2005. The principal activity of the Assessee is to make and hold investments. The Assessee holds valid Tax Residency Certificates ('TRC') issued by the Mauritius Revenue Authority ('MRA') and Category 1 Global Business License ('GBL') issued by the Financial Services Commission, Mauritius since inception of the Assessee.
5. Essar Telecom Investments Limited ('ETIL'), an Indian company, held a total of 6,56,34,887 equity shares in Vodafone Essar Ltd ('VEL')(Initially known as Hutchison Max Telecom Private Limited ('HMTL') subsequently known as Hutchison Essar Limited ('HEL') and now VEL), an Indian company, constituting 15.85% of the ordinary share capital of VEL. Pursuant to the approval obtained by ETIL on 11 December 2006 from Foreign Investment Promotion Board ('FIPB'), the Assessee infused USD 400.61 million into ETIL in various tranches during January 2007 and February 2007.
6. Majority of the funding for the investment by the Assessee in ETIL was from funds infused in the Assessee by Essar Communications (Mauritius) Limited ('ECML' Holding Company). The source of the aforesaid funds was a loan taken by ECML of USD 1.1 billion from the Standard

Chartered Bank ('SCB'), UK, in January 2007, which was subsequently refinanced and upsized to USD 1.4 bn in June 2007 and then to USD 3.59 billion in August 2007 from a consortium of banks led by SCB, UK. For the aforesaid loans, VEL shares held by the Assessee and Essar Com Limited ('ECom') were effectively pledged as security.

7. The lenders, in order to have greater enforceability over security of VEL shares, wanted direct pledge on the VEL shares. Accordingly, an application for direct pledge of VEL shares was made in February 2007, to the Reserve Bank of India ('RBI'), by ETIL, pursuant to the USD 1.1 bn loan agreement. Since no approval from the RBI was forthcoming for such pledge, the consortium of lenders of the USD 3.59 bn loan required liquidation of ETIL in order to migrate shares to the Assessee, so that the VEL shares can be directly pledged with the lenders. The RBI vide letter dated 4 October 2007 rejected the application made by ETIL to pledge VEL shares [refer RBI letter on page 1682 of the ITAT Paper book]. Thereafter, ETIL was liquidated in July 2008 pursuant to the lenders' stipulation in the USD 3.59 bn loan agreement. Pursuant to such liquidation, the VEL shares were distributed to the Assessee and it became a direct owner of VEL shares. Subsequently, an application for pledge of VEL shares was filed by the Assessee with the RBI, in line with the loan agreement. The same was approved by the RBI vide letter dated 14 November 2008 [refer page 1697 of the ITAT Paperbook].
8. Under an Offshore Underwritten Put Option Agreement dated 24 August 2007 (as amended and restated on 22 September 2009) between Vodafone and Essar, ECML had a put option to sell shares of the Assessee, thereby effectively transferring the VEL shares or procure sale of VEL shares by ECom and the Assessee. Pursuant to negotiations with Vodafone, the put option agreement was amended by deed of amendment

dated 1 July 2011, wherein revised consideration for VEL shares was agreed by the Assessee.

9. Accordingly, the Assessee sold all the shares it held in VEL to Euro Pacific Securities Limited ('EPSL') (a non-resident company nominated by Vodafone International Holdings B.V) for total consideration of USD 3,02,05,21,511. The gross consideration was received by the Assessee after deduction of tax at source @ 21.012% i.e., INR 28,21,21,70,693.
 - a. The Assessee, in the return of income it claimed that the capital gain arising on the sale of aforesaid shares was not chargeable to tax in India by virtue of Article 13(4) of the India – Mauritius Double Taxation Avoidance Agreement ("DTAA"). Consequently, a refund of the tax deducted at source of INR 28,21,21,70,693 was claimed by the Assessee in the return of income filed for the year under consideration. The learned AO and CIT(A) have denied the benefit under Article 13(4) of the India-Mauritius DTAA by holding the Assessee is a resident of India under section 6(3) of the Act as the control and management of its affairs is wholly situated in India and the Assessee has no substance and is a sham entity incorporated only to take benefit of India-Mauritius DTAA.

At the time of hearing, ShreePardiwala representing the assessee submitted as under:

I. The Essar Group has been in Mauritius since the year 1992:

10. It is submitted that first investment by the Essar Group from Mauritius was made way back in the year 1992 when Essar Energy Holdings Ltd (earlier known as Prime Finance Co. Ltd) and Essar Steel Holdings Ltd

(earlier known as Prime Holding Ltd) were incorporated. By the year 2012, Essar Group has invested, through Mauritius, approx. USD 6 bn in India and USD 2.5 bn in various business carried out in countries other than India. The sector holding companies of steel business, oil business, power business as well as the telecom business were based in Mauritius. The President of Mauritius, in a speech given on 17 August 2010, has recognized the fact that the Essar Group has made significant investments through Mauritius in various businesses internationally which has helped in the development of its economy. In fact, Essar Energy PLC, a UK company which was listed on the London Stock Exchange is headquartered in Mauritius. The group owns an office building in Mauritius from which the Assessee has been operating its business subsequently.

11. Therefore, the contention of the lower authorities that the Assessee is a sham entity and the investment in Mauritius was made only for the purpose of claiming benefits of India-Mauritius DTAA is baseless and without any substance.

II. TRC issued by the MRA is conclusive proof of beneficial ownership of the shares sold by the Assessee consequently, the benefit of India-Mauritius DTAA cannot be denied:

12. The Assessee submits that the MRA has issued TRCs to the Assessee from the inception of the Assessee and even for the years subsequent to the sale of the shares by the Assessee, certifying that the Assessee is a tax resident of Mauritius since its inception including for the year under consideration. The MRA vide their letter dated 29 May 2012 has further clarified that the TRC was issued to the Assessee not only on the basis of the incorporation of the company in Mauritius but also on the basis of the

control and management of the Assessee being in Mauritius (refer page 186 of the ITAT Paperbook). In this regard, the Assessee refers to **Circular No. 789 dated 13 April 2000** issued by the Central Board of Direct Taxes ('CBDT') clarifying that wherever a certificate of residence is issued by the MRA such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the provisions of DTAA. Accordingly, the capital gain arising on sale of shares by a resident in Mauritius would not be taxable in India.

13. It is further submitted that in the case of **UOI vs. Azadi Bachao Andolan (263 ITR 706) (SC)** wherein the validity of Circular No. 789 dated 13 April 2000 was in question, the Supreme Court has held that the CBDT was justified in issuing the aforesaid circular, since the action of the tax authorities bringing to tax the capital gains earned by Mauritian residents was contrary to the provisions of Article 13(4) of India-Mauritius DTAA. Therefore, the Supreme Court held that the CBDT was correct in issuing the aforesaid circular directing the Assessing Officers that wherever the TRC is issued by the MRA, the benefit of India-Mauritius DTAA is available to the taxpayer.
14. The validity of Circular No. 789 dated 13 April 2000 arose once again before the Supreme Court in the case of **Vodafone International Holdings B.V. vs UOI (341 ITR 1)** wherein the Supreme Court held that the presence of Circular No. 789 and TRC (which proves the residency and beneficial ownership of the person) is adequate/ sufficient for grant of benefits under the India-Mauritius DTAA to a taxpayer. It was further held that the tax department cannot at the time of sale/disinvestment/exit from such investments deny benefits of the DTAA to such Mauritius companies inter alia where such Mauritius company is not a fly by night operator.

15. The Assessee further submits that the Finance Bill 2013 had proposed an amendment to section 90 of the Act which provided that a TRC issued by a competent authority of another country is not sufficient to claim benefits of a DTAA notified under section 90 of the Act. The aforesaid amendment would have diluted the benefit available under Circular No. 789 which provides that the TRC issued by MRA is sufficient proof of residency and beneficial ownership for the purpose of Article 13(4) of the DTAA. However, the amendment proposed by the Finance Bill, 2013 was never implemented and on the contrary, a clarification was issued by the CBDT on 1 March 2013 stating that the TRC produced by a resident of a Contracting State will be accepted as evidence that it is a resident of a Contracting State and that tax authorities will not go behind the TRC and question the residential status. In the case of Mauritius, Circular No. 789 dated 13 April 2000 continues to be in force. The finding given by the lower authorities is contrary to a circular issued by the CBDT which is binding on them and such a course of action on his part cannot be countenanced.
16. The judgment of the Delhi High Court in the case of **Blackstone Capital Partners (Singapore) VI FDI Three Pte.Ltd.W.P.(C) 2562/2022 & CM APPL. 7332/2022** and the Bombay High Court in the case of **Bid Services Division (Mauritius) Ltd. (WP No. 713 of 2021)** has reiterated that the tax authorities cannot go behind the TRC issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residential status and legal ownership. Therefore, the benefits of DTAA cannot be denied to the Assessee ignoring the TRC issued by the competent authority.
17. Further, the Delhi Tribunal in the case of **MIH India (Mauritius) Ltd. [ITA No.1023/Del/2022]** and in the case of **Reverse Age Health**

Services Pte. Ltd. [ITA No. 1867/Del/2022] has reiterated the legal position that as per Circular No. 789, where a TRC is issued by the foreign tax authorities, it will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for the purpose of claiming treaty benefits.

18. In view of the above, the Assessee submits that denial of benefit of Article 13(4) by the lower authorities ignoring the TRC issued by the MRA and the clarification issued by the MRA vide letter dated 29 May 2012 to the Assessee, is incorrect and bad in law.

III. In the absence of Limitation of Benefit (“LOB”) clause, the benefit of India-Mauritius DTAA cannot be denied:

19. The Assessee submits that the DTAA between India and Mauritius as it was in force for the year under consideration did not contain any LOB clause which restricted the benefit available under Article 13(4) of the DTAA nor provided for any condition to be fulfilled for claiming the benefit of Article 13(4) of the DTAA.
20. It is important to note that under the India-USA DTAA (executed in 1989), Article 24 specifically provides that a company can claim the benefit of the India-USA DTAA only when 50% shares of that company is held by individuals who are residents of either India or USA. Similarly, Article 24 of the India-Singapore DTAA (executed in 1994) provided that the exemption or lower rate of tax provided under the DTAA for income arising in a Contracting State will be restricted to the amount considered for taxation on receipt or remittance basis in the other Contracting State. The protocol executed between India and Singapore on 1 August 2005 further provides that the benefits provided under the DTAA shall not be available if the affairs of a resident were arranged with the primary

purpose of claiming benefit of the DTAA and further, the company will be treated as a shell/conduit company if the annual expenditure incurred on the operations is less than SD 2,00,000.

21. Similarly, Article 29 of the India – UAE DTAA (executed in 2007) and Article 29 of the India – Luxemburg DTAA (executed in 2008) provide that the benefit of the DTAA will not be available to the residents of a Contracting State if the main purpose or one of the main purposes of incorporating a company was to obtain benefits of the DTAA.
22. However, the India-Mauritius DTAA did not have any of the clauses incorporated by India in the DTAA executed with other countries and, therefore, in the absence of any restriction placed in the India-Mauritius DTAA, the treaty benefits cannot be denied by the tax authorities invoking the conditions which are not part of the DTAA. In this regard, the Assessee places reliance on the judgment in the case of **Vodafone International Holding B.V. (supra)** wherein the Supreme Court held that in the absence of a LOB clause in the India- Mauritius DTAA, there is no justification in prohibiting the incorporation of companies in Mauritius for deriving benefits of the DTAA. The absence of LOB clause makes the scope of the DTAA positive from the perspective of a special purpose vehicle ('SPV') created specifically to route investments into India and, the tax authorities cannot at the time sale/disinvestment deny benefit on the ground that the investment was only routed through Mauritius.
23. The Assessee further submits that similar argument was raised by the Revenue before the Supreme Court in the case of **Azadi Bachao Andolan (supra)** wherein it was contended that the companies incorporated in Mauritius are shell companies as they don't carry on any business and are incorporated in Mauritius with the motive of treaty

shopping. The Supreme Court rejected the argument of the Revenue and held that if the intention was to preclude a person from the third state from claiming benefits of the DTAA, then a suitable term of limitation to that effect should have been incorporated therein, and that in the absence of a limitation clause, such as the one contained in Article 24 of the India-USA DTAA, there are no disabling or disentitling conditions under the India-Mauritius DTAA prohibiting the benefits thereunder. The Supreme Court further held that the motives with which the companies have been incorporated in Mauritius is wholly irrelevant and cannot in any way affect the legality of the transaction. And, that there being nothing like equity in a fiscal statute, which applies *proprio vigore* or it does not.

24. The Assessee further submits that the LOB clause was inserted as Article 27A in the India-Mauritius DTAA only w.e.f. 1 April 2017 which provided for restriction on the benefits available under Article 13 of the DTAA that a company shall not be entitled to the benefits of Article 13 if the primary purpose was to take advantage of the DTAA and the company is a shell company incurring expenditure on operations of less than Mauritian Rs. 1.5 mn in Mauritius. The CBDT press releases dated 10 May 2016 and 29 August 2016 further clarify that the amendments made to the India-Mauritius DTAA will be applicable only from A.Y. 2018-19 that too on capital gains arising on the securities purchased after 1 April 2017.
25. Without prejudice to the fact that the said Article 27A does not apply to A.Y. 2012-13 i.e., the year under adjudication for entitlement of DTAA benefits to the Assessee, even if the principle laid down in the LOB clause found in the India-Mauritius DTAA is applied for the earlier year, the threshold of a minimum spend in Mauritius is easily met by the Assessee as the Assessee has incurred expenses in excess of Mauritian

Rs.1.5 mn for the year under consideration. The workings and the extract of profit and loss account for the financial year ended 31 March 2012 (which has comparative figures for 2011) are at page 1683 to 1684 of the ITAT Paperbook.

26. In view of the above, the Assessee submits that the orders passed by the lower authorities denying the benefit of Article 13(4) of India-Mauritius DTAA for the A.Y. 2012-13 are unsustainable and bad in law.

IV. The capital gain arising on the securities purchased before 1 April 2017 has been grandfathered and cannot be brought to tax in India

27. The Assessee submits that with effect from 1 April 2017 amendments have been made to Article 13 of the India-Mauritius DTAA whereby Article 13(3A) has been inserted which provides that capital gain arising on transfer of shares, acquired on or after 1 April 2017, will be taxable in the country in which the company whose shares are sold is resident. Article 13(3B) further provides that the capital gain arising, on shares acquired on or after 1 April 2017, during the period 1 April 2017 and 31 March 2019 will be chargeable to tax @50% of the rate it is ordinarily taxed in the residence country of the company whose shares are being alienated.
28. Article 13(4) has been substituted and provides that any capital gain arising from alienation of any property other than Article 13(1) (Capital gain on immovable property), 13(2) (Capital gain on movable property of Permanent Establishment), 13(3) (Capital gain on ships and aircrafts), 13(3A) (Capital gain on shares acquired after 1 April 2017), 13(3B) (Capital gain on shares between 1 April 2017 to 31 March 2019), will be taxable only in the country in which alienator is a resident. Therefore, the

amended Article 13(4) effectively provides that the capital gain arising on alienation of shares acquired before 1 April 2017 cannot be brought to tax in India in any situation. Hence, the jurisdiction to tax capital gain in India is vested only w.e.f. 1 April 2017, that too only for the capital gain arising on alienation of shares acquired on or after 1 April 2017.

29. In these circumstances, it is not open to the Revenue to deny the benefit of the DTAA for an assessment year prior to A.Y. 2017-18. In order to test the correctness of the Revenue's stand let us visualise a situation where the sale under consideration has been affected post 1 April 2017. In such a case, the capital gain arising from the shares purchased before 1 April 2017 would not be chargeable to tax in India and the provisions of Article 13(4) would continue to protect the assessee. Therefore, the Assessee submits that the denial of benefit of Article 13(4) to the Assessee is without jurisdiction and bad in law.
30. The aforesaid position has been clarified by the CBDT vide press release dated 29 August 2016 wherein it has been provided that the amendment made to India-Mauritius DTAA which provides for capital gains arising on transfer of shares on or after 1 April 2017 will be restricted to the shares purchased on or after 1 April 2017 and the capital gain arising on transfer of shares which were acquired before 1 April 2017 have been grandfathered and will not be subject to capital gain taxation in India.
31. In view of the above, the Assessee submits that the orders passed by the lower authorities taxing the capital gains on the shares which were acquired in 2008 and sold in 2011, which is much before 1 April 2017, is unsustainable and bad in law.

V. **The Assessee is not a resident of India as its control & management is not situated wholly in India:**

a. **Residential status of an assessee is required to be determined every year**

32. The Assessee submits that under section 6(3)(ii) of the Act (as applicable for the year under consideration), a company which is not incorporated in India is considered to be a resident of India only if, during the previous year, the control and management of its affairs is wholly situated in India. The relevant portion of the section 6(3) is reproduced as under:

“6. For the purposes of this Act, —

.....

(3) A company is said to be resident in India in any previous year, if—

(i) it is an Indian company; or

(ii) during that year, the control and management of its affairs is situated wholly in India.”

33. The words “previous year” and “during that year” employed in the provision clearly bring out that the residential status of an assessee company is to be ascertained each year considering the control and management of the company during the previous year. However, the lower authorities have determined the residential status of the Assessee based on events and documents pertaining to earlier years which is wholly incorrect and contrary to the express provisions of section 6(3)(ii) of the Act which require that the residential status is to be ascertained basis the events pertaining to the previous year.
34. In this regard, reference is made to the judgments of **Wallace Brothers & Co. Ltd v CIT (1945) 13 ITR 39 (FC)**, **Sri Raja K.V. Narsimha Rao Bahadur v CIT (1950) 18 ITR 181 (Madras)**, **GirdharlalGhelabhai v CIT (1964) (53 ITR 23) (Gujrat)** wherein the courts have consistently

taken a view that the residential status under provisions analogous to section 6(3) of the Act is to be determined for the relevant previous year in which the income arises and it is the control and management during such year alone that is relevant to determine the residential status under the Act.

35. Without prejudice to the above, the Assessee submits that even if the earlier years' events and/or documents are to be considered for the purpose of determining the residential status of the Assessee for the year under consideration, as sought to be done by the lower authorities, it would still qualify as a non-resident, since atleast a part of the control and management of the Assessee was situated in Mauritius, which is evident from the fact that the board meetings have taken place in Mauritius. A brief summary of decisions taken in relation to acquisition, sale and important decisions in relation to VEL is attached herewith as **Annexure 1** and of other decisions taken in earlier years is attached herewith as **Annexure 2**.
36. In view of the above, the Assessee submits that the contention of the lower authorities that to decide the residential status, the events and documents relating to earlier years are required to be considered is unsustainable and bad in law.

b. A company incorporated outside India is a resident of India only if the control and management is “wholly” situated in India:

37. The Assessee submits that under the provisions of section 6(3)(ii) of the Act, a company incorporated outside India can be considered as a resident of India only when the control and management is “wholly” situated in India. Therefore, if any part of the control and management is situated outside India, the company cannot be considered a resident of India.

38. In this regard, reliance is placed on **Narottam Pereira Ltd. vs. CIT (1953) 23 ITR 454 (Bom)**, **CIT vs. Nandlal Gandlal (1960) 40 ITR 1 (SC)**, **Radha Rani Holdings (P.) Ltd. vs. ADIT (2007) (110 TTJ 920)(Delhi ITAT)** wherein the courts/tribunals have held that a company incorporated outside India will not be considered as a resident of India if any part of the control and management is situated outside India.
39. This is further amplified by the Explanatory memorandum to the Finance Bill, 2015 which reaffirms the aforesaid legal position. The relevant part of the memorandum is reproduced as under:

“The existing provisions of Section 6 of the Act provides for the conditions under which a person can be said to be resident in India for a previous year. In respect of a person being a company the conditions are contained in clause (3) of Section 6 of the Act. Under the said clause, a company is said to be resident in India in any previous year, if-

(i) it is an Indian company; or

(ii) during that year, the control and management of its affairs is situated wholly in India.

*Due to the requirement that whole of control and management should be situated in India and that too for whole of the year, the condition has been rendered to be practically inapplicable. **A company can easily avoid becoming a resident by simply holding a board meeting outside India.**”*

40. In the instant case, the Assessee is controlled and managed by its board of directors. All decisions concerning the affairs of the Assessee are taken by the board of directors in meetings held at the registered office of the Assessee in Mauritius. During the previous year relevant to the A.Y. 2012-13, the board of directors held all **11 meetings** at the registered office of the Assessee in Mauritius in which various decisions, including in respect of sale of VEL shares, were taken which conclusively proves

that the control and management of the Assessee was situated in Mauritius. It is also important to note that the Assessee had nine directors during the year and all of them, except Ms. Dina Wadia, who was a nominee director appointed by the lenders, were residents of Mauritius/non-residents of India. Therefore, it is submitted that the Assessee is not a resident of India as the control and management of the Assessee was not situated wholly in India and, on the contrary, the same was wholly in Mauritius. A brief profile of the directors is attached herewith as **Annexure 3** and a summary of the 11 board meetings which took place in F.Y. 2011-12 is attached herewith as **Annexure 4**.

41. The Assessee further relies on the judgment of the Calcutta High Court in the case of **CIT vs Bank of China (1985) (154 ITR 617)**, wherein it was held that the control and management of a company is situated at a place where meetings are held by the board of directors. In the instant case, all the decisions relating to the affairs of the company have been taken by the board of directors in the meeting held at its registered office in Mauritius and the tax authorities have not brought any material on record which shows that persons other than the directors have taken any decision, let alone any person based in India.
42. The various allegations made by the lower authorities are specifically rebutted in the submissions and can be found at page 1 to 183, page 1608 to 1614 and page 1703 to 1705 of the ITAT Paperbook and for the sake of brevity are not reproduced here.
43. The lower authorities relying on the judgment of **De Beers Consolidated Mines Limited vs Howe (5 TC 198) (HL)** have held that the word “control and management of affairs wholly situated in India” used in section 6(3) of the Act is equivalent to “central control and management” and would satisfy the requirements of section 6(3) even if a part of the

control and management is situated outside India. The contention of the lower authorities is incorrect as the House of Lords in the case of **De Beers Consolidated Mines Limited** (supra) was not concerned with the provisions similar to the provisions found in section 6(3) of the Act which specifically provide that the control and management has to be “wholly” situated in India. The test of central control and management was evolved by the House of Lords to determine the residency of a company in the absence of any specific condition in the Income-tax Act, 1853 (UK). Therefore, the Assessee submits that the same cannot be applied while determining the residency of a company under section 6(3) of the Act.

44. Without prejudice to the above, the Assessee further submits that even if the test of central control and management as contended by the lower authorities is to be applied, the whole of the central control and management of the Assessee company is situated in Mauritius which is evident from board meetings that have taken place at the registered office of the company in Mauritius for the year under consideration and for the earlier years. The lower authorities have not brought any material on record to substantiate that the central control and management of the Assessee is situated in India. In **Nandlal Gandalal** (supra), the Supreme Court in the context of Section 4A(b) of the Indian Income-tax Act, 1922, which considered a partnership firm non-resident in India if the control and management was “situated wholly” outside India. The Supreme Court interpreting the word “situated wholly” held that the control and management being partly inside and partly outside India does not satisfy the requirement of it being “situated wholly” outside India. Similarly, the Bombay High Court in case of **Narottam Pereira** (supra), after considering the Judgment of House of Lords in **De Beers Consolidated Mines Limited** (supra) has unequivocally held that if any part of the

control and management is situated outside India, the company would not be resident in India. Therefore, the Assessee submits that the reliance placed by the lower authorities on the judgment of **De Beers Consolidated Mines Limited (supra)** to hold that the requirements of section 6(3) is complied with even when a part of the control and management is situated outside India is incorrect and bad in law.

45. Therefore, it is submitted that the control and management of the Assessee was situated in Mauritius and by no stretch of imagination it can be said that the control and management of the Assessee was wholly in India for the year under consideration.

a. Execution of decisions by Indian personnel is not relevant to decide the control and management of the Assessee:

46. The lower authorities to come to the conclusion that the control and management of the Assessee is in India, have held that the agreements and the documents have been executed by employees of other Essar Group entities that are based in India and therefore the control and management of the Assessee is wholly situated in India. Consequently, the Assessee becomes a resident of India in terms of section 6(3) of the Act.
47. The lower authorities have failed to appreciate that the making of a decision is different from the execution of the decision. To determine the residential status under section 6(3) of the Act, the Assessing Officer is required to ignore circumstances where action is taken by personnel in India that has been delegated or authorised by the Assessee's board of directors. In the instant case, the Assessing Officer has in fact observed that the personnel in India executed the transaction only after they were

duly authorised by the board of directors of the Assessee (see page 855 of the ITAT appeal set).

48. The Assessee in support of the aforesaid, places reliance on the judgment of the Bombay High Court **Narottam Pereira Ltd. (supra)** wherein the High Court has observed that the board of directors had delegated authority to implement certain decisions and gave directions for same from time to time does not mean that the control and management does not vest with the directors. The relevant portion of the judgment is extracted as under:

“But it is equally clear from the minutes of the meetings of the board of directors which are also before us that the central management and control has been kept in Bombay and has been exercised by the directors in Bombay. The minutes deal with various matters which are delegated to these two managers and yet the directors from a proper sense of responsibility to the company have retained complete control over these matters and have from time to time given directions to the managers as to how things should be done and managed....”

d. To determine the residential status under section 6(3) of the Act, de facto control is to be considered:

49. The lower authorities, to come to the conclusion that the control and management was not with the board of directors of the Assessee, have relied on clauses of various loan agreements by stating that the change of control clauses in various loan agreements bring out that control on VEL shares is of Shashikant, Ravikant and Prashant Ruia because as per the said clause, change of control will occur if these persons together with persons and entities controlled by them (directly or indirectly) and who are promoters of the borrower cease to have control over the VEL shares.
50. The lower authorities have failed to appreciate that there exists difference between management control and shareholder control. For the purpose of

section 6(3) of the Act, what is required to be seen is de facto control, i.e., where the control and management is actually exercised. In the instant case, it is very clear that the control and management was exercised by the board of directors in Mauritius since all the 11 meeting during the previous year relevant to A.Y. 2012-13 were held in Mauritius. The lower authorities have not produced a single document which in any manner shows that members of the Ruia family have taken any decision with regard to the Assessee in any capacity other than as director of the Assessee. Therefore, it is submitted that the control and management of the Assessee is with the board of directors in Mauritius and the allegation made by the lower authorities is baseless and contrary to evidence on record.

VI. Significant presence of Essar Group in Mauritius:

51. The lower authorities have denied treaty benefits to the Assessee on the basis that the investment has been made through Mauritius with a singular motive of claiming the benefits of not being liable to pay tax in India on the capital gains and having regard to the provisions, as they then stood, of the capital gain tax under India-Mauritius DTAA.
52. The lower authorities have failed to appreciate that the Essar Group is a multinational group with more than 200 companies which had a net worth in excess of USD 10 bn and had a presence in more than 25 countries across the 5 continents (in 2011-12). It operates in several sectors such as shipping, oil & gas, power, steel, exploration and production of oil and gas, ports etc. It had raised a debt of over USD 5 billion from reputed overseas lenders and the shares of some of the entities in the group were listed on stock exchange India and the UK (including on the FTSE 100).

53. The Essar Group has its presence in Mauritius since 1992, i.e., even before mobile telephony started in India. Further, the Assessee was incorporated in Mauritius in 2005 which also supports the fact that the Assessee was not set up in Mauritius only for availing the treaty benefits on sale of shares, which it acquired only in 2008. By 2012, the group as a whole had made investments of approx. USD 6 bn in India and USD 2.5 bn in various businesses internationally.
54. The sector holding companies of the Essar Group mainly operate from Mauritius. In fact, even some foreign companies of the group are headquartered from Mauritius (for e.g., Essar Energy PLC – a UK listed Company) (refer page 1621 of the ITAT Paperbook)
- for overall presence in Mauritius –refer page 1620 of the ITAT Paperbook;
 - for accolades that were received by the Essar Group from the Mauritian government, refer page 1622 and 1623 of the ITAT Paperbook;
 - for newspaper article published in l'express (www.lexpress.mu), which also shows the photograph of Essar House in Mauritius, refer page 1625 of the ITAT Paperbook;
 - for sample photograph of board meeting held on 4 November 2011, refer page 1624 of the ITAT Paperbook.

VII. Legitimate investment business activity undertaken by the Assessee:

55. The lower authorities have denied treaty benefits to the Assessee on the basis that the Assessee was nothing but a shell company which had been used as a conduit with the sole objective of avoidance of tax on capital gain that arose on sale of VEL shares.
56. The lower authorities have failed to appreciate that the principal purpose test of incorporating the company in Mauritius for capital gain exemption

purpose was brought in for the first time by the insertion of the LOB clause w.e.f. 1 April 2017 and, therefore, the capital gain exemption claimed by the Assessee cannot be denied on this ground. On the contrary, the judgment of the Supreme Court in **Vodafone International Holding B.V. (supra)** supports the Assessee, wherein it has been held that claiming of treaty benefit is one of the relevant factors of making investment through the Mauritius route. The relevant portion of the judgment is extracted as under:

“97. We are, therefore, of the view that in the absence of LOB clause and the presence of Circular No. 789 of 2000 and TRC certificate, on the residence and beneficial interest/ownership, Tax Department cannot at the time of sale/disinvestment/exit from such FDI, deny benefits to such Mauritius companies of the treaty by stating that FDI was only routed through a Mauritius company, by a company/principal resident in a third country; or the Mauritius company had received all its funds from a foreign principal/company; or the Mauritius subsidiary is controlled/managed by the foreign principal; or the Mauritius company had no assets or business other than holding the investment/shares in the Indian company; or the foreign principal/100 per cent shareholder of Mauritius company had played a dominant role in deciding the time and price of the disinvestment/sale/transfer; or the sale proceeds received by the Mauritius company had ultimately been paid over by it to the foreign principal/its 100 per cent shareholder either by way of special dividend or by way of repayment of loans received; or the real owner/beneficial owner of the shares was the foreign principal company. Setting up of a WOS Mauritius subsidiary/SPV by principals/genuine substantial long term FDI in India from/through Mauritius, pursuant to the DTAA and Circular No. 789 can never be considered to be set up for tax evasion.”

57. Without prejudice to the above, the lower authorities have failed to appreciate that the Assessee is an investment holding company and its principal activity was investing in the telecom sector in India. It is akin to

other sector holding company structures within the group. There is no aberration in the Assessee being an investment holding company in Mauritius.

58. The only way an investment holding company can monetize its investments is either to sell them or pending sale, raise funds based on such investments to further promote the group interests. Based on this rationale, ECML monetized the indirect investments it held in VEL by raising loans on the strength of the shares. The loan agreements prohibited the Assessee from doing any other business, other than being in the business of holding VEL shares so as to ensure that the security provider (i.e., the Assessee) did not undertake any activity that dilutes the lender's security.
59. SPVs/ investment companies are very common in holding structures and have been accepted as a legitimate business practice in various judicial precedents. Reliance is placed on:

- **Vodafone International Holdings B.V. (supra)**

“79. When a business gets big enough, it does two things. First, it reconfigures itself into a corporate group by dividing itself into a multitude of commonly owned subsidiaries. Second, it causes various entities in the said group to guarantee each other's debts. A typical large business corporation consists of sub-incorporates. Such division is legal. It is recognized by company law, laws of taxation, takeover codes etc. On top is a parent or a holding company. The parent is the public face of the business. The parent is the only group member that normally discloses financial results. Below the parent company are the subsidiaries which hold operational assets of the business and which often have their own subordinate entities that can extend layers. If large firms are not divided into subsidiaries, creditors would have to monitor the enterprise in its entirety. Subsidiaries reduce the amount of information that creditors need to gather. Subsidiaries also promote the benefits of specialization. Subsidiaries permit

creditors to lend against only specified divisions of the firm. These are the efficiencies inbuilt in a holding structure. Subsidiaries are often created for tax or regulatory reasons. They at times come into existence from mergers and acquisitions. As group members, subsidiaries work together to make the same or complementary goods and services and hence they are subject to the same market supply and demand conditions. They are financially inter-linked. One such linkage is the intra-group loans and guarantees....

...

136. Corporate structure created for genuine business purposes are those which are generally created or acquired: at the time when investment is being made; or further investments are being made; or the time when the Group is undergoing financial or other overall restructuring; or when operations, such as consolidation, are carried out, to clean-defused or over-diversified. Sound commercial reasons like hedging business risk, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structures. In transnational investments, the use of a tax neutral and investor-friendly countries to establish SPV is motivated by the need to create a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain countries are partially exempted and, in certain countries, there is nil tax on capital gains. Such factors may go in creating a corporate structure and also restructuring.”

- **Sanofi Pasteur Holdings SA (2013) 354 ITR 316 (AP).**

“(18) ...

No curial or academic authority is placed before us to hazard a conclusion that a corporate entity must necessarily involve itself either in manufacture or marketing/trading in/of goods or services to qualify for the ascription of being in business or commerce. Creation of wholly owned subsidiaries or joint ventures either for domestic or overseas investment is a well established business/commercial organizational protocol; and investment is of

itself a legitimate, established and globally well recognized business/ commercial avocation.

ShanH is a special purpose joint venture investment vehicle, established initially by MA and co-adopted in due course by GIMD and eventually by Mr. Georges Hibon, to facilitate investment by way of participation in the shareholding of SBL. That is a ShanH business and its commercial purpose.”

60. The Courts have recognised the use of tax efficient SPVs and that corporate structures are created for genuine business purposes generally at the time when investment is being made. Multinational companies develop corporate structures, joint ventures for operational efficiency, tax planning, risk, mitigation etc. such that better returns can be offered to their shareholders. The burden is entirely on the Revenue to demonstrate that such incorporation has been affected to achieve a fraudulent, dishonest purpose to defeat the law. In this regard, reliance is placed on **Bid Services Division (Mauritius) (supra)**, wherein the Bombay High Court has followed the judgment in **Vodafone International Holding B.V. (supra)**.
61. Given the above, the Assessee submits that there is nothing unusual in the fact that the investment in VEL shares is itself the legitimate business of the Assessee. Accordingly, it cannot be said that the Assessee is a conduit and has not undertaken any business activity or that there was lack of commercial/ business substance in the present case.

VIII. Utilisation of loan proceeds and sale consideration:

62. The lower authorities have also denied the treaty benefits on the basis that no benefit of the loans taken on the strength of the VEL shares was

obtained by the Assessee and further the sale consideration from the VEL shares was not utilised by the Assessee.

63. Out of the loan of USD 1.1 Bn taken in January 2007 from SCB, UK by ECML, USD 526 mn was paid by the lenders directly to the Assessee as share application money on behalf of ECML. The Assessee in turn used the funds so received to effectively infuse capital in ETIL and in ECom (which was effectively used by ETIL and ECom to acquire VEL shares and repay their existing debts taken to acquire VEL shares).
64. In large multinationals, it is normal for companies to support one another to maximize overall benefit to all in the group. Further, it would be appreciated that it is natural for a subsidiary company to act for the benefit of its holding company. Maximizing shareholders' wealth is the ultimate objective of any company.
65. The investments in VEL by the Assessee yielded significant gains/ value to the Assessee and the Assessee was able to support/assist its overseas group entities to make other investments. It may also be noted that various group entities have supported/ assisted the Assessee. Illustratively, when the Assessee required funds for acquiring ETIL shares, the Assessee obtained funds in the form of interest-free and temporary loans from Essar Infrastructure Holdings Limited ('EIHL'), Mauritius (the shareholder of the Assessee) and Essar Global Fund Limited ('EGFL'), Cayman Islands (the then indirect shareholder of the Assessee). Further, group entities also provided non-monetary support to the Assessee such as assistance/ guidance/ support of different personnel with relevant expertise in various fields. The group entities co-operated with each other for reciprocal/ mutual benefit and interest.
66. As regards utilisation of sale proceeds, it may be noted that the Assessee was a guarantor to the 3.59 bn loan granted to ECML by a consortium of

lenders led by SCB, UK in August 2007. As the loan was to be repaid and ECML (the borrower) did not have the funds to repay, the Assessee sold its VEL shares in order to meet its obligations under the loan agreement towards repayment of the facility. The tax authorities cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder - **Vodafone International Holdings B.V. (supra), Becton Dickinson (Mauritius) Ltd (434 ITR 180) (AAR) and E*Trade Mauritius Limited (2010) 324 ITR 1 (AAR)**

67. The transactions were undertaken for commercial reasons and it is not open to the tax authorities to step into the shoes of the board of directors and question the business purpose of a transaction. The Assessee has also benefited from the various loans that were raised on the basis of ETIL/VEL shares and therefore, it agreed to pledge its holding in ETIL/VEL shares.

IX. Liquidation of ETIL was pursuant to lenders requirement and rejection of pledge of VEL shares by the RBI:

68. The lower authorities have denied treaty benefits to the Assessee on the basis that the liquidation of ETIL was undertaken with a view to shift the locus of shares from India to Mauritius without any commercial purpose and, was a colourable device to avoid capital gains tax in India.
69. The lower authorities have failed to appreciate the commercial purpose behind the liquidation of ETIL, viz., the same would enable a direct pledge of VEL shares to the lenders resulting in greater enforceability of VEL shares as a security, which was not possible so long as the VEL shares were held by ETIL in view of the provisions of Foreign Exchange

Management Act, 1999. The same is evident from the rejection by the RBI vide its letter dated 4 October 2007 of the application made for pledge of VEL shares by ETIL [refer RBI letter on page 1682 of the ITAT Paperbook].

70. The lower authorities have also failed to appreciate that there was no intention to liquidate ETIL in the first place as is evident from the application dated 12 February 2007 made by ETIL for pledge of VEL shares to the RBI. Accordingly, the option of liquidation of ETIL provided under the USD 1.1 bn loan agreement was not preferred by the Assessee.
71. The lower authorities failed to appreciate that while the application dated 12 February 2007 for pledge of VEL shares was pending, ECML was in the process of obtaining a loan of USD 3.59 bn i.e., more than 3 times the loan already obtained. Since the approval of RBI was not forthcoming, the lenders in the loan agreement dated 17 August 2007, specifically stipulated that ETIL must, necessarily, be liquidated and the shares of VEL must be directly held by the Assessee so that the same can be pledged with the lenders directly.
72. The lower authorities failed to appreciate that after execution of the loan agreement dated 17 August 2007 for USD 3.59 bn, the application made to the RBI for pledging of VEL shares by ETIL was rejected vide letter dated 4 October 2007 (in respect of USD 1.1 bn loan). Further, the pledge of the VEL shares was allowed by the RBI only after holding of the shares by the Assessee (post liquidation of ETIL), which is evident from the approval dated 14 November 2008 granted by the RBI subsequent to liquidation of ETIL [refer page 1697 of ITAT Paperbook].
73. The Assessee further submits that the liquidation of ETIL was not carried out with a view to claim the benefit of India-Mauritius DTAA, because,

even in the absence of liquidation, the benefit of India-Mauritius DTAA was available to the Assessee as the Assessee had the option of selling the shares of ETIL, the gains arising whereof would have been exempt from tax under Article 13(4) of the India-Mauritius DTAA. In fact, even if ECML had sold shares of the Assessee, there would have been no tax liability in India under the Act itself and further, ECML would have been entitled to the benefits of the India - Mauritius DTAA as well. Please see the alternative scenarios attached at page 635 to 637 of the ITAT Paperbook.

74. In view of the above, it cannot be said that the motive behind the liquidation of ETIL was tax avoidance as it was undertaken for a commercial purpose and further no tax benefit was obtained by the Assessee by undertaking the liquidation. Accordingly, the same cannot be termed as a colourable device and the reliance of the lower authorities in this respect are bad in law.

X. Conclusion

75. The Assessee being a foreign company reiterates that:

- it is a Mauritius incorporated company and a tax resident of Mauritius;
- its control and management is situated outside India, i.e., in Mauritius since inception;
- it is a non-resident of India as per the provisions of the Act;
- it held valid TRCs since inception issued by the MRA;
- the transactions undertaken by it were based on commercial expediency and cannot be termed as colourable device/ design to avoid taxes by any stretch of imagination.

In light of the explanations and documentary evidences submitted time and again, the Assessee is eligible for the benefits of exemption from

capital gains tax as provided under Article 13(4) of the India-Mauritius DTAA. Accordingly, the capital gains that have arisen to it on the sale of shares of VEL are not liable to tax in India.

76. At the time of hearing, Id. ASG, Shri N. Venkatraman Sr. Advocate submitted that the issue involved in both the appeals, viz., Essar Communications Limited and Essar Com Limited are inter-connected and intertwine and the facts have to be appreciated together. He submitted his arguments in detail and it was submitted in 5 paras as under :-

PART A - Background and the proceedings before the AAR and other Income Tax Authorities

This part comprises of - Background of the case; The AAR Ruling; Order of the Assessing Officer; Order of the CIT(A); Present proceedings before the Hon'ble ITAT 1.

1. Background of the case:

Facts in brief are that the assessee, Essar Communications Ltd ("ECL" in short) and Essar Com Limited ("ECOM" in short), companies of Essar Group, claimed that these were the companies incorporated in Mauritius; that they were non-residents in India; and that they did not have a permanent establishment in India.

The incorporation background is that the assessee, ECOM was initially incorporated in Mauritius on 09.03.2001 in the name of Clickforsteel Holdings Limited. The name was changed to Essar Telecom India Holdings Limited on 25.05.2004 and later to Essar Com Limited on 08.11.2005. The ECOM held a Global Business Licence (GBL 1) issued by Financial Services Commission (FSC) of Mauritius and it was stated to be engaged in investment holding activities.

Similarly, ECL was initially incorporated in Mauritius on 13.10.2005 in the name of Essar Power India Holdings Ltd. The name was changed to Essar Communications Limited on 12.12.2005. The EeL too held a Global Business Licence (GBL 1)

issued by Financial Services Commission (FSC) of Mauritius and it was stated to be engaged in investment holding activities. Both the assessee companies have undergone numerous ownership changes within the group and on the date of transfer of VEL shares to EPSL of Vodafone group, ECL happened to be hundred percent owner of the shareholding of Ecom.

Vodafone Essar Limited (VEL) was a joint venture of Vodafone Group and Essar Group. Before the entry of Vodafone, it was a joint venture between Hutchison Group and Essar Group and was known as Hutchison Essar Limited (HEL).

Ecom, a Mauritius incorporated Essar Group Company held 2,56,51,389 nos, of equity shares (6.19% of total equity share of the Essar group) in Vodafone Essar Ltd (VEL), an Indian company engaged in mobile telephone business in India. Similarly, Essar Communications Limited, Mauritius (ECL, in short) which is 100% holding company of ECOM, held equity shares (15.85% of total equity of the Essar Group) in VEL. Both the companies are together known as assesseees. Thus, together ECL and ECOM held 22.04% in VEL and another group company, resident of India held balance of the 11 % holding of the Essar Group in EL. The retention of around 11 % of ownership in the hands of the Indian resident company of the Essar Group, arose out of the agreement between the two groups when the Indian FDI regulations relaxed the FDI norms in the Telecom sector, to enhance foreign holding limit to 74%. Thus. on the date of transfer of the impugned shares, foreign shareholding of the Essar group was around 22% and Indian shareholding was around 11 %. The Indian company, transferred its shareholding in the VEL to another Indian company (of Piramal group) nominated by the Vodafone Group in F. Y. 2011-12, as part of the deal between the Vodafone and the Essar Group. Thus, the FDI regulatory requirements were satisfied by the group.

On 01.06.2011 and 01.07.2011, the two assesseees sold all the shares they held in VEL to Euro Pacific Securities Limited (EPSL) (a non-resident company of Vodafone Group, nominated by Vodafone International Holdings B.Y) for a total consideration of USD 1,18,04,78,489 and USD 3,02,05,21,511 and realised capital

gains thereon. The gross consideration (including interest) was received by the assessee after deduction of tax at source at 21.012%. The shares under the impugned transactions were sold upon exercise of put option by another group company ECML, Mauritius. Consideration was received on 01.07.2011 in the bank account of the assessee's companies in Mauritius.

Prior to the sale of the VEL shares by the assessee, EPSL made an application before the Hon'ble Authority for Advance Rulings ('AAR) seeking a ruling on its withholding tax liability on the proposed payment of sale consideration to the assessee for the transfer of shares in VEL. Capital gains made on proposed sale of shares to EPSL were claimed exempt under the DTAC before the AAR.

On their miscellaneous application filed before the AAR, the assessee was admitted as interveners in the matter.

After various rounds of hearings before the AAR, between March 2011 to June 2011 for which both Vodafone Group and the Essar Group were parties- Vodafone Group as the deductors and the assessee as interveners, application for withdrawal of case was filed before the AAR. This application for withdrawal was made after an agreement dated 01.07.2011 between the two groups- Vodafone and Essar was entered into. This agreement inter alia included clause for enhancement of consideration payable by the Vodafone group to the Essar group on account of taxes payable on the transaction.

As per terms of the settlement through this agreement. Vodafone agreed to increase the total consideration of VEL shares of ECL and ECOM to' 4.20 I Bn USD from earlier 3.8 Bn USD. The tax deduction component was agreed to be USD 882.7 Mn. Thus, Essar parties received increased consideration, the increase being about 400 Mn USD. The tax component was thus nearly shared equally by the Vodafone and Essar parties. The relevant recitals from the deed of amendment dated 1.7.2011 referring to the terms of settlement of dispute are as under:

" ... 2.1 The parties agree that the offshore agreement is hereby amended so that:

(A) the put option price, as defined in clause 2.18 of the offshore agreement, is amended and is now US\$ 4,201,000,000 (being c.US\$46.02 per share) of which US\$ 3,020,521,511 is the price payable for the 65,634,887 put option shares owned or formerly owned by ECL and US\$ 1,180,478,489 is the price payable for the 25,651,389 put option shares owned by ECom;

(B) notwithstanding any provision to the contrary in the Offshore agreement (including, but not limited to, clauses 4. J and 4.4 of the offshore agreement) and notwithstanding the provision of the Double Tax Avoidance Agreement between India and Mauritius, Vodafone or Vodafone s nominee or VG Pic as Guarantor can deduct from the payment of the put option price (as amended by the terms of Clause 2.1 (A) above) an amount upto a maximum of US\$ 882,714,120 (plus any amount withheld from any interest paid on the put option price) towards tax deducted at source in respect of capital gains tax on the sale and transfer of the put option shares provided that such withheld amount is deposited with the relevant tax authorities in accordance with the terms agreed between the parties. "(Emphasis supplied)

From this deed of settlement, it is observed that the two groups i.e. Vodafone and Essar have settled the amount of sale consideration and tax on the capital gains at taxable rate charged as per Indian law and have expressed the same to be attributed towards the withholding tax liable to be deducted at source, notwithstanding any provisions of DTAA.

The AAR allowed the said application for withdrawal vide order dated 01.07.2011 dismissing the application as “dismissed as withdrawn without prejudice to the rights of the applicant (i.e. EPSL), the Revenue and the intervener to put forward whatever contentions they have at appropriate stage in other proceedings, in accordance with law.

Thereafter TDS was deposited by EPSL. i.e. the deductor. This TDS was claimed to be paid under protest on the ground that capital gains arising from" sale of these shares were exempt from income-tax in India under Article 13(4) of the India-Mauritius Tax Treaty ('tax treaty).

Subsequently, on 26.09.2012, again applications were filed by ECL and ECOM before the same forum, i.e. the AAR. These applications were for the same transaction and on the identical question which was the subject matter of earlier proceedings, i.e. whether the assesseees were chargeable to tax in India on the capital gains arising from transfer of shares in VEL. Capital gains made on sale of shares to EPSL viz 1.079 Bn USD (INR 4772 Crore) by Ecom and 2.647 Bn USD (Rs. 11,772/- Crore] by ECL were claimed exempt by the assesseees under the DTAC in this application before the AAR.

This second round of application was made after a gap of about one year and 3 months and after the constitution of the AAR had changed upon the retirement of Hon'ble justice Balasubramanyam. After multiple hearings, the AAR analyzed the issues like forum shopping, "other proceedings" dismissed both the applications on 10.10.2019 as non-maintainable. In addition, in the order, the Hon'ble AAR also held that it was prima-facie a case of tax avoidance. The AAR further enlisted the series of events submitted by the Revenue as evidences for tax avoidance and specifically expressed that the aspect of tax avoidance was to be examined by the authorities at the time of proceedings related to assessment.

This order of the AAR was challenged by the assesseees before the Hon'ble Delhi High Court by way of a writ petition. The Hon'ble Delhi High Court disposed off the writ petition vide its order dated 19.12.2019. The order of the High Court also directed the AO to expedite the assessment proceedings and to pass the assessment order preferably on or before 30.06.2020 (later extended to 15.03.2021).

The return of incomes which were filed by Ecom on 29.09.2012 declaring nil income and claiming refund of

Rs.1097,18,51,195/- being TDS deducted by EPSL was kept in abeyance on account of AAR proceedings in the second round. In this return it was claimed that the capital gains arising from transfer of shares in VEL was not chargeable to tax in India as per Article 13 (4) of the tax treaty. The case was taken up for scrutiny.

Similarly, the return of income which was filed by ECL on 29.09.2012 declaring nil income and claiming refund of Rs. 2821,21,70,693/- being TDS deducted by EPSL was also kept in abeyance. In this return, it was claimed that the capital gains arising from transfer of shares in VEL was not chargeable to tax in India as per Article 13(4) of the tax treaty. The assessment proceedings in both the cases were taken up subsequent to the decision of the AAR.

As facts of both ECL and ECOM are similar and intertwined, frequent reference to both the assesseees have been made in the preceding orders of the authorities and also in earlier as well as the present submission.

2. The AAR Ruling:

i. On the issue of maintainability of the applications filed before the same forum, i.e. the AAR, after withdrawal of the same and having been dismissed as withdrawn, the AAR held the applications to be non-maintainable.

ii. On the plea of the taxpayer, that the revenue should limit itself to the activities and affairs of the relevant financial year in which the share were transferred, i.e. F. Y. 2011-12 only, the AAR held that all the functions related to the affairs of the companies needed to be examine, which in the instant cases involved acquisition, application, maintenance and disposal. The relevant portion of the decision is reproduced:

"186. At the outset it is mentioned that we are not in agreement with the plea of the applicant that for considering the issue of prima-facie tax avoidance or exemption under treaty, we have to limit ourselves to the activities and affairs of the relevant financial year i.e., if the (sale) pertains to

financial year 2011-12, we have to examine whether there was a scheme of tax avoidance during that year. This is not acceptable interpretation. Imagine a share sale transaction happening on 1st April, 2011, there is nothing to even look for any documents or papers for the relevant financial year. A scheme of tax avoidance presupposes a series of events and actions which might have been planned for few years and thereafter the desired event occurs leading to the intended tax benefit. The key determinants inter-alia as pointed out by Hon 'ble Supreme Court in Vodafone case are whether the entity exists for commercial purpose, whether it is entering into transaction of say asset purchase, asset sale, loans, strategic investment, etc., for its own benefit, or if it is merely a conduit for someone else to park the funds or carry out activities as mere puppet at the behest of actual beneficiary who decides, strategies, executes its plan through the puppet entity. We do appreciate that there is very thin line between influence by parent company in affairs of executes its plan through the puppet entity. We do appreciate that there is very thin line between influence by parent company in affairs of subsidiary and abdication of responsibility by subsidiary company in favour of parent. But for prima-facie tax avoidance what is to be ascertained is whether there is a scheme which is apparent from the documents on hand or ascertainable from the chain of events. Prima-facie means what appears to be true even though it may be proved false later.

iii. On the issue of the transaction was prima facie a case of tax avoidance, gave a finding that the transaction was prima facie for the purpose of section 245R(2)(iii) and hence non maintainable. The relevant observations are:

"187. We are in agreement with revenue that in the instant case certain events inter-alia do serve as pointer towards prima-facie tax avoidance. These are:

- Investment for acquisition of VEL share not made by applicants but funds were routed through them and on Lop

of that they bound themselves in restrictive covenants of loan agreements.

- Further loans were raised by pledging these shares for benefit of Essar group.
- When shares were sold consideration immediately moved out from accounts of applicant to lenders on the directions of executives of Essar group
- Shares were bought, pledged, sold by Essar group and the entities
- Funds were routed through them and on top of that they bound themselves in restrictive covenants of loan agreements
- Further loans were raised by pledging these shares for benefit of Essar group
- When shares were sold consideration immediately moved out from accounts of applicant to lenders on the directions of executives of Essar group
- Shares were bought, pledged, sold by Essar group and the entities merely lent their name to see treaty benefits.
- The shares in HEL/VEL have been acquired by ECL by voluntary liquidation of ETIL. The sale purpose, it seems is to transfer the situs of ownership of 15.85% of HEL/VEL shares owned by Essar group, to Mauritius to avoid capital gains tax in India.

188. In view of foregoing, we hold that the present applications are barred under clause (iii) of proviso to section 245R(2).”

- iv. The AAR flagging the issues to the assessing and appellate authorities for examining the transaction to be one for tax avoidance:

"189. We have held earlier that applications are not maintainable and liable to be dismissed and that applicants can pursue their cases in other proceeding in forum other than AAR, it would be in fitness of things that concerned authorities would also consider this aspect of tax avoidance in detail at the time of merit proceedings."

(Emphasis supplied)"

3. Order of the Assessing Officer:

After multiple hearings and analysis of facts, legal provisions and judicial decisions, the AO finalized the assessment in detailed orders dated 13.04.2021. The AO denied benefits under Article 13(4) of the tax treaty to the assesseees by concluding inter alia that the assesseees were nothing but a shell company which had been used as a conduit with the sole objective of avoidance of tax on capital gain arisen on sale of VEL shares. The AO held that the control and management of the assessee company always lay in India since the board of directors were for namesake only and all the decisions in respect of the assessee were taken by Ruia family and executed through the key persons of Essar group in India. The AO concluded that the assesseees were tax residents of India and were not entitled to the benefit claimed under the tax treaty. Accordingly, long term capital gains were charged to tax.

The draft assessment orders were issued and served on the assesseees on 15.03.2021 u/s 144C of the Act. Vide letter dated 17.03.2021, the assesseees informed the AO that they were not willing to approach the Dispute Resolution Panel and reserved the right to appeal before CIT(A) against the final assessment orders. Accordingly, final assessment orders were passed. Aggrieved by the assessment order, the assesseees filed appeals before the CIT(A). The AO, arrived at conclusion of the transactions leading to the capital gains being taxable in India, based on the following reasons:

- ECL and ECom were always controlled by the trusts controlled and managed by Ruia family members;

- Investment for acquisition of VEL shares were not made by ECOM/ECL but funds were routed through them and on top of that they bound themselves in restrictive covenants of loan agreements;
- Further loans were raised by pledging these shares for benefit of Essar group;
- When shares were sold consideration immediately moved out from accounts of applicant to lenders on the directions of executives of Essar group:
- Shares were bought, pledged, sold by Essar group and the entities merely lent their name to seek treaty benefits.
- The shares in HEL/VEL have been acquired by ECL by voluntary liquidation of ETIL. The sole purpose, was to transfer the situs of ownership of 15.85% of HEL/VEL shares owned by Essar group, to Mauritius to avoid capital gains tax in India.
- Board of directors of the companies were for namesake only and all the decisions in respect of the companies were taken by Ruia family and It executed through the key persons of Essar group in India, and thus, the board was controlled and managed by the Essar group from India and the respective boards of ECOM/ECL were mere puppets;
- Analysis of financial statements of ECL/ECOM showed that they were only paper companies without any substance as they were not involved in any significant business activities and their income/expenditure was minimal in quantum;
- It is not the holding of board meetings or complying to certain regulations but it is the Act of the Central Management and Control applied through brain in factual matrix of course of business. Hon'ble Supreme Court applied the CMC test (Central Management and Control test) which determines from which place the real business is carried on. In the facts of the case, the Central Management and Control i.e. the "Brain" of the assessee company was being exercised in India and thus the company was a resident of India under the provisions of section 6(3) of the Act:
- Assessee company acted merely as a puppet and agreed to show the ownership in its own name as a mere name lender and without any knowledge, authority and decision- making

power into what was being done for the use of the shares owned in its name by the beneficial owners based in India;

- ECOM/ECL are nothing but shell companies which have been used as a conduit with the sole objective of avoidance of tax on capital gain arisen on sale of VEL shares:
- ECL/ECOM are tax resident of India and are not entitled to the benefit claimed under the tax treaty.

4. Order of the CIT(A):

i. The CIT (A) framed the following questions for deciding the two appeals:

"6. The issues that arise for determination in this case are as follows:

Regarding taxation of capital gains on transfer of shares of VEL

a) Whether the assessee was a tax resident of India and whether its control and management lay wholly in India during the relevant financial year,

b) Whether the assessee was entitled to the benefits of Article 13 (4) of India- Mauritius Double Taxation Avoidance Convention (DTAC);

c) Whether the assessee was a conduit company set up for availing tax treaty benefit and for avoidance of tax.

Regarding application of surcharge

Whether the assessee was liable to surcharge at the rate applicable to that on a foreign company or a domestic company.

Regarding taxing the interest income and balances written back

Whether the interest income and balances written back are to be added to the total income.

Regarding taxing interest received from EPSL

Whether the interest received from EPSL is to be taxed twice both as part of sale consideration as well as 'income from other sources'.

Regarding indexed cost of acquisition

Whether the indexed cost of acquisition of the VEL shares was correctly computed in the hands of the Assessee. "

ii. Summary of the findings of the CIT(A):

The CIT(A) has summarized his findings in para 170 of his order as follows:

"170. The summary of findings against the assessee are as under:

The assessee was tax resident of India and that its control and management was wholly in India;

The assessee was not entitled to the benefits of Article 13(4) of India-Mauritius DTAC;

The capital gains earned by the assessee on the sale of VEL shares were related to assets located in India in telecommunication sector which derived its value based on the economic activity and value creation in India;

The assessee was a conduit company set up for availing tax treaty benefit and for avoidance of tax;

The assessee had contrived to devise a scheme to show that the of claim of exemption from capital gains taxation in India under Article 13(4) of the tax treaty on the transfer of shares in an Indian company;

The assessee lacked commercial substance and was a colourable device.

170.1 Accordingly, the action of the AO in charging the capital gains to tax is confirmed. Grounds No.2 to 4 are dismissed. "

5. Present proceedings before the Hon'ble ITAT:

Against the decision of the CIT(A), the two assessee preferred appeals. During the course of the proceedings, based on comprehensive factual evidences, extensive oral submissions have been made before your honours on behalf of the department. The submissions of the revenue drew extensive support from the written submissions filed before the AAR, the ruling of the AAR, the order of the assessing officer and the order of the CIT(A).

PART B - Annotation of significant issues considered by the CIT(A) for the decision

The Ld CIT(A) has considered the issues in all comprehensiveness while referring extensively to the ruling of the AAR as also to the submissions filed before the AAR. Therefore, it is considered apt to flag his analysis including the relevant factual, legal and judicial analysis for his decision. These annotations are tabulated for clarity and intelligibility.

SI No.	Issue	Relevant paragraph of the CIT(A)
1.	Facts in brief and the background proceedings	Para 3-4 (page 14-17) ECL Para 3-4 (page 12-16) ECOM
2.	Issues framed by the CIT(A)	Para 6 (page 17-18) ECL Para 6 (page 16) ECOM
3.	Analysis of the results of the background proceedings leading to capital gains taxation	Para 7 (page 18-20) ECL Para 7 (page 16-19) ECOM
4.	Summarising the analysis of the AO	Para 8 (page 20-22) ECL Para 8 (page 19-21) ECOM
5.	Summarising the analysis of the AAR	Para 9 (page 22-24) ECL Para 9 (page 21-23) ECOM
6.	Facts and circumstances leading to the conclusion of capital gains taxation by the AO	

6.1	Broad view of Essar Group Company forming part of the existing arrangement	Para 11 (page 24-27) ECL Para 11 (page 23-25) ECOM
6.2	Moving of holding Essar Group in Indian Telecom Business from Onshore to offshore	Para 12 (page 27-33) ECL Para 12 (page 26-31) ECOM
6.3	Acquisition of VEL shares by ECL through voluntary Liquidation of ETIL and the evidences that voluntary liquidation was a colourable device	Para 13 (page 33-52) ECL Para 13 (page 31-51) ECOM
6.4	Analysis of evidences that Ruia family was the ultimate beneficiary of ECL/Ecom	Para 14 (page 52-57) ECL Para 14 (page 51-55) ECOM
6.5	Infographics showing Ruia family members to be ultimate beneficiaries of ECL/Ecom through maze of companies and trusts in Mauritius, Cayman Island and British Virgin Island	Para 14.1, 14.2 & 14.10 (page 52, 53, 54 & 57) ECL Para 14.1, 14.2, & 14.10 (page 51, 52 & 55) ECOM
6.6	Questionable independence of directors and the issues relating to secrecy and non-transparency through analysis of GBL 1 Company in Mauritius and the profile of Mauritian directors	Para 15 & 16 (page 58-61) ECL Para 15 & 16 (page 56 - 59) ECOM
6.7	Use of colourable device in acquisition of shares, raising of loans, movement of funds for the benefit of Ruia family etc	Para 17 & 18 (page 61-72) ECL Para 17 & 18 (page 59-70) ECOM
6.8	Analysis of Joint Assignment Agreement dated 31.01.2007 as a colourable device and the infographic representation of the same	Para 19 (page 72-76) ECL Para 19 (page 70-74) ECOM
6.9	Analysis of loan agreements taken on the strength of the impugned shares for the benefit of Ruia family and the group companies and the Essar Group companies	Para 20 -28 (page 76-83) ECL Para 20-28 (page 74-80) ECOM
6.10	Analysis of Advantages of USD 2.2 bn given to Ruia family through Essar Global Ltd. Cayman Island	Para 26 (page 80) ECL Para 26 (page 77) ECOM
6.11	Infographic of the benefit of fund flow of loan of USD 1.4 Billion on the strength of India based impugned shares	Para 27.1 (page 82) ECL Para 27.1 (page 79) ECOM
6.12	Over arching role of Essar Global Ltd., Cayman Island and practically no role of ECL/ Ecom in deciding the application of the impugned shares	Para 29 (page 83-86) ECL Para 29 (page 80-82) ECOM
6.13	Infographics of Frequent changes in holding structure devoid of commercial substance	Para 30 (page 86-88) ECL Para 30 (page 82-85) ECOM
6.14	Settlement of tax dispute before the AAR on 01.07.2011 through deed of amendment and enhancement of consideration	Para 31 (page 89-90) ECL Para 31 (page 86-87) ECOM
6.15	Analysis of financial statements of ECL/ Ecom evidencing practically no discharge of functions by ECL/Ecom	Para 32 (page 90-96) ECL Para 32 (page 87-93) ECOM
6.16	Entire affairs of ECL/Ecom and also of the transactions relating to the impugned shares carried	Para 33 (page 96-142) ECL Para 33 (page 93-139)

	out by key Essar Group executives	ECOM
6.17	ECL/Ecom not taking vital decisions even during F.Y. 2010-11 & F.Y. 2011-12 and also many of the earlier years	Para 34-37 (page 142-158) ECL Para 34-37 (page 140-155) ECOM
6.18	Residential status profile of the key management personnel substantially demonstrating decision making in India	Para 35 & 36 (page 147-150) ECL Para 35 & 36 (page 144-147) ECOM
6.19	Letter of Mauritius Revenue Authority stating Central Management Control in Mauritius, based on specific criteria mentioned by the assesses	Para 38 (page 158 & 159) ECL Para 38 (page 155-156) ECOM
6.20	Non-production of TRC during the assessment proceedings for F.Y. 2004-05 to F.Y. 2009-10	Para 39 (page 159-160) ECL Para 139 (page 156-157) ECOM
7.	Central management and control in India by the Essar Group to which the ECL/Ecom having absolutely no role	Para 40 & 41 (page 160-164) ECL Para 40 & 41 (page 157-161) ECOM
8.	Written submissions of the ECL/Ecom and analysis and rejection of arguments by the CIT(A)	Para 43 (page 164-177) ECL Para 43 (page 161-173) ECOM
9.	Non-applicability of paragraph 4 of Article 13 under India Mauritius Treaty- Application of Section 6(3) of the Indian Income Tax Act, Article 4(3) of India Mauritius Treaty, place of effective management, circular 1 of 2023 clarifying that in the case of findings of facts by the assessing officer establishing dual residence, place of effective management to be the governing criteria for residence	Para 44-47 (page 177-179) ECL Para 44-47 (page 173-175) ECOM
10.	Hon'ble Supreme court in Azadi bachao- clarifying power of the authorities to give finding of fact for determination of residential status in case of dual residence under Article 4(3) of the treaty	Para 48 (page 179-180) ECL Para 48 (page 175-176) ECOM
11.	Conclusion by the CIT(A) that circular 1 of 2023 and Honble Supreme Court on Azadi Bachao andolan mandate that the residential status deciding the taxability governed by findings of facts	Para 49 (page 180-181) ECL Para 49 (page 176-177) ECOM
12.	Testing of residential status by the CIT(A) through examination of the concept of control and management of affairs under the factual matrix of the cases- acquisition, use and disposal of the impugned shares	Para 50-59 (page 181 - 185) ECL Para 50-59 (page 177-181) ECOM
13.	Analysis of the cases of V.V.R.N.M. Subbaya Chettiar; English case of DeBeers Howe; English	Para 60-73 (page 185-195) ECL

	case of Laerstate BV Vs HMRC; English case of Development Securities Vs HMRC (2019); Erin Estate Vs CIT(1958) (SC); CIT Vs. Nandlal Gandadal (1960)(SC); CIT Vs Chitra Palayakat (1985) (Madras HC); CIT Vs. Bank of China (Calcutta HC); Universal Cargo Carriers Inc.; Meenu Sahi Mamik (AAR)	Para 60-73 (page 181-191) ECOM
14.	Conclusion of the CIT(A) based on the application of judicial rulings, treaty definition of Article 4(3), circular 1 of 2023, the concept of place of effective management as defined by the OECD to factual matrix holding control and management of affairs wholly in India	Para 74-89 (page 195-205) ECL Para 74-89 (page 191-201) ECOM
15.	CIT(A) finding that the factual matrix prove complete lack of commercial substance and is a clear case of treaty abuse	Para 90-92 (page 205-213) ECL Para 90-92 (page 201-209) ECOM
16.	CIT(A) testing the factual matrix in terms of the guidance laid down by Hon'ble SC in Vodafone, Azadi Bachao (SC), Banyan and Berry(Gujarat), Consolidated Finvest& Holdings Ltd. (Delhi Tribe), Wipro Ltd.(Kar), Copal Research Ltd.(Delhi), Gosalia Shipping (R) Ltd (SC), Panipat Woollen & General Mills Co. Ltd. (SC), Redington (India) Ltd (Madras HC), McDowell & Co. Ltd. (SC) case	Para 93-100 (page 213-216) ECL Para 93-100 (page 209-214) ECOM
17.	CIT(A) tabulating and discussing guidelines of Hon'ble Supreme Court in Vodafone's case and fitting the same to the factual matrix of the present case for consideration and rebuttal of the assessee's submissions	Para 101-139 (page 217-281) ECL Para 101-139 (page 213-277) ECOM
18.	CIT(A) discussing the assessee's plea that the affairs of the company should be viewed within the restrictive parameter of RY. 2011-12 and rejecting the assessee's plea based on his factual and legal analysis, analysis and findings of the AAR in the present cases, ruling of the AAR in the case of Capex Com Ltd (2021)	Para 140 (page 281-284) ECL Para 140 (page 177-280) ECOM
19.	CIT(A) rendering the finding that the transaction in question was a case of colourable device and sham transaction	Para 141-142 (page 284) ECL Para 141-142 (page 280) ECOM
20.	CIT(A) discussing the decision cited by the assesseees and holding that such cases are distinguishable on findings of facts while further relying on various decisions of the AAR and the High Courts	Para 143-146 (page 284-289) ECL Para 143-146 (page 280-285) ECOM
21.	Analysis and the findings of the CIT(A) that the impugned capital assets was located in India	Para 147-167 (page 289-302) ECL

		Para 147-167 (page 285-298)
		ECOM
22.	Findings of the CIT(A) that no relief granted to the taxpayers in earlier proceedings i.e. two rounds of proceedings before the AAR - in the first round after hearing the case on behalf of the revenue, the application was withdrawn from the AAR and full payment of tax was made. In the second round before the AAR, application was filed after almost two years of withdrawing the applications before the same forum under curious circumstances. Ruling was rendered by the AAR that the taxpayer cannot contest before the same forum after having withdrawn the application. Ruling was also given to the effect that the application been tenable because the case was prima facie for the purpose of tax avoidance. The AAR expressed for the authorities passing/examining the assessment orders to examine the issues brought on record by the department and flagged by the AAR pointing at tax avoidance.	Para 168 (page 302) ECL Para 168 (page 298) ECOM
23.	Final conclusion and the summary of findings holding taxability of the gains from the impugned transactions to be taxable as capital gains in India.	Para 169-170 (page 302-304) ECL Para 169-170 (page 298-300) ECOM
24.	Inference drawn by the CIT(A) with regard to non-production of the documents mentioned at pages 252-253 of the assessment order, before the AO	Para 171 (page 304-305) ECL Para 171 (page 300-301) ECOM

PART C -Annotation of written submission dated 23.09.2019 made by the revenue before the Hon'ble Authority for Advanced Rulings

Written submissions dated 23.09.2019 were filed before the Hon'ble AAR which covers the submissions made for and on behalf of the Revenue as well as the rebuttal to the contentions canvassed by and on behalf of the taxpayer companies. These submissions were given in two parts, Part-A and Part-B. Part-A of the submissions cover issues relating to bar contained in item (i) of the proviso to Section 245R (2), suppression of fact of intervention in the Application No. 982 of 20 10 filed by Euro Pacific Securities Ltd ("EPSL", in short) in the second round of applications filed by the Essar Group before the AAR and the effect of the said

Intervention Application on the maintainability of second round of applications.

Part-B of such submissions deal with the contention of the revenue with regard to the bar contained under item (iii) of the proviso to section 245R(2) of the Act and thus submission made praying to disregard the claim of exemption from capital gains taxation made by the two applicants, seeking benefit of Paragraph (4) of Article 13 of the Double Taxation Avoidance Agreement between India and Mauritius. This part of the submission made before the AAR dated 23.09.2019, contains seven (7) sub-parts B-1 to B-VII.

The factual legal and judicial analysis made in this part was accepted by the AAR while holding the applications to be barred under clause (iii) of the proviso to section 245R(2) and decision in favour of revenue was granted by the AAR. This submission was also considered relevant by the Ld. AO and the Ld. CIT(A). Accordingly, it is submitted that this written submission is equally relevant for the current proceedings before this very Hon'ble Tribunal. Therefore, annotation of Part B of the submissions filed before the AAR is tabulated below for the assistance of the Hon'ble ITAT.

S. No.	Issue	Relevant pages of the written submissions dated 23.09.2019
PART-B		
PART-BI - Main Propositions		
2	Issues relating bar contained in item (iii) of the proviso to section 245R (2) of the Act and claim of exemption made by the two applicants in their returns of income seeking benefit of Paragraph (4) of Article 13 of the Indo-Mauritius DTAA	26-32
PART-B11- Facts of the case including colourable devices		
3	(I) Consolidation of holding of Essar Group In Indian Telecom Business V	33-35
4	(II) Acquisition of shares in the name of ECOM, Mauritius in HEL/VEL, India	36-51

5	(III) Voluntary liquidation of ETIL- Colourable device for tax avoidance Shifting of situs to Mauritius of ownership of VEL shares held by ETHL India by first transferring such shares to ETIL India and thereafter its voluntary liquidation	52-76
6	(IV) Another colourable device-Joint Assignment Agreement dated 31.1.07 Loan taken on pledge of impugned shares changes colour and lands as income in another group company	77-80
7	(V) Loan availed by Group based on the security of ownership of ECL/ECOM in HEL/VEL - Facts showing that Applicant Companies have no decision making power	81-87
8	(VI) Various Put and Call Option Agreements with Vodafone Group -showing lack of separate identity of the Applicant Companies	88-93
9	(VII) Ultimate beneficiary Factual Matrix - Ruia Family to be the ultimate beneficiary and controlling and managing the affairs of the Applicant Companies	94-102
10	(VIII) Another colourable device - Frequent Changes in Holding Structure: Arrangement lacking commercial substance	103-104
11	(IX) Settlement of tax disputes between Vodafone & Essar Groups by way of tax sharing through deed of amendment dated 1.7.2011 - Against all norms of propriety	105-114
11	(X) Financial Statements of the Applicants Companies -- showing that these are empty boxes based in Mauritius only for tax benefit.	115-119
Part B-III -Analysis of Board minutes and various tables		
13	(I) ECL- Mauritius; persons authorised as per Board minutes along with purpose of authorisation;	120-125
14	(II) ECOM- Mauritius; persons authorised as per Board minutes along with purpose of authorisation	126-133
15	(III) ECML- Mauritius; persons authorised as per Board minutes along with purpose of authorisation	134-136
16	(IV) ETIL, India -Persons authorised as per Board minutes	137-138
17	(V) Chart showing Various agreements-their signatories---and the authorized persons as per Board minutes	139-152
18	(VI) Date -wise chart of Board meetings and written resolutions - how the companies are run through written resolutions largely	153-154
19	(VII) Serious discrepancies in board minutes of ECL and ECOM upto the period 16.8.2007	155-162
20	(VIII) Serious discrepancies in minutes of ECL & ECOM for FY 2010- 11 &FY 2011-12	163-174
21	(IX) Board minutes of FY 2010-12 and FY 2011-12 are of doubtful authenticity [submissions on without prejudice basis]	175-179
22	(X) ITD Profile of residential status of key management personnel	180-181

	and various Essar Group Executives	
23	(XI) Control and management in India during FY 2011-12 - based on Board minutes provided for FY 2010-11 and FY 2011-12 [submissions on without prejudice basis]	182-195
Part B-IV - Legal submissions on Tax avoidance in view of the facts of the case		
24	Legal submissions on Tax avoidance read with facts of the case	201-208
Part B-V - Legal submissions on Control and management in view of the facts of the case		
25	(I) Prima Case of Tax Avoidance as the control and management of affairs of the Applicants vests wholly in India-Article 4(1) of the Indo Mauritius Treaty read with Section 6(3) of the IT Act India	209-222
26	(II) Judicial Dicta on tests for “control and management of affairs situated wholly in India”	223-239
27	(III) Case of Dual Residence under the Treaty-Applicability of Article 4(2) of Indo-Mauritius DTAA	235-239
Part-B-VI - Rebuttal of objections of Applicants		
28	(I) Revenue rebuttal on Applicant’s submissions on (8) allegations of Revenue	240-267
29	(II) Revenue rebuttal of separate objections of the Applicants on nine (9) legal and factual issues.	268-274
Part-B-VII - Final Conclusion on facts of the case.		
30	(I) Case of prima-facie tax avoidance - use of colourable device under judicial anti-avoidance rules	275-284
31	(II) Applicants taxable in India under Treaty as the control and management of affairs of the Applicants vests wholly in India-Article 4(1) of the Indo Mauritius Treaty read with Section 6(3) of IT Act India	285-292
Miscellaneous - Few relevant charts		
32	Charts and diagrams	293-312

PART D - Legal arguments and the judicial dicta further impinging on the issues involved in the present proceeding

1. The Legal submissions are in sections I, II and III which had been argued in detail and have now been captured as Written Submissions.
2. Before Respondents proceed to place on record the legal submissions, two aspects are first on record. This case is essentially and principally a case revolving around the test of Control and Management. And more importantly, the

Control and Management test is between India and Mauritius.

3. On facts, the Respondents had demonstrated that there is no Control and Management in Mauritius and it is wholly in India. The expression "wholly" both under the erstwhile Section 4 of the Income Tax Act, 1922 and the present Section 6(3) of the Income Tax Act, 1961 both prior and subsequent to 2016 have been interpreted by the Hon'ble Supreme Court in the case of Mansarovar Commercial Pvt. Ltd. v. Commissioner of Income Tax, Delhi {2023} 8 S.C.R. 452. The Judgement dealt in detail in the latter half relying on all the earlier preceding Judgments, interpreting the expression "wholly" as the head and brain test. The erstwhile Section 4, Section 6(3) up to 2016 and Section 6(3) post 2016 and Section 73(1)(b) of the Mauritius Income Tax Act are parimateria. A detailed discussion on the same is brought on record in the later portion of the submissions.
4. As regards the India-Mauritius DTAA, according to the Respondents, the case would squarely fall under Article 4(1) and the residency test stands proved as India. Even applying the Tie breaker test, it would be self-evident that the Control and Management test both on facts and in law would only be in India.
5. With this background, the Respondents now proceed to place on record the submissions in law along with case law analysis.

Section I - Judgement of the Hon'ble Supreme Court rendered in Azadi and Vodafone and Observations on Circular No. 789, dated 13.04.2000 - Are they Ratio or Obiter?

1. The cases of the present two Assessees, namely ECL and ECOM, pertain to direct transfer of shares involving two sovereign jurisdictions-India and Mauritius-and, beyond them, a complex web of upstream entities situated in Mauritius and ultimately the Cayman Islands. While the India-Mauritius Double Taxation Avoidance Agreement

(DTAA), originally entered into in 1983, has been amended and extended from time to time-the latest amendment being in 2017-

2. The two earlier landmark decisions of The Hon 'ble Supreme Court-Azadi Bachao Andolan and Vodafone International Holdings B. V-did not involve an examination of a typical transaction under the India-Mauritius DTAA.

Decision in Azadi Bachao Andolan

3. In Azadi Bachao Andolan, the issue arose in the context of Public Interest Litigation (PIL) whereby legal validity of CBDT Circular No. 789 dated 13.04.2000 was challenged before Delhi High Court by way of 2 Writ petitions. These petitions also sought a declaration that exemption granted to Foreign Institutional Investors (FIIs) and various investment funds from income tax in India under the India Mauritius DTAA is void. Against these Writ petitions, the Delhi High Court in its judgment rendered on 16.03.01 declared the aforesaid Circular as illegal and void. Against such judgment of Hon'ble Delhi High Court, SLPs were filed before The Hon'ble Supreme Court by Union of India. The Hon'ble Supreme Court vide its order dated 07.10.03 set aside the order dated 16.03.01 passed by the Delhi High Court and upheld the legal validity of CBDT Circular No 789.
4. The legal framework applicable to Foreign Institutional Investors (FIIs), Mutual funds, and similar entities under the Income Tax Act, 1961 as well as the context of Circular No.789 is markedly different from that governing the sale of a business investment, whether by way of direct or indirect transfer. Accordingly, The Hon'ble Supreme Court in Azadi Bachao Andolan never had the occasion to examine the tax implications of a direct or indirect transfer of shares or the applicability of Circular No. 789 in such a context. The Respondents respectfully submit that this distinction will be further elaborated upon in the subsequent sections of these submissions.

5. In Azadi Bachao Andolan, both the Delhi High Court and The Hon'ble Supreme Court had an occasion to deal only with investments made by Foreign Institutional Investors (FIIs), mutual funds, and other such entities. The judgment of The Hon'ble Supreme Court in Azadi Bachao Andolan was delivered at a time when India had yet to encounter cross-border transactions involving the direct or indirect transfer of shares constituting business investment. It is equally pertinent to note that, even under Mauritian law, the Financial Services Act came into force only in the year 2001-subsequent to the issuance of CBDT Circular o. 789 dated t 3.04.2000. Thus, Azadi Bachao Andolan dealt only with the prior legal regime then prevailing in Mauritius, namely the Mauritius Offshore Business Activities Act, 1992 (MOBA Act), which did not deal with the type of transactions currently under examination before The Hon'ble Supreme Court-a position that has been accepted by both parties in the present case.
6. To substantiate this distinction, the Respondents referred to the judgment dated 07.10.03 rendered by The Hon 'ble Supreme Court in Azadi Bachao Andolan, which is discussed below:
 - a. Paragraph 9 of the judgment records that, in the year 2000, certain Income Tax Authorities issued show cause notices to various Foreign Institutional Investors (FIIs) operating in India, questioning why they should not be taxed on the profits and dividends accruing to them from their Indian investments. The basis on which the showcause notices were issued was that the recipient of the showcause notices were shell companies incorporated in Mauritius, with the sole or primary purpose of routing investments into India through Mauritius so as to avail the benefits under India-Mauritius DTAA. These actions created significant panic in the financial markets, leading to a hasty withdrawal of funds by FIIs. In response, the then Finance Minister issued a press note dated 04.04.2000, clarifying that such show cause notices did not represent or reflect the policy of the Government of India and reaffirming the commitment of

Government of India to honour the treaty-based tax exemptions applicable to FIIs investing through Mauritius.

- b. Therefore, the facts as set out in paragraph 9 of the Azadi Bachao Andolan judgment clearly pertain to the denial of tax benefits to Foreign Institutional Investors (FIIs), and not to any transaction involving the direct or indirect transfer of shares constituting a business investment. It was in this context that Circular No. 789 dated 13.04.2000 was issued by CBDT. Paragraph 10 of the judgment reproduces the entire text of the aforesaid Circular as under:

"10. Thereafter, to further clarify the situation, CBDT issued Circular No.789 dated 13-4-2000. Since this is the crucial circular, it would be worthwhile reproducing its full text. The circular reads as under:

"Circular No. 789
F. No. 500/60/2000-FTD
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES

New Delhi
13-4-2000

To,
All the Chief Commissioners/Directors General of Income Tax
Sub: Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Taxation Avoidance Convention (DTAC) - Reg.

The provisions of the Indo-Mauritius DTAC of 1983 apply to 'residents' of both India and Mauritius. Article 4 of DTAC defines a resident of one State to mean any person who, under the laws of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. Foreign institutional investors and other investment funds etc. which are operating from Mauritius are invariably incorporated in that country. These entities are 'liable to tax' under the Mauritian tax law and are therefore to be considered as residents of Mauritius in accordance with DTAC

Prior to 1-6-1997, dividends distributed by domestic companies were taxable in the hands of the shareholder and tax was deductible at source under the Income Tax Act, 1961. Under DTAC, tax was deductible at source on the gross dividend paid out at the rate 0/5% or 15% depending upon the extent of shareholding of the Mauritian resident. Under the Income Tax Act, 1961, tax was deductible at source at the rates specified under Section 115-A etc. Doubts have been raised regarding the taxation of dividends in the hands of investors from Mauritius. It is hereby clarified that wherever a certificate of residence is issued by the Mauritian authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying DTA C accordingly.

The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares. Accordingly, FIIs etc. which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph (4) of Article 13.

The aforesaid clarification shall apply to all proceedings which are pending at various levels. "

The above Circular pertains solely to Foreign Institutional Investors (FIIs) and other investment funds such as mutual funds and similar entities. It is crucial to underscore that both FIIs and investment funds are governed by the regulatory framework prescribed by the Securities and Exchange Board of India (SEBI). Consequently, entities incorporated in Mauritius and registered with SEBI either as FIIs or as investment funds, which invested capital in Indian stock markets and derived income by way of dividends or capital gains on the sale of shares were extended the benefit of the India-Mauritius DTAA under the said Circular.

- c. The Public Interest Litigation (PIL) filed before the Hon'ble Delhi High Court in the form of two Writ petitions challenged the validity of CBDT Circular No. 789 on the grounds of unconstitutionality and violation of Article 14 of the Constitution of India. It was contended that the Circular discriminated against similarly situated investors within India who were subjected to tax on dividends and capital gains arising from the sale of shares, whereas foreign investments routed through Mauritius via SEBI registered

FIIIs and investment funds were granted exemption under the India-Mauritius DTAA and thus did not bear a similar tax burden. This differential treatment, it was argued, amounted to unequal treatment before the law.

- d. Paragraph 11 of the judgment records the specific prayers sought in the PIL filed before Delhi High Court, which included a direction to the Union of India to revise, modify, or terminate the India-Mauritius Double Taxation Avoidance Agreement (DT AA), with a view to preventing Foreign Institutional Investors (FIIIs) and on-Resident Indians (NRIs) from allegedly 'marauding' the financial resources of the State. Additionally, the petitioners sought the quashing of CBDT Circular No. 789 dated 13.04.2000, contending that it was illegal and unconstitutional.
- e. Paragraph 12 of the judgment records the reliefs granted by the Delhi High Court in allowing the PIL. The key findings and directions issued by the High Court were as follows:
 - i. Circular No. 89. dated 13.04.2000 was held to be ultra vires the Income Tax Act. 1961 and beyond the powers of the CBDT.
 - ii. The Income Tax Officer, being a quasi-judicial authority, was held to be entitled to lift the corporate veil to examine the residential status of the investing entity.
 - iii. TRC issued by a foreign tax jurisdiction was held not to be conclusive evidence of tax residency
 - iv. Treaty shopping by entities from a third country through the India- Mauritius DTAA was declared impermissible and illegal.

In addition to the above, the Delhi High Court also granted several other reliefs besides declaring such Mauritius based entities as mere shell companies.

- f. Setting aside various relief granted by Delhi High Court, The Hon'ble Supreme Court in its judgment held/affirmed as under:
- i. Paragraph 29 of the judgment affirms that Circular 0 789 is a Circular issued within the meaning of Section 90 of the Income Tax Act, 1961 and therefore it must have the legal consequences contemplated by Section 90(2) i.e. the Circular shall prevail even if inconsistent with the provisions of Income Tax Act'1961 insofar as assessee covered by the provisions of DT AA are concerned.
 - ii. Paragraph 51 of the judgment observes that Article 13 of India Mauritius DT AA lays down detailed rules with regard to taxation of capital gains. It further observes that Clause (3) of Article 4 provides that if, after application of the detailed rules provided in Article 4, it is found that a person other than an individual is a resident of both the contracting States, then it shall be deemed to be a resident of the contracting State in which its place of effective management is situated. The DTAA requires the test of 'place or effective management' to be applied only for the purposes of the tie-breaker clause in Article 4(3) which could be applied only when it is found that a person other than an individual is a resident both of India and Mauritius. This test cannot be applied in any other situation.
 - iii. Even though Circular No. 789 dated 13.04.2000 was held to be legally valid and within the parameters of the powers exercisable by the CBDT under Section 119 of the Act, the Paragraph 53 makes it clear that the Circular does not in any way crib, cabin or confine the powers of an Assessing officer with regard to any particular assessment. Paragraph 54 reiterates that Circular No. 789, dated 13.04.2000 does not take away or curtail the jurisdiction of the Assessing Officer to assess the income before it.

- iv. The judgment rejected the contentions raised in Paragraph 68 that the FIIs incorporated and registered under the provisions of the law in Mauritius are carrying on nobusiness there; they are, in fact, prevented from earning any income there; they are not liable to income tax on capital gains under the Mauritius Income-tax Act. They are liable to pay income-tax under Indian Income-tax Act, 1961, since they do not pay any income-tax on capital gains in Mauritius, hence, they are not entitled to the benefit of avoidance of double taxation under the DT AA
- v. Paragraphs 84 to 110carefully examines the legal framework under the Mauritius Offshore Business Activities Act, 1992 (MOBA), which prohibits offshore entities from earning income in Mauritius. Paragraph 91 clarifies that merely because such entities are not liable to taxation in Mauritius, it does not follow that they cannot be regarded as residents of Mauritius under the DTAA. Paragraph 104 further rejects the contention that the avoidance of double taxation can arise only when tax is actually paid in at least one of the contracting States.
- vi. Paragraphs 111 to 118 address the issue of treaty shopping and concludes that the mere fact that investments are routed through Mauritius does not render them illegal or abusive. Motives behind incorporation of entities are not by themselves sufficient to invalidate their eligibility for treaty benefits. Consequently, the paragraph 115 of the judgment records that the principle of 'piercing the corporate veil' cannot be applied to the situation as the one before The Hon'ble Supreme Court in that case. Paragraph 124 rejects the recommendations of the WorkingGroup on on-Resident Taxation as the same being about what the law ought to be and which per se does not render an attempt by resident of a third party to take advantage of the existing DT AA illegal.

Paragraphs 133 to 136 of the judgment bring on record the various facets of treaty shopping and conclude that such considerations fall squarely within the domain of policy-making

- vii. Paragraph 137 -168 discusses the judgment of Constitutional Bench of The Hon'ble Supreme Court in the case of Macdowell & Co Ltd vs CTO. In this context, the paragraph 146 of the judgment observes that Duke of Westminster's doctrine is very much alive and kicking in the country of its birth (UK). Paragraph 148 further upholds the view of the Gujarat High Court in *Banyan and Berry v. CIT*, which after referring to Macdowell held that tax planning is not bad unless the same fall under the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity. Paragraph 154 again holds that Duke of Westminster's doctrine had acquired judicial benediction of the Constitutional Bench in India (*Mathuram Aggarwal case*) notwithstanding the temporary turbulence created in the wake of Macdowell.
- viii. Paragraph 161 and 164 clarifies what would be a sham or a device as under:

"164. If the court finds that notwithstanding a series of legal steps taken by an assessee, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate steps, but it would not be permissible for the court to treat the intervening legal steps as non est based upon some hypothetical assessment of the "real motive" of the assessee. In our view, the court must deal with what is tangible in an objective manner and cannot afford to chase a will-o'-the-wisp."

Comments of the Respondents on Azadi Bachao Andolan

7. A bare perusal of the judgment of The Hon'ble Supreme Court in the case of Azadi Bachao Andolan, thus makes the following key aspects abundantly clear:

- a. The Judgement does not even remotely deal with the present subject matter under consideration, namely direct transfer of shares constituting business investment. The judgment was rendered in a wholly distinct factual and legal matrix involving investments by FIIs and investment funds in the nature of Mutual Funds registered with SEBI in India and operating in Indian stock market.
- b. The judgment dealt with the legal regime prevailing under the Mauritius Offshore Business Activities Act, 1992 (MOBA, 1992) and not under the Finance Services Act, 2001 as amended by the 2005 Act.
- c. At the time the Circular no. 789 dated 13.04.2000 was issued, large-scale direct or indirect transfers of shares constituting business investments had not yet emerged. Therefore, the circular, being specifically framed for FIIs and mutual funds registered with SEBI in India, cannot be extended by implication to encompass transactions of the nature involved in the present dispute.
- d. There is neither any discussion, nor any ratio, nor even an obiter dictum in the Azadi Bachao Andolan judgment that touches upon the issue of direct transfers of shares constituting business investments.
- e. The show cause notices issued to FIIs, the subsequent Press Note dated 04.04.2000, the issuance of Circular No. 789, the PIL filed before the Delhi High Court, and the reliefs granted - all exclusively pertained to investments made by FIIs and Investment Funds registered with SEBI and did not refer or deal with direct or indirect transfer of shares constituting business investment.

8. At this juncture, reliance is placed on the decision of the 11 - Judge Bench in the case of *Madhav Rao Jivaji Rao Scindia v. Union of India*, (1971) 1 SCC 85

"229. In *State of Orissa v. Sudhansu Sekhar Misra* [AIR 1968 SC 647: (1968) 2 SCR 154 : (1968) 2 SCJ 263 J dealing with the question as to the importance to be attached to the observations found in the judgments of this Court, this is what this Court observed:

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, L.C said in *Quinn v. Leathem*, (1901) AC 495:

'Now before discussing the case of *Allen v. Flood*, (1898) ACI and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may deem to follow logically from it. Such a mode of reasoning assume that [he law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.'

It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. "

9. In the light of the above, it is respectfully submitted that no reliance can be placed by the Assessee either on Azadi BacliaoAndolanor Circular No. 789 dated 13.04.2000 to its support.

Decision in Vodafone International Holdings B. V.

10. The case of Vodafone International Holdings BV unlike Azadi Bachao Andolan involved only indirect transfer of shares constituting business investment and the underlying transaction did not involve the India-Mauritius DTAA. Instead, the transaction pertained to the acquisition of a 67% controlling interest in Hutchison Essar Ltd. (HEL), an Indian telecom entity, by Vodafone International Holdings B.V. (Netherlands) from Hutchison Telecommunications International Ltd. (HTIL, Cayman Islands). HTIL Cayman Island had downstream entities in Mauritius and The Hon'ble Supreme Court vide para 134-135 held as follows:

"134. Firstly, the Tier I (Mauritius companies) were the indirect subsidiaries of HTIL who could have influenced the former to sell the shares of Indian companies in which event the gains would have arisen to the Mauritius companies, who are not liable to pay capital gains tax under the Indo-Mauritius DTAA. That, nothing prevented the Mauritius companies from declaring dividend on gains made on the sale of shares. There is no tax on dividends in Mauritius. Thus, the Mauritius route was available but it was not opted for because that route would not have brought in the control over GSPL.

135. Secondly, if the Mauritius companies had sold the shares of HEL, then the Mauritius companies would have continued to be the subsidiaries of HTIL, their accounts would have been consolidated in the hands of HTIL and HTIL would have accounted for the gains in exactly the same way as it has accounted for the gains in the hands of HTIL. (CI) which was the nominated payee. Thus, in our view, two routes were available, namely, the CGP route and the Mauritius route. It was open to the parties to opt for anyone of the two routes. "

11. It is therefore evident that HTIL could have either sold the shares at a Cayman Island level or at a Mauritius level.

However, as a matter of fact, HTIL chose to structure the transaction at the Cayman Island level, thereby facilitating a complete exit from the Indian business and effectuating a lock, stock, and barrel transfer in favour of Vodafone. Consequently, the actual transaction occurred at the Cayman Island level and not through the Mauritius entities. As a result, The Hon'ble Supreme Court had no occasion to examine the India-Mauritius DTAA from a transactional standpoint so as to lay down any binding ratio in relation to direct transfer arising under the India-Mauritius DTAA in the current Essar cases. Thus, the ratio in Vodafone cannot be construed as laying down any legal proposition concerning the India-Mauritius treaty on this aspect. The judgment in Vodafone deals with several important legal facets, notably the issue of control and management, (which bears direct relevance to the present set of Essar cases) and also about Circular o. 789, dated 13.04.2000 holding that TRC cannot be construed as a conclusive proof for residence.

12. The legal principles evolved through this decision is brought out hereunder with a very respectful caveat that these are only Obiter dicta and not Ratio decidendi. It is a settled legal position that both the Ratio and the Obiter of The Hon'ble Supreme Court would be binding on all other Courts and judicial bodies. However, it is equally clear that the Obiter rendered by The Hon'ble Supreme Court in a Judgement is not binding on The Hon'ble Supreme Court. In this regard, attention is drawn to the decision of The Hon'ble Supreme Court in the case of Property Owners Assn. v. State of Maharashtra, 2024 see OnLine SC 3122 wherein The Hon'ble Supreme Court vide para 126-127 had held as follows:

126. In any event, the mere presence of an observation in multiple opinions of the court, be it concurring or dissenting opinions, does not automatically indicate that they form part of the ratio decidendi. In order to determine whether the observations form part of the ratio decidendi, one must go back to the drawing board and determine whether the observations pertained to an issue which

actually arose between the parties and were necessary to the determination by the court. In other words, even if a numerical majority of judges or opinions of the Court affirm an observation, it would not automatically constitute the ratio decidendi of the case. It must be independently established that the observation relates to an issue which was in dispute before the court.

127. Therefore, the single-line observation in Mafatlal that the phrase 'material resources of the community' used in Article 39(b) includes privately owned resources was obiter dicta and is not binding on this Court.

13. In *Secunderabad Club v. CIT*, (2023) 457 ITR 263, .The Hon'ble Supreme Court held as follows:

20. As against the ratio decidendi of a judgment, an obiter dictum is an observation by a court on a legal question which may not be necessary for the decision pronounced by the court. However, the obiter dictum of the Supreme Court is binding under article 41 to the extent of the observations on points raised and decided by the court in a case. Although the obiter dictum of the Supreme Court is binding on all courts, it has only persuasive authority as far as the Supreme Court itself is concerned.

21. In the context of understanding a judgment, it is well settled that the words used in a judgment are not to be interpreted as those of a statute. This is because the words used in a judgment should be rendered and understood contextually and are not intended to be taken literally. Further, a decision is not an authority for what can be read into it by implication or by assigning an assumed intention of the judges and inferring from it a proposition of law which the judges have not specifically or expressly laid down in the pronouncement. In other words, the decision is an authority for what it specifically decides and not what can logically be deduced therefrom.

It is therefore respectfully prayed that The Hon'ble Tribunal while dealing with Vodafone may kindly note this aspect of distinction while appreciating the aforesaid judgment.

14. The Hon'ble Supreme Court in its leading judgment authored by Justice S.H. Kapadia in Vodafone held/affirmed as under:

a. Paragraph 61-70 of judgment deals with the Constitutional Bench Judgement of The Hon'ble Supreme Court in McDowell. Paragraph 69-70 holds as under:

69. In the judgment of Reddy, J in McDowell [(1985) 3 SCC 230 : 1985 SCC (Tax) 391] there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability" (paras 7-10, 17 & 18). In our view, although Chinnappa Reddy, J makes a number of observations regarding the need to depart from Westminster [IRE v. Duke of Westminster, 1936 Ae 1 : 1935 All ER Rep 259 (HL)] and tax avoidance- these are clearly only in the context of artificial and colourable devices.

70. Reading McDowell [(1985) 3 see 230 : 1985 see (Tax) 391] , in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between McDowell [(1985) 3 SCC 230 : 1985 SCC(Tax) 391] and Azadi Bachao [(2004) 10 SCC 1] or between McDowell [(1985) 3 SCC230: 1985 see (Tax) 391] and Mathuram Agrawal [(1999) 8 see 667].

Prior to that, Paragraphs 65 to 67, the judgment refers to three seminal decisions of the House of Lords, namely Ramsay v. IRC, Furniss v. Dawson, and Craven v. White. These decisions collectively laid down important principles in the realm of tax jurisprudence, particularly regarding tax avoidance schemes. The Hon'ble Court noted the following key principles:

- i. That a device which is colourable in nature, introduced solely with the intent to avoid tax, must be ignored as a mere fiscal nullity.
 - ii. That any inserted step in a transaction which serves no commercial or business purpose other than deferment of tax, though it may have some business effect, should be disregarded for tax purposes.
 - iii. That whether a transaction amounts to tax deferment or a saving device, should be determined by applying the "look at" test.
- b. Therefore, as a matter of first principle in tax law, The Hon'ble Supreme Court has reaffirmed and approved the test laid down in *McDowell and Co. Ltd. v. Commercial Tax Officer*, wherein it was held that a sham, colourable device, or an artificial arrangement created for the purpose tax deferment or avoidance must be ignored as a fiscal nullity.
- c. Paragraph 71-81 delves into international tax aspects of corporate holding structures and acknowledged that it is a well-established principle under international tax law that a parent company and its subsidiary are distinct and separate taxable entities. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/ participants. However, paragraph 82 raises following caution:
 - i. Exercise of shareholder influence by a parent entity does not, in and of itself, justify treating the subsidiaries as residents of the State in which the parent company is situated.

- ii. However, if the competences of executive directors of the subsidiary are transferred or decision making has become fully subordinate to the holding company such that they are mere puppets, that may be a good ground in identifying the place of residence as that of the holding entity.
 - iii. Likewise, if the actual controlling non-resident enterprise makes an indirect transfer through abuse of organisation form/legal form and without reasonable business purpose, Revenue is entitled to disregard that form of arrangement and recharacterize the transaction based on its actual economic substance.
 - iv. When the transaction is used principally as a colourable device for the distribution of earnings, profits and gains, the doctrine of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or alter ego arises and there may be several other circumstances which can influence in holding totally or partially that the transaction is a device or a conduit in the pejorative sense.
- d. Paragraph 76-77 notes that it is not uncommon for structures to be incorporated or registered to avoid lengthy approval and registration process required for a direct transfer, but the same should not be for tax deferrals or tax avoidance.
- e. Paragraph 77 makes a clear distinction between Treaty shopping (dealt in Azadi Bachao Andolani from the General Anti Avoidance Rule (GAAR) and proceeded to hold that GAAR is not new to India since India already has a JAAR (Judicial Anti Avoidance Rule) such as substance over form, piercing the Corporate Veil, sham or conduit etc.

- f. Paragraph 79 places the burden on the Revenue to allege and establish abuse and permits the revenue to invoke JAAR in the form of substance over form or piercing the corporate veil and similar such tests to prove that a transaction is sham or for tax avoidance.
- g. After referring to certain illustrative transaction such as circular trading, round tripping or payment of bribes, the judgment also affirmed that when the structure under question has no commercial/business substance and has been interposed only to avoid tax, then in such cases, applying the test of fiscal nullity, Revenue is entitled to ignore that entity.
- h. The Hon'ble Supreme Court in the judgment also held that this has to be done at the threshold, meaning at the very beginning and this would arise under the Indian context only when the direct or indirect transfer of share happens and not at an anterior stage since mere investments are not considered to be income earning transactions for income tax purposes. It is only when the investments are sold and profits earned out of it, the same would give rise to a capital gains tax and at not point prior to it.
- i. Paragraph 80 applies "look at" test which would mandate looking at the entire transaction as a whole and not to adopt a dissecting approach and genuine tax planning should not be brought within its rigours.
- j. Paragraph 81-82 lists out the factors which can influence genuineness. Paragraph 82 reiterates that the corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.

- k. Paragraph 103 reiterates that shareholder's influence on its subsidiaries cannot obliterate the decision making power or authority of its subsidiaries and such influence does not render the subsidiary a mere puppet of the parent.
- l. Paragraph 105 brings out the distinction between having the power and having the persuasive position and held that each subsidiary has to protect its own separate commercial interest.
- m. Paragraph 106-107 holds that on facts the Control and Management test in this case is only persuasive in nature since the group holding was only 42% plus 10% pro rata and therefore could only persuade and not prevail.
- n. Paragraph 160 reiterates a very important principle on Control and Management:

"160. The right of a shareholder may assume the character of a controlling interest where the extent of the share holding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected. in the felicitous phrase of Lord MacMillan in IRC v. Crossman [1937 AC 26 : (1936) JAIL ER 762 (HL)], shares in a company consist of a "congeries of rights and liabilities" which are a creature of the Companies Acts and the memorandum and articles of association of the company. Thus, control and management is a facet of the holding of shares."

- 15. The above aspect have been culled out from the leading judgement authored by the then chief justice of India Justice SH Kapadia. One more concurring Judgement was also authored by K.S.P. Radha Krishnan who had opined on Circular No. 789, dated 13.04.2000 as follows:

- a. Vide paragraph 277 of the judgment held as follows;

"A. Lifting the veil- Tax laws

277. Lifting the corporate veil doctrine is readily applied in the cases coming within the company law, law of contract, law of taxation. Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction.”

- b. Vide paragraph 304-322, the judgement deals with India-Mauritius DT AA and Azadi Bachao Andolan. Vide paragraph 311, it observed as under:

311. We are, therefore, of the view that in the absence of an LOB clause and the presence of Circular No. 789 of 2000 and the TRC certificate, on the residence and beneficial interest/ownership, the Tax-Department cannot at the time of sale/disinvestment/exit from such FDI, deny benefits to such Mauritius companies of the Treaty by stating that FDI was only routed through a Mauritius company. by a company/principal resident in a third country; or the Mauritius company had received all its funds from a foreign principal/company; or the Mauritius subsidiary is controlled/managed by the foreign principal; or the Mauritius company had no assets or business other than holding the investment/shares in the Indian company; or the foreign principal/100% shareholder of Mauritius company had played a dominant role in deciding the time and price of the disinvestment/sale/transfer; or the sale proceeds received by the Mauritius company had ultimately been paid over by it to the foreign principal/its 100% shareholder either by way of special dividend or by way of repayment of loans

received; or the real owner/beneficial owner of the shares was the foreign principal company. Setting up of a Mauritius subsidiary/SPV by principals/genuine substantial long-term FDI in India from/through Mauritius, pursuant to the DTAA and Circular o. 789 can never be considered to be set up for tax evasion.

- c. Vide paragraph 312-314, it held that TRC is not always conclusive. The same is extracted as below:

"TRC whether conclusive

312. LOB and look through provisions can not be read into a tax treaty but the question may arise as to whether the TRC is so conclusive that the Tax Department cannot pierce the veil and look at the substance of the transaction.

313. DTAA and Circular No. 789 dated 13-4-2000, in our view, would not preclude the Income Tax Department from denying the tax treaty benefits, if it is established, on facts, that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance. The Tax Department, in such a situation, notwithstanding the fact that the Mauritian company is required to be treated as the beneficial owner of the shares under Circular No. 789 and the Treaty is entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to the Tax Department to discard the device and take into consideration the real transaction between the parties, and the transaction may be subjected to tax. In other words, TRC does not prevent enquiry into a tax fraud; for example, where an OCB is used by an Indian resident for round-tripping or any other illegal activities, nothing prevents the Revenue

from looking into special agreements, contracts or arrangements made or effected by Indian resident or the role of OCB in the entire transaction.

314. No court will recognise a sham transaction or a colourable device or adoption of a dubious method to evade tax, but to say that the Indo-Mauritian Treaty will recognise FDI and FII only if it originates from Mauritius, not the investors from third countries, incorporating company in Mauritius, is pitching it too high, especially when statistics reveal that for the last decade FDI in India was US \$178 billion and, of this, 42% i.e. US \$74.56 billion was through the Mauritian route. Presently, it is known, FII in India is Rs 4,50,000 crores, out of which Rs.70,000 crores is from Mauritius. The facts, therefore, clearly show that almost the entire FDI and FII made in India from Mauritius under DT AA does not originate from that country, but has been made by Mauritius companies SPV, which are owned by companies/individuals of third countries providing funds for making FDI by such companies/individuals not from Mauritius, but from third countries. "

- d. Vide paragraph 334, it rejected the reference of Macdowell to a Larger Bench

Comments by the Respondents on Vodafone

16. A bare perusal of the judgment of The Hon'ble Supreme Court in the case of Vodafone, thus makes the following key aspects abundantly clear:
- a. It is an unassailable fact that the transaction under consideration was sale of the shares held by the Cayman Island entity and did not involve India-Mauritius DTAA or Circular No. 789, dated 13.04.2000.
 - b. It is for good reason that the leading Judgement by two learned Judges do not deal with either India-Mauritius

DTAA or Circular No. 789, dated 13.04.2000 since the underlying transaction is not sale of shares held by any Mauritian entity.

- c. This is also amply clear from the perusal of paragraph 134 and 135 of the leading Judgment of the two judges.
- d. However, the leading Judgment has reiterated the importance of JAAR as part of the Indian jurisprudence and reiterated that the classical test of the doctrine of substance over form/piercing the corporate veil/lacking in commercial substance/beneficial ownership/sham or bogus entities or conduits etc., can always be applied by the Courts.
- e. It has also reiterated the importance of control and management test especially in such cases where the holding and subsidiary structures are in different destinations or tax jurisdictions.
- f. It brought out the distinction between influence of power over the subsidiaries rendering them as puppets vis-a-vis persuasive control. The former if resorted to for tax avoidance would become a colorable device or sham, but the latter is not. The examination of the facts in question has rendered the finding that the control and management in the Vodafone case is only persuasive in view of the percentage of holding structure. The judgment, therefore, reiterates the relevance and significance of the 'control and management' test as an indispensable criterion in determining the true nature of a transaction involving the indirect transfer of shares constituting a business investment-specifically, whether such a transaction amounts to legitimate tax planning or a device/scheme of tax avoidance.
- g. The concurring judgement of Justice Radha Krishnan makes it clear that TRC is not always conclusive and the tax authorities are always entitled to examine the same. It is neither conclusive, nor final nor determinative and is subject to scrutiny.

- h. As regards observations vide paragraph 311, being a concurring Judgement and not a differing Judgement, these observations had to be aligned and read in conjunction and harmony to the findings rendered by the leading Judgement of the other two learned Judges.
- i. It is most respectfully prayed that an interpretation that para 311 is in the nature of dissent or overarching the decision of the leading Judgement should be avoided. Being a concurring Judgement, it has to be aligned in a harmonious way.
- j. Even more importantly, it is respectfully submitted that the observations by para 311 on Circular No. 789, dated 13.04.2000 or on control and management test is only an Obiter and not Ratio and therefore not binding, in light of the well settled position of law and reiterated recently by the 9-judge bench in Property Owners Assn. referred supra.

**Section II - Legislative History and Evolution of Section 90,
Relevant Provisions of Mauritius Income Tax Act**

- 17. In Part II, the Respondents have placed on record how Circular No. 789, dated 13.04.2000 and Azadi Bachao Andolandoes not deal with direct or indirect transfer of shares constituting business investment. Vodafone also dealt with only indirect transfer and there is no underlying transaction involving India-Mauritius DT AA or Circular No.789, dated 13.04.2000.
- 18. It is respectfully submitted that there are no other decisions of The Hon'ble Supreme Court specifically addressing the India-Mauritius DTAA or the interpretation of Circular No. 789 dated 13.04.2000. It has becomes imperative for the Respondents to place on record before this Hon'ble Tribunal all relevant aspects and legal features under the Income Tax Act, 1961, the DT AA, the aforementioned Circular, and the legislative amendments introduced through the Finance Acts of 20 12,2013, and 2017, as well as the amendments to the

DT AA and the governing laws in Mauritius as argued by both sides, namely the Mauritian Income Tax Act and the Financial Services Act, 2005.

19. The entire chronology commencing from the initial India-Mauritius DTAA dated 01.04.1983, which came into effect on 16.12.1983, along with the significant milestones concerning its application, clarifications, and subsequent legislative amendments, is now being placed on record in a sequential and comprehensive manner. This is intended to assist The Hon'ble Tribunal in the interpretation of a matter of considerable importance in the realm of international taxation. The Respondents would also be placing references to authoritative commentaries by internationally renowned authors, as well as the OECD Commentary.
20. Before proceeding further, it is necessary to briefly summarize the interplay between the Income Tax Act, 1961 and a Double Taxation Avoidance Agreement (COT AA) notified under Section 90 of the Act. The significance, scope, and relevance of this interplay have been elaborately discussed by The Hon'ble Supreme Court in paragraphs 14 to 32 of the judgment in *Azadi Bachao Andolan*, which are extracted below for ready reference:

"Purpose and consequence of Double Taxation Avoidance Convention

14. To appreciate the contentions urged, it would be necessary to understand the purpose and necessity of a Double Taxation Treaty, Convention or Agreement, as diversely called. The Income Tax Act, 1961, contains a special Chapter IX which is subject of "double taxation relief".

15. Section 90, with which we are primarily concerned, provides as under:

"90. Agreement with foreign countries.-(1) The Central Government may enter into an agreement with the Government of any country outside India-

(a) for the granting of relief in respect of income on which have been paid both income tax under this Act and income tax in that country, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income tax under this Act and under the corresponding law in force in that country,

and may, by notification in the Official Gazelle, make provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies. the provisions of this Act shall apply to the extent they are more beneficial to that assessee. "

(Explanation omitted as not relevant.)

16. Section 4 provides for charge of income tax. Section 5 provides that the total income of a resident includes all income which: (a) is received, deemed to be received in India, or (b) accrues. arises or is deemed to accrue or arise in India, or (c) accrues or arises outside India, during the previous year. In the case of a non-resident, the total income includes "all income from whatever source derived" which

(a) is received or is deemed to be received or, (b) accrues or is deemed to accrue in India, during such year. A person "resident" in India would be liable to income tax on the basis of his global income unless he is a person who is "not ordinarily" a resident within the meaning of Section 6(b). The concept of residence in India is indicated in Section 6. Speaking broadly, and with reference to a company, which is of concern here, a company is said to be a "resident" in India in any previous year, if it is an Indian company or [f during that year the control and management of its affairs is situated wholly in India.

17. Every country seeks to tax the income generated within its territory on the basis of one or more connecting factors such as location of the source, residence of the taxable entity, maintenance of a permanent establishment, and so on. A country might choose to emphasise one or the other of the aforesaid factors for exercising fiscal jurisdiction to tax the entity. Depending on which of the factors is considered to be the connecting factor in different countries, the same income of the same entity might become liable to taxation in different countries. This would give rise to harsh consequences and impair economic development. In order to avoid such an anomalous and incongruous situation, the Governments of different countries enter into bilateral treaties, conventions or agreements for granting relief against double taxation. Such treaties, conventions or agreements are called Double Taxation Avoidance Treaties, Conventions or Agreements.

18. The power of entering into a treaty is an inherent part of the sovereign power of the State. By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws. Our Constitution makes no provision making legislation a condition for the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is, qua the State, competent to represent the State

in all matters international and may by agreement, convention or treaty incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with Parliament under Entries IO and I-I of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the law of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty. [See in this connection *Maganbhai Shwarbhai Patel vs. Union of India*. (1970) 3 SCC 400].

19. When it comes to fiscal treaties dealing with double taxation avoidance, different countries have varying procedures. In the United States such a treaty becomes a part of municipal law upon ratification by the Senate. In the United Kingdom such a treaty would have to be endorsed by an order made by the Queen-in-Council. Since in India such a treaty would have to be translated into an Act of Parliament, a procedure which would be time-consuming and cumbersome, a special procedure was evolved by enacting Section 90 of the Act.

20. The purpose of Section 90 becomes clear by reference to its legislative history, Section 49-A of the Income Tax Act, 1922 enabled the Central Government to enter into an agreement with the Government of any country outside India for the granting of relief in respect of income on which, both income tax (including super tax) under the Act and income tax in that country, under the Income Tax Act and the corresponding law in force in that country, had been paid. The Central Government could make such provisions as necessary for implementing the agreement by notification in the Official Gazette. When the Income Tax Act, 1961 was introduced, Section 90 contained therein initially was a reproduction of Section 49-A of the 1922 Act. The Finance Act, 1972 (Act 16 of 1972) modified Section 90 and brought

it into force with effect from 1-4-1972. The object and scope of the substitution was explained by a circular of the Central Board of Direct Taxes (No. 108 dated 20-3-1973) as to empower the Central Government to enter into agreements with foreign countries, not only for the purpose of avoidance of double taxation of income, but also for enabling the Tax Authorities to exchange information for the prevention of evasion or avoidance of taxes on income or for investigation of cases involving tax evasion or avoidance or for recovery of taxes in foreign countries on a reciprocal basis. In 1991, the existing Section 90 was renumbered as sub-section (1) and sub-section (2) was inserted by the Finance Act, 1991 with retrospective effect from 1-4-1972. CBDT Circular No. 621 dated 19-12-1991 explains its purpose as follows:

"43. Taxation of foreign companies and other non-resident taxpayers.-Tax treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a level lower than what has been provided in the tax treaty.

43.1. Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-a-vis other taxpayers, Section 90 of the Income Tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision in the tax treaty is less beneficial."

21. The provisions of Sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the

Income Tax Act and a notification issued under section 90, is no longer res integra.

22. The Andhra Pradesh High Court in CITv. Visakhapatnam Port Trust [(1983) 144 ITR 146 (AP)] held that provisions of Sections 4 and 5 of the Income Tax Act are expressly made "subject to the provisions of the Act" which means that they are subject to the provisions of Section 90. By necessary implication, they are subject to the terms of the Double Taxation Avoidance Agreement, if any, entered into by the Government of India. Therefore, the total income specified in Sections 4 and 5 chargeable to income tax is also subject to the provisions of the agreement to the contrary, if any.

23. In CITv. Davy Ashmore India Ltd. [(1991) 190 ITR 626 (Cal)] while dealing with the correctness of Circular No. 333 dated 2-4-1982, it was held that the conclusion is inescapable that in case of inconsistency between the terms of the Agreement and the taxation statute, the Agreement alone would prevail. The Calcutta High Court expressly approved the correctness of CBDT Circular No. 333 dated 2-4-1982 on the question as to what the assessing officers would have to do when they found that the provision of the double taxation was not in conformity with the Income Tax Act, 1961. The said circular provided as follows (quoted at ITR p. 632):

"The correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, that provision will prevail over the general provisions contained in the Income Tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income Tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.

Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law i.e. the Income Tax Act, that will govern the taxation of income.”

24. The Calcutta High Court held that the circular reflected the correct legal position inasmuch as the convention or agreement is arrived at by the two contracting States "in deviation from the general principles of taxation applicable to the contracting States". Otherwise, the Double Taxation Avoidance Agreement will have no meaning at all. [See also in this connection Leonhardt Andra Und Partner, GmbH v. CIT, (2001) 249 ITR 418 (Cal)]

25. In CIT v. R.M. Muthaiah [(1993) 202 ITR 508 (Kant)] the Karnataka High Court was concerned with DTAT between the Government of India and the Government of Malaysia. The High Court held that under the terms. of the Agreement, if there was a recognition of the power of taxation with the Malaysian Government, by implication it takes away the corresponding power of the Indian Government. The Agreement was thus held to operate as a bar on the power of the Indian Government to tax and that the bar would operate on Sections 4 and 5 of the Income Tax Act, 1961, and take away the power of the Indian Government to levy tax on the income in respect of certain categories as referred to in certain articles of the Agreement. The High Court summed up the situation by observing (ITR atpp. 512-13):

"The effect of an 'agreement' entered into by virtue of Section 90 of the Act would be:

(i) if no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act: (ii) if a tax liability is imposed by this Act, the agreement may be

resorted to for negating or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the Appellate Authorities and the court."

26. It also approved of the correctness of Circular No. 333 dated 2.4.1982 issued by the Central Board of Direct Taxes on the subject.

27. In *Arabian Express Line Ltd. of United Kingdom v. Union of India* [(1995) 212 ITR 31 (Guj)] the Gujarat High Court, interpreting Section 90, in the light of Circular No. 333 dated 2-4-1982 issued by CBDT, held that the procedure of assessing the income of an NRI because of his occasional activities in establishing a business in India would not be applicable in a case where there is a convention between the Government of India and the foreign country as provided under Section 90 of the Income Tax Act, 1961. In case of such an agreement, Section 90 would have an overriding effect. Interestingly, in this case a certificate issued by HM inspector of Taxes certifying that the company was a resident of the United Kingdom for purposes of tax and that it had paid advance corporate tax in the office of the English Revenue Accounts Office, was held to be sufficient to take away the jurisdiction of the income tax officer.

28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no

purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC

29. The contention of the Assessee, which weighed with the High Court viz. that the impugned Circular No. 789 is inconsistent with the provisions of the Act, is a total non-sequitur. As we have pointed out, Circular No. 789 is a circular within the meaning of Section 90, therefore, it must have the legal consequences contemplated by sub-section (2) of Section 90. In other words, the circular shall prevail even if inconsistent with the provisions of the Income Tax Act, 1961 insofar as assessee covered by the provisions of DTAC are concerned.

30. Though a number of interconnected and diffused arguments were addressed, broadly, the argument of the Assessee appears to be as follows: by reason of Article 265 of the Constitution, no tax can be levied or collected except by authority of law. The authority to levy tax or grant exemption therefrom vests absolutely in Parliament and no other body, howsoever high, can exercise such power. Once Parliament has enacted the Income Tax Act, taxes must be levied and collected in accordance therewith and no person has the power to grant any exemption therefrom. The treaty-making power under Article 73 is confined only to such matters as would not fall within the province of Article 265. With respect to fiscal treaties, the contention is that they cannot be enforced in contravention of the provisions of the income Tax Act, unless Parliament has made an enabling law in support. The Assessee highlighted the provisions of the OECD Models with regard to tax treaties and how tax treaties were enunciated, signed and implemented in America, Britain and other countries. Placing reliance on the

observations of Kier and Lawson [D.L. Kier and FH. Lawson: Cases in Constitutional Law, pp. 53-54, 159-63 (ELBS & Oxford University Press, 5th Edn.)] it was contended that in England it has been recognised that "there are, however, two limits to its capacity; it cannot legislate and it cannot tax without the concurrence of Parliament". It is urged that the situation is the same in India; that unless there is a specific exemption granted by Parliament, it is not open for the Central Government to grant any exemption from the tax payable under the IncomeTax Act.

31. In our view, the contention is wholly misconceived. Section 90, as we have already noticed (including its precursor under the 1922 Act) was brought on the statute-book precisely to enable the executive to negotiate DTAC and quickly implement it. Even accepting the contention of the Assessee that the powers exercised by the Central Government under Section 90 are delegated powers of legislation, we are unable to see as to why a delegatee of legislative power in all cases has no power to grant exemption. There are provisions galore in statutes made by Parliament and State Legislatures wherein the power of conditional or unconditional exemption from the provisions of the statutes are expressly delegated to the executive. For example, even in fiscal legislation like the Central Excise Act and Sales Tax Act, there are provisions for exemption from the levy of tax. [See Section 5-A of the Central Excise Act, 1944 and Section 8(5) of the Central Sales Tax Act, 1956.] Therefore, we are unable to accept the contention that the delegatee of a legislative power cannot exercise the power of exemption in a fiscal statute.

32. The niceties of the OECD Model of tax treaties or the Report of the Joint Parliamentary Committee on the Stock Market Scam and Matters Relating Thereto, on which considerable time was spent by Mr Jha, who appeared in person, need not detain us for too long, though we shall advert to them later. This Court is not concerned with the manner in which tax treaties are negotiated or enunciated; nor is it concerned with the wisdom of any particular treaty.

Whether the Indo-Mauritius DTAC ought to have been enunciated in the present form, or in any other particular form, is none of our concern. Whether Section 90 ought to have been placed on the statute-book, is also not our concern. Section 90, which delegates powers to the Central Government, has not been challenged before us, and, therefore, we must proceed on the footing that the section is constitutionally valid. The challenge being only to the exercise of the power emanating from the section, we are of the view that Section 90 enables the Central Government to enter into a DTAC with a foreign Government. When the requisite notification has been issued thereunder, the provisions of sub-section (2) of Section 90 spring into operation and an assessee who is covered by the provisions of DTAC is entitled to seek benefits thereunder, even if the provisions of DTAC are inconsistent with the provisions of the Income Tax Act, 1961.

Stare Decisis

33. The learned Attorney General justifiably relied on the observations of this Court in *Mishri Lal v. Dhirendra Nath* [(1999) -I SCC 11, paras 14 to 22] in which this Court referred to its earlier decision in *Maktul v. Manbhari* [AIR 1958 SC 918: 1959 SCR 1099] on the scope of the doctrine of stare decisis with reference to Halsbury's Laws of England and Corpus Juris Secundum, pointing out that a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by courts of higher authority other than the court establishing the rule, even though the court before whom the matter arises afterwards might be of a different view. The learned Attorney General contended that the interpretation given to Section 90 of the Income Tax Act, a Central Act, by several High Courts without dissent has been uniformly followed; several transactions have been entered into based upon the said exposition of the law; that several tax treaties have been

entered into with different foreign Governments based upon this law, hence, the doctrine of stare decisis should apply or else it will result in chaos and open up a Pandora's box of uncertainty.

34. We think that this submission is sound and needs to be accepted. It is not possible for us to say that the judgments of the different High Courts noticed have been wrongly decided by reason of the arguments presented by the Assessee. As observed in *Mishri Lal* (1999) 4 SCC 11, paras 14 to 22] even if the High Courts have consistently taken an erroneous view (though we do not say that the view is erroneous), it would be worthwhile to let the matter rest, since large number of parties have modulated their legal relationship based on this settled position of law."

21. India and Mauritius entered into a DTAA on 01.04.1983 and the same was notified on 16.12.1983. The same was renewed in 1993 and thereafter the last amendment was carried out in 2017.
22. The CBDT issued the first Circular relating to India Mauritius DTAA being Circular No. 682 dated 30.03.1994. The same is extracted below:

1605B. Clarification regarding agreement/or avoidance of double taxation with Mauritius

1. A Convention for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes of income and capital gains was entered into between the Government of India and the Government of Mauritius and was notified on 6-12-1983. In respect of India, the Convention applies from the assessment year 1983-84 and onwards.

2. Article 13 of the convention deals with taxation of capital gains and it has five paragraphs. The first paragraph gives the right of taxation of capital gains on the alienation of immovable property to the country in which the property

is situated. The second and third paragraphs deal with right to taxation of capital gains on the alienation of movable property linked with business or professional enterprises and ships and aircrafts.

3. Paragraph 4 deals with taxation of capital gains arising from the alienation of any property other than those mentioned in the preceding paragraphs and gives the right of taxation of capital gains only to that state of which the person deriving the capital gains is a resident. In terms of paragraph 4, capital gains derived by a resident of Mauritius by alienation of shares of companies shall be taxable only in Mauritius according to Mauritius tax law. Therefore, any resident of Mauritius deriving income from alienation of shares of Indian companies will be liable to capital gains tax only in Mauritius as per Mauritius tax law and will not have any capital gains tax liability in India.

4. Paragraph 5 defines 'alienation' to mean the sale, exchange, transfer or relinquishment of the property or the extinguishment of any rights in it or its compulsory acquisition under any law in force in India or in Mauritius.

Circular: No. 682, dated 30-3-1994.

23. Following the issuance of show cause notices to FIIs, as recorded in paragraph 9 of the Azadi Bachao Andolan, the Central Board of Direct Taxes (CBDT) issued another Circular being Circular No. 789, dated 13.04.2000. The text of the Circular is extracted below for reference:

"Circular No. 789
F. No. 500/60/2000-FTD
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES

New Delhi
13-4-2000

To,
All the Chief Commissioners/Directors General of Income Tax

Sub: Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Taxation Avoidance Convention (DTAC) - Reg.

The provisions of the Indo-Mauritius DTAC of 1983 apply to 'residents' of both India and Mauritius. Article", of DTAC defines a resident of one State to mean any person who, under the laws of that State is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. Foreign institutional investors and other investment funds etc. which are operating from Mauritius are invariably incorporated in that country. These entities are 'liable to tax' under the Mauritian tax law and are therefore to be considered as residents of Mauritius in accordance with DTAC.

Prior to 1-6-1997, dividends distributed by domestic companies were taxable in the hands of the shareholder and tax was deductible at source under the Income Tax Act, 1961. Under DTA C, tax was deductible at source on the gross dividend paid out at the rate of 5% or 15% depending upon the extent of shareholding of the Mauritian resident. Under the Income Tax Act, 1961, tax was deductible at source at the rates specified under Section 115-A etc. Doubts have been raised regarding the taxation of dividends in the hands of investors from Mauritius. It is hereby clarified that wherever a certificate of residence is issued by the Mauritian authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well a beneficial ownership for applying DTAC accordingly.

The test of residence mentioned above would also apply in respect of income from capital gains on sale of shares. Accordingly, FIIs etc. which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph (4) of Article 13.

The aforesaid clarification shall apply to all proceedings which are pending at various levels."

24. The Hon'ble Supreme Court delivered its judgment in Azadi Bachao Andolanon 07.10.2003. During the pendency of this case, a third Circular, being Circular No. 1/2003 dated 10.02.2003, was issued by the CBDT. The text of the said Circular is extracted below for ready reference.:

Clarification regarding taxation of income from dividends and capital gains under the Indo-Mauritius Double Tax Avoidance Convention (DTAC)

Reference is invited to the Circular No. 789, dated 13-4-2000 issued by the Board where it was clarified that "wherever the certificate of residence is issued by the Mauritian authorities, such certificate will constitute sufficient evidence for accepting the status of residence, as well as beneficial ownership for applying DTAC accordingly. The said circular specified the mode of proof of residence of an entity in Mauritius.

Certain doubts have been raised regarding the effect of the aforesaid circular, particularly whether the said circular would also apply to entities which are resident of both India and Mauritius. In order to remove all doubts on the subject, it is hereby clarified that where an assessee is a resident of both the Contracting States, in accordance with para J of article 4 of Indo-Mauritius DTAC, then, his residence is to be determined in accordance with para 3 of the said article, which reads as under :-

"3. Where, by reason of the provisions of paragraph 1, a person other than an individual is resident of both the Contracting States, then it shall be deemed to be a resident of the Contracting State in which the place of effective management is situated. "

In view of the above, where an Assessing Officer finds and is satisfied that a company or an entity is resident of both India and Mauritius, he would be free to proceed to determine the residential status under para 3 of article 4 of

DTAC Where it is found as a fact that the company has its place of effective management in India, then notwithstanding its being incorporated in Mauritius, it would be taxed under the DTAC in India.

Circular: No. 112003, dated 10-2-2003.

25. The Mauritius Offshore Business Activities Act, 1992 (MOBA, 1992), which was referred to in Azadi Bachao Andolan, was subsequently replaced by the Financial Services Development Act, 2000 in Mauritius, which, for the first time, introduced the concept of Global Business License Category 1 and Category 2 under Section 20 of the aforesaid Act. However, what is of particular relevance is the Financial Services Act, 2007 (Act 14 of 2007), dated 28.09.2007, as amended up to 20.07.2023.
26. Part X (Sections 71-79) of the Financial Services Act, 2007 deals with Global Business License.
 - a. Section 71(3) obligates the following:
 - (3) (a) A holder of a Global Business Licence shall, at all times-
 - i. carry out its core income generating activities in, or from, Mauritius, as required under the Income Tax Act;
 - ii. be managed and controlled from Mauritius; and
 - iii. be administered by a management company.
 - b. The Section 71 (3)(b) of Financial Services Act, 2007 further reads as under:
 - (b) In determining whether a holder of a Global Business Licence is managed and controlled from Mauritius, the Commission shall have regard to such matters as it deems necessary in the circumstances and in particular but without limitation to whether that corporation -

- (i) has at least 2 directors, resident in Mauritius, of sufficient calibre to exercise independence of mind and judgement;
- (ii) maintains, at all times, its principal bank account in Mauritius;
- (iii) keeps and maintains, at all times, its accounting records at its registered office in Mauritius;
- (iv) prepares its statutory financial statements and causes such financial statements to be audited in Mauritius; and
- (v) provides for meetings of directors to include at least 2 directors from Mauritius.

c. The Section 71 (6) of Financial Services Act, 2007 further reads as under:

In this section -

"resident corporation" means a company incorporated or registered under the Companies Act, a society or partnership registered in Mauritius, a trust or any other body of persons established under the laws of Mauritius.

d. Introduction of Sections 90(4) through Finance Act, 2012, Explanatory Memorandum and proposed amendment of Section 90(5) through Finance Bill, 2013 and the press release dated 01.03.2013

i. Vide Finance Act 2012, Parliament introduced Section 90(4) and the same reads as under:

An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or

specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

ii. The Explanatory Notes to the said amendment read as under:

Tax Residence Certificate (TRC) for claiming relief under DTAA

Section 90 of the Income Tax Act empowers the Central Government to enter into an agreement with the Government of any foreign country or specified territory outside India for the purpose of -

- (i) granting relief in respect of avoidance of double taxation,
- (ii) exchange of information and
- (iii) recovery of taxes.

Further section 90A of the Act empowers the Central Government to adopt any agreement between specified associations for relief of double taxation.

In exercise of this power, the Central Government has entered into various Double Taxation Avoidance Agreements (DTAA's) with different countries and have adopted agreements between specified associations for relief of double taxation. The scheme of interplay of treaty and domestic legislation ensures that a taxpayer, who is resident of one of the contracting country to the treaty, is entitled to claim applicability of beneficial provisions either of treaty or of the domestic law.

It is noticed that in many instances the taxpayers who are not tax resident of a contracting country do claim benefit under the DTAA entered into

by the Government with that country. Thereby, even thirdpartyresidents claim unintended treaty benefits.

Therefore, it is proposed to amend Section 90 and Section 90A of the Act to make submission of Tax Residency Certificatecontaining prescribed particulars, as a necessary but not sufficient condition for availing benefits of the agreements referredto in these Sections.

These amendments will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years.

[Clauses 31, 32]

- iii. The Finance Bill, 2012 proposed introduction of sub-section (5) in Section 90which read as under:

(5) The certificate of being a resident in a country outside India or specified territory outside India, as the case may be, referred to in sub-section (4), shall be necessary but not a sufficient condition for claiming any relief under the agreement referred to therein.

- iv. However, this amendment was not carried out and Section 90(5) came into effect in the following form:

Amendment of section 90.

23. In section 90 ofthe Income-tax Act,-

(a) (a) sub-section (2A) shall be omitted;

(a) (b) after sub-section (2), the following sub-section shall be inserted with effect from the 1st day of April, 2016, namely:-

"(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A

of the Act shall apply to the assessee even if such provisions are not beneficial to him."

(a) (c) in sub-section (4), for the words "a certificate, containing such particulars as may be prescribed, of his being a resident", the words "a certificate of his being a resident" shall be substituted,'

(a) (d) after sub-section (4) and before Explanation 1, the following sub-section shall be inserted, namely:-

"(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed. "

v. Meanwhile, the Finance Ministry also issued a press release dated 01.03.2013 on the proposed Section 90(5) as under:

FINANCE MINISTRY'S CLARIFICATION ON TAX
RESIDENCY
CERTIFICATE (TRC)
PRESS RELEASE, DATED 1-3-2013

Concern has been expressed regarding the clause in the Finance Bill that amends Section 90 of the Income Tax Act that deals with Double Taxation Avoidance Agreements. Sub-section (4) of section 90 was introduced last year by Finance Act, 2012. That subsection requires an assessee to produce a Tax Residency Certificate (TRC) in order to claim the benefit under DTAA.

DTAAs recognize different kinds of income. The DTAAs stipulate that a resident of a contracting state will be entitled to the benefits of the DTAA.

In the explanatory memorandum to the Finance Act, 2012, it was stated that the Tax Residency Certificate containing prescribed particulars is a necessary but not sufficient condition for availing benefits of the DTAA. The same words are proposed to be introduced in the Income-tax Act as sub-section (5) of section 90. Hence, it will be clear that nothing new has been done this year which was not there already last year.

However, it has been pointed out that the language of the proposed sub-section (5) of section 90 could mean that the Tax Residency Certificate produced by a resident of a contracting state could be questioned by the Income Tax Authorities in India. The government wishes to make it clear that that is not the intention of the proposed subsection (5) of section 90. The Tax Residency Certificate produced by a resident of a contracting state will be accepted as evidence that he is a resident of that contracting state and the Income Tax Authorities in India will not go behind the TRC and question his resident status.

In the case of Mauritius, circular no. 789, dated 13-4-2000 continues to be in force, pending ongoing discussions between India and Mauritius.

However, since a concern has been expressed about the language of sub-section (5) of section 90, this concern will be addressed suitably when the Finance Bill is taken up for consideration.

The Mauritius Income Tax Act, 1995

27. The provisions of Section 73 and 73A of Mauritius Income Tax Act, 1995 are extracted below:

73. Definition of residence

- (1) For the purposes of this Act, "resident", in respect of an income year, when applied to -
- (a) an individual, means a person who -
- (i) has his domicile in Mauritius unless his permanent place of abode is outside Mauritius;
 - (ii) has been present in Mauritius in that income year, for a period of or an aggregate period of 183 days or more,' or
 - (iii) has been present in Mauritius in that income year and the 2 preceding income years, for an aggregate period of 1270 days or more,'
- (b) a company, means a company which -
- (i) is incorporated in Mauritius: or
 - (ii) has its central management and control in Mauritius;
- (c) a society -
- (i) means a society which has its seat or siege in Mauritius; and
 - (ii) includes a society which has at least one associate or shareholder resident in Mauritius:
- (d) a trust, means a trust -
- (i) where the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; or
 - (ii) where the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed:

- (da) a Foundation, means a Foundation which
- (i) is registered in Mauritius; or
 - (ii) has its central management and control in Mauritius;
- (e) any other association or body of persons. means an association or body of persons which is managed or administered in Mauritius.
- (2) Where a person wishes to be certified as a resident in Mauritius in respect of an income year, he should apply to the Director-General for a Tax Residence Certificate.
- (3) The Tax Residence Certificate under subsection (2) shall be issued within a period of 7 days from the date of the application, provided that the person has submitted the return required to be submitted under section 112 or 116, as the case may be, and paid such service fee as may be prescribed.

73A. Companies treated as non-resident in Mauritius

- (1) Notwithstanding section 73, a company incorporated in Mauritius shall be treated as non-resident if it is centrally managed and controlled outside Mauritius.
- (2) A company referred to in subsection (1) shall submit a return of income as required under section 116.

Section 73 refers to footnote 441 and Section 73A refers to footnote 446 as found in Appendix 1 of the said Act. Both the footnotes are extracted below:

441 FA 2006 - Existing provision numbered (1) w.e.f.07.08.06.

446 FA 2019 - Section 73A amended, subsection (1) repealed and replaced, shall be deemed to have come into operation on 1 July 2019.

Previously:

(1) Notwithstanding section 73, a company which is incorporated in Mauritius shall be treated as non-resident if its place of effective management is situated outside Mauritius.

FA 2018 - Section 73A repealed and replaced - shall come into operation on 1 October 2018.

Section III - Issues and Propositions

28. During the course of hearing before The Hon'ble Tribunal, the Assessee made following submissions.

- a. In terms of Article I of India Mauritius DTAA, this convention shall apply to the persons who are residents of one or both of the Contracting States
- b. As per Article 4, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of similar nature.
- c. The Assessee was incorporated in Mauritius and thus is a tax resident of Mauritius as per Section 73(1)(b) of Mauritius Income Tax Act by virtue of incorporation.

73. Definition of residence

- (1) For the purposes of this Act, "resident", in respect of an income year, when applied to -
 - b) a company, means a company which -

- (i) is incorporated in Mauritius,' or
 - (ii) has its central management and control in Mauritius,
- d. The Assesseees are holding valid TRC issued by Mauritius Authority confirming tax residency. The Indian Tax Authorities have no jurisdiction to go beyond TRC and determine the Tax residency of these entities under the Mauritius Income Tax Act, which can only and only be done by Mauritius Tax Authorities.
- e. Since the Assesseees are holding valid TRC, the control and management test cannot be invoked as well.
- f. In terms of Article 4, the Place of Effective Management test is relevant specifically in cases falling under Article 4(3), which provides the tie-breaker rule to resolve situations where an entity is considered a resident of both contracting states-such as India and Mauritius. However, this test cannot be invoked to determine whether Place of Effective Management existed in Mauritius or in a third jurisdiction. It is applicable only when the issue is between the two contracting states under the DTAA.
- g. Once a Tax Residency Certificate (TRC) is issued, it constitutes conclusive proof of residency for the purposes of availing treaty benefits, as per CBDT Circular No. 789, dated 13.04.2000.
- h. What was earlier laid down through a CBDT Circular was subsequently given statutory backing by the Finance Act, 2013, through the insertion of Section 90(4) of the Income Tax Act which reads as under:
 - (4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside

India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

- i. The amendment proposed in the Finance Bill, 2013 to introduce Section 90(5) which read as under. was withdrawn.

"The certificate of being a resident in a country outside India or specified territory outside India as the case may be referred to in sub-Section 4 shall be necessary but not sufficient condition for claiming any relief under the agreement referred to therein. "

A revised version of Section 90(5), which read under, was subsequently enacted.

- (5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed.
 - j. Press note dated 01.03.13 issued by the Ministry again supports this aspect that TRC once issued becomes conclusive in determining the residential status under Article 4(1) of DTAA.
29. The Respondents would deal all the above submissions of the Assesseees by classifying them into following broad categories:
- a) Whether India as a source state while ascertaining treaty eligibility can determine tax residency of an entity incorporated in Mauritius under domestic laws of Mauritius or the same can be done only by Mauritius Authorities?
 - b) Whether Control and Management test can be invoked in this case?
 - c) What is the scope and contours of Circular No. 789. dated 13.04.2000 and to whom does it apply?

- d) What is the scope of Section 90(4) and 90(5) and Press release dated 01.03.2013 and to whom does it apply?
- e) Whether TRC as filed becomes all conclusive even in the case of a direct transfer and therefore all proceedings should come to a closure?

Determination of Tax Residency under Article 4(1) ofDTAA

30. The Assessee had argued that India as a source state cannot determine tax residency of an entity incorporated in Mauritius under domestic laws of Mauritius which can be done only and only by Mauritius Tax Authorities. Thus, once a valid TRC is issued by Mauritius Tax Authorities, it is argued by the Assessee that India is bound to accept it as a conclusive proof of Mauritius Tax Residency. Such proposition of the Assessee is incorrect as amply evident from Paragraph 25 of Klaus Vogel commentary on Article 4 (3rd Edition) which is reproduced below:

Whether or not the circumstances exist that establish residence in the other contracting state in accordance with the latter's domestic law, is a question which each state may examine on its own (and which it may discuss with the competent authority of the other contracting state under the terms of mutual agreement procedure. The fact that a person is actually subjected to resident taxation in the other contracting state is a strong indication of the legal pre-requisite having been satisfied, but it is not more than that. Thus, in the Johansson case, the US Court of Appeals (5th Circuit) quite properly declined to accept a determination by the Swiss authorities that Johansson was a resident of Switzerland as sufficient evidence of Johansson's treaty entitlement (336 F2d 809 (1964)). The French Conseil d'Etat, on the other hand, accepted as sufficient the fact that a taxpayer resident in Liechtenstein and maintaining a dwelling in Paris was effectively taxed as a resident in Germany (req. n.

28.177, 35 Dr. Fisc. Com., (1983) cone!.Bissara: Germany s DTC with France; of Hahn. H., 29, R1W 623 (1983). Generally, it will be incumbent upon the taxpayer to supply facts from which a residence in the other contracting State might arise.

The Indian tax authorities thus can determine if the person is a resident of the other contracting State for purposes of the treaty by applying the Mauritius domestic law.

Whether control and Management Test Applicable in the present case?

31. It is now a well-settled and undisputed principle that the test of control and management constitutes a key component in applying the doctrine of "substance over form" while determining the bonafide/malafide of an underlying transaction. The doctrine of substance over form, recognized under common law and widely applied across jurisdictions, is used to assess whether a transaction or structure is genuinely commercial in nature or is a mere subterfuge-such as a shell, conduit, or interposed entity- established solely for the purpose of tax avoidance
32. Courts have consistently applied this time-honoured test to distinguish between legitimate tax planning and tax avoidance. Where it is found that a transaction falls into the latter category, the interposed structure may be declared a nullity, disregarded, or pierced in order to identify the true beneficial owner.
33. It is equally well settled that the substance over form doctrine has long been in use and has been applied to assess the legality of business structures and underlying transactions even prior to the advent of DTAA's. This doctrine continues to hold relevance and applicability under the DTAA regime as well. Notably, both the OEcD and Klaus Vogel commentaries, along with decisions of The Hon'ble Supreme Court in Azadi Bachao Andolan and

Vodafone, have unequivocally reaffirmed the significance of the substance over form doctrine.

34. Every sovereign Nation has a right to tax a transaction in its soil. Taxation is an inherent and natural power vested with every sovereign Nation. This power which is a foundational power to every source Nation to impose taxation can never be eroded or annihilated. Consequently, while testing the sovereign power to tax, Courts have always applied what is called the "substance test" in deciding whether a transaction leads to tax evasion or a tax avoidance.
35. Considering globalization and its inevitable offshoot of cross border transactions, Sovereign Nations started to sign DTAA's which are Treaties in the form of contracts entered into by Sovereign partners. The overarching objective of every DTAA is to avoid double taxation to agree and allocate taxing powers and to extend tax Treaty benefits wherever contractually provided. Consequently, the principal question is how does and when does DTAA come into play and how does the source State apply DTAA and confer tax benefits? Every source State will apply a two-fold test as under:
 - a) As a source State, having sovereign power of taxation, it would decide whether the transaction under question is taxable under its domestic laws. For any reason the transaction is not taxable, then the same goes out of the scope of taxation at the threshold level itself and therefore the question of applying DTAA to such transaction would not arise at all.
 - b) On the other hand, if a transaction is found to be taxable in the source State, the tax authorities would then proceed to the second step- verifying whether the said transaction qualifies for any tax benefits under the applicable DTAA entered into with the other contracting State. If the DTAA provides for such benefits, they should be extended to the assessee. However, if no such benefit is envisaged under the

DTAA, the transaction would be subject to taxation in accordance with the domestic law of the source State.

36. Courts across jurisdictions have made a distinction between a tax Treaty benefit viz-a-viz a tax treaty abuse and carved out the following exceptions:
- a) Conferment of tax benefits through a DTAA cannot mean to include or promote tax evasion or tax avoidance
 - b) A DTAA merely permits the allocation of taxing rights between contracting States; it does not involve the surrender or cessation of a State's sovereign right to tax. In such a framework, the question arises-who has the authority to examine whether a transaction constitutes treaty abuse? Without any doubt, the default rule must be that the source country, which holds the primary right to tax the transaction, is entitled to undertake such an examination.
 - c) The power of taxation, the conferment of treaty benefits, and the examination of treaty abuse arise under distinct legal circumstances and cannot be conflated. It would be erroneous to assume that, by granting treaty benefits, a sovereign State also transfers or delegates the authority to assess treaty abuse to the other contracting State. No such jurisprudence has ever been established, nor can it be permitted to develop through the courts of any sovereign nation. The inherent sovereign power to tax lies fundamentally with the source State, which naturally encompasses the power to scrutinize and address abusive transactions.
 - d) The allocation of taxing rights or the conferment of tax benefits under a DTAA cannot, by default, curtail or diminish the sovereign authority of the source State to examine instances of tax abuse. Such sovereign

power cannot be contractually relinquished or transferred through a tax treaty.

37. The taxability of the transaction in question can be examined in the following steps:
- a) Now the question is whether the India-Mauritius DTAA confers any Treaty benefit upon the Assesseees. The Assesseees' claim is that, notwithstanding the fact that the transfer relates to assets situated in India, the taxing rights on the resulting capital gains are allocated to Mauritius under the terms of Article 13(4) of the DTAA- provided the Assesseees qualify as tax residents of Mauritius. Consequently, the Assesseees raised two contentions to the Respondent's pursuit:
 - i. Having produced a TRC evidencing residency in Mauritius, benefit under Article 13(4) cannot be denied.
 - ii. The substance test is not part of the DTAA and therefore cannot be raised or examined for the transactions under question.
38. The Respondent respectfully submit that this is exactly where the problem arises. Substance test is not a tax Treaty benefit test. It is an anti-abuse exercise and will therefore be outside the ken of a tax Treaty benefit.
39. Coming to the other aspect of proof of residency by way of TRC, while examining the residency, one may have to look into the provisions of the Mauritius Income Tax Act. Section 73 of the Mauritius Income Tax Act defines residence and sub-clause (b) is identically worded to Section 6(3) of the Income Tax Act, 1961.

73. Definition of residence

(2) For the purposes of this Act, "resident", in respect of an income year; when applied to

-

b) a company, means a company which -

(i) is incorporated in Mauritius; or

(ii) has its central management and control in Mauritius;

Section 73A of the Mauritius Income Tax Act further provides that a company incorporated in Mauritius shall be treated as non-resident if it is centrally managed and controlled outside Mauritius.

73A. Companies treated as non-resident in Mauritius

(1) Notwithstanding section 73, a company incorporated in Mauritius shall be treated as non-resident if it is centrally managed and controlled outside Mauritius.

This is the law with effect from July 2019. Prior to that, Section 73A read as under:

(1) Notwithstanding section 73, a company which is incorporated in Mauritius shall be treated as non-resident if its place of effective management is situated outside Mauritius.

40. The bottom line is clear without any ambiguity.

a) Section 6(3) of the Income Tax Act, 1961 mandates Control and Management as essential test for determining residency. Equally true is the position even under the Mauritius law.

b) Section 71 (3)(a) and (b) of the Financial Services Act, 2007 of Mauritius mandate that the holder of a

Global License shall at all times be managed and controlled at Mauritius and sub-clause (b) even though lists five ingredients, caveats that very clearly that the same is not limited to these five by use of the expression "the commission shall have regard to such matters as it deems necessary in the circumstance and in particular, without limitation to ...".

- c) With effect from October 2018, even the Mauritius income tax Act vide Section 3 mandated Place of Effective Management/Control and Management tests.
41. In light of the foregoing discussion, it is no longer open for the Assessee to argue that the Control and Management test is inapplicable under the India-Mauritius DTAA merely because a Tax Residency Certificate (TRC) has been issued by the Mauritian tax authorities. The issuance of a TRC, while relevant, does not preclude the application of the substance over form doctrine or the examination of control and management to determine the genuineness of the residency claim and to address potential treaty abuse.
42. This is a case which falls squarely under Article 4(3) since the Control and Management test is between India and Mauritius and not even Mauritius and yet another State which again would be governed under Article 4. Article 4(3) reads as under. This Article is defined and understood as the tie breaker rule and the deciding factor is Place of Effective Management or in other words, the Control and Management test. This is a test as contracted by the parties to the Treaty and therefore bound and governed by it. The Control and Management test in law is therefore inevitable to be applied and once applied, it is self-evident on facts that the entire Control and Management was only in India and not in Mauritius. The detailed finding by the CIT (Appeals) upholding the AO Order that every critical limb of the commercial transaction had happened only in India, thus evidencing the fact that the Control and Management is only in India.

43. The Hon'ble Supreme Court, in the Vodafone judgment, unequivocally upheld the application of the "substance over form" doctrine and extensively analyzed the Control and Management test in that context. The Court drew a clear distinction between influencing power and persuasive power. It held that influencing power-which enables a holding entity to exercise actual control-could indicate that the subsidiary is merely a conduit or sham. In contrast, persuasive power, stemming from mere shareholding influence without effective control, would not vitiate the integrity of the subsidiary's independent legal status. Upon a thorough analysis of the facts, the Court concluded that going by the percentage of shareholding the control exercised in the Vodafone case was persuasive and not influencing, thereby recognizing the bonafide nature of the holding- subsidiary structure and allowing it to survive the substance test.
44. While applying the substance over form test, The Hon'ble Supreme Court in paragraph 77 of the Vodafone judgment reaffirmed the relevance of the JAAR (Judicial Ant-Avoidance Rule) as an integral part of Indian jurisprudence.
45. In the light of the above, the authorities below are right in invoking the Control and Management test.
46. Control and Management test otherwise called as the Head and Brain test has been dealt very recently and in detail by The Hon'ble Supreme Court in Mansarovar Commercial Pvt. Ltd. v. Commissioner of Income Tax, Delhi [2023] 8 S.C.R. 452. Para 75.1-76 reads as follows: (the extracts are taken from (2023) 17 SCC 109 for ease of reference)

"75. On control and management of business, few decisions on interpretation of Section 4-A of the erstwhile the Income Tax Act, 1922 and interpretation of Section 6(3) of the Income Tax Act, 1961 are required to be referred to, which are as under:

75.1. In Subbayya Chettiar [Subbayya Chettiar v. CIT, 1950 SCC 971 : AIR 1951 SC 101 : 1950 SCR 961] , it is observed in para 10 as under: (SCC pp. 974-75)

"10. The principles which are now well established in England and which will be found to have been very clearly enunciated in Swedish Central Railway Co. Ltd. v. Thompson [Swedish Central Railway Co. Ltd. v. Thompson, 1925 AC -195 (HL) : 9 TC 373 (HL)] , which is one of the leading cases on the subject, are:

(1) That the conception of residence in the case of a fictitious "person", such as a company, is as artificial as the company itself, and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company. What these words mean have been explained [Ed. : CIT v. Subbayya Chettiar, 1947 SCC OnLine Mad 194] by Patanjali Sastri, J. with very great clarity in the following passage where he deals with the meaning of Section 4-A(b) of the Income Tax Act:

'4-A. (b) 'Control and management' signifies, in the present context, the controlling and directive power, "the head and brain" as it is sometimes called, and "situated" implies the functioning of such power at a particular place with some degree of permanence, while "wholly" would seem to recognise the possibility of the seat of such power being divided between two distinct and separated places. '

As a general rule, the control and management of a business remains in the hand of a person or a group of persons, and the question to be asked is wherefrom the person or group of persons controls or directs the business.

(2) Mere activity by the company in a place does not create residence, with the result that a company

may be "residing" in one place and doing a great deal of business in another.

(3) The central management and control of a company may be divided, and it may keep house and do business in more than one place, and, if so, it may have more than one residence.

(4) In case of dual residence, it is necessary to show that the company performs some of the vital organic functions incidental to its existence as such in both the places, so that in fact there are two centres of management. "

75.2. Thereafter, in Erin Estate [Erin Estate v. CIT, 1958 SCC Onl.ine SC 108 : 1959 SCR 573 : AIR 1958 SC 779] , it is observed in paras 6 and 9 as under: (SCC Online SC)

"6. There is no doubt that the question raised for our decision is a question of law. Whether or not the Respondent is a resident firm under Section -I-A(b) would depend upon the legal effect of the facts proved in the case. The status of the Respondent which has to be determined by reference to the relevant section of the Act is a mixed question of fact and law and in determining this question the principles of law deducible from the provisions of the said section will have to be applied. This position has not been disputed before us in the present proceedings. Section 4-A(b) provides inter alia that

'for the purpose of the Act, a firm is resident in the taxable territories unless the control and management of its affairs is situated wholly without the taxable territories '.

This provision shows / hat, where / he partners of a firm are residents of this country, the normal presumption would be that the firm is resident in the taxable territories. This presumption is rebuttable and

it can be effectively rebutted by the assessee showing that the control and management of the affairs of the firm is situated wholly without the taxable territories. The onus to rebut the initial presumption is on the assessee, The control and management contemplated by the section evidently refers to the controlling and directing power. Often enough, this power has been described in judicial decisions as the "head and brain"; the affairs of the firm which are subject to the said control and management refer to the affairs which are relevant for the purpose of taxation and so they must have some relation to the income of the firm. When the section refers to the control and management being situated wholly without the taxable territories it implies that the control and management can be situated in more places than one. Where the control and management are situated wholly outside India the initial presumption arising under the section is effectively rebutted. It is true that the control and management which must be shown to be situated at least partially in India is not the merely theoretical control and power, not a de jure control and power but the de facto control and power actually exercised in the course of the conduct and management of the affairs of the firm. Theoretically, if the partners reside in India they would naturally have the legal right to control the affairs of the firm which carries on its operations outside India. The presence of this theoretical de jure right to control and manage the affairs of the firm which inevitably vests in all the partners would not by itself show that the requisite control and management is situated in India. It must be shown by evidence that control and management in the affairs of the firm is exercised, may be to a small extent, in India before it can be held that the control and management is not situated wholly without the taxable territories. (Vide *Bhimji R. aik v. CIT* [Bhimji R. aik v. CIT, 1944 SCC Online Bom 64 : (19-15) 13 ITR 12-1) .Bhimji .aik v. CIT [Bhimji Naik v. CIT, 19-16 SCC OnLine Bom 82: (1946) 14 ITR 334]) The

effect and scope of the provisions of Section 4-A(b) has been considered by this Court in Subbayya Chettiar v. CfT [Subbayya Chettiar v. CIT, 1950 SCC 971 : AIR 1951 SC 101 : 1950 SCR 961} . After examining the relevant decisions on this point, Fazl Ali, J, who delivered the judgment of the Court, has observed: (Subbayya Chettiar case [Subbayya Chettiar v. CfT, 1950 SCC 971 : AIR 1951 SC 101 : 1950 SCR 961} , SCC p. 975, para 10)

'10 (1) That the conception of residence in the case of a fictitious "person", such as a company, is as artificial as the company itself, and the locality of the residence can only be determined by analogy, by asking where is the head and seat and directing power of the affairs of the company.

(2) Mere activity by the company in a place does not create residence, with the result that the company may be "residing" in one place and doing a great deal of business in another.

(3) The central management and control of a company may be divided, and it may keep house and do business in more than one place, and, if so, it may have more than one residence.

(4) In case of dual re id. 11 e. it i necessary to show that the company performs someof the vital organic function incidental to its existence as such in both the places, so that in fact there are two centres of management. '

It is in the light of these principles that Section -I-A (b) has to be construed. Thus, the only question which remains to be considered is whether the High Court of Madras was right in holding that the Respondent was resident in India under Section 4-A(b).

9. Mr Kolah then raised a further point which had not been urged before the High Court. He contended that the control and management mentioned in Section -I-A (b) must be control and management valid and effective in law. Under Section 12 of the Partnership Act; it is only the majority of partners who could have given effective directions to the superintendent and since there is no evidence that the alleged control and management has been exercised by the majority of partners acting in concert it would not be possible to hold that any control and management of the firm's affairs resided in India. We do not think there is any substance in this argument. Under Section 12(a), every partner has a right to take part in the conduct of the business and it is only where difference arises as to ordinary matters connected with the business of the firm that the same has to be decided by majority of partners under sub-section (c) of the said section. It has not been suggested or shown that there was any difference between the partners in regard to the matters covered by the individual partner's letters of instruction to the superintendent. Indeed the course of conduct evidenced by these letters shows that Andiappa Pillai who holds the maximum number of individual shares has purported to act for the partnership and usually gave instructions in regard to the conduct and management of the firm's affairs. On the record we see no trace of any protest against, or disagreement with, this conduct of Andiappa Pillai. Besides, it was never suggested during the course of the enquiry before the Income Tax Officers that the directions given by Andiappa Pillai were not valid or effective and had not been agreed upon by the remaining partners. That is why we think this technical point raised by Mr Kolah must fail."

75.3. That thereafter the Bombay High Court in *Narottam & Pereira* [*Narottam & Pereira Ltd. v. CIT*, (1953) 23 ITR 454 .] 1953 SCC Onl.in Bom 142J through Me. Chagla, J. as his

Lordship then was, observed and held in paras 3 and 4 as under :

(SCC OnLine Bom)

"3. It is also necessary that the control and management of the affairs of the company should be situated wholly in the taxable territories. Therefore, if any part of the control and management is outside the taxable territories then the company would not be resident. In this connection it is perhaps necessary to look at the converse definition for a Hindu undivided family, firm or other association of persons. In their case they are resident unless the control and management of its affairs is situated wholly without the association of persons any measure of control and management within the taxable territories would make them resident, in the case of a company any measure of control and management of its affairs outside the taxable territories would make it non-resident. In construing the expression "control and management" it is necessary to bear In mind the distinction between doing of business and the control and management of business. Business and the whole of it may be done outside India and yet the control and management of that business maybe wholly within India. In this particular case considerable emphasis is placed upon the fact that the whole of the business of the company is done in Ceylon and the whole of the income which is liable to tax has been earned in Ceylon. But that is not a factor which the Legislature has emphasised, It is entirely irrelevant where the business is done and where the income has been earned. What is relevant and material is from which place has that business been controlled and managed. "Control and management" referred /0 in Section -I-A (c) is, as we shall presently point out on the authorities, central control and management. The control and management contemplated by this sub-section is not the carrying on of day to day business by servants,

employees or agents. The real test to be applied is, where is the controlling and directing power, or rather, where does the controlling and directing power function or to put it in a different language there is always a seat of power or the head and brain, and what has got to be ascertained is, where is this seat of power, or the head and brain. A company or for the matter of that a firm or an undivided Hindu family has got to work through servants and agents, but it is not the servants and agents that constitute the seat of power or the controlling and directing power. It is that authority to which the servants, employees and agents are subject, it is that authority which controls and manages them, which is the central authority, and it is at the place where the central authority functions that the company resides. It' may be in some cases that like an individual a company may have residence in more than one place. It may exercise control and management not only from one fixed abode, but it may have different places. That would again be a question dependent upon the circumstances of each case. But the contention which Mr Kolah has most strongly pressed before us is entirely unacceptable that a company controls or manages at a particular place because its affairs are carried on at a particular place and they are carried on by people living there appointed by the company with large powers of management. A company may have a dozen local branches at different places outside India, it may send out agents fully armed with authority to deal with and carry on business at these branches, and yet it may retain the central management and control in Bombay and manage and control all the affairs of these branches from Bombay and at Bombay. It would be impossible to contend that because there are authorised agents doing the business of the company at six different places outside India, therefore the company is resident not only in Bombay but at all these six different places.

4 It is perfectly true that these two managers do all the business of the company in Ceylon and in doing that business naturally a large amount of discretion is given to them and a considerable amount of authority. But the mere doing of business does not constitute these managers the controlling and directing power. Their power-of-attorney can be cancelled at any moment, they must carry out any orders given to them from Bombay, they must submit to Bombay an explanation of what they have been doing, and throughout the time that they are working in Ceylon a vigilant eye is kept over their work from the Directors' board room in Bombay. The correspondence which has also been relied upon between the company here and its office in Colombo also goes to show and emphasises the same state of affairs. Mr Kolah is right again when he puts emphasis upon the fact that what we have to consider in this case is not the power or the capacity to manage and control, but the actual control and management, or, in other words, not the de jure control and management but the de facto control and management, and in order to hold that the company is resident during the years of account it must be established that the company de facto controlled and managed its affairs in Bombay. Mr Kolah says that the two powers of attorney go to show that whatever legal or juridical control and management the company might have had, in fact the actual management was exercised by the two managers in Ceylon. In our opinion this is not a case where the company did nothing with regard to the actual management and control of its affairs and left it to some other agency. As we said before, the two managers were the employees of the company acting throughout the relevant period under the control and management of the company, and therefore in the case we are considering there was not only a de jure control and management, but also a de Jacto control and management. "

That thereafter, Kania, J as his Lordship then was, after referring to the decision in *Bhimji R. Naik v. CIT* [*Bhimji R. Naik v. CIT*, 1944 SCC OnLine Bom 64 : (1945) 13 ITR 124] has observed and held that the expression "control and management" means where the central control and management actually abides.

75.4. The Calcutta High Court in *Bank of China* [*CIT v. Bank of China*, 1985 SCC OnLine Cal 24] has specifically held that a company may be simultaneously resident in more than one place, but the control and management is where the head and brain is situated. While holding so, in paras 7 to 9, it is observed and held as under: (SCC pp. 287-89)

"7. Under Section 6(3), a non-Indian company is said to be resident in India in any previous year if during that year the control and management of its affairs is situated wholly in India. The determination as to at what place or places the control and management of a particular company is situated is essentially a question of 'fact to be determined on the facts and circumstances of the particular case. A company can be simultaneously resident in more than one place but the question is whether the control and management is situated wholly in India during the relevant previous year. The expression "control and management" signifies the controlling and directive power, "the head and brain", as it is sometimes called, and "situated" implies the functioning of such power at a particular place with some degree of permanence. The word "wholly" as used in Section 6(3) would indicate that the seat of such power may be divided between two distinct and separate places. The expression "control and management" means de facto control and management and not merely the right or power to control and manage. In order to hold that a non-Indian company is resident in India during any previous year, it must be established that such company de facto controls and manages its affairs in India. The principles are by now well settled.

8. Lord Loreburn L. C. in *De Beers Consolidated Mines Ltd. v. Howe* [*De Beers Consolidated Mines Ltd. v. Howe*, 1906 A C 455 (HL) : (1906) 5 TC 198 (HL)] at p. 212, observed as follows : (AC p. 458)

'Mr Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else

I cannot adopt Mr Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of *Kelly C. B. and Huddleston B. in Cesena Sulphur Co. Ltd. v. Henry Nicholson* [*Cesena Sulphur Co. Ltd. v. Henry Nicholson*, (1876) LR / Ex D 428 : (1876) / TC 83J ' now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

9. Since that judgment, the words underlined have been taken as the test, although central management and control has sometimes been stated in the form "head, seat and directing power". The question depends on the fact of the management and not on the

physical situation of the thing that is managed. A company is managed by the board of Directors and if the meetings of the board of Directors are held within India, it may be said that the central control and management is situated here. The direction, management and control "the head and seat and directing power" of a company's affairs is, therefore, situate at the place where the Directors' meetings are held and, consequently, a non-Indian company would be a resident in this country if the meetings of the Directors who manage and control the business are held here. The word "affairs" means affairs which are relevant for the purpose of the 1. T. Act and which have some relation to the income sought to be assessed. It is not the bare possession of powers by the Directors, but their taking part in or controlling the affairs relating to the trading, that is of importance in determining the question of the place where the control is exercised. They must exercise their power of control in relation to business or activity wherefrom the profit is derived. [See Mitchell (Surveyor of Taxes) v. Egyptian Hotels Ltd. [Mitchell (Surveyor of Taxes) v. Egyptian Hotels Ltd., 1915 AC 10 (HL): (1915) 6 TC 542 (HL)]]"

75.5. In Nandlal Gandlal [CIT v. and Nandlal Gandlal, (1960) 40 ITR 1 (SC)] , this Court has held that the expression "control and management" in Section 4-A (b) of the Income Tax Act, 1922, means de facto control and management and not merely the right or power to control and manage.

76. The sum and substance of the above decisions of this Court as well as various High Courts would be that where the head and seat and directing power of the affairs of the company and the control and management is must be shown is not merely theoretical control and power i. e. not de jure control and power, but de facto control and power actually exercised in the course of the conduct and management of the affairs of the firm; that the domicile or the registration of

the company is not at all relevant and the determinate test is where the sale right to manage and control of the company lies. "

Effects of Circular No. 789, dated 13.04.2000, Amendment to Section 90(4) and 90(5) and Press release dated 01.03.2013 and Conclusiveness of TRC

47. To recapitulate, the Respondents while dealing with Azadi BacltaoAndolan had submitted as under:

- a) Direct and indirect transfer of shares constituting business investment was not a much prevalent concept way back in 2000 and the then prevailing laws of Mauritius as discussed in Azadi Bachao Andolan did not contemplate a Global Business License regime.
- b) Financial Services Act 2001 which gave way to the Financial Services Act, 2007 elaborately deals with Global Business License regime
- c) Para 9 and 11 of Azadi Bachao Andolan brings out clearly that what was questioned by the tax authorities then was the investments made by the FIIs and the investment funds registered with SEBI and not direct or indirect transfer of shares constituting business investment. Even the prayers in the PIL were directed only against FIIs. It is a common fact and not disputed that FIIs and investment funds like mutual funds are overseas entities registered with SEBI and investing in the Indian share market. These are not entities which make business investments, take control of the management, become part of Board of directors, add value to the growth of the company and exit at an appropriate time by making a direct or indirect transfer of shares.

48. When this is the background and a scenario of direct or indirect transfer of share was nowhere in the radar and not even remotely referred to in Circular No. 789. Dated 13.04.2000, there is

absolutely no legal basis for the Assesseees to claim or contend that the said Circular governs its transaction and the TRC once given cannot be questioned.

49. The background of the challenge and the ratio laid down by The Hon'ble Supreme Court should not be overlooked. The cry of the PIL was the discrimination sought to be maintained between a domestic investor and an FII even though both invest in the same Indian stock market. It was a policy choice of the Government to extend the Treaty benefit and to give confidence to these set of investors namely FIIs and investment funds and similar NRIs and thus issued Circular No. 789, dated 13.04.2000 and directed the AOs to accept the TRC.

50. Such a policy choice was not exercised for direct or indirect transfers and the Assesseees had not placed an iota of material in support of such assumption. Even the subsequent Circular No 1 dated 10th February 2003 does not refer to direct or indirect transfer of shares. Consequently, the basic assumption of the Assesseees that Circular No. 789, dated 13.04.2000 applies in all force needs to be rejected.

51. In the light of the above, the following inferences are inescapable:

- a) Circular No. 789, dated 13.04.2000 is only in relation to FIIs and investment funds and NRI and not for direct and indirect transfer of shares constituting business investment.
- b) This interpretation stands vindicated if one looks into the pattern of amendments brought through Finance Act, 2012 and 2013 while giving a statutory affirmation to Circular No. 789, dated 13.04.2000 by introducing Section 90(4) and 90(5). The assurance given to FII, investment funds and NRIs through Circular No. 789, dated 13.04.2000 stands statutorily aligned.

- c) As regards the applicability of Circular No. 789, dated 13.04.2000, it is crucial to note that the said Circular did not contemplate or address scenarios involving direct or indirect transfer of shares.

52. A cumulative analysis of Circular No. 789 dated 13.04.2000, Sections 90(4) and 90(5) of the Income Tax Act, 1961, read with Rule 10U(I)(b) and (c) of the Income Tax Rules, 1962, makes it evident that investments made by Foreign Institutional Investors (FIIs) are treated as permissible transactions, and such transactions are not subject to scrutiny under GAAR, provided the FII furnish a valid Tax Residency Certificate (TRC) issued by the Mauritius authority. In contrast, the same protection does not extend to transactions in involving direct or indirect transfers of shares constituting business investments.

53. In conclusion, the Respondents respectfully reiterate the established global jurisprudence that the prerogative to examine and address treaty abuse lies with the source State in full consonance with this global principle and reflects India's legitimate exercise of its sovereign taxing powers.

54. In the light of the above, the submission of the Assessee both on the Control and Management test and conclusivity of TRC needs to be rejected.

55. At this juncture, reliance is placed on the decision Constitutional Bench judgement of The Hon'ble Supreme Court in *Lzliar Ahmad Khan v. Union of India*, 1962 SCCOnLine SC 1 where the following was held on irrebuttable presumption (conclusive proof):

29. In deciding the question as to whether a rule about irrebuttable presumption is a rule of evidence or not, it seems to us that the proper approach to adopt would be to consider whether fact A from the proof of which a presumption is required to be drawn about the existence of fact B, is inherently relevant in the matter of proving fact B and has inherently any probative or persuasive value in that behalf or not. If fact A is inherently relevant in proving the existence

of fact B and to any rational mind it would bear a probative or persuasive value in the matter of proving the existence of fact B, then a rule prescribing either a rebuttable presumption or an irrebuttable presumption in that behalf would be a rule of evidence. On the other hand, if fact A is inherently not relevant in proving the existence of fact B or has no probative value in that behalf and yet a rule is made prescribing for a rebuttable or an irrebuttable presumption in that connection, that rule would be a rule of substantive law and not a rule of evidence. Therefore, in dealing with the question as to whether a given rule prescribing a conclusive presumption is a rule of evidence or not, we cannot adopt the view that all rules prescribing irrebuttable presumptions are rules of substantive law. We can answer the question only after examining the rule and its impact on the proof of facts A and B. If this is the proper test, it would become necessary to enquire whether obtaining a passport from a foreign Government is or is not inherently relevant in proving the voluntary acquisition of the citizenship of that foreign State.

30. It has been fairly conceded before us that a passport obtained by the petitioners from the Pakistan Government would undoubtedly be relevant in deciding the question as to whether by obtaining the said passport they have or have not acquired the citizenship of Pakistan. Sometimes the argument appears to have been urged and accepted that a passport in question would not be relevant to the enquiry as to whether citizenship of Pakistan has been acquired or not. That view, in our opinion, is clearly erroneous.

56. Section 2 of The Bharatiya Sakshya Adhinyam, 2023 defines the following:

- (b) "conclusive proof" means when one fact is declared by this Adhinyam to be conclusive proof of another. the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it;

- (h) "may presume ".-Whenever it is provided by this Adhiniyam that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it;
- (I) "shall presume ".-Whenever it is directed by this Adhiniyam that the Court shall presume a fact, it shall regard such fact as proved. unless and until it is disproved.
57. The Respondents respectfully submit that neither Section 90(4) nor Section 90(5) of the Income Tax Act, 1961, nor Circular No. 789 dated 13.04.2000, confer any statutory or executive conclusivity upon Tax Residency Certificate (TRC). Both Azadi Bachao Andolan and Vodafone decisions affirmatively clarify that the TRC, while relevant, is not final or conclusive. Quasi-judicial authorities and Courts are not precluded from examining the true nature and character of the business structure and the underlying transaction to ascertain whether the arrangement is bona fide or a colorable device aimed at tax avoidance.
58. Further, it may also be noted that DTAA's are instruments which are negotiated by two countries to divide the rights of taxation of different incomes. It has been well recognised across the globe in all international forms such as OECD, UN etc. that the purpose of DTAA's is to avoid double taxation of income rather than to promote double non-taxation. In fact, during the BEPS Pillar two negotiations, there was a larger consensus among the countries that there should be a minimum 15% tax rate across jurisdictions and if some jurisdiction has less than 15% tax rate then jurisdiction in which the parent company is situated, shall have right to collect the differential.
59. The basic idea is that tax is a justified right of a country to run a welfare state. If some jurisdiction tries to create an arbitrage by imposing lower taxes, then it disturbs the justified right of other countries to collect their rightful share of taxes. It may happen in two different ways. First, by

attracting the taxpayers to create colourable devices and structures to avoid taxes. Second, by tempting them to shift their base to the low tax jurisdictions. In either situation, the justified rights of the jurisdictions that impose normal taxes for the welfare of their citizens is affected.

60. The first situation is more serious because in that case, the taxpayer is trying to avoid taxes by creating colourable devices to avoid justified taxes in a jurisdiction. This has been well recognised across the globe and that is the reason why many countries, including India have come out with their general anti avoidance regulations which try to lift the corporate veil and pierce the colourable structures so that the jurisdiction can get its rightful share of taxes. This principle has been well recognised by the Hon'ble Supreme Court in different cases.
61. Hon'ble Supreme Court in the case of Vodafone International Holdings laid down the guiding principles regarding the situation in which corporate veil may be lifted as follows:

"The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of

the veil but that does not mean that they alter the legal position between the companies. The directors of the subsidiary under their Articles are the managers of the companies. If new director are appointed even at the request of the parent company and even if such directors were removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors."

Hon'ble Court has made a very critical observation that corporate veil can be lifted where somebody has a steering interference with the subsidiary's core activities. In para 67 of the judgement, Hon'ble Court also held:

67. It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary's executive directors' competences are

transferred to other persons/bodies or where the subsidiary's executive directors' decision making has become fully subordinate to the Holding Company with the consequence that the subsidiary's executive directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling on- Resident Enterprise (RE) makes an indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of on-Resident Holding Company, re-characterize the equity transfer according to its economic substance and impose the tax on the actual controlling Non-Resident Enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense)."

65. The majority judgment in McDowell held that "tax planning may be legitimate provided it is within the framework of law" (para 45). In the latter part of para 45, it held that "colourable device cannot be a part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods". It is the obligation of every citizen to pay the taxes without resorting to subterfuges.

66. Thus, it is well recognised principle that colourable devices can not be allowed as a tool of tax evasion. Also, the decision about the genuineness of a structure and it being a colourable device will depend upon the facts and circumstances of the case. In this context, the most crucial fact is the nature of the assessee company and the activities carried out the assessee. The facts and

circumstances surrounding the transaction are required to be seen. The facts and circumstances of the case are as follows:

- a) Shares are owned by the assessee company, as a result of voluntary liquidation of ETIL, India which is a colourable device

The issue under consideration is the taxability of capital gains on the sale of shares of Vodafone Essar Ltd (an Indian company) by the assessee company. The assessing Officer as well as the CIT(A) in their orders have clearly established that the shares reached the assessee company as a result of voluntary liquidation of ETIL, India after several complicated restructuring of the Indian companies of the group. The AO has clearly established that voluntary liquidation of ETIL, India is a colourable device at page 44-63 of his order. Thus, the entire structure has been created from the very beginning as a colourable device for the sole object of evading the income tax liability in India.

- b) Colourable holding structure of Essar group being highlighted in paradise paper leak

The assessee company is a group company of Ruia family. Ruia family holds 100% stake in the assessee company through a chain of holding passing through Mauritius, Cayman Islands, etc. Thus, despite the Ruia family continue to control the colourable device created in Mauritius in the form of assessee company. It is quite evident why this complicated structure has been created by the Ruia family. Why would any person who is willing to pay the taxes due in India would like to control the holding in Indian company through Triton Trust and Virgo Trusts. The names of these two trusts appear in Paradise Papers leak, and can also be found in public domain at the following links:

<https://indianexpress.com/article/india/paradise-papers-shashi-ravi-ruia-essar-khaitan-appleby-black-money-49274191>

The AO has mentioned the enquiries into the affairs of Ruia family and offshore trusts by the DRI at page 222-224 of his order.

c) No operations of assessee company in Mauritius

The assessee company is a colourable device formed just to hold the investment of Ruia family in Mauritius and has no operations in Mauritius. It has no substance other than the shares of VEL.

d) Assessee company is only a paper company to hold investments and has no real operations and management other than decisions to purchase and sell shares that are taken by Ruia family through its key executives:

The concept of control and management for a fully operational company that has full fledged operations and a company like assessee company that is formed as a colourable device just to hold shares of an India company of the Ruia family can't be the same. In case of assessee company, there are only two critical decisions: when and how to purchase the shares and when and how to sell the shares and both these decisions can not be taken by anybody other than the Ruia family.

e) No role of the Board over the decisions related to borrowings:

Even the shares of VEL were acquired by the assessee company out of the proceeds of the borrowed funds, which were borrowed on the security of shares of VEL as elaborated by the AO in his order page no 85-87. The AO on page 91 of the order has mentioned

that even the board meetings do not discuss the purpose, and cost benefit analysis etc of the loan facility. If the control and management of the assessee company is in Mauritius, how can such a significant decision be taken without Board of Directors not contemplating on such a crucial matter?

f) An analysis of the financial statements of the assessee company confirms that it is a colourable device

An analysis of the financial statements of the assessee company has been carried out by the AO at page 107-110 of his order, The assessee company has no operative income or operative expenses. The sole activity of the assessee company from FY 05-06 to FY 11-12 is to hold the shares of VEL. There is no operational expenses and the sole expenses being in the nature of professional fees, audit fees, etc.

g) Key executives of the Essar group performed all crucial activities and not the directors of assessee company:

Moreover, even to carry out the transactions of sale of shares, and also bank transactions, the key executives of Essar Group are authorised by the assessee company, as elaborated by the AO at page 116-129 of his order. The key executives of the Essar group are parties to all major agreements signed by the assessee company as tabulated by the AO in his order at page 130-142 of his order.

h) Discrepancies in Board minutes clearly establishing that it was a colourable device:

There are serious discrepancies in the Board minutes, clearly establishing that the assessee company is a colourable device. These discrepancies have been elaborated by the AO at page 144-163 of his order.

That shows that minutes of the Board meetings have been casted to hide the reality. Directors have signed despite not being present in the meeting. The entire emphasis of the assessee is that the "control and management" of its affairs is in Mauritius, while discrepancies the minutes of the Board meetings establish it beyond doubt that these are just paper works and the real "control and management" lies in India. The AO has established at page 177 of his order that the Board Minutes are of doubtful authenticity due to many factual contradictions.

i) Puppet directors

The Directors of the assessee company are acting just as a puppet of the Ruia family in India. As pointed out by the AO in para 5(1)(4) of his Order, as per the minutes of the Board meetings, Mr Uday Kumar Gujadhur and Mr Yuvraj Kumar Juwaheer are the Mauritian directors of the assessee company. Both these persons hold multiple directorships. A search was carried out on the website of Mauritius registrar of companies where around 83 companies of Essar group were found and the details of directors in all these companies are tabulated below. Mr GUJADHUR UDAY KUMAR is director in more than 50 companies of the group. The other names in the director list are also common and just a perusal of the list would reveal that all these people have been there on the Board just for "name lending".

j) Assessee company is a classic case of being colourable device on all the parameters

The assessee company is a perfect example of colourable device on all the tests laid down by the Hon'ble Supreme Court in various decisions. The same has been established by the AO in the following extracts from page 210-212 of the AO's order:

Test	Facts/Parameters	How applicable to assessee
Fiscal nullity Test	<ul style="list-style-type: none"> • No economic independence • No independent source of funds, • No facts regarding any Fiscal independence or independence existence 	<ul style="list-style-type: none"> • It is apparent that the Assessee Company have been interposed only to avoid paying taxes in India. It has not carried out any business activity other than holding the shares transferred to it by parent company • All the funds are based on the foundation of control and management by/arranged by the ultimate beneficiaries, i.e. the Ruia family • No Income during the entire period of Holding • Incurred losses on account of interest. The benefits going to Essar Group •
Commercial/business substance Test	<ul style="list-style-type: none"> • No specific business, • No business income, • No independent functions 	<ul style="list-style-type: none"> • There is no commercial/business substance in the assessee company with no income generating activity, no infrastructure • As per financials of both the companies, they have no significant assets no income has been offered to tax during the entire period of holdings. • Income earned upon the transfer of shares has gone immediately to ECML(M) for repayment of Loan taken for Group benefit. • Shareholding in VEL not used for the purpose own business • No significant employees
“Look at” Principle	<ul style="list-style-type: none"> • Structures created to defeat the purpose of law 	<ul style="list-style-type: none"> • Substantial funds already used as income by Essar Group companies (USD 2.2 Bn as dividend income by goes to EGL Cayman) by design of structure out of loan taken on the pledge

		<p>of impugned shares and subsequently loan returned out of the sale consideration of impugned transactions.</p> <p>USD 532 Mn goes as income to EIHL in the form of sale consideration out of the loan taken on the pledge of impugned shares and subsequently loan returned out of the sale consideration of impugned transactions.</p> <p>Rest of the loan fund given to various group companies in the form of share capital ETHL India getting the substantial portion and subsequently loan returned out of the sale consideration of impugned transactions.</p> <p>The liabilities adjusted by book entry among group companies in the form of convertible debentures with no timeline for repayment, conversion, interest or dividend.</p>
Investment Participation Test	<ul style="list-style-type: none"> Whether, strategic investment made in India 	<ul style="list-style-type: none"> No strategic investment made in India (i) The investment by Ecom was made out of loan executed by Essar Group on the strength of Ruia Family, (ii) In the case of ECL the situs of shares already owned by ETHL India has been shifted to Mauritius by voluntary liquidation of ETIL India
Time duration Test	Formation and existence of the Subsidiary in question	<ul style="list-style-type: none"> Acquisition in the hands of Ecom Mauritius made after Supreme Court decision in the case of Azadi Bachao ETHL India shareholding

		<p>in VEL transferred to Mauritius after FDI Policy relaxed to 74% from 49%</p> <ul style="list-style-type: none"> • The Holding structure of the Applicant Companies keeps changing for USD 1 in most of the cases • ECL(M) has acquired VEL shares upon voluntary liquidation of ETIL in July 2008. Thus, the transfer of impugned shares made within 3 years.
Business operations Period in India Test	Business operations undertaken by the entity under examination	<ul style="list-style-type: none"> • The Applicants have not participated in shareholders functions of VEL operating in India • The shareholders function of VEL is being participated by Indian key management personnel-Shri Ravinkant Ruia and other Essar Group executives •
Generation of taxable revenues in India Test	Whether the entity under examination has earned any taxable revenues in India or anywhere else.	<ul style="list-style-type: none"> • The only taxable Revenue in India is out of transfer of impugned shares • No tax paid under section 46(2) upon the assets 'transferred in 2008 on voluntary liquidation of ETIL claiming the benefit of India Mauritius Treaty.
Timing of the Exit	When and how the timing of exit of the entity u under examination has been decided.	The timing of exit decided in India and not by the Assessee Company
Continuity of business on Exit	Whether the entity under examination has continued its business after the exit	Since the Essar Group has completely exited VEL after the impugned transfer and subsequent trigger of call option, transfer of balance of 10.97% shares made by Indian

		Company, this test does not apply.
Scheme and Dominant Purpose Test	The rationale of the transaction entered into involving the entity under examination	The scheme and dominant purpose of the assessee is tax avoidance by claiming benefit of Mauritius DTAA this scheme is supported by frequent changes in holding structure and layering of beneficial ownership through maze of companies in Mauritius, Cayman Island, BVI and India
Colourable or Artificial Device Test	Whether entity under examination is just a colourable device.	Based on the all the above facts the Assessee Company squarely fails the test, being a colourable device to avoid taxes in India.

62. In view of all the facts above, the Respondents respectfully submit that the transaction undertaken by the taxpayer is a colourable device and therefore JAAR is invoked in these cases and the India-Mauritius DTAA does not apply. Further, on a without prejudice basis, the Respondents also submit that the taxpayer is resident of both the countries and the tiebreaker rule based on effective place of management would kick in. In this scenario, since the India-Mauritius DTAA is applicable but effective management is in India, as per article 4(3) of the DTAA, the taxpayer is resident in India and therefore taxation as per the domestic legislation would be applicable.

PART E - Summing up of the prayers

Summing up

- 1. The CIT(A) has held the taxability of capital gains in India in twofold manner:**
 - A. Taxability in India under the Statutory provisions taking into consideration the provisions of the I. T. Act of India and those of DTAC between India and Mauritius.**

The CIT(A) gave findings of facts that the Essar Group and the Assessee engineered colourable devices, created for seeking benefit of Article 13(4) of India Mauritius DTAC. He held that the Central Management control of the Assessee is in India as per the provisions of Section 6(3) of the IT Act and thus the Assessee is a resident of India. Since, the assessee claims to be a resident of Mauritius, at the most it is the case of dual residence. Accordingly, the CIT(A) invoked the provisions of Article 4(3) of the Treaty read with Article 4(1) of the Treaty and relying upon OECD and UN Model Convention and also the judicial dicta on the subject, expressed that where the Central Management control abides, Place of effective management also abides. For this purpose, the CIT(A) drew support from the commentary of Claus Vogel as well. The CIT(A) finally confirmed the order of the AO holding the taxability of the capital gains truncation in India as the Central Management and Control abide in India.

B. Taxability in India under the Judicial Anti Avoidance Rule, a Distinguishing Feature of Common Law

The AO and the CIT(A) have demonstrated completely and conclusively that the Assessee's were created by way of active engagement involving creation of shell companies, layering of shell companies through the maze of conduit companies and passing of the benefits through such layering to Essar Group Companies controlled and managed in India as also to the Members of the 'Ruia Family' resident in India. The CIT(A) held the capital gains taxable in India under Judicial anti avoidance rules through the tabular representation and application of peculiar facts of the case to the tests laid down by the Hon'ble Supreme Court in the case of Vodafone. The CIT(A) made it unambiguously clear that the incorporation, the application of the HELIVEL shares, the transfer of the impugned shares and finally the application of sale proceeds of such shares for repayment of Bank loans a complete round tripping through loan and share monetization, were nothing but colourable devices with the sole purpose to seek exemption under Article 13(4) of the India Mauritius DTAA. The observations of Hon'ble Gujarat High Court in order dated 31.01.1977 are relevant:

"If the party seeks the assistance of the Court to reduce its tax liability, the Court should be the last instrument to grant such assistance or judicial process to defeat a tax liability ... here the tax cannot be avoided unless the Court lends its assistance, namely, by sanctioning the scheme of amalgamation. In other words, the judicial process is used or polluted to defeat the tax by forming an appropriate device or subterfuge. Such a situation can never be said to be in the public interest and on this ground the Court would not sanction the scheme of amalgamation. "

3. Lastly, it is submitted before this Hon'ble Tribunal that this case presses into application the entire treatise on tax avoidance under the Common and Civil Law, starting from the ruling of Substance over Form way back in 1935 by US Supreme Court in Gregory v. Helvering, case, the commercial or industrial purposes test laid down in W. T. Ramsay Ltd. v. Inland Revenue Commissioners to the Indian Supreme Court's decision propounding Colourable device doctrine in Mc Dowell and Azadi Bachhao and finally the Fiscal nullity Test, commercial/business substance Test, Round Tripping Test, Dominant Purpose Test and Colourable or Artificial Device Test laid down in Vodafone's case.

4. The final prayers before Your Honours draw support from the words of Hon'ble Supreme Court of US in the case of Higgins v. Smith, U.S. 473 (1940) propounding the doctrine of Economic Substance:

"Transactions, which do not vary, control or change the flow of economic benefits, are to be dismissed from consideration"

Accordingly, it is prayed that the capital gains arising from the transfer of shares of VEL in the hands of Ecom and ECL be held to be taxable in India, confirming the orders of Ld. CIT(A) and of the assessing officer on two-fold grounds:

A. That the assesseees are taxable in India as Indian resident companies under erstwhile section 6(3) of the Indian Income

Tax Act read with Article 4(1) and 4(3) of India Mauritius DTAC.

- B. The colourable devices adopted by the Ruia family and the Essar Group of India may be disregarded to hold the assessee companies taxable in India.

78. In the rebuttal, Id. AR of the assessee addressed various allegations made by the Revenue in the tabular form and we are reproducing the same as under :-

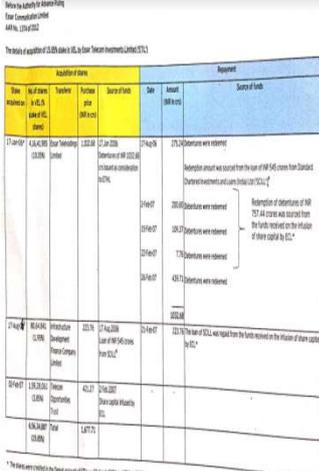
“The issues which arise in the captioned appeal are as under:

- Whether the Assessee is a tax resident of India under the provisions of erstwhile Section 6(3) of the Income tax Act, 1961 (‘the Act’) and is entitled to the benefits of India Mauritius double taxation avoidance agreement (India-Mauritius DTAA);
- Whether the Assessee is entitled to the benefits of Article 13(4) of the India-Mauritius DTAA on the sales of Vodafone Essar Limited (‘VEL’) shares acquired from the funds raised overseas;
- Whether the Assessee can be denied benefits of Article 13(4) of the India-Mauritius DTAA when the VEL shares sold by the Assessee were acquired upon liquidation of an Indian company which was undertaken pursuant to genuine commercial reasons;

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
(I) Complete Holding structure of the company			
	Ruia Family is getting all the benefits of all the avoidance structures through Essar Global Limited, be it under settlement agreement or by way of loan arrangements.	Page 2	<p>a) It is submitted that the aforesaid contention of Ruia family members getting all the benefits under settlement and loan agreement has been raised by the Revenue for the first time and the same has never been raised by the Assessing Officer ('AO') or Commissioner of Income-tax (Appeals) ('CIT(A)'). Under the provisions of the Act, the Revenue is not permitted to raise fresh grounds without rectifying or revising the assessment order. However, we are submitting our reply below on a without prejudice basis.</p> <p>b) The structure chart referred to on Page 2 of the Revenue submission are the entities above the Group Holding company i.e. Essar Global Limited, Cayman Island ('EGL') [later name changed to Essar Global Fund Limited ('EGFL')]. It is submitted that the entities above EGL have no role to play and are not relevant to decide the issue under consideration in the present appeal as no transactions have taken place with those entities by any of the Assessee herein.</p> <p>c) It is further submitted that the Revenue has made a bald allegation that Ruia family is getting benefits under the settlement agreement or loan transactions through the tax avoidance structure, however, no material or evidence have been produced apart from making bald allegations against the Assessee. In any case, the Assessee further submits that the rationale behind the aforesaid structure was explained to the lower authorities during the course of proceedings. (Para 161-166, Page 105 and Para 27-28, Page 24-25 of ECL ITAT PB)</p> <p>d) The issue involved in the present appeal is the levy of capital gain tax on sale of shares of VEL by the Assessee on the footing of the Revenue that the Assessee is a resident of India. Accordingly, whether any part of the proceeds from the sale of the VEL shares or from loans raised on security of VEL shares or from the settlement between Essar and Hutchison was received by the Ruia family members is not germane to the appeal. In any case, the Assessee would like to clarify that no amount received</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			under the settlement agreement or loan agreement have gone to the Ruia family members.
	A. Acquisition of 26.82% stake in Hutchison Essar Limited (HEL)/ VEL by Essar Teleholdings Limited ('ETHL'), India	Page 5	a) It is submitted that at the relevant point of time ETHL was a listed company and therefore, it is incorrect to contend that it was beneficially owned by 1 member of Ruia family. In any case, it submitted that the ownership of ETHL is not relevant to decide the issue arising for consideration in the present appeal.
	B. Several internal restructuring leading to transfer of 10.97% [out of 26.82%] stake ONSHORE [45425328 shares]	Page 5	a) It is submitted that in the present appeal, the Tribunal is not concerned with the sale of onshore stake of 10.97%. Accordingly, the Assessee is not required to give any submissions since the same is not relevant to the present appeal.
	C. Several internal restructuring leading to transfer of 15.85% [out of 26.82%] stake OFFSHORE [65634887 shares]	Page 5	a) It is submitted that while the factual assertions made are not disputed but the inference sought to be drawn is incorrect and the Assessee further wishes to clarify that the internal restructuring was undertaken for commercial reasons as submitted before lower authorities.
	D. 6.19% offshore stake in VEL	Page 5	a) These facts pertain to the appeal of Essar Com Limited ('ECom') and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
	Page 1-5		a) These are factual and there are no allegations by the Revenue (except the above points). Hence, these do not merit any reply.
	Page 6 to 8		a) These are factual and there are no allegations by the Revenue (except the above points). Hence, these do not merit any reply.

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
(II) Share transaction details between ETHL and Essar Telecom Investments Limited ('ETIL')			
	<ol style="list-style-type: none"> 1. ETIL issued debentures 2. ETHL transferred its shares to ETIL 3. ETIL entity has no resources and is a paper entity 4. Value of this acquisition is Rs. 2077.7 cr (USD 400.61 million) and ETIL did not have anything to pay for this acquisition 5. Essar Communications (Mauritius) Limited ('ECML') provided funds to purchase 6. The source of funds explained by applicants for acquisition of 15.85% shares in VEL by ETIL, India is stated to be as under: 	Page 9	<ol style="list-style-type: none"> a) ETHL was holding 26.82% shares in VEL, however, it was heavily leveraged and there were defaults made by ETHL in complying with the listing agreements with various stock exchanges. In November 2005, 1.95% of VEL shares were monetized for Rs. 200 crores from Infrastructure Development Finance Company Ltd. ('IDFC'). Similarly in December 2005, 3.85% of VEL shares were monetized for Rs 395 crores from Telecom Opportunities Trust ('TOT'). However, due to overly leveraged balance sheet and listing defaults on the part of ETHL, it was finding difficult to monetize the value of VEL shares on favourable terms from the lenders. Further, the existing regulatory framework [Reserve Bank of India ('RBI') & The Foreign Exchange Management Act, 1999 ('FEMA') regulations], was making it difficult to monetize the value of VEL shares. (Para 123, Page 82 and Point B, Page 1707 of ECL ITAT PB, also refer response to Sr. (II).7(e)(ii) of the Revenue submission). b) It is also submitted that FDI in telecom sector was relaxed in November 2005 up to 74% foreign shareholding from 49% earlier. Hutch and ETHL were in discussions for utilization of this excess foreign shareholding percentage (74% - 49% = 25%) wherein it was agreed that ETHL will continue to hold 10.97% VEL stake in India, which would be counted towards the FDI sectoral cap. Further, under the FDI regulation, the resident Indian promoter was required to hold at least 10% shareholding. Also, under the shareholders agreement with Hutch, ETHL was required to have a minimum 10% shareholding in order to enjoy certain rights. Essar group was keen to monetize its VEL stake by raising funds in and outside India funds on favourable terms. c) Given the above reasons, ETHL transferred 10.05% of VEL shares to a new entity namely, ETIL so that it could monetize the value of VEL shares in a new company having a clean balance sheet. The shares were transferred to ETIL for a value of Rs. 1,032 crores and debentures of

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	 <p>The table in the screenshot has the following columns: Date, Particulars, Amount, and Remarks. It lists several entries related to the redemption of debentures, with dates ranging from 2014 to 2017. The amounts are in INR Lakhs. The remarks column provides details about the source of funds and the nature of the transactions.</p>		<p>the same value were issued to ETHL (Point A, Page 1706 of ECL ITAT PB) which helped ETHL in deleveraging its balance sheet (redemption of debentures as explained below). ETIL also, acquired the aforementioned stakes in VEL (1.95% from IDFC and 3.85% from TOT)</p> <p>d) Thereafter, ETIL was able to monetise the value of VEL shares, since it was a clean company and raised Rs. 545 crores as a loan from Standard Chartered Investments and Loans (India) Limited ('SCILL'). From the loan proceeds, ETIL redeemed part of the debentures that had been issued to ETHL. (Point B, Page 1707 of ECL ITAT PB).</p> <p>e) While funds were raised to some extent from the Indian NBFC as explained above, the regulatory restrictions constrained the ability to unlock the entire value of the VEL shares by raising of loans on favourable terms. With the opening of FDI cap as explained above, it was thus contemplated to bring eligible VEL holding (in accordance with the proportion of foreign holding agreed with Hutch) under Essar group's normal investment pattern (i.e. holding through Mauritius). It is submitted that holding of the VEL shares in a foreign-owned vertical would enhance the value of the shares since a foreign telecom holding is more marketable than an Indian telecom holding. This is because the foreign holding being held in compliance with FDI norms could be sold either to a foreigner or to an Indian party whereas Indian holding could be sold to a foreigner only if such transfer would not breach FDI caps. Further, the ability to raise finance would also be increased through a foreign-owned vertical since overseas debt markets had far greater depth than Indian markets, borrowing rates were lower overseas and raising loans overseas against security of foreign-owned Indian shares wasn't constrained with regulatory restrictions. Accordingly, ETIL approached Foreign Investment Promotion Board (FIPB) for seeking permission to receive foreign funding from ECL.</p> <p>f) Once FIPB approved and the investment was made by ECL, ECML [earlier known as Essar Communications</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>(India) Ltd. ('ECIL') obtained a loan of USD 1.1 billion (on the strength of VEL shares inter alia held by ETIL) which could be used by the group for expansion of other businesses. Out of the aforesaid loan, ~USD 330 million and USD 70 million (worth of intra group loans), ECL infused USD 400.61 million in ETIL as share capital. (Point B, Page 1707 and Point B, Page 1726 of ECL ITAT PB). The correct Rupee equivalent of the USD 400.61 million was Rs. 1,767.88 crores as mentioned in Annexure C to the submission dated 15 March 2016 filed by the Assessee to the AO.</p> <p>g) The aforesaid USD 400.61 million was utilised by ETIL (Point A, Page 1706 of ECL ITAT PB):</p> <ul style="list-style-type: none"> • to repay loan of SCILL which was utilized to purchase the stake of 1.95% of VEL from IDFC and to redeem part of debentures issued to ETHL amounting to Rs. 275.24 crores • to pay off the balance debentures which were issued to ETHL and • to acquire the stake of 3.85% of VEL from TOT for Rs. 421.27 crores (Page 101 of ECL ITAT PB) <p>h) FDI in ETIL enabled monetization of the VEL shares resulting in raising of loan of USD 1.1 billion from overseas lender.</p> <p>In nutshell, all the above-mentioned transactions have been undertaken for commercial/ business reasons, and it is incorrect for the Revenue to allege that ETIL was a paper entity with no resources and had nothing to pay for the acquisition of VEL shares or to draw any negative inference from the transactions that were undertaken.</p>
	<p>7. Money infused by ECL Mauritius via assistance 400.61 million USD to ETIL which is Rs. 2077.7 cr:</p>	Page 10	<p>a) The correct Rupee equivalent of the USD 400.61 million was Rs. 1,767.88 crores as mentioned in Annexure C to the submission dated 15 March 2016 filed by the Assessee to the AO.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<ul style="list-style-type: none"> • Rs. 200 Cr. to ETHL, Chennai for redeeming debentures issued by ETHL. - Money flowing to ETHL, Chennai: ETHL floated 2 Cr fully convertible debenture of Rs 100 each around 15.01.2007. ETIL subscribed to the same and paid part of the share capital infused by ECL(M) (pp 294-295, Vol 5, ETIL minutes) 	Page 12	a) This is factual and there is no allegation by the Revenue. Hence, it does not merit any reply.
	<ul style="list-style-type: none"> • 20 Cr. to Girishan Investment Private Ltd. ('Girishan') for buy back of shares from Girishan by ETIL <p>Money flowing to Girishan, company which is 100% controlled by Manju Ruia. The payment was by way of buyback of 20 lakh shares invested by Girishan in the share capital of ETIL.</p>	Page 12	a) While the factual assertion made regarding the amount and recipient of buyback proceeds is not disputed, it is submitted that negative inference sought to be made by the Revenue therefrom is not correct / appropriate and has no basis. The buyback by ETIL from Girishan was undertaken at Rs. 100 per share after obtaining requisite FIPB approval. In any case, the Revenue's argument has no bearing on the availability of the India-Mauritius DTAA to the Assessee.(Para 127, Page 84 of ECL ITAT PB)

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>Even while the shares were subscribed at Rs 10 per share the same was bought back at a value of Rs 100, that is at a premium of Rs 90. Thus, against share capital investment of Rs 2 Cr Girishan was paid Rs 20 Cr.</p>		
	<ul style="list-style-type: none"> 180 Cr as issued Share capital to ECL Share Capital increased from 2 Cr to 180 Cr in January 2007 	Page 12	a) This is factual and there is no allegation by the Revenue. Hence, it does not merit any reply
	<p>The whole money amounting to Rs 2077.7 Crores has gone to the flagship companies of Essar.</p>	Page 12	a) ETHL is only one of the Essar entities in the group which held investments in VEL. The Assessee further submits that the Revenue's reference to ETHL as the flagship company is incorrect. It should be noted that ETHL has actually transferred 10.05% stake in VEL to ETIL and only the agreed amount has been utilized by ETIL in settling consideration for the same. This is a genuine transaction that has been explained by the Assessee above and accordingly, no adverse inference should be drawn in the facts of the present case. (Para 126, Page 84 of ECL ITAT PB)
	<p>USD 400.61 million loan provided by ECL, Mauritius from and out of a loan of USD 1.1 billion taken from Standard Chartered</p>	Page 12	a) It is submitted that the allegation of the Revenue that 15.85% shares of VEL were pledged to obtain the loan of USD 1.1 billion is incorrect. It is submitted that the Assessee had made an application to RBI for pledge of VEL shares pursuant to loan of USD 1.1 billion vide letter dated 12 February 2007, however, the approval for pledge

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	Bank ('SCB') on 31 January 2007 pledging the very shares of VEL, which includes 15.85% shares of ETHL.		<p>was never received and eventually the application for pledge of VEL shares was rejected by RBI vide letter dated 4 October 2007. Therefore, the contention/allegation of Revenue is factually incorrect and contrary to evidence on record.</p> <p>b) It is further submitted that statement that 15.85% VEL shares are owned by ETHL is also incorrect. It is submitted that 15.85% of shares were not owned by ETHL and at the time of availing the loan of USD 1.1 billion, the VEL shares were owned by ETIL and not ETHL.</p> <p>c) Without prejudice to the above, it is normal for the lenders to expect that the asset being acquired is itself pledged as security for the loan being availed. It is not uncommon to use the jewel in the group for financing/ expansion of the group. Accordingly, it is submitted that it is a common business practice to obtain loans for group companies by pledging their securities i.e. it is not unusual for entities to guarantee debts of other group entities. Refer Vodafone International Holdings B.V. (2012) 341 ITR 1 (SC) – Para 79 (Para 177, Page 111 and Page 1717 of ECL ITAT PB)</p>
	d) This is a simple case of shares of VEL being pledged, money borrowed and given to ETIL to acquire the very shares which are pledged, perfect case of round tripping and nothing else	Page 13	<p>a) The allegation of the Revenue that the shares of VEL were pledged to avail the loan of USD 1.1 billion and the same was given to ETIL to acquire the shares of VEL is factually incorrect. As submitted above, the shares of were not pledged since there was no approval from RBI for pledge of VEL shares therefore, the conclusion of the Revenue that the very shares of VEL were pledged to borrow money and the same money was given to ETIL to acquire the shares of VEL is totally incorrect and contrary to facts on record.</p> <p>b) Without prejudice to the above, it is submitted that the aforesaid contention of "round tripping" has been raised by the Revenue for the first time and the same has never been raised by the AO or CIT(A). Under the provisions of the Act, the Revenue is not permitted to raise fresh grounds without rectifying or revising the assessment order.</p>

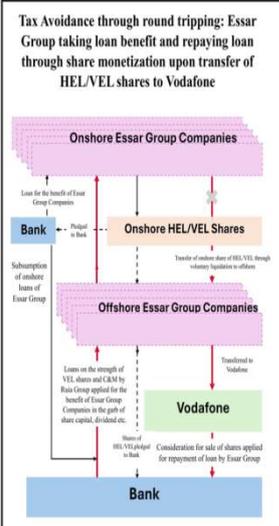
Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>Therefore, the reasons given by the lower authorities for denying the DTAA benefits cannot be revised by the learned ASG before the Hon'ble Tribunal.</p> <p>c) Without prejudice to the above, the Assessee submits that pledging the asset with bank which a person wants to buy with borrowed money is the most normal transaction that takes place on day-to-day basis in the commercial world. For example, an individual buys a house with borrowed money by pledging the same house (which he is buying) with a bank. Therefore, it is completely incorrect for the Revenue to even suggest that the same is in the nature of "round tripping".</p> <p>d) The Assessee submits that borrowing money outside India based on the value of shares of an Indian company and thereafter utilising the borrowed money for purchasing the shares cannot be at all termed as "round tripping".</p> <p>e) It is further submitted that "round tripping" means the funds/ income which originate in India are sent out of India and the same money coming back to India in the form of investment for claiming DTAA benefits. In this regard, the Assessee relies on the judgment of Vodafone International (supra) which has explained the meaning of "round tripping" (circular movement of capital) as under:</p> <p>(i) Round Tripping can take many formats like under-invoicing and over-invoicing of exports and imports.</p> <p>(ii) Round Tripping involves getting the black money or capital that is hidden out of India, say Mauritius, and then come to India like FDI or FII.</p> <p>f) Reference in this regard is also made to Para 8.84 of the Report by the 'Joint Committee on stock market scam and matters relating thereto' dated December 2002 which again raised concerns regarding the round tripping of funds from India to claim the benefits of India-Mauritius DTAA for avoidance of taxes.</p> <p>g) In view of the above, it is submitted that "round tripping" involves funds which originate in India, sent outside India clandestinely and are reinvested in India. In the instant case, there is not even an allegation/suggestion by the</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>lower authorities that the Assessee is claiming benefits of DTAA by virtue of round tripping of funds.</p> <p>In any case, the Assessee submits that the money was borrowed from outside India from SCB, UK and the same was used for investment purpose in India and outside India. Therefore, there is no case of round tripping in the facts of the present case as alleged by the Revenue for the first time.</p>
	<p>e) This is a simple case of monies being borrowed by ETHL, which needs to be squared off. This could have been done within India, instead of doing that, a convoluted route was structure with two purposes contrary to law-</p> <p>i) The borrowing was made by upstream Mauritius companies which had no commercial substance as the borrowing was not for their use. Not a single dollar of this borrowing was utilised by Mauritian Companies. The borrowing happened on the strength of pledging Indian shares, which could have been done by Indian entities.</p>	Page 13	<p>a) It is submitted that the contention that the Assessee ought to have borrowed funds in India is being raised for the first time and has not been raised by the lower authorities in the orders passed by them. As submitted above, the Revenue is not permitted to raise fresh grounds for denying the benefits of India-Mauritius DTAA, accordingly, the fresh contention raised should not be taken cognisance of.</p> <p>b) It is further submitted that the Revenue cannot step into the shoes of an assessee and then direct as to how the business is to be conducted by the assessee (SA Builders vs. CIT (288 ITR 1)). The money was borrowed outside as the terms of borrowings were more favourable and suitable to the group entities. Accordingly, it is submitted that the Revenue cannot insist that the Assessee ought to have borrowed money in India and therefore, the contention is contrary to the settled principles of law.</p> <p>c) Without prejudice to the above, the Assessee submits that the money could not be borrowed in India on the strength of VEL shares since the existing Reserve Bank of India ('RBI') regulatory framework did not allow banks to lend money against the pledge of shares above the limit specified under the regulations and made it difficult to raise money based on the value of VEL shares. Further, under the FEMA regulations, a company could not borrow money under the External Commercial Borrowings ('ECB') route to pay off its existing rupee loans. (Para 123, Page 82 of ECL ITAT PB)</p> <p>d) In fact, in view of the aforesaid restrictions, ETHL attempted to monetize the value of VEL shares from non-</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>ii) The whole exercise of acquisition is totally farcical and loan arrangement, a camouflage, as ETIL was a company created on paper without any substance and has had a very short existence before this transaction.</p>		<p>banking financial companies (NBFCs) (that also had a call option) i.e. with IDFC for 1.95% and TOT for 3.85%, however, ETHL was unable to borrow money on favourable terms from these NBFCs as the value of borrowing, interest rates etc. were not attractive. In addition to the above, ETHL was highly debt laden and in default of the listing agreement (Point B, Page 1707 of ECL ITAT PB).</p> <p>e) In view of the above, ETHL was unable to borrow money due to various regulatory restrictions and because of overly leveraged balance sheet. Therefore, the argument of the Revenue that the money ought to have been borrowed in India on the strength of VEL shares is baseless and contrary to the evidence on record.</p> <p>f) The Assessee further submits that since the money could not be borrowed in India on favourable terms, the only other option was to borrow money at the level of holding company in Mauritius since that would allow full utilization of value of VEL shares for the purpose of borrowing which were held by ECom & ETIL at one go. As submitted above, the increase in FDI cap to 74% allowed the borrowing of funds outside India. It is further incorrect to say that the money borrowed was not utilized by the entities in Mauritius. As submitted on multiple occasions, out of USD 1.1 billion loan, ~USD 525 million was infused by ECML in ECL (Point B, Page 1707 of ECL ITAT PB) of which ~USD 145 million was infused in ECom and ~USD 330 million was infused in ETIL (as also USD 50 million by ECL to repay EIHL for short term loan taken by ECL for investing in ETIL). Therefore, the argument of the Revenue that the borrowed money was not utilised by the companies in Mauritius is without any basis and is contrary to the evidence on record. (Para 174-177, Page 111 of ECL ITAT PB)</p> <p>g) As mentioned in this note and earlier submissions as well, incorporation of ETIL, transfer of VEL shares to ETIL from ETHL, loan borrowings by Mauritius entity, liquidation of ETIL etc. were all transactions undertaken</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			for commercial/ business reasons and it is incorrect on the part of the Revenue to allege that the entire arrangement was farcical and loan arrangement was a camouflage, which is contrary to the evidence on record. (Para 123-128, Page 82 and Para 129-134, Page 85 of ECL ITAT PB)
	iii)Secondly, a vehicular movement has been structured by migrating the ETHL shares out of India through ETIL to ECL, Mauritius. It is important to highlight that besides settling the loan, balance monies were again for the benefit of the Ruia family	Page 13	<p>a) It is submitted that the contention that monies were again for the benefit of the Ruia family is being raised for the first time and has not been raised by the lower authorities in the orders passed by them. As submitted above, the contention of the Revenue ought not to be taken cognisance of and the same is liable to be rejected.</p> <p>b) Without prejudice to the above, it is submitted that the transition of shares from ETIL to ECL was by virtue of the loan agreement with SCB. The lenders wanted a direct pledge on the shares of VEL which were held by ETIL. An application was made to RBI for pledge of the VEL shares for loan taken by ECML from SCB however, the approval of RBI was not forthcoming and eventually the application made by ETIL was rejected by the RBI. In view of the rejection by the RBI, there was no option left but to liquidate ETIL as in the absence of pledge of VEL shares the loan agreement could be cancelled by the lenders. The Assessee submits the fact that an application was made to the RBI for a pledge demonstrates that the first intention of the Assessee was not to transfer the ownership to a Mauritius entity by way of liquidation and the liquidation was driven by circumstances beyond its control. Hence, the argument of the Revenue that vehicular movement has been structured for migrating the shares outside India for tax avoidance reasons is baseless and contrary to the evidence on record. (Para 136-137, Page 89and Point C, Page 1708 of ECL ITAT PB)</p>
(III) Loan transactions and loans and borrowings conducted through various trusts to Ruia family			
	Diagrammatic representation of use of	Page 14	a) The chart referred clearly demonstrates that the loan borrowed of USD 1.4 billion was utilised for the purpose

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	USD 1.4 billion Loan dated 29.6.2007		<p>of business and not a single rupee has gone to the Ruia family members and the Revenue has not brought any evidence on record to prove that such monies have actually gone to the Ruia family members.</p> <p>b) The use of the funds raised vide the loans was explained to the AO as referred to on page 231 of the assessment order</p>
	<p>Loan of USD 3.59 billion taken by the ECIL(M) on the pledge of HEL/VEL shares owned by the Group (onshore & offshore: no distinction)</p> <p>• Balance of 2.20 Bn</p>  <pre> graph LR ECL["ECL (M)"] -- "USD 2.20 Bn Loan" --> TH["Telecom Holding Cayman Island"] TH -- "USD 2.20 Bn for purchase of ECL(M) from ECHL(M)" --> ECHL["ECHL (M)"] ECHL -- "USD 2.20 Bn dividend payment to ECL Cayman" --> EGCI["Essar Global Cayman Island"] EGCI -- "Beneficiaries through various British Virgin Island Trusts" --> R["Eight Ruia Family Members"] </pre>	Page 14	<p>a) It is submitted that the contention that monies were given to 8 family members of the Ruia family is being raised for the first time and has not been raised by the lower authorities in the orders passed by them. As submitted above, the contention of the Revenue ought not to be taken cognisance of and the same is liable to be rejected.</p> <p>b) Without prejudice to the above, it is submitted that out of the USD 3.59 billion loan taken by ECML, USD 1.4 billion was used to repay the loan of USD 1.4 billion to SCB, UK (USD 1.1 billion loan was refinanced to USD 1.4 billion). Copies of loan agreements for USD 1.1 billion, USD 1.4 billion and USD 3.59 billion are attached at Page 642 to 962 of ECL ITAT PB.</p> <p>c) The balance funds of ~ USD 2.18 billion were lent by ECML to Telecom Holdings (Cayman) Limited, Cayman Island ('THCL') to acquire shares of ECML (and consequently indirectly shares of ECom and the Assessee) from ECHL in line with the requirement of the lenders to have a separate standalone structure which could be efficient from a security enforceability standpoint such as there being no other liabilities, better conditions for invocation of pledge, etc. The money ultimately went to EGFL, Cayman Islands as dividend declared by its subsidiary ECHL. (Para 180, Page 113 and Page 1719 of ECL ITAT PB)</p> <p>d) The loan agreement further provided that the money received by EGL as a dividend would be used for general investment and corporate purpose (Clause 3 Page at Page 878 of ECL ITAT PB). The same is also evident from the cash flow statement of EGFL for Financial Year ('F.Y.') 2007-08 which shows that the money has been used for</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>investment in subsidiaries and group companies and corporate purposes (refer cash flow statement of EGFL at Page 1597 of ECL ITAT PB). (Para 180, Page 113 of ECL ITAT PB)</p> <p>Therefore, the argument of the Revenue that the amount of dividend given to EGFL has benefitted Ruia family members is factually incorrect and contrary to the evidence on record. The Assessee further submits this contention has been raised for the first time before the Tribunal without any basis and the same was not raised by any of the authorities below.</p>
		<p>Page 15</p>	<p>a) As stated above, the allegation round tripping has not been raised by the lower authorities and has been raised for the first time before the Tribunal. Since this allegation was not made by the lower authorities, the Revenue is not permitted to raise the same before the Tribunal for the first time.</p> <p>b) Without prejudice to the above, there is no round tripping of funds (i.e. circular movement of funds originating from India, movement abroad and inflow of such funds back into India to claim treaty benefits/ tax avoidance scheme) involved in the facts of the present case. All transactions i.e. borrowings in India and outside India, pledge of VEL shares, liquidation of ETIL, sale of VEL shares and application of such funds for repayment of borrowings, have been undertaken for commercial/ business reasons i.e. monetizing the value of VEL shares and utilizing the same to fund expansion of the business (as explained above). Accordingly, the allegation of the Revenue as stated in the diagram is entirely misplaced and is overlooking the business/ commercial realities.</p>
	<p>5. This is again a perfect case of round tripping. What is taken as a loan by ECIL(M) converts into an income in the hands</p>	<p>Page 16</p>	<p>a) At the time of execution of loan agreement, ECML was held by Essar Communications Holdings Limited, Mauritius (ECHL) (parent) and EGL (grand parent). ECHL was the holding company for passive telecom infrastructure business and, EGL was the holding company for all the businesses of the group and further had huge</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>of Telecom Holding Caymen Island when ECHL(M) the parent entity has sold the shares of the subsidiary which is the borrowing entity, and as a result, it now becomes an income of USD 2.20 billion in the hands of Telecom Holding Caymen Island.</p>		<p>borrowings and other obligations as a flagship company of the group. Therefore, the lenders under the loan agreement required that the VEL shares basis which the loan was being taken, to be held under a separate structure and not under the umbrella of EGL from security enforceability stand point. Accordingly, various steps were undertaken in line with the loan agreement, to separate the holding of VEL shares and house it under an independent structure. Therefore, the argument of the Revenue that the same is round tripping is perverse and without any basis in law since the steps were undertaken with commercial substance and to meet the requirement of the lenders. (Page 1719, 1737 and 1739 of ECL ITAT PB)</p> <p>b) It is further submitted that there is no “round tripping” as explained by Supreme Court in case of Vodafone International (supra) and JPC Report and the allegation has been made by the Revenue without any material in support of the same.</p>
	<p>6. Telecom Holding Cayman Island conveys this USD 2.20 billion as dividend to Essar Global Caymen Island through various beneficiaries entities situated in BVI and they in turn pass on the entire USD 2.20 billion to the eight Ruia family members.</p>	<p>Page 16</p>	<p>a) This allegation is factually incorrect as dividend of USD 2.18 billion was distributed by ECHL to EGL and not by THCL. It is further submitted that the dividend of USD 2.18 billion was not at all passed on to the eight Ruia family members and as explained above the same was used by EGL for investment and corporate purpose in India and outside India. It is further submitted that no dividend has been actually declared by EGL. The Revenue apart from making a bald allegation has not adduced any material which suggests that the loan amount was passed on to the Ruia family members.</p> <p>b) Without prejudice to the above, it is submitted that the issue before the Tribunal is regarding taxability of shares under Article – 13 of India-Mauritius DTAA and the above allegation has no bearing on the issue which arises for consideration of the Tribunal.</p>
	<p>7. The whole financials transaction undergoes</p>		

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	the following mutations:		
	a. It initially partakes the colour and character as a loan. It becomes an income in the second stage without any underlying commercial purpose.	Page 16	a) The explanation for the commercial purpose of the loan by ECML to THCL has been provided in response to Sr (III).5 of the Revenue submission above
	b. It mutates into dividend through a very complex structure with a sole idea to benefit the 8 Ruia family members and ultimately the consideration arising out of the sale of shares of these two Assesseees before this Hon'ble Tribunal is again used to payback all the pending loan across the Essar Group entities where Ruia family has a direct interest	Page 16	<p>a) This allegation is factually incorrect as submitted above, the amount of USD 2.18 billion was used by EGL for various business purposes and not a single penny has gone to the Ruia family members or repayment of loans across entities where Ruia family members have direct interest. As submitted above, the loan agreement provided that the amount of USD 2.18 billion was to be used for general investment and corporate purpose and as evident from the cash flow statement of EGL for the relevant year, the amount has been used for the same purpose. Further, the Revenue has not produced any evidence to support their allegation and in fact, the allegation is contrary to the evidence on record and is therefore liable to be rejected. (Page 878 and 1597 of ECL ITAT PB)</p> <p>b) It is also submitted that the amount received on sale of VEL shares was utilised to pay back the loan of USD 3.59 billion taken by ECML since the Assessee was a guarantor to the loan. However, the same does not bar the Assessee from claiming the benefit of Article – 13 of India-Mauritius DTAA. (Para 248, Page 149 and Page 1717 of ECL ITAT PB)</p>
	c. Most importantly, a commercial loan secured for business purposes ends up as family dividend for		a) This allegation is factually incorrect as submitted above, the amount of USD 2.18 billion was used by EGL for investment and business purposes and the same was not at all distributed as dividend to the Ruia family members. Neither any material is produced, nor any details are given

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>the Ruia family and the shares held through substance less entities namely the two Assesseees are sold to payback the loans.</p>		<p>by the Revenue for making this allegation. Therefore, in the absence of any material in support the aforesaid allegation, the same is liable to be rejected.</p> <p>b) It is further submitted that the Assessee cannot be termed as a “substance less” entity since it is an investment holding company and have been undertaking requisite investment holding activities in Mauritius (Page 1711 of ECL ITAT PB). Further, there are qualified people on the Board of directors (the Board) who have taken decisions concerning the affairs of the Assesseees, in Mauritius (Page 280-283 of ECL ITAT PB). The entities have also facilitated raising of substantial loans (from third party lenders). The directors are required to discharge obligations and undertake various duties under the Mauritian laws. Accordingly, the existence of these entities should be respected by the Revenue. Without prejudice to the above, if the Revenue alleges that the Assessee is substance less then the income (for taxability of income from sale of VEL shares) ought not to have been taxed in its hands. Reliance in this regard is placed on Vodafone International (supra) [Para 98], Sri Meenakshi Mills Ltd. [1967] 63 ITR 609 (SC), Aditya Birla Nuvo Ltd. (342 ITR 308) (Bom) and Alibaba.Com Singapore E-Commerce (P.) Ltd. [2023] 459 ITR 508 (Bombay). Accordingly, the capital gain charged by the AO in the hands of the Assessee is incorrect and bad in law.</p>
	<p>d. The net effect of the whole transaction can be reduced to a one liner – Essar Group entities have loans to be discharged in various group companies. These loans ultimately got discharged by selling</p>	<p>Page 17</p>	<p>a) As submitted above, the loan was taken by ECML with a view to monetize the value of VEL shares and use the funds for expansion of business [Refer response to Sr. (II). 1 to 6 of Revenue submission and response to Sr. (III).7(b) of Revenue submission]. Therefore, the conclusion of the Revenue that loans to be discharged by various entities was discharged by selling shares of Essar is factually incorrect.</p> <p>b) It is further submitted that the conclusion of the Revenue that the shares belong to an Indian entity and entities were created in Mauritius to migrate and monetize the shares without paying taxes is factually incorrect and contrary to</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>the Essar shares held by the Ruia family. The shares belong to an Indian entity. Ruia family are residents of India. Whereas, illusory super imposing entities where created in Mauritius to migrate and monetize the share, the sale and its consideration without paying taxes</p>		<p>the evidence on record. As explained above, due to various regulatory restrictions, the money was borrowed outside India as the terms and conditions of the loan were far more favourable and, the shares held by ETIL were transferred to ECL on liquidation due to a requirement under the loan agreement regarding direct pledge of shares which was rejected by the RBI. Therefore, the argument of the Revenue ignores the compelling circumstances which led to migration of shares to Mauritius. [Refer response to Sr. (II). 1 to 6 of Revenue submission]. Without prejudice to the above, the benefit of India-Mauritius DTAA was available even without the migration of VEL shares to Mauritius as the Assessee could have sold the shares of ETIL or ECML could have sold the shares of ECL. (Para 123-128, Page 82 and Para 129-134, Page 85 of ECL ITAT PB)</p> <p>c) It is further submitted that the conclusion of the Revenue that all the family members of Ruia family are residents in India is again factually incorrect as Mr. Ravikant Ruia (A.Y. 2010-11 onwards) and Mr. Rewant Ruia (A.Y. 2011-12 onwards) were not residents in India for the year under consideration therefore, assuming without admitting, even then the whole of control and management of the company is not in India. Consequently, the Assessee cannot be considered as a resident in India under section 6(3) of the Act.</p>
	<p>e. Most importantly, it needs to be highlighted that there is no foreign investment or any other investment coming into India. This is a reverse transaction. Indian shares worth USD 3.2 billion is</p>	<p>Page 17</p>	<p>a) The Assessee submits that this allegation is factually incorrect. ECL had infused USD 400.61 million in ETIL (Point A, Page 1706 of ECL ITAT PB) which was partly from the borrowings of USD 1.1 billion and partly from the borrowings from overseas group companies. (Page 5 of ECL ITAT PB)</p> <p>b) The Assessee has already explained the rationale behind migration of VEL shares from ETIL to ECL (Please refer response to Sr. (III).7(d) of the Revenue submission)</p> <p>c) Therefore, the contention of the Revenue that there is no FDI coming into India and this is reverse transaction of</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	migrated and monetised outside India through sham transactions and colourable devices.		shares being migrated through sham transactions and colourable devices is without any basis and bad in law.
	f. Loan taken on the pledge of shares owned by ECom(M) and ECL(M)/ ETIL (India)/ ETHL (India) has gone as dividend income in the hands of key holding company of the entire Ruia Group i.e., Essar Global Limited Cayman Islands. This company is held by eight of Ruia family members as beneficiaries of various trusts created in B.V. Island.	Page 17	<p>a) As explained above, the funds received as dividends were used by EGL, Cayman Islands for investment and business purposes and the same was not passed on to the Ruia family members. [refer response to Sr. (III).7(b) of the Revenue submission]</p> <p>b) It is submitted that the entities above EGL, Cayman Islands have no role to play and are not relevant for the transaction under consideration in the present appeal as no transactions have taken place with those entities by the Assessee. In any case, the Assessee further submits that the rationale behind the aforesaid structure was explained to the lower authorities during the course of proceedings. (Page 1735-1740 of ECL ITAT PB).</p> <p>c) For completeness, it is further submitted that EGL, Cayman Island is not held by the members of Ruia Family but the shareholders are the private companies which in turn are held by discretionary trusts (some of the beneficiaries are private companies of which Ruia family members are shareholders) incorporated under Star laws of Cayman Island and not British Virgin Islands as contended by the Revenue. (Para 27, Page 24 of ECL ITAT PB)</p> <p>d) Without prejudice to the above, it is submitted that the aforesaid allegation made by the Revenue has no bearing on the question that arises for consideration of the Tribunal in the present appeal i.e. taxability of capital gains in the hands of the Assessee under Article – 13 of India-Mauritius DTAA.</p>
	g. If this amount of USD 2.20 billion had gone directly as loan from ECML(M)	Page 17	a) Out of the USD 3.59 billion loan taken by ECML, USD 1.4 billion was used to repay the loan of USD 1.4 billion to SCB. Balance funds of ~ USD 2.18 billion were lent by ECML to THCL to acquire shares of ECML from ECHL in

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	to ECHL(M), it could not have paid the same to EGL Cayman Island as dividend income because the dividend income is only paid out of income or reserves on account of income.		<p>line with the requirement of the lenders to have a separate standalone structure which could be efficient from a security enforceability standpoint. (refer response above to diagram (III), Page 14 of the Revenue submission)</p> <p>b) In order to effectuate this separation, the lenders had required that THCL acquire from ECHL the aforesaid vertical and hence they required the USD 2.18 billion to be paid for as sale consideration for ECML shares (to transfer the vertical).</p> <p>c) The transactions were undertaken for commercial reasons and it is not open to the Revenue to rewrite/compare the transactions consummated with a hypothetical one such as a loan from ECML to ECHL.</p> <p>d) Without prejudice to the above, whether the dividend was given out of income or reserves or not has no bearing on the issue arising for consideration in the present appeal i.e. eligibility of the Assessee to claim benefits of India-Mauritius DTAA.</p>
	h. It is self-evident from the above that not a single USD/Rupee out USD 3.59 billion has not been utilised by ECL/ECom/ETIL nor ECML/ECIL.	Page 17	a) It is incorrect to say that the money borrowed was not utilized by the entities in Mauritius. As submitted above, the loan 3.59 was used to pay the loan of USD 1.1 billion loan of which ~USD 525 million was infused by ECML in ECL of which ~USD 145 million was infused in ECom and ~USD 330 million was infused in ETIL (as also USD 50 million by ECL to repay Essar Infrastructure Holdings Limited, Mauritius (EIHL or EGL, Mauritius) for short term loan taken by ECL for investing in ETIL). Therefore, the argument of the Revenue that the borrowed money was not utilised by the companies in Mauritius is without any basis and is contrary to the evidence on record. (Point B, Page 1707 of ECL ITAT PB)
	i. These have been used as mere conduits in transferring the monies from one	Page 17	a) As submitted above at response in point (a) to allegation at Sr. 5, Page 16 of the Revenue submission, the Assessee or any of the group companies cannot be termed as conduits since all the transactions have been carried out with commercial substance and as explained above, the money

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	entity to another and ultimately serving to the benefit of the various other Essar groups.		<p>was transferred from one group company to another with a business purpose. (Page 1735-1740 of ECL ITAT PB)</p> <p>b) It cannot be said that the entities involved in the transactions were conduits for the reason also that their genuineness was recognized by the providers of the loan. The lenders would not have required for the transactions to have been undertaken between the parties (and treated such transactions as the purpose of the use of funds in clause 3 of the facility agreement) unless the transactions were real, had commercial purpose and legal consequences.</p> <p>c) The Revenue has made bald allegation without bringing any material on record to controvert the commercial reasons for carrying out various transactions. Therefore, it is submitted that in the absence of any material in support of its allegation, the bald allegation made by the Revenue ought to be rejected.</p>
	j. Two things are critical- asset pledged remains to be VEL shares with situs in India and secondly, the entire borrowings have not been of any use to any of the entities referred above.	Page 18	a) While there is no dispute that the VEL shares were pledged and their situs was in India, it is factually incorrect to say that the borrowings were not used by the entities referred to by the Revenue, as the Assessee too received and invested from the loan proceeds as explained above. (Para 174-176, Page 111 of ECL ITAT PB)

(IV) Voluntary Liquidation of ETIL

<ol style="list-style-type: none"> 1. ETIL was incorporated in November 2004. 2. ETIL was liquidated on 28.07.2008. 3. The intent of so-called voluntary liquidation of ETIL 	Page 19	<ol style="list-style-type: none"> a) From a greater security enforceability standpoint, the lender (SCB, UK) had kept the route of liquidation of ETIL as a possible option to the pledge of VEL shares by ETIL. b) ETIL made an application for pledge of VEL shares to RBI on 12 February 2007 (under the USD 1.1 billion loan agreement) which shows that ECL did not want to liquidate ETIL straightaway without exploring the option
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Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>was clear from a loan agreement dated 31.01.2007 to which ETIL was not even a party and was rather happily talking about its business expansion</p>		<p>of pledging of shares. As no approval was forthcoming from the RBI even 6 months after the application was made, in the USD 3.59 billion loan agreement (which was more than 3 times the USD 1.1 billion loan), the consortium of lenders required liquidation of ETIL in order to migrate VEL shares to ECL so that the same could be pledged with the lenders with RBI's approval which was possible if the shares were held by a non-resident. Hence, the intent was to perfect the security for the lenders. In fact, the concerns of the lenders came true when the RBI vide letter dated 4 October 2007 finally and officially rejected the application made by ETIL to pledge VEL shares. Therefore, the only way to secure lenders interest was to liquidate ETIL and provide pledge of the shares. (refer Page 1708 of ECL ITAT PB)</p> <p>c) It is important to note that in July 2008 ETIL was liquidated and the share were distributed to ECL by the liquidator after receiving the approval from the Income-tax Department vide letter dated 14 July 2008 [refer Page 284 of ECL ITAT PB]. After which an application was made again to the RBI for pledging of shares and it was only after the shares were transferred to ECL pursuant to liquidation, the RBI granted permission to pledge VEL shares in favour of the lender, vide approval dated 14 November 2008, in view of liquidation of ETIL. (Page 1708 of ECL ITAT PB)</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>4. None of the companies - ECL/ETIL were party to loan borrowed on the strength of the assets owned by them</p> <p>5. They were not aware about pledging of shares owned by them</p>	Page 19	<p>a) It is submitted that ECL was a party to the loan agreement to the USD 3.59 billion loan agreement as a guarantor and had given Non-disposable Undertakings to the lenders for USD 1.1 billion, USD 1.4 billion for ETIL shares and pledge of ECom and VEL shares to the lenders for USD 3.59 billion. In view of the above, it is incorrect to say that ECL was not aware of the pledging of shares owned by them and was not a party to the aforesaid agreements. (Page 1711 of ECL ITAT PB)</p> <p>b) ECL agreed to pledge the ETIL and ECom shares and the pledge agreements were tabled in the meeting of the Board of ECL held on 24 January 2007, 8 June 2007 and 16 August 2007 and were approved by the Board for further execution [Page 117 (Sr. 8) and Page 118 (Sr. 12,15) of AO order and Annexure L of submission dated 20 June 2016 filed with the AO]. (Para 183, Page 114 of ECL ITAT PB)</p> <p>c) ETIL agreed to pledge the VEL shares and the pledge agreements were tabled in the meeting of the Board of ETIL held on 15 January 2007, 8 June 2007 and 16 August 2007 [Page 128 (Sr. 19), 129 (Sr. 24 and 28) of the AO order and Annexure A of submission dated 20 June 2016 filed with the AO].</p> <p>The aforesaid events clearly show that ECL/ ETIL have considered the relevant loan and security documents in their Board meetings and approved/ actioned obligations under such agreements. Therefore, it is incorrect to say that ECL/ETIL were not aware of the pledging of shares and were not parties to loan agreements is factually incorrect.</p>
	<p><u>Key Inferences being drawn from the Voluntary Liquidation of ETIL:</u></p>		
	<p>A) No control over one's own creation or dissolution</p>	Page 19	<p>a) As mentioned above, in the USD 3.59 billion loan agreement, the liquidation of ETIL was mandated by the lenders (third party) in order to have a direct holding of the VEL shares as it provided an enhanced enforceability of</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>security to the lender. Further, the failure to liquidate ETIL as per the loan agreement was, inter alia, would have resulted into default with loan agreement and cancellation of loan leading to amount becoming immediately payable to the lenders (Page 914 of ECL ITAT PB). Therefore, the liquidation of ETIL was driven by commercial considerations as seen from the aforesaid sequence of events. The said liquidation was in the interest of these parties, who in the absence of such liquidation would have been regarded as defaulters. Given this, ETIL noted in its resolution that the same is inter alia in the best interest of the shareholders. (Para 139, Page 90 of ECL ITAT PB)</p> <p>b) It should also be noted that liquidation of a company is a shareholder's function and there is no provision under the Companies Act, 1956 which empowers a company to restrict its shareholders from voluntarily dissolving a company. Therefore, the argument of Revenue that ETIL did not have control over its own liquidation is without any basis and bad in law. Further, it is submitted that after the Assessee in a meeting of its Board passed a resolution for liquidating ETIL, the same was subsequently discussed in the Board meeting of ETIL and further proceeded with the liquidation. (Para 140, Page 90 of ECL ITAT PB)</p> <p>Given the above, the Assessee would like to submit that the liquidation was driven by commercial considerations accordingly, no adverse inferences can be drawn against the Assessee.</p>
	B) No control over pledging one's own shares and in what manner	Page 19	Refer response to Sr (IV).5 of the Revenue submission

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	C) The owners of the shares had been denied the rightful claim and use of the money borrowed based on one's own pledged shares	Page 19	a) As submitted above, ECL/ETIL have discussed in the Board meeting the loan agreements and security agreements that were required to be executed in order to borrow money under the various loan agreements. Therefore, it is incorrect for the Revenue to contend that ECL/ETIL have been denied the rightful claim and use of the money borrowed basis the pledged shares and did not have control over decision to sell shares and its proceeds since the aforesaid are the consequences of agreeing to such arrangements. (refer response to Sr. (IV). 4-5 of the Revenue submission)
	D) Owners did not have control over decision to sell share, and how to sell the shares and its proceeds	Page 19	b) It is further submitted that in fact ECL has benefitted out of the loans taken by ECML because out of the loan of USD 1.1 billion taken in January 2007 from SCB UK, USD 526 million was paid by ECML to ECL as share application money on behalf of ECML. ECL in turn used the funds so received to infuse capital in ETIL and in ECom (which was effectively used by ETIL to acquire VEL shares and repay its existing debts taken to acquire VEL shares and by ECom to repay its existing debts taken to acquire VEL shares) (Page111 and 112 of ECL ITAT PB).
	E) More importantly, owners did not have right to utilize the sale proceeds, which has been used by various other companies of this group	Page 19	c) In large multinationals, it is normal for companies to support one another to maximize overall benefit to all in the group. Further, it would be appreciated that it is natural for a subsidiary company to act for the benefit of its holding company. Maximizing shareholders' wealth is the ultimate objective of any company (Page 112 of ECL ITAT PB). d) The investments in VEL by ECL yielded significant gains/ value to ECL and ECL was able to support/assist its overseas group entities to make other investments. It may also be noted that various group entities have supported/ assisted ECL. Illustratively, when ECL required funds for acquiring ETIL shares, ECL obtained funds in the form of interest-free and temporary loans from EIHL, Mauritius (the then shareholder of ECL) and EGFL, Cayman Islands (the then indirect shareholder of

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>ECL). Further, group entities also provided non-monetary support to ECL such as assistance/ support of different personnel with relevant expertise in various fields. The group entities co-operated with each other for reciprocal/ mutual benefit and interest (Page 112 of ECL ITAT PB).</p> <p>e) The sale of the shares held in VEL has been discussed by the Board of directors of the Assessee. Kindly refer Sr C of positive case sheet attached as Exhibit A on Page 1727 of ECL ITAT PB.</p> <p>f) As regards utilisation of sale proceeds, it may be noted that the Assessee was a guarantor to the 3.59 billion loan granted to ECML by a consortium of lenders led by SCB, UK in August 2007 (Page 1711 of ECL ITAT PB). As the loan was to be repaid and ECML (the borrower) did not have the funds to repay, the Assessee sold its VEL shares in order to meet its obligations under the loan agreement towards repayment of the facility (Para 184, Page 115 of ECL ITAT PB). The tax authorities cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder - Vodafone International (SC) (supra) (Para 97 of Radhakrishnan), Becton Dickinson (Mauritius) Ltd (434 ITR 180) (AAR) and E*Trade Mauritius Limited (2010) 324 ITR 1 (AAR) (Para 188-189, Page 116 and Page 1717 of ECL ITAT PB)</p> <p>g) The transactions were undertaken for commercial reasons and it is not open to the tax authorities to step into the shoes of the Board of directors and question the business purpose of a transaction. The Assessee had also benefited from the various loans that were raised on the basis of ETIL/VEL shares and therefore, it is incorrect for the Revenue to argue the aforesaid as it is contrary to the facts on record. (Para 184-187, Page 116 of ECL ITAT PB)</p>
	F) Decision making and authority does not lie with ECL/ECom		

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>a) Cerebral Control in India: All the vital/cerebral functions of ECL and ECom being centrally controlled and managed from India by Essar Group executives based in India at the instance of Ruias.</p>	<p>Page 19</p>	<p>a) The Revenue has failed to appreciate that:</p> <ul style="list-style-type: none"> i) All the directors on the Board for A.Y. 2012-13 were residents of Mauritius except Ms. Dina Wadia (Para 16, Page 21 of ECL ITAT PB) who was appointed by the lenders. ii) None of the directors on the Board for A.Y. 2007-08 to A.Y. 2012-13 were residents of India except Ms. Dina Wadia (Page 1626 of ECL ITAT PB) who was lender's nominee director on the Board. iii) The Board of directors have taken relevant decisions in the meeting and thereafter have passed resolutions authorising various personnels of group companies for execution of agreements and security documents. This fact has also been accepted by the AO and CIT(A) that the group personnels were authorised by the Assessee. [Page 92-95 of ECL CIT(A) order and Page 116-118 of ECL Assessment Order] (Page 1712 of ECL ITAT PB) iv) The agreements and security documents have been signed and executed outside India. (Para 34-39, Page 28 and Page 1712 of ECL ITAT PB) v) There is no evidence or material which shows that any decision was taken by personnel of group companies or much less that the decisions were taken in India at the instance of Ruia family members. (Para 34-39, Page 28 and Page 1712 of ECL ITAT PB) vi) Typically, the relevant boards of the respective entities authorise the directors along with experienced personnel of the group with relevant expertise, for executing the documents under delegated authority for administrative convenience. This is not at all uncommon amongst large business houses/ groups and helps optimise cost and bring efficiencies. <p>b) The only basis of Revenue's conclusion that the control and management of the Assessee is in India is that the agreements and security documents have been signed by</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>the personnel of group companies who were residents in India.</p> <p>c) The Assessee submits that the argument of the Revenue is incorrect and unsustainable in law for the following reasons:</p> <p>i) According to the Revenue the person signing and executing the documents is same as the Board of directors who have authorised him to do so. This is directly in contradiction with the law laid down by Bombay High Court in case of Narottam Pereira Ltd (1953) (23 ITR 454) which has held that the control and management is with the Board of directors and not with the persons who have been delegated certain functions.</p> <p>ii) In any case, the Revenue has not brought any material on record to even suggest that the decisions have actually been taken or emanated from India and much less at the instance of Ruia family members. On the contrary, all the meeting for A.Y. 2012-13 and for earlier years have taken place in Mauritius.</p> <p>Therefore, the argument of the Revenue that the cerebral control is in India is perverse, baseless and contrary to the evidence on record.</p>
	<p>b) Unified Central Command is obvious when viewed holistically: Entire process i.e. creation of various entities, consolidation of shares (of VEL/HEL) in various entities – with varying percentages of onshore and</p>	<p>Page 19</p>	<p>a) The Assessee submits that the argument of the Revenue that there is a unified Central command when viewed holistically is also unsustainable and without any evidence in support. As explained above, the evidence on record shows that the control and management of the Assessee rests with the Board of directors in Mauritius. Further, the Revenue has not found any evidence or material to support its conclusion that the decisions have been taken by Unified Central command and not by the Board of Directors. The argument of the Revenue is based on following allegations/ inferences:</p> <p>i) <u>Creation of various entities:</u> Entities have been incorporated for business and</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>offshore, borrowings for the benefit of Essar Group and to fund share acquisition by pledging the very shares of VEL, passing on benefit of rights issue to a subsidiary without consideration, creation and dissolution of ETIL to make onshore shares as offshore, the impugned transactions of transfer/sale of shares in 2011 and use of sale proceeds to repay the loans and for the benefit of Essar Group is a unified exercise controlled and managed centrally in India by the Essar Group and not isolated independent decisions taken by the entities concerned.</p>		<p>commercial reasons as explained before the AO and CIT(A) (Para 152-153, Page 94 and Page 1735-1740 of ECL ITAT PB)</p> <p>ii) <u>Consolidation of shares in various entities with varying percentage onshore and offshore:</u> This allegation is factually incorrect and there is no consolidation of VEL shares onshore and offshore. The shares of VEL held by ETIL were migrated on liquidation due to various regulatory and commercial reasons as explained above.</p> <p>iii) <u>Borrowing for the benefit of Essar group:</u> The borrowing based on the VEL shares was for the benefit of the Assessee and also the group. The same is permissible in law and does not show lack of control and management as held by Vodafone International (supra) (Para 79)</p> <p>iv) <u>Funding of VEL shares by pledging the shares of VEL:</u> The same is a normal transaction which takes on day to day basis in the commercial world. For example, an individual buys a house with borrowed money by pledging the same house (which he is buying) with a bank.</p> <p>v) <u>Passing on benefit of rights issue to subsidiary without consideration:</u> These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p> <p>vi) <u>Creation and dissolution of ETIL to make onshore shares as offshore:</u> The Assessee submits that the very transfer of shares to ETIL and application to RBI for pledging of VEL shares by ETIL shows that the Assessee did not want to transfer the VEL shares outside India and the same was done only after the rejection by RBI of the pledge application. (Para 136-137, Page 89 and Point C, Page 1708 of ECL ITAT PB)</p> <p>vii) <u>Use of sale proceeds to repay the loans and for the</u></p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p><u>benefit of Essar group:</u> The loan was taken for the benefit of the Assessee and for the expansion of the group. Therefore, the repayment of the same from the sale of shares does not in any manner show that the Assessee is not in control of the affairs of the company. Supreme Court in case of Vodafone International (supra) has specifically held that the same is permissible and there is nothing incorrect about it in law. (Para 248-251, Page 149 of ECL ITAT PB)</p>
	<p>c) No role in decision making: mere ratification, acquiescence to the direction given by executives of Essar Group from India by the Board of Mauritian Companies.</p>	<p>Page 20</p>	<p>a) It is incorrect on the part of the Revenue to allege that there is ratification and acquiescence to the directions issued by executives of Essar group from India. As explained above, the Revenue has not produced any material/ evidence to show that directions have been issued by executives of Essar group and such directions have been issued from India. As already submitted, the decisions have been taken by the Board of directors in the meeting held in Mauritius as evident from various material/ evidence on record. Therefore, the contention/ allegation of the Revenue is without any basis and is liable to be rejected in law. (Para 99, Page 65 and Page 1712 of ECL ITAT PB)</p>
	<p>d) Three Agreements for acquisition of HEL/VEL shares in the name of ECom by the Essar Group. (i) Share Purchase Agreement dated 03.07.2004 between Distacom India Co. Limited and ECom (formerly Essar Telecom India Holdings Limited)</p>	<p>Page 20</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>and Essar Global Limited Mauritius (now EIHL). The agreement with Distacom has been signed by Neeraj Gupta, an India based employee of Essar Group. This person has no employment relationship (as evident from the meagre expenditure on this account in the Financial Statement) or contractual relationship (as evident from the Board minutes).</p>		
	<p>(ii) The (Share Purchase Agreement dated 03.07.2004 between Distacom India Co. Limited and ECom) agreement has Essar Global Ltd. Mauritius as co-contracting party and requires Essar Global Mauritius to ensure that ECom fulfils all the conditionalities of the agreement. The</p>	<p>Page 20</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>

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	<p>role of Essar Global limited, Mauritius being pivotal to the affairs of ECom(M) and ECL(M), the Board minutes of ECom(M) were examined to understand the role assigned to this company. However, there is no mention, discussion, agreement or understanding with regard to Essar Global Ltd., Mauritius assuming such role in acquisition of shares from Distacom.</p>		
	<p>(iii) Various decisions for complying to Clause 2 of the agreement has not been taken by the Board of ECom(M). It is not known as to who has taken this vital decision in respect of acquisition of shares of Hutchison Max Telecom Pvt. Ltd. India (HMTL),</p>	<p>Page 21</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>even though the same is claimed by the Applicants to be acquired by ECom(M).</p>		
	<p>(iv) Share Purchase Agreement dated 16 July 2004 between ECom (formerly Essar telecom India Holdings Limited) and Hutchison Telecommunication (India) Limited (HTIL-BVI). The acquisition of 19.60% shares of HMTL, as sequel to the Agreement with Distacom by ECom is for a consideration of promissory note issued by HTIL (BVI) in favour of Essar for an amount of USD 76,633,333.</p>	<p>Page 21</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>
	<p>(v) The agreement has been signed by Vikash Saraf, Sr. Executive of Essar Group in India. This person has no employment relationship (as evident from the</p>	<p>Page 21</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	meager expenditure on this account in the Financial Statement) or contractual relationship (as evident from the Board minutes).		
	(vi) Share Purchase Agreement dated July... 2004 (date not provided) between ECom and HTIL (BVI) Holdings Limited. (This agreement has not been provided by the Assessee).	Page 21	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
	(vii) As regards the acquisitions of 2,12,54,008 of HMTL from Distacom by ECom in 2004, the source of acquisition is submitted to be loan from Amaranth LLC and ADRC Limited vide their agreement dated 20 July 2004 with Essar Global Ltd, Mauritius	Page 22	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>(presently EIHL) as the guarantor and ECom(M) as the borrower. In this agreement, Essar Global Limited, Mauritius has entered into agreement jointly with ECom, even while it has been designated as guarantor. The responsibilities of Essar Global Limited Mauritius is absolute towards the performance of the Agreement required to be done by Essar Group which could be understood from para 15 of the agreement.</p> <p>However, there is no deliberation with regard to such overarching role of Essar Global Ltd Mauritius in the relevant Bord minutes of ECom.</p>		
	(viii)Some of the noteworthy definitions as defined in para 1.1	Page 22	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>of the agreement and applied to the stipulations in the agreement are as under:</p> <ul style="list-style-type: none"> ○ “Essar Group means the groups of companies affiliated with the Ruia family”. ○ Control means the power to direct the management and the policies of an entity whether through the ownership of voting capital, by contract or otherwise. ○ Clause 7.2 of the agreement stipulates that upon change of control of the Ruia family, the loan facility for acquisition of shares from Distacomceases to have effect 		
	<p>(ix) The agreement has been signed by Neeraj Gupta, an Essar Group Senior Executive based in India on behalf of both ECom Mauritius and Essar Global Mauritius.</p>	<p>Page 23</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	(x) From the contents of the agreement it is clear that all decision and actions have been taken by Senior Executives of Essar Group in India and the loan is based on the foundation of control, management and affiliation by 'Ruia family'	Page 23	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
	(xi) Subsequent acquisition of 4,397,381 shares of HEL on account of right issue of HEL- HEL has issued Right issue for subscription of 6/29 shares by its shareholders. ECom Mauritius by virtue its ownership of 6.19% share in HEL is eligible to avail of Right issue. However, even while its newly acquired subsidiary ECHL(M) has not made any payment	Page 23	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.

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	<p>towards this rights issue, the share acquired through the right issue have been transferred in its favour. The Board has not deliberated upon commercial substance of this transfer.</p>		
	<p>e) Rights shares having been transferred to the wholly owned subsidiary, without payment of any consideration and without the Board discussing and deciding to this effect, leads to the inference that the various corporate entities among the group companies lack their separate corporate identity.</p>	<p>Page 23</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>
	<p>f) Another striking feature observed from the Board minutes corresponding to the loan facility dated 20.07.2004 is that While the minutes suggest the possible</p>	<p>Page 23</p>	<p>a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>source of subscription to the right issue as loan from Essar Infrastructure Holding Ltd., in actual practice the right issues has been subscribed out of short-term loan from American Express Bank.</p>		
	<p>V. Role of key executives starts from para 33 (internal Page 87 of CIT(A) order up to Page 134) (None of which was disputed before the Hon'ble Tribunal)</p>	Page 24	<p>a) The Assessee submits that the allegations made by the AO in the assessment order which have been repeated by the CIT(A) in its order were rebutted in detail before the CIT(A) by way of written submission filed by the Assessee and were referred to at the time of hearing before the Tribunal. Therefore, the contention of the Revenue that relevant aspects have not been disputed by the Assessee is incorrect and contrary to the evidence on record.</p>
	<p>1. Para 33 - 33.3 of CIT(A) order deals broadly on the above aspect including the references of key persons individually</p>	Page 24	<p>a) Here the CIT(A) has provided profiles of persons authorised by the board of ECL. The profiles themselves show that the persons appointed are qualified people having relevant expertise.</p>
	<p>2. Page 92 of CIT(A) order contains a table of persons authorised as per Board minutes for ECL(M).</p>	Page 24	<p>a) The learned AO/CIT(A) have also accepted the fact that various people have been authorized by the Board of the directors of the Assessee. [Page 92-95 of ECL CIT(A) order and Page 116-118 of ECL assessment order]. Further, it is submitted that there is a significant difference between taking decisions (which are taken by the Board) and execution of documents (done by authorised signatories under delegated authority by the Board). It is a legally accepted that a decision maker may be an executor of the said decision, however, the executor of a decision</p>
	<p>3. Page 92 – 95 of CIT(A) order refers to the person authorised as per Board minutes along</p>	Page 24	

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	with purpose of authorisation in the case of Essar Power India Holdings Limited which later became ECom.		<p>may not be the same person/ individual who has the authority to take a decision. Therefore, the facts on record show that the decision have been taken by the Board of directors, and they have authorised relevant persons for execution of transactions. (Para 37, Page 29 and Page 1712 of ECL ITAT PB)</p> <p>b) Name of Essar Power India Holdings Ltd was subsequently changed to Essar Communications Limited (on 12 December 2005)</p>
	4. Page 96 of CIT(A) order refers to the same in the case of ECom.	Page 24	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
	5. Page 104 of CIT(A) order refers to ECML Mauritius.	Page 24	a) These facts do not pertain to the appeal of ECL and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
	6. Page 105-107 of CIT(A) order refers to ECIL.	Page 24	
	7. Page 107 – 119 of CIT(A) order refers to ETIL which transferred its onshore holding in VEL to ECL and migrating it into offshore	Page 24	a) As submitted above, the migration of shares by ETIL to ECL was due to reasons beyond the control of the Assessee and was necessitated as a consequence of the failure to obtain pledge approval from RBI, in order to achieve the commercial purpose of monetising the value of VEL shares by raising offshore loans.
	8. Page 120 and 121 of CIT(A) order - Date wise chart of Board minutes / written resolutions of ECL, ECom, ECML and	Page 24	a) The Mauritius Company law allows the Board to conduct the business of the companies through written resolutions. As per Section 158 read with Eighth Schedule of the Companies Act, 2001, in Mauritius a written resolution is as valid and effective as if it had been passed at a meeting of the Board duly convened and held. Further, as per the

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	ETIL		settled judicial position on the subject, it is only the control and management of the year in which the income is earned that is relevant for determining the residential status of that year. In the present case, the Assessee held 11 Board meetings discussing various affairs of the company in detail and taking decisions key to its affairs, during the year under consideration i.e. F.Y. 2011-12 (and no written resolutions were issued during that year. (Para 65, Page 46 of ECL ITAT PB)
	9. Page 121 – 124 of CIT(A) order - Serious discrepancies in Board minutes of ECL Mauritius up to 16.08.2007 – Incidents casting doubt over CMC in Mauritius.	Page 24	<p>a) It is submitted that there are no discrepancies in the Board minutes but only clerical/ administrative errors that have been pointed out by the lower authorities and the same have been explained by the Assessee before the lower authorities. (Responses to the errors pointed by CIT(A) Page 121-124 of ECL CIT(A) order - refer Sr. No. 1-19 of Exhibit B on Page 1729 of ECL ITAT PB)</p> <p>b) These minutes do not relate to the year under consideration and have no bearing on availability of India – Mauritius DTAA benefits for determining taxability of capital gains arising from sale of the VEL shares in the hands of the Assessee. However, the Assessee in any case have provided clarification before the lower authorities. (Page 1712 and 1725 of ECL ITAT PB)</p>
	10. Page 124 – 126 - Serious discrepancies in Board minutes of ECom Mauritius up to 16.08.2007 – Incidents casting doubt over CMC in Mauritius.	Page 24	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
	11. Page 127 – 133 - Board minutes of ECL and ECom for the F.Y. 2010-11 and	Page 24	<p>a) For responses to the errors pointed by CIT(A) Page 127-138 of ECL CIT(A) order - refer Sr. No. 20-27 of Exhibit B on Page 1731 of ECL ITAT PB</p> <p>b) In response to Revenue's allegation in para 34.2 of the</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	2011-12 (observations/ instances casting serious doubt over the genuineness of the meetings and the recording of minutes)		CIT(A) order [Page 134 of ECL CIT(A) order], it is submitted that it is evident from the due diligence report from BLC Chambers, the Board minutes of ECL for F.Ys 2010-11 and 2011-12 had been contemporaneously shared with BLC Chambers and the report of BLC Chambers was contemporaneously provided to the MRA vide the application dated 26 April 2012. The report also summarizes the said minutes (refer Page 1649 of ECL ITAT PB). It is also relevant to note that extracts of various Board meetings including for the relevant year have been contemporaneously shared with BLC Chambers, third party lenders, Vodafone and Assessee's auditor. Hence to allege that the Board minutes of F.Y. 2010-11 and 2011-12 are of doubtful authenticity, is completely misplaced and should be rejected. (Para 234, Page 144 and Page 1714 of ECL ITAT PB)
	12. Page 134 to 138 brings out again the minutes for the F.Y. 2010-11 and F.Y. 2011-12 for doubtful authenticity.	Page 24	
	13. Page 141 of CIT(A) order - CIT(A) reiterates the findings of the AO as to the list of documents which were not submitted by the Assessee for F.Y. 2010-11 and 2011-12 even during the hearing on 6 April 2017 before the AAR.	Page 25	a) Kindly refer to response at Page 172-175 and Page 1724 of ECL ITAT PB
Board of Directors of the Group Companies Abdicating Responsibility related to the Affairs			
A.	As is evident, from the minutes of the Board, discussed supra, and also the Board minutes of ECL(M), that the decision for voluntary liquidation has not taken	Page 25	a) The contention of the Revenue is factually incorrect as the decision regarding liquidation of ETIL was taken by ECL in its Board meeting held on 10 September 2007 (Page 633 of ECL ITAT PB) and was further noted by the Board of directors of ETIL on 12 October 2007. Therefore, it is incorrect to say that the decision regarding liquidation of ETIL was not taken by ECL or ETIL. (Para 129, Page 85

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	place in Board minutes of any of the relevant Companies, that is ECL and ETIL. The entire decision has been taken centrally by the Essar Group and executed by and through the employees of the Essar Group in India		and Point B, Page 1726 of ECL ITAT PB) b) In fact, the Revenue has not produced any evidence which demonstrates that the decision regarding liquidation of ETIL was taken by any other person than the directors of ECL and ETIL. Therefore, the argument of the Revenue that the decision has been taken centrally by the Essar group is perverse and contrary to the evidence on record.
B.	Acquisition of shares of ETIL is an important event so far as the affairs of ECL is concerned. However, in the minutes Book of the ECL, there is no mention with regard to this affair as on the date of the FIPB Application. In fact, on 5 January 2007 that is almost after 6 months of the submission of FIPB Application for investment by ECL(M) into ETIL(India) shareholding, there is mention for the first time in the Board meetings:	Page 25	a) The contention of the Revenue is incorrect because the application made by ETIL was pending for approval of FIPB which was received only on 11 December 2006 and immediately thereafter, the Board of directors have discussed the matter of receipt of FIPB and investment to be made in ETIL on 5 January 2007. Therefore, the argument of the Revenue that an important event relating to investment in ETIL is not found in minutes is incorrect and bad in law. (Para 72, Page 49 and Page 1709 of ECL ITAT PB)
C.	In the Board minutes of ECL(M), the recording of fact with regard to ETIL holding 15.85 % shares of HEL and VEL on relevant date is wrong. In fact, on 5	Page 25	a) From the extract of the minutes for the meeting on 5 January 2007, it is clear that the stake of VEL then held by ETIL was not considered by the Board of ECL as 15.85% but that ETIL wished to increase the stake to 15.85%. The relevant extract is below: <i>“He suggested that with respect to the above, it would be good idea to consider investment in the Indian</i>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>January 2007, only 49,706,826 shares were with ETIL and not 15.85 % as recorded. Thus, the directors are completely unaware of the correct set of facts. The Board of ECL(M) had no idea with regard to its proposed investment in ETIL while letter had already been issued to FIPB on behalf of the applicant company</p>		<p><i>group company Essar Telecom Investment Limited (ETIL) which currently holds equity stake in Vodafone Essar Limited and wishes to increase the holding upto 15.85%”</i></p> <p>b) The allegation by the Revenue is entirely misplaced.</p> <p>(Para 49, Page 37 of ECL ITAT PB)</p>
D.	<p>While ETIL has allotted shares to ECL on 02 February 2007 and 26 February 2007 totalling 154625210 in numbers, the Board of ECL has got to know about this vide minutes dated 7 March 2007</p>	Page 26	<p>a) On 5 January 2007 the Board of ECL had authorised any director to explore and make investments in ETIL. Subsequently, investments into ETIL were made on the authorisation of director of the Assessee on 8 January 2007. The Assessee would like to respectfully submit that once the decision to make investment into ETIL was already made by the Board, no further deliberations was required by the Assessee’s Board for any future allotment other than taking the allotment of ETIL’s shares on record. It would be appreciated that allotment is a process that is undertaken by the investee company and hence the same was merely noted by the Assessee as a shareholder of ETIL in its subsequent Board meetings.</p> <p>b) The written resolution of the directors dated 7 March 2007 of the Assessee only records the fact of allotment of equity shares by ETIL, the last of which allotment was on 26 February 2007. Based on this written resolution of 7 March 2007, it cannot be said that the Board of directors of ECL came to know about the investment in ETIL only on 7 March 2007.</p> <p>(Para 103, Page 66 and Point G, Page 1710 of ECL ITAT PB)</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			Hence, it cannot be said that the Assessee's Board was unaware of allotment of shares by ETIL and accordingly, no adverse inference could be drawn from the aforementioned allegation.
E.	The next most important event of ECL(M) is - investment into the Share Application money of ECom(M) amounting to USD 153.177 million on 3 March 2007. There is no mention about these important affairs in the Board minutes for the whole of F.Y. ending 31 March 2007 even while the amount has been received and utilized inter alia for repayment of loan facility for USD 140 million along with interest.	Page 26	a) On 3 August 2006, the Assessee had authorised any director to seek shareholder support and to fund ECom at its request. The Board of directors of ECL discussed that ECom had borrowed funds from parties leading to high borrowing costs and that ECom wished to raise funds by way of equity to repay its existing borrowings and to fund operations. Accordingly, this shows that ECL was well aware about repayment requirement of the loan of ECom. Hence, the allegation of the department is baseless, since they have ignored the authorisation of 3 August 2006. (Para 68, Page 48 and Page 1732 of ECL ITAT PB)
F.	After the close of the F.Y., that is on 27 April 2007, the matter with regard to receipt of share application money of USD 558.786 has been ratified by the Board. This implies that the Board of ECL(M) was neither aware of (i) Investment into the share application money of ECom(M) nor aware	Page 26	a) In the Board meeting of ECL held on 5 January 2007, it was resolved to estimate the requirement of funds for investment in ETIL and authorise any one director of ECL to discuss with shareholder regarding requirement of funding by way of equity. b) Therefore, the Board of directors of the Assessee was well aware of the investments into ECom and ETIL and the written resolution dated 27 April 2007 merely ratifies the investment into ECom and of investment of ECML into ECL which was already decided. c) Hence, the argument of the Revenue that the Assessee was not aware of the investment in ECom and investment by ECML in the Assessee is factually incorrect and bad in

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	of (ii) Investment by ECML(M) into the Share Application money of the applicant.		law. (Para 68, Page 48 of ECL ITAT PB)
G.	Similarly, the Board minutes of ECML(M), ratifies the investments into ECL on 27 April 2007, i.e. a date subsequent to the investment of such huge amount out of the loan proceeds facilitated on the basis of pledge of HEL/VEL shares owned by ETIL India and ECom(M).	Page 26	<p>a) In this regard, it is respectfully submitted that these allegations made by the Revenue are not applicable in the present case. The observations of the Revenue do not pertain to the Assessee. (Para 119, Page 78 of ECL ITAT PB)</p> <p>b) In any case, on 29 January 2007, the Board of directors of ECML held meetings and discussed to make investment in ECL wherein it was informed to the Board that the subsidiary of the company i.e. ECL had approached the company for finance in the form of equity shares in order to enable ECL to make downstream investments and its business operations. Hence, the Board of directors of ECML was aware about investment into ECL.</p>
H.	Even, the Board minutes of ECom(M), ratifies the investments received from ECL on 27 April 2007, i.e. a date subsequent to the investment of such huge amount out of the loan proceeds facilitated on the basis of pledge of HEL/VEL shares owned by ETIL India and ECom(M).	Page 26	a) These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.
I.	It is noteworthy to know, that various decisions for complying to Clause 2 of the agreement has not been taken by the Board of	Page 26	Refer response at Sr. No. (IV). F.(d)(iii) of the Revenue submission

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	ECom(M). It is not known as to who has taken this vital decision in respect of acquisition of shares of HMTL, even though the same is claimed by the Applicants to be acquired by ECom(M).		
J	Point J on Page 27 of the submission	Page 27	Refer response to Page 31 of the Revenue submission
	VI – Core aspects relevant to the case brought out in the order of the CIT(A) approving the order of the AO (None of which was disputed before the Hon’ble Tribunal)		a) The Assessee submits that the allegation made by the AO in the assessment order which have been repeated by the CIT(A) in its order were rebutted in detail before the CIT(A) by way of written submission filed by the Assessee and were referred to at the time of hearing before the Tribunal. Therefore, the contention of the Revenue that relevant aspects have not been disputed by the Assessee is incorrect and contrary to the evidence on record.
	1. No decision making for transfer of shares (Page142)	Page 29	a) The allegation is that ECom and ETIL have not raised any question regarding ECML being given the put option for the VEL shares. The contention of the Revenue is without any substance since the put option agreement also provided for direct sale of VEL shares by ECom and ETIL which was in their interest accordingly, there was no occasion/reason for ECom and ETIL to raise any dispute regarding this. The alternative put option under which ECML could sell the shares of ECL and consequently the entire structure under it, was agreed by the parties in the event the transaction was to be done at the holding company level. b) In fact, it is important to note that when the parties wanted to directly sell the shares of VEL the consent of the lenders for direct sale of VEL shares was not coming through and ECML was compelled to exercise the alternative put option whereby shares of ECL were to be sold to Vodafone (Page 577 of ECL ITAT PB). Therefore, the

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>option of indirect sale of shares by ECML was kept under the agreement to deal with such unforeseen circumstances. (Page 1712 of ECL ITAT PB)</p> <p>c) A put option is merely the right to sell, without the obligation to sell and hence there is no question of the decision to sell having been made merely on account of entering into an option agreement. Commercially, the exercise of option was subject to various considerations, inter alia, to the value of the shares at the time of determining whether to exercise the option. If the value of shares at the said time was in excess of the option price, the Board wouldn't have exercised the option for all shares and could have either sold some of the shares under the fair value put option or decided to refinance the USD 3.59 billion loan after continuing to hold the shares and letting the put option expire. In fact, the fair value in 2011 was below the underwritten put option price which was deliberated upon by the Board of ECL and hence they preferred the underwritten put option. (Para 42, Page 32 of ECL ITAT PB)</p> <p>d) In any case, Supreme Court in Vodafone International (supra) has held that group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Therefore, there is nothing incorrect or unusual in the present case.(Point 3, Page 1715 of ECL ITAT PB)</p> <p>e) The direct sale of VEL shares was thoroughly evaluated by ECL which has been explained in positive case sheet (refer Sr. C of Exhibit A at Page 1727 of ECL ITAT PB).</p>
	2. No decision making for valuation for transfer (Page143)	Page 29	a) The allegation is factually incorrect as in the financial statements the Assessee has valued the put option agreement under which VEL shares were to be sold and, in the Board minutes, the valuation aspect that has been

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>discussed is regarding the 3G spectrum bidding. Therefore, the two points are completely different and distinct.</p> <p>b) The fair valuation of options reflected in the financial statements is a requirement under the applicable accounting framework which have been confirmed by the auditors and subsequently approved by the board of directors in its meeting. (Para 41, Page 30 and Page 1715 of ECL ITAT PB)</p> <p>c) The allegation about no discussion in the Board minutes about Market Value put option is factually incorrect. The fair market value put option amendment agreement protected the rights of the Assessee and provided that any excess bidding by Vodafone for 3G spectrum leading to fall in value of VEL shares would be compensated to the Assessee. The aforesaid aspect of excess bidding for 3G spectrum was specifically discussed by the Board of Directors in the Board meetings held on 10 September 2009, 2 March 2010, 28 July 2010 and it was decided that the Assessee would be protesting against the excess bidding by Vodafone and will also request Vodafone to compensate for the fall in value of VEL shares. Therefore, it is incorrect to allege that the aforesaid aspect is not found in the Board minutes. (Page 1727 of ECL ITAT PB)</p> <p>d) It is further submitted that the minutes of ECML discuss the agreement in detail and the same brings out that the concern of the Assessee were taken care of in the Fair Market Value Put Option amendment agreement therefore, the allegation that there is no discussion in the minutes of ECom, ECL and ECML is factually incorrect and bad in law.</p>
	3. No participation in spectrum auction (Pg.144)	Page 29	<p>a) The contention that there was no participation by the Assessee in 3G spectrum auction is factually incorrect. As the aspect of 3G spectrum bidding was discussed by the Board in the following Board minutes:</p> <ul style="list-style-type: none"> • On 10 September 2009 – Mr. Uday Gujadhur was authorised to obtain 3G valuation in consultation with

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>ECHL India</p> <ul style="list-style-type: none"> • On 2 March 2010 meeting 3G valuation report tabled before the Board • On 28 July 2010 the Board approved the compensation of Rs. 3404 million on account of 3G impact (Page 1715 and 1727 of ECL ITAT PB).
	4. Mere acquiesce to the consideration without any participation (Pg.144).	Page 29	a) The price of USD 3.8 billion agreed under the Put Option Agreement was in line with the value at which Hutchison had sold its stake to Vodafone group and further, there was an option agreed under the put option agreement wherein if the fair market value was higher than the fixed price then the shares would be sold at fair market value. Therefore, there was no occasion for the Assessee to raise any question on the price as the interest of the Assessee was completely protected. In any case, the put option was merely a right to sell and not an obligation to sell the VEL shares.
	5. Non-evaluation of tax payments by the Assessee and done by other entities (Pg.145).	Page 29	<p>a) The allegation that the Board of directors were not aware of the application filed before the AAR by Vodafone is incorrect as the Board minutes of the Assessee for the meetings on 28 July 2010, 23 November 2010 and 30 March 2011 clearly show that the Board of ECL were aware of the application unilaterally filed by Vodafone to the AAR.</p> <p>b) The other allegation that the Assessee was not aware of the nominee of Vodafone group till 15 May 2011 is also incorrect as the option to sell the shares was exercised by the Assessee only on 30 March 2011 and thereafter the Board of directors were informed about the nomination of Euro Pacific Securities Limited ('EPSL') as noted in the minutes dated 15 May 2011.</p> <p>c) The Assessee further submits that as evident from the above mentioned Board minutes, the Board of directors have discussed the issue of tax dispute with Vodafone and were aware that an application is pending with AAR therefore, immediately after exercise of option, the</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			Assessee filed an application for intervention before the AAR which was signed by one of the Directors Mr. Sushil Kumar Baid and was also discussed in the Board minutes dated 15 May 2011. (Para 57-58, Page 42 and Page 1716 of ECL ITAT PB)
	6. No role for the Assessee in giving effect to the transfer (Page 145 and 146)	Page 29	<p>a) The contention of the Revenue that the Board minutes of the Assessee do not speak of the manner in which various responsibilities as stipulated in shareholder term sheet are to be carried out is incorrect and contrary to the evidence on record. It should be noted that the Board in their meeting dated 24 June 2011 has considered the settlement that was proposed by Vodafone and authorized, <i>inter alia</i>, Sushil Baid and Uday Gujadhur (both directors to the Assessee) to execute various agreements in connection with such settlement which included the agreement to settle and terminate the shareholder term sheet.</p> <p>b) Further, post the exit of the Assessee from VEL it is but natural that the members nominated would resign from the Board of VEL and the same does not require any discussion in the Board meetings of the Assessee. (Para 59, Page 43 of ECL ITAT PB)</p> <p>c) It should also be appreciated that ECL has nominated representatives to attend various meetings, and the Board has taken important decisions in relation to VEL (refer Exhibit E to submission before CIT(A) dated 9 November 2021) including sale. (Page 1716 of ECL ITAT PB)</p> <p>d) Given the above, it is incorrect on the part of the Revenue to allege that Assessee has no role to play in giving effect to the transfer and is in fact contrary to the evidence on record.</p>
	7. Assessee neither received consideration nor applied the same for its use (Pg.146).	Page 29	<p>a) The Revenue has erred in alleging that the Assessee has neither received consideration nor applied the same for its use.</p> <p>b) It is an admitted fact that the sale consideration has been received by the Assessee in its bank account. Thereafter, the proceeds were utilized towards discharge of USD 3.59</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>billion loan taken by ECML in respect of which the Assessee was a guarantor and the payment so made was reflected as receivable in its books of accounts, which was later converted into preference shares.</p> <p>c) As regards utilisation of sale proceeds, it may be noted that the Assessee was a guarantor to the USD 3.59 billion loan granted to ECML by a consortium of lenders led by SCB, UK in August 2007 (Page 1711 of ECL ITAT PB). As the loan was to be repaid and ECML (the borrower) did not have the funds to repay, the Assessee sold its VEL shares in order to meet its obligations under the loan agreement towards repayment of the facility (Para 184, Page 115 of ECL ITAT PB). The same has been discussed by the Assessee's Board in its Board meetings dated 3 March 2011 (Page 572 of ECL ITAT PB), 25 May 2011 (Page 208 of ECL ITAT PB) and 24 June 2011 (Page 214 of ECL ITAT PB).</p> <p>d) In any case, the Assessee was a party to the USD 3.59 billion loan agreement that has been approved by the Board, wherein the Assessee acted as a guarantor to such loan. (Para 184, Page 115 and Page 1711 of ECL ITAT PB)</p> <p>e) The tax authorities cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder - Vodafone International (SC) (supra) (Para 97 of Radhakrishnan), Becton Dickinson (Mauritius) Ltd (434 ITR 180) (AAR). The transactions were undertaken for commercial reasons and that is the legitimate objective of an SPV like the Assessee i.e. to maximise benefit to the shareholder. (Page 1717 of ECL ITAT PB)</p> <p>Accordingly, it is incorrect on the part of the Revenue to make such a bald allegation.</p>
	8. Decisions with regards to assets,	Page 29	a) The Board of directors of ECL had discussed the conversion of receivables from ECML into preference

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	liabilities and income and expenditure not taken by the Assesseees (Pg.147-148)		<p>shares and the same is forming part of the audited financial statements approved by the Board of directors. A mere omission by the secretarial team to record a discussion is being used by the Revenue to create prejudice against the Assessee. (Page 1731 of ECL ITAT PB)</p> <p>b) It is submitted that conversion to preference shares was indeed a non-cash transaction. (Reference by the lower authorities to debentures appears to be an error). Once repatriation of sale proceeds cannot be frowned upon, in view of Vodafone International (supra), a legal mode of such ploughing back cannot be questioned. (Page 1717 of ECL ITAT PB)</p> <p>c) It is further submitted that the allegation pertaining to ECML and THCL is not relevant to the issue arising for consideration of the Tribunal.</p>
	9. Even compliance to Government Regulations were not handled by the Assesseees (Pg. 148)	Page 29	<p>a) The Revenue has erred in alleging that exit by the Assessee from the telecom business of VEL required approval from FIPB, RBI etc</p> <p>b) It should be noted that the sale of VEL stake was by one non-resident company i.e. the Assessee to another foreign company (EPSL) and it did not require approvals from FIPB/ RBI etc on the part of the sellers. Hence there was no need for any deliberation on any FIPB/ RBI related approvals by the board of ECL. (Para 60, Page 44 of ECL ITAT PB)</p> <p>c) This is another example of the bald allegation that is being raised by the Revenue, which is not sustainable in the facts of the present case.</p>
	10. Breach of the lock in period on sale of equity of promoters of Assesseees' shares (Pg. 148).	Page 29	<p>a) The Revenue has erred in alleging that there is a breach of the lock in period under Unified Access Service ('UAS') license conditions.</p> <p>b) It is respectfully submitted that the Revenue cannot judge the legality of transfer when the Department of Telecom has not raised any objection.</p> <p>c) In any case, there is a specific exclusion from the lock-in condition in cases where the holder of license holds license</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>for multiple circles which VEL did and hence this condition is not applicable in the facts of the present case. (Page 1694 of ECL ITAT PB)</p> <p>d) The Assessee would also like to mention that this issue is not germane to the issue of taxability of income on sale of VEL shares in the hands of the Assessee by virtue of Article 13(4) of the India Mauritius DTAA and is liable to be rejected.</p> <p>(Point E, Page 1709 of ECL ITAT PB)</p>
	<p>VII – Tax Residency Certificate (‘TRC’) (None of which was disputed before the Hon’ble Tribunal)</p>		<p>a) As submitted above, the contention of the Revenue is incorrect and contrary to the facts on record, the allegation and contentions of the lower authorities have been specifically rebutted by the Assessee.</p>
	<p>1. Vide para 39 (Page 150 and 151) of the CIT(A) order, the authority had concluded that TRCs for F.Y. 2004-05 to 2009-10 were not produced during the assessment proceedings and no application was filed under Rule 46A for admission of any fresh evidence even after an adverse view was drawn by the AO on this issue. Therefore, the issue of TRC is actually a non-issue and could not have been raised</p>	<p>Page 30</p>	<p>a) It is submitted that during the course of the assessment proceedings, the AO had called for the TRC for the year under consideration vide notice dated 7 May 2014 which TRCs the Assessee furnished vide letter dated 4 June 2014 and further informed the AO that the Assessee has been a resident of Mauritius since inception however, the AO did not call upon the Assessee to produce the TRC for the earlier years thereafter (Page 1611 and Page 1718 of ECL ITAT PB).</p> <p>b) It was for the first time in the assessment order that the AO stated that the Assessee had not submitted the TRC for the earlier years, in response to that allegation the TRC for the earlier years were produced by the Assessee before the CIT(A). Therefore, the contention of the Revenue that the TRCs for the earlier years were not produced before the AO and no application was filed under Rule 46A is incorrect.</p> <p>c) In any case, the TRCs for the earlier years are not relevant since the resident status for each year has to be decided separately and TRCs of earlier years have no bearing on the year under consideration. (Page 1713 of ECL ITAT PB)</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	before this Hon'ble Tribunal for consideration.		
	2. Vide Para 40-41, Page 151 – 154, the CIT(A) concurring with the AO catalogues the list of factual conclusions none of which were disputed during the hearing.	Page 30	a) The Assessee submits that the allegation made by the AO in the assessment order which have been repeated by the CIT(A) in its order were rebutted in detail before the CIT(A) by way of written submission filed by the Assessee and were referred to at the time of hearing before the Tribunal. Therefore, the contention of the Revenue that relevant aspects have not been disputed by the Assessee is incorrect and contrary to the evidence on record.

(VIII) Joint Assignment Agreement (JAA) dated 31st January 2007 between Essar Group Companies : Conducting of loan proceeds taken on the basis of pledge of impugned shares, as income in favour of Group Company

	1. The assignment agreement is based on the premise that EIHL(M) has an income of USD 532 million receivable from ECML(M) towards the sale consideration of ECL(M) shares acquired by it 6 days back for USD 1 from another Group Company ECHL(M). No valuation exercise is seen to be carried out as per the Board minutes of ECL(M) and ECML(M) for	Page 31	<p>a) It is submitted that the transaction referred to by the Revenue does not concern the Assessee nor in any way is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. Therefore, the allegation made by the Revenue basis this transaction is wholly unsustainable and bad in law.</p> <p>b) Without prejudice to the above, it is submitted that the transfer of ECL shares by ECHL to EIHL was a reversal of a transfer of ECL shares by EIHL to ECHL three months prior and accordingly was undertaken at the same price as the earlier transaction that is USD 1</p> <p>c) In this regard, it is submitted that Hybrid had taken a loan of USD 413 million from SCB UK and had provided a loan of USD 398 million to Essar Oil & Gas Limited ('EOGL'). Further, ECML had payable of USD 532 million to EIHL for purchase of the Assessee's shares.</p> <p>d) Net payable / receivable positions were as below:</p> <p style="padding-left: 40px;">i) SCB had receivable of USD 413 million from Hybrid</p>
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Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>this astronomical enhancement. It is also seen that as a general practice the Group is engaged in transferring the ownership of these offshore companies for USD 1 irrespective of the value of assets of such companies Thus, the transfer of ownership of ECL(M) is a colorable device to transfer USD 532.7 Million as income to EIHL(M) which through a maze of assignment transactions without commercial substance among Essar Communication(India) Ltd Mauritius, Essar Infrastructure Holding Limited (EIHL) Mauritius, Copper Canyon Holding Ltd. Cayman Island ('CCHL'), Kettle River Holding Ltd. Cayman Islands (KRHL), Essar Global Ltd. Grand</p>		<p>ii) Hybrid had receivable of USD 398 million from EOGL iii) EIHL had receivable of USD 532 million from ECML</p> <p>e) SCB agreed to provide a loan of USD 1.1 billion to ECML on the basis that Hybrid loan is repaid in full to reduce its overall exposure to Essar. If ECML had lent USD 398 million directly to Hybrid, the receivables/ payables would have been:</p> <p>i) Hybrid would continue to have a receivable of USD 398 million from EOGL ii) Hybrid would have a payable of USD 398 million to ECML iii) EIHL would continue to have a receivable of USD 398 million (out of the USD 532 million) from ECML</p> <p>f) In order to simplify the receivables / payables among the group entities, the JAA was entered into under which following steps were undertaken:</p> <p>i) Step 1: SCB granted a loan of USD 1.1 billion to ECML against security of shares of the Assessee and ECom ii) Step 2: ECML paid EIHL USD 398 million against outstanding payable iii) Step 3: EIHL provided loan of USD 199 million each to KRHL & CCHL iv) Step 4: KRHL and CCHL infused USD 199 million each into their EGL as equity in 50:50 proportion v) Step 5: EGL infused USD 398 million into its 100% subsidiary EEHL as equity vi) Step 6: EEHL infused USD 398 million into its 100% subsidiary EOGL as equity vii) Step 7: EOGL repaid USD 398 million to Hybrid against outstanding payable to Hybrid viii) Step 8: Hybrid repaid loan of SCB</p> <p>g) Net payable/receivable position was as below:</p> <p>i) SCB loan was repaid by Hybrid</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>Cayman, Essar Energy Holding Ltd. Mauritius, Vadinar Oil Mauritius, Hybrid Capital Pte Ltd. British Virgin Islands ('Hybrid') is applied for repayment of loan amounting to USD 413 million taken by Hybrid.</p> <p>2. Joint Assignment Agreement dated 31 January 2007 between Essar Communication (India) Ltd Mauritius, Essar Infrastructure Holding Limited (EIHL) Mauritius, Copper Canyon Holding Ltd. Cayman Island, Kettle River Holding Ltd. Cayman Islands, Essar Global Ltd. Grand Cayman, Essar Energy Holding Ltd. Mauritius, Vadinar Oil Mauritius, Hybrid.is applied for repayment of loan amounting to</p>		<p>ii) Hybrid loan was repaid by EOGL iii) EIHL receivable settled by ECML</p> <p>h) Accordingly, the JAA was fully explained to the learned AO/CIT(A), the purpose of the transactions and how the commercial objective of cleaner inter-company balances between various Essar entities was achieved. This is diagrammatically explained by way of chart attached at Page 1596 of ECL ITAT PB. The slides explaining the transactions and the objective have been also reproduced by the learned AO and the CIT(A) in their orders.</p> <p>i) Further, reliance is placed on the case of Aditya Birla Telecom Ltd. [2019] 105 taxmann.com 206 (Bombay High Court) (SLP dismissed - [2021] 125 taxmann.com 85), wherein, it was held that merely because several corporate structures were either created or came into play in routing the investment in the assessee through a specially constituted Mauritius based company would not be sufficient to brand the transaction as invalid.</p> <p>j) It is quite natural for group entities to streamline inter-company balances by eliminating them to the extent possible. The Revenue has also failed to appreciate that the transactions were all amongst non-Indian entities, with no Indian tax / regulatory implications, including an independent reputed foreign bank.</p> <p>(Para 168 to 171, Page 107 of ECL ITAT PB)</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	USD 413 million taken by Hybrid.		
	<p>3. Even while the value of USD 1 is mentioned as the transaction value in the Board minutes of ECML(M) on 23 January 2007, the same has been recorded in the minutes dated 30 March 2007 as USD 532.7 million. However, the register of shareholders printed on 5 June 2007 which is a statutory document placed on (Page 399, Vol-5) shows the consideration for such transfer taken place for USD 1.</p>	Page 32	<p>a) It is submitted that the transaction referred to by the Revenue does not concern the Assessee nor in any way is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. Therefore, the allegation made by the Revenue basis this transaction is wholly unsustainable and bad in law.</p> <p>b) Without prejudice to the above, it is submitted that the consideration for transfer of the Assessee was USD 532 million and not USD 1. This is evident from the financial statements of ECML for F.Y. ended on 31 March 2007 (refer Page 581 of ECL ITAT PB) for relevant extract) and Board minutes of ECML dated 30 March 2007. Due to an inadvertent error in ECML resolution dated 23 January 2007, consideration was erroneously mentioned as USD 1 (i.e. the same as the face value). Consequently, consideration in stock transfer form and the shareholder register was also mentioned as USD 1.</p> <p>c) In August 2006, SCB, UK had given a loan of USD 413 million to Hybrid. In January 2007, after acquiring the Assessee, ECML was looking to raise further funds against the underlying value of its assets. The purpose of the loan taken by ECML from SCB, UK included use of the proceeds of the loan by ECML to pay EIHL towards payment of purchase consideration due from ECML to EIHL for the acquisition of the above referred ECL shares, which sum would be used by EIHL to provide funds to Hybrid, which in turn would use the proceeds to repay in full its loan from SCB, UK.</p> <p>d) The above explanation also evidences that the purchase consideration payable by ECML to EIHL could not have been USD 1. The amount that was paid was indeed USD 532 million and has been accounted for accordingly by ECML and EIHL. The reference to USD 1 in the register of members is to the face value of the shares transferred</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>and not the value at which they were transferred. This inadvertent error was rectified by an agreement and the same was filed with the Registrar General of Mauritius and Registrar of Companies, Mauritius.</p> <p>e) In any case, the Assessee was not a party to the said arrangement and hence the same is not relevant for determining the taxability on sale of VEL shares in its hands for the relevant year (i.e. F.Y. 2011-12).</p> <p>(Para 104 to 108, Page 67,68 of ECL ITAT PB)</p>

IX - Intragroup Arrangements and Agreements demonstrating melting of corporate veil

	<p>1. The Assessee ECL, Mauritius or its precursor Avatar, as well as ECom, Mauritius were not party to the Put option agreements dated 24 August 2007 (before deed of amendment dated 1 July 2011)</p>	<p>Page 34</p>	<p>a) As per the agreement, the put options were available in two forms – direct and alternative (which was indirect). The alternative underwritten put option was for sale of shares of holding companies instead of VEL shares directly. Such an option could be exercisable only by an indirect holding company, such as ECML. (Page 1714 of ECL ITAT PB)</p> <p>b) Kindly see structure chart to explain business logic (commercial rationale) (refer Exhibit D at Page 1735 to 1740 of ECL ITAT PB)</p> <p>c) It is usual for multinational companies to not have multiple companies in the group run negotiations with third parties for achieving the same objective. The subsidiary companies could agree to the outcome as their objectives were being met. Hence, the subsidiaries which were VEL shareholders were not required as parties to the agreement. Accordingly, ECL was not a party to such agreement. (Para 192, Page 119 of ECL ITAT PB)</p> <p>d) The direct sale of VEL shares was thoroughly evaluated by ECL which has been explained in positive case sheet (refer Page 1714 and Sr. C of Exhibit A at Page 1727 of ECL ITAT PB).</p> <p>e) Upon exercise of the direct put option, ECL became a party to the put-option agreement vide Board resolution on 24 June 2011 (Page 214 of ECL ITAT PB) and then executed the deed of amendment on 1 July 2011 (Page 343</p>
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Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>of ECL ITAT PB), pursuant to which the sale of VEL shares have taken place. (Page 1716 of ECL ITAT PB)</p> <p>f) It may be noted that the Revenue has conducted assessment proceedings and sought to assess the capital gains to tax in the hands of the Assesseees. Thus, the Revenue itself has thereby recognized the Assesseees as the legal and beneficial owners of the VEL shares. Hence, the contention that the Assesseees are sham/dummy entities and that the corporate veil should be lifted cannot be made by the Revenue. Reliance in this regard is placed on Vodafone International (supra) [Para 67], Sri Meenakshi Mills Ltd. [1967] 63 ITR 609 (SC), Aditya Birla Nuvo Ltd. (342 ITR 308) (Bom) and Alibaba.Com Singapore E-Commerce (P.) Ltd. [2023] 459 ITR 508 (Bombay)</p> <p>g) In any case, ECML had taken loans of USD 1.1/1.4/3.59 billion and was a party to Put option agreements. Without prejudice, it is also submitted that ECML is also a tax resident of Mauritius since its inception (holding valid TRCs issued by the MRA since inception) and would be eligible for the benefits of Article 13(4) of the India-Mauritius DTAA as such. (Para 56, Page 41 of ECL ITAT PB)</p>
	<p>2. Shri Vikas Saraf has signed the settlement Agreement on behalf of all the Essar Group parties.</p>	<p>Page 34</p>	<p>a) This allegation is not relevant to ECL.</p> <p>b) The Board of directors of ETIL in their meeting held on 14 March 2007 have authorized Vikash Saraf to execute the Settlement agreement. Therefore, the decision to enter into the Settlement Agreement was taken by the Board of directors of ETIL on that date and only the action of signing and executing the agreement was carried out by the personnel of the group companies (after authorisation from the Assessee)</p>
	<p>3. Both the Assessee companies have assigned the benefit arising to the Essar Group on Settlement</p>	<p>Page 35</p>	<p>a) It is submitted that the transaction referred to by the Revenue does not concern the Assessee nor in any way is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. Therefore, the allegation made by the Revenue</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
	<p>with Hutchison Group to ECIL(M), amounting to US\$ 373.5 million for no consideration. The facts relating to the objection before FIPB, its withdrawal has not been discussed in the Board of the Assessee Companies. The Board of Applicant have not deliberated upon abdication of this Authority in favour of ETHL.</p>		<p>basis this transaction is wholly unsustainable and bad in law.</p> <p>b) It is further submitted that the amount referred to herein has already been brought to tax by the Revenue in the hands of ETHL.</p> <p>c) Without prejudice to the above, it is submitted that Hutchison was in discussions with various other parties to sell its equity stake in HEL representing 67% of equity shareholding.</p> <p>d) ETHL, ECom and ETIL while being vitally concerned as to who the acquirer may be but they did not have the capacity to raise or borrow requisite funds independently in India or from abroad</p> <p>e) Also, any such bid would have entailed very significant risks. In order to protect their mutual interest and to enable a friendly bidder, EGL, to make a credible bid for Hutchison's stake in HEL, the Essar shareholders (ETHL, ETIL and ECom) decided to enter into arrangement with EGL to make a bid, which had a strong balance sheet at that time and could try and raise the necessary funds required for acquisition of Hutchison's 67% stake in VEL.</p> <p>f) EGL was entitled to the benefits on account of the following:</p> <p>i) EGL, being the only entity with a net-worth of circa USD 6 billion (in F.Y. 2006-07), had presence in several countries around the world. It was able to get a commitment to raise finance to the tune of USD 14 billion from Citi Group and based on their commitment letter, could make a binding offer for acquisition of VEL shares.</p> <p>ii) Essar shareholders benefitted by leveraging EGL's ability to raise finance and the assurance that the alliance would maximize the long-term value of its holdings in VEL. Further, the arrangement clearly contemplated that all the risks (and therefore benefits) of financing were to EGL's account. EGL at a huge cost and risks arranged the necessary funding for the acquisition of the Hutch's stake and</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>for all related legal and other costs. It also took full responsibility of protecting Essar shareholders against any downside to their investment in VEL and provided full cost indemnification and protection of minority rights.</p> <p>iii) EGL's involvement helped Essar shareholders to negotiate a fresh shareholder agreement dated 15 March 2007 with Vodafone which protected rights of Essar shareholders including the Assessee and also benefited them to obtain put option with an attractive floor price from Vodafone. Also, ECL/ ECom/ ETHL became parties to shareholders terms sheet and got minority protection as well.</p> <p>iv) These benefits were reaped by them without incurring any cost or risks. All the cost was incurred and risks taken by EGL.</p> <p>v) Accordingly, following negotiations between Hutchison, Essar Shareholders together with ECML, entered into a Settlement Agreement with Hutchison under which a consideration of USD 415 million was paid to EGL for its efforts and for the risks undertaken.</p> <p>g) It is submitted that the draft settlement agreement was tabled in the meeting of board of directors and cognizance of the same was taken by the board.</p>
	<p>The tax amount was to be shared between EPSL and ECL/ECom (Para 31, 31.1 – Page 80 CIT(A) - ECL)</p>	<p>Page 36</p>	<p>a) Under the Put option agreement, it was the Assessee's position that the consideration for transfer of VEL shares was to be received without any deduction of taxes. There was a dispute between the parties on withholding of Indian taxes which was settled by the Assessee's agreement dated 1 July 2011, wherein the Assessee agreed for deduction of taxes as against increase of consideration for transfer of VEL shares from USD 3.8 billion to USD 4.201 billion.</p> <p>b) It is submitted that the said allegation of the Revenue is misplaced and is not relevant in deciding the issues arising in the present appeal before the Tribunal.</p>

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee
			<p>c) Without prejudice to the above, it is respectfully submitted that there was a clear understanding in the agreement with Vodafone that the refund of the taxes would belong to ECL and ECom.</p> <p>d) In any case, under the income-tax law, refund of any taxes withheld by the buyer shall belong and be claimed by the seller and further, it is ECL and ECom that have claimed the refund in their respective tax returns and recorded the refund recoverable as an asset in their financial statements.</p> <p>e) In view of the above, the allegation of Revenue is liable to be rejected.</p> <p>(Para 112, Page 70 and Page 1716 of ECL ITAT PB)</p>

Note: Many of the above do not relate to the year under consideration and/or do not relate to the Assessee and have no bearing on availability of India – Mauritius tax treaty benefits for determining taxability of capital gains arising from sale of the VEL shares in the hands of the Assessee. However, the information/responses have been provided on a without prejudice basis in order 108 to allay the learned CIT(A) and Assessing officer's concerns and/ or address their various allegations, to the extent details are available with the Assessee.

80. For the aforesaid submissions of the ld. AR of the assessee, ld. ASG, Shri N. Venkatraman submitted the rebuttal of the Revenue as under :-

“The issues which arise in the captioned appeal are as under:

- Whether the Assessee is a tax resident of India under the provisions of erstwhile Section 6(3) of the Income tax Act, 1961 ('the Act') and is entitled to the benefits of India Mauritius double taxation avoidance agreement (India-

Mauritius DTAA);

- Whether the Assessee is entitled to the benefits of Article 13(4) of the India Mauritius DTAA on the sales of Vodafone Essar Limited ('VEL') shares acquired from the funds raised overseas;

Sr No	Allegations made by the Revenue	Reference to Revenue submission	Rebuttals of the Assessee	Revenue's Submission
(I) Complete Holding structure of the company				
	Ruia Family is getting all the benefits of all the avoidance structures through Essar Global Limited, be it under settlement agreement or by way of loan arrangements.	Page 2	<p>a) It is submitted that the aforesaid contention of Ruia family members getting all the benefits under settlement and loan agreement has been raised by the Revenue for the first time and the same has never been raised by the Assessing Officer ('AO') or Commissioner of Income-tax (Appeals) ('CIT(A)'). Under the provisions of the Act, the Revenue is not permitted to raise fresh grounds without rectifying or revising the assessment order. However, we are submitting our reply below on a without prejudice basis.</p> <p>b) The structure chart referred to on Page 2 of the Revenue</p>	<p>a) The claim of the assessee that this contention raised by the Revenue has never been raised by the AO or CIT(A) is misplaced. Reference is invited to paragraph 4 (pg. 8) of the AO's order where the Essar group structure and transactions are discussed. Para 4.2 (pg. 9) clearly brings out how the two Cayman Island based trusts – Virgo and Triton – are controlled by the Ruia family. Further, at para 4.2 (a) (pg. 10) it is clearly demonstrated by way of a detailed chart that the beneficiaries of these two trusts are various companies in which Ruia family members are 100% stakeholders.</p> <p>b) Reference is also invited to the discussion on pages 65-69 of the AO's order. On page 67, para iv. Sub-para 'a.' discusses the role of Ruia in control and</p>

		<p>submission are the entities above the Group Holding company i.e. Essar Global Limited, Cayman Island ('EGL')[later name changed to Essar Global Fund Limited ('EGFL')]. It is submitted that the entities above EGL have no role to play and are not relevant to decide the issue under consideration in the present appeal as no transactions have taken place with those entities by any of the Assessee herein.</p> <p>c) It is further submitted that the Revenue has made a bald allegation that Ruia family is getting benefits under the settlement agreement or loan transactions through the tax avoidance structure, however, no material or evidence have been produced apart from making bald allegations against the Assessee. In any case, the Assessee further submits that the rationale behind the aforesaid</p>	<p>management as per various relevant and vital agreements. Some key agreements and their terms have been analysed in this portion of the order. In some of the agreements, the definition of Essar Group has been provided as "Essar Group means the group of companies affiliated with the Ruia family." Further, on page 68 sub-para 'c.' and 'd.' mention extracts from debt/loan agreements where it has been observed that the entire loan facility is based on the ownership of VEL shares by the assessee companies is controlled and managed by the Ruia family together with persons and entities controlled by them</p> <p>c) Part V of the AO's order (pg. 221) discusses the benefit, control and management of Ruia family through EGL Cayman in detail. It is also mentioned at point (f) on pg.227 that the assessee did not submit the documents in relation to the Trusts as called for by the AO. At part (h) on pg. 228, thus, the AO observed that the assessee is not only gradually changing its stance regarding ultimate</p>
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		<p>structure was explained to the lower authorities during the course of proceedings. (Para 161-166, Page 105 and Para 27-28, Page 24-25 of ECL ITAT PB)</p> <p>d) The issue involved in the present appeal is the levy of capital gain tax on sale of shares of VEL by the Assessee on the footing of the Revenue that the Assessee is a resident of India. Accordingly, whether any part of the proceeds from the sale of the VEL shares or from loans raised on security of VEL shares or from the settlement between Essar and Hutchison was received by the Ruia family members is not germane to the appeal. In any case, the Assessee would like to clarify that no amount received under the settlement agreement or loan agreement have gone to the Ruia family members.</p>	<p>beneficiaries but also has denied furnishing the requisite information holding it as irrelevant. It is clear that the replies filed by the assessee are evasive in nature suppressing the material information.</p> <p>d) It may be mentioned that the contention of the assessee mentioned at (c.) has not been supported by any documentary evidence even while filing its Paper Book before the ITAT.</p>
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<p>A.Acquisition of 26.82% stake in Hutchison Essar Limited (HEL)/ VEL by Essar Teleholdings Limited ('ETHL'), India</p>	<p>Page 5</p>	<p>a) It is submitted that at the relevant point of time ETHL was a listed company and therefore, it is incorrect to contend that it was beneficially owned by 1 member of Ruia family. In any case, it submitted that the ownership of ETHL is not relevant to decide the issue arising for consideration in the present appeal.</p>	<p>a) ETHL was one of the flagship companies of the Essar group and held substantial stake in HEL/VEL on part of the group. The AO's order at page 45 mentions that the holding structure for ETHL and the chart demonstrates that the ultimate owner of the company is Mrs. Manju Ruia w/o Shashikant Ruia. It is also mentioned that ETIL was incorporated in November, 2004 with ETHL as its 99% shareholder. ETIL consolidated 15.85% stake in VEL(page 46-47 of AO order).</p> <p>b) The VEL shares acquired by ETIL from ETHL, Chennai were in lieu of debentures issued. The consideration for debentures has been paid from the loan taken on strength of these shares only. These are circular intra-group transactions. The security for all loans remains VEL shares.</p> <p>c) The Essar group created the ingenious structure of shifting holding from ETHL to ETIL and further liquidating ETIL in favour of ECL, thereby placing a structure in place whereby they could claim capital gain exemption later in Mauritius jurisdiction.</p>
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			Thus, the ownership of ETHL was relevant in the context of the above mentioned group restructuring and transfer of shares of VEL and subsequent liquidation of ETIL. It is the common ownership/beneficiaries and managerial persons that made it possible to authorize and execute the above decisions
B. Several internal restructuring leading to transfer of 10.97% [out of 26.82%] stake ONSHORE [45425328 shares]	Page 5	a) It is submitted that in the present appeal, the Tribunal is not concerned with the sale of onshore stake of 10.97%. Accordingly, the Assessee is not required to give any submissions since the same is not relevant to the present appeal.	
C. Several internal restructuring leading to transfer of 15.85% [out of 26.82%] stake OFFSHORE [65634887 shares]	Page 5	a) It is submitted that while the factual assertions made are not disputed but the inferences ought to be drawn is incorrect and the Assessee further wishes to clarify that the internal restructuring was undertaken for commercial reasons as submitted before lower authorities.	a) It is submitted that the AO in his order has amply demonstrated how there was no commercial substance in the internal restructuring undertaken by the Essar Group at various instances in the order. Further, a consolidated chart regarding the frequent changes in holding structure of the Essar group companies is presented at pg. 100-101 of the AO's order.

	D. 6.19% offshores take in VEL	Page 5	a)These facts pertain to the appeal of Essar Com Limited ('Ecom') and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	
	Page 1-5		a)These are factual and there are no allegations by the Revenue (except the above points). Hence, these donot merit any reply.	
	Page 6 to 8		a) These are factual and there are no allegations by the Revenue (except the above points). Hence, these donot merit any reply.	
(II) Share transaction details between ETHL and Essar Telecom Investments Limited ('ETIL')				

	<p>1. ETIL issued debentures</p> <p>2. ETHL transferred its shares to ETIL</p> <p>3. ETIL entity has no resources and is a paper entity</p> <p>4. Value of this acquisition is Rs. 2077.7 cr (USD 400.61 million) and ETIL did not have anything to pay for this acquisition</p> <p>5. Essar Communications (Mauritius) Limited ('ECML') provided funds to purchase</p> <p>6. The source of funds explained by applicants for acquisition of 15.85% shares in VEL by ETIL, India is stated to be as under:</p>	Page 9	<p>a) ETHL was holding 26.82% shares in VEL, however, it was heavily leveraged and there were defaults made by ETHL in complying with the listing agreements with various stock exchanges. In November 2005, 1.95% of VEL shares were monetized for Rs. 200 crores from Infrastructure Development Finance Company Ltd. ('IDFC'). Similarly in December 2005, 3.85% of VEL shares were monetized for Rs 395 crores from Telecom Opportunities Trust ('TOT'). However, due to overly leveraged balance sheet and listing defaults on the part of ETHL, it was finding difficult to monetize the value of VEL shares on favourable terms from the lenders. Further, the existing regulatory framework [Reserve Bank of India ('RBI') & The Foreign Exchange Management Act,</p>	<p>a) From pages 48 to 62 of the AO's order, detailed arguments have been given in respect of how the liquidation of ETIL was a colourable device. The AO has given logical arguments to show that the liquidation of ETIL was preordained.</p> <p>b) The Notes to Financial Statements for ECL for FY 2007-08 mentions at note number 17 titled "Subsequent Events" that subsequent to receipt of RBI approval, the liquidation of ETIL was completed (pg. 421 of assessee's paper book filed with ITAT).</p>
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			<p>Hutch, ETHL was required to have a minimum 10% shareholding in order to enjoy certain rights. Essar group was keen to monetize its VEL stake by raising funds in and outside India funds on favourable terms.</p> <p>c) Given the above reasons, ETHL transferred 10.05% of VEL shares to a new entity namely, ETIL so that it could monetize the value of VEL shares in a new company having a clean balance sheet. The shares were transferred to ETIL for a value of Rs.1,032 crores and debentures of the same value were issued to ETHL (PointA, Page 1706 of ECL ITAT PB) which helped ETHL in deleveraging its balance sheet (redemption of debentures as explained below). ETIL also, acquired the aforementioned stakes in VEL (1.95% from IDFC and 3.85% from TOT)</p>	
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			<p>d) Thereafter, ETIL was able to monetise the value of VEL shares, since it was a clean company and raised Rs.545 crores as a loan from Standard Chartered Investments and Loans (India) Limited ('SCILL'). From the loan proceeds, ETIL redeemed part of the debentures that had been issued to ETHL. (Point B, Page 1707 of ECL ITAT PB).</p> <p>e) While funds were raised to some extent from the Indian NBFC as explained above, the regulatory restrictions constrained the ability to unlock the entire value of the VEL shares by raising of loans on favourable terms. With the opening of FDI cap as explained above, it was thus contemplated to bring eligible VEL holding (in accordance with the proportion of foreign holding agreed with Hutch) under Essar group's normal investment pattern (i.e. holding through Mauritius). It</p>	
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			<p>is submitted that holding of the VEL shares in a foreign-owned vertical would enhance the value of the shares since a foreign telecom holding is more marketable than an Indian telecom holding. This is because the foreign holding being held in compliance with FDI norms could be sold either to a foreigner or to an Indian party whereas Indian holding could be sold to a foreigner only if such transfer would not breach FDI caps. Further, the ability to raise finance would also be increased through a foreign-owned verticals in overseas debt markets had far greater depth than Indian markets, borrowing rates were lower overseas and raising loans overseas against security of foreign-owned Indian shares wasn't constrained with regulatory restrictions. Accordingly, ETIL approached Foreign Investment</p>	
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			<p>Promotion Board (FIPB) for seeking permission to receive foreign funding from ECL.</p> <p>f) Once FIPB approved and the investment was made by ECL, ECML [earlier known as Essar Communications (India) Ltd. ('ECIL')] obtained a loan of USD 1.1 billion (on the strength of VEL shares inter alia held by ETIL) which could be used by the group for expansion of other businesses. Out of the aforesaid loan, USD 330 million and USD 70 million (worth of intragroup loans), ECL infused USD 400.61 million in ETIL as share capital. (Point B, Page 1707 and Point B, Page</p>	
			<p>1726 of ECL ITAT PB). The correct Rupee equivalent of the USD 400.61 million was Rs. 1,767.88 crores as mentioned in Annexure C to the submission dated 15 March 2016 filed by the Assessee to the AO.</p> <p>g) The aforesaid USD</p>	

		<p>400.61 million was authorize by ETIL (Point A, Page 1706 of ECL ITAT PB):</p> <ul style="list-style-type: none"> • To repay loan of SCILL which was utilized to purchase the stake of 1.95% of VEL from IDFC and to redeem part of debentures issued to ETHL amounting to Rs.275.24 crores • To pay off the balance debentures which were issued to ETHLand • To acquire the stake of 3.85% of VEL from TOT for Rs.421.27 crores (Page 101 of ECL ITAT PB) <p>h) FDI in ETIL enabled monetization of the VEL shares resulting in raising of loan of USD 1.1 billion from overseas lender.</p> <p>In nutshell, all the above-mentioned transactions have been undertaken for commercial/ business reasons, and it is incorrect for the Revenue to allege that ETIL was a paper entity with no resources and had nothing to pay for the acquisition ofVEL shares or to draw any</p>	
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			negative inference from the transactions that were undertaken.	
	7. Money infused by ECL Mauritius via assistance 400.61 million USD to ETIL which is Rs.2077.7 cr:	Page 10	a) The correct Rupee equivalent of the USD 400.61 million was Rs. 1,767.88 crores as mentioned in Annexure C to the submission dated 15 March 2016 filed by the Assessee to the AO.	
	<ul style="list-style-type: none"> • Rs.200 Cr. To ETHL, Chennai for redeeming debentures issued by ETHL. <p>-Money flowing to ETHL,Chennai: ETHL floated 2 Cr fully convertible debenture of Rs 100 each around 15.01.2007. ETIL subscribed to the same and paid part of the share capital infused by ECL(M) (pp294-295,</p>	Page 12	a) This is factual and there is no allegation by the Revenue. Hence, it does not merit any reply.	

	Vol5, ETIL minutes)			
	<ul style="list-style-type: none"> 20 Cr. To Girishan Investment Private Ltd. ('Girishan') for buy back of shares from Girishan by ETIL Money flowing to Girishan company which is 100% controlled by Manju Ruia. The payment was by way of buyback of 20 lakh shares invested by Girishan in the share capital of ETIL. Even while the shares were subscribed at Rs 10 per share the same was bought back at a value of Rs100, that is at a premium of Rs 90. Thus, against share capital investment of Rs 2 Cr Girishan 	Page 12	a)While the factual assertion made regarding the amount and recipient of buyback proceeds is not disputed, it is submitted that negative inference sought to be made by the Revenue therefrom is not correct / appropriate and has no basis. The buyback by ETIL from Girishan was undertaken at Rs. 100 per share after obtaining requisite FIPB approval. In any case, the Revenue's argument has no bearing on the availability of the India-Mauritius DTAA to the Assessee. (Para127, Page84 of ECL ITAT PB)	

	was paid Rs 20 Cr.			
	<ul style="list-style-type: none"> 180 Cr as issued Share capital to ECL Share Capital increased from 2 Cr to 180 Cr in January 2007 	Page 12	a) This is factual and there is no allegation by the Revenue. Hence, it does not merit any reply.	
	The whole money amounting to Rs2077.7 Crores has gone to the flagship companies of Essar.	Page 12	a) ETHL is only one of the Essar entities in the group which held investments in VEL. The Assessee further submits that the Revenue's reference to ETHL as the flagship company is incorrect. It should be noted that ETHL has actually transferred 10.05% stake in VEL to ETIL and only the agreed amount has been utilized	
			By ETIL in settling consideration for the same. This is a genuine transaction that has been explained by the	

			Assessee above and accordingly, no adverse inference should be drawn in the facts of the present case. (Para 126, Page 84 of ECL ITAT PB)	
	USD 400.61 million loan provided by ECL, Mauritius from and out of a loan of USD 1.1 billion taken from Standard Chartered Bank ('SCB') on 31 January 2007 pledging the very shares of VEL, which includes 15.85% shares of ETHL.	Page 12	<p>a) It is submitted that the allegation of the Revenue that 15.85% shares of VEL were pledged to obtain the loan of USD 1.1 billion is incorrect. It is submitted that the Assessee had made an application to RBI for pledge of VEL shares pursuant to loan of USD 1.1 billion vide letter dated 12 February 2007, however, the approval for pledge was never received and eventually the application for pledge of VEL shares was rejected by RBI vide letter dated 4 October 2007. Therefore, the contention/allegation of Revenue is factually incorrect and contrary to evidence on record.</p> <p>b) It is further submitted that statement that 15.85% VEL shares</p>	

			<p>are owned by ETHL is also incorrect. It is submitted that 15.85% of shares were not owned by ETHL and at the time of availing the loan of USD 1.1 billion, the VEL shares were owned by ETIL and not ETHL.</p> <p>c) Without prejudice to the above, it is normal for the lenders to expect that the asset being acquired is itself pledged as security for the loan being availed. It is not uncommon to use the jewel in the group for financing/ expansion of the group. Accordingly, it is submitted that it is a common business practice to obtain loans for group companies by pledging their securities i.e. it is not unusual for entities to guarantee debts of other group entities. Refer Vodafone International Holdings B.V. (2012) 341 ITR 1 (SC) –Para79 (Para</p>	
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			177, Page 111 and Page 1717 of ECL ITAT PB)	
	d) This is a simple case of shares of VEL being pledged, money borrowed and given to ETIL to acquire the very shares which are pledged, perfect case of round tripping and nothing else	Page 13	<p>a) The allegation of the Revenue that the shares of VEL were pledged to avail the loan of USD 1.1 billion and the same was given to ETIL to acquire the shares of VEL is factually incorrect. As submitted above, the shares of were not pledged since there was no approval from RBI for pledge of VEL shares therefore, the conclusion of the Revenue that the very shares of VEL were pledged to borrow money and the same money was given to ETIL to acquire the shares of VEL is totally incorrect and contrary to facts on record.</p> <p>b) Without prejudice to the above, it is submitted that the aforesaid contention of “round tripping” has been raised by the Revenue for the first time and the same has never been raised by the AO or CIT(A). Under the provisions of the Act, the</p>	<p>a) Discussion at Para VI onwards at pages 228-234 of the AO’s order wherein the conclusion drawn is that the Assessee was evasive in its replies in respect of utilization of loans taken. In its replies the assessee does not seem to have taken this stand earlier as the AO’s order mentions this fact (That shares of VEL were pledged to avail loan of USD 1.1 billion) at multiple instances.</p> <p>b) At pages 228-234 the AO discusses the utilization of the loans taken. The AO observed that loan facilities have been availed by different companies of Essar group on the strength of HEL/VEL shares owned by the ECL and Ecom which were pledged with the lenders as security. However, out of loan raised not a single penny was utilized by the assessee for its own business. In fact this was provided in the loan agreement itself that the assessee will not undertake any business or commercial activity. As such, after sanction instead</p>

			<p>Revenue is not permitted to raise fresh grounds without rectifying or revising the assessment order. Therefore, the reasons given by the lower authorities for denying the DTAA benefits cannot be revised by the learned ASG before the Hon'ble Tribunal.</p> <p>c) Without prejudice to the above, the Assessee submits that pledging the asset with bank which a person wants to buy with borrowed money is the most normal transaction that takes place on day-to-day basis in the commercial world. For example, an individual buys a house with borrowed money by pledging the same house (which he is buying) with a bank. Therefore, it is completely incorrect for the Revenue to even suggest that the same is in the nature of "round tripping".</p> <p>d) The Assessee submits that borrowing money outside India based on the value of</p>	<p>of crediting the loan into assessee's accounts, it was disbursed directly to the other companies of Essar group utilizing these funds. That is why assessee was required to explain the ultimate utilization of loan funds. The assessee however did not come forward with the targeted information requisitioned by the Assessing Officer and furnished general replies.</p> <p>c) Repayment of old loans is not a utilization of new loan unless the utilization of old loan is explained properly.</p> <p>d) The money ultimately went to whom did not explain the kind of investment made, by which entity and in which business and thus who is the ultimate beneficiary of these balance funds. The replies furnished by the assessee are thus apparently evasive in nature preventing the Assessing Officer to reach logical conclusions.</p>
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			<p>shares of an Indian company and thereafter</p> <p>225 authorize the borrowed money for purchasing the shares cannot be at all termed as “round tripping”.</p> <p>e) It is further submitted that “round tripping” means the funds/income which originate in India are sent out of India and the same money coming back to India in the form of investment for claiming DTAA benefits. In this regard, the Assessee relies on the judgment of Vodafone International (supra) which has explained the meaning of “round tripping” (circular movement of capital) as under:</p> <p>(i) Round Tripping can take many formats like under-invoicing and over-invoicing of exports and imports.</p> <p>(ii) Round Tripping involves getting the blackmoney or capital that is hidden out of India, say</p>	
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		<p>Mauritius, and then come to India like FDI or FII.</p> <p>f) Reference in this regard is also made to Para 8.84 of the Report by the 'Joint Committee on stock market scam and matters relating thereto dated December 2002 which again raised concerns regarding the roundtripping of funds from India to claim the benefits of India-Mauritius DTAA for avoidance of taxes.</p> <p>g) In view of the above, it is submitted that "round tripping" involves funds which originate in India, sent outside India clandestinely and are reinvested in India. In the instant case, there is not even an allegation/suggestion by the lower authorities that the Assessee is claiming benefits of DTAA by virtue of round tripping of funds.</p> <p>In any case, the Assessee submits that the money was borrowed from outside India from SCB,</p>	
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			<p>UK and the same was used for investment purpose in India and outside India. Therefore, there is no case of round tripping in the facts of the present case as alleged by the Revenue for the first time.</p>	
	<p>c) This is a simple case of monies being borrowed by ETHL, which needs to be squared off. This could have been done with in India, instead of doing that, a convoluted route was structure with two purposes contrary to law-</p>	<p>Page 13</p>	<p>a) It is submitted that the contention that the Assessee ought to have borrowed funds in India is being raised for the first time and has not been raised by the lower Authorities in the orders passed by them. As submitted above, the Revenue is not permitted to raise fresh grounds for denying the benefits of India-Mauritius DTAA, accordingly, the fresh contention raised should not be</p>	

			taken authorisation of.	
	<p>i) The borrowing was made by upstream Mauritius companies which had no commercial substance as the borrowing was not for their use. Not a single dollar of this borrowing was authorized by Mauritian Companies. The borrowing happened on the strength of pledging Indian shares, which could have been done by Indian entities.</p> <p>ii) The whole exercise of acquisition is totally farcical and loan arrangement, a camouflage, as ETIL was a company created on paper without any substance and has had a very short existence before</p>		<p>b) It is further submitted that the Revenue cannot step into the shoes of an assessee and then direct as to how the business is to be conducted by the assessee (SA Builders vs.CIT (288ITR 1)). The money was borrowed outside as the terms of borrowings were more favourable and suitable to the group entities. Accordingly, it is submitted that the Revenue cannot insist that the Assessee ought to have borrowed money in India and therefore, the contention is contrary to the settled principles of law.</p> <p>c) Without prejudice to the above, the Assessee submits that the money could not be borrowed in India on the strength of VEL shares since the existing Reserve Bank of India ('RBI') regulatory framework did not allow banks to lend money against the pledge of shares</p>	

	this transaction.		<p>above the limit specified under the regulations and made it difficult to raise money based on the value of VEL shares. Further, under the FEMA regulations, a company could not borrow money under the External Commercial Borrowings ('ECB') route to pay off its existing rupee loans. (Para 123, Page 82 of ECL ITAT PB)</p> <p>d) In fact, in view of the aforesaid restrictions, ETHL attempted to monetize the value of VEL shares from non-banking financial companies (NBFCs) (that also had a call option) i.e. with IDFC for 1.95% and TOT for 3.85%, however, ETHL was unable to borrow money on favourable terms from these NBFCs as the value of borrowing, interest rates etc. were not attractive. In addition to the above, ETHL was highly debt laden and in default of the listing agreement (Point B, Page 1707 of ECL ITAT PB).</p>	
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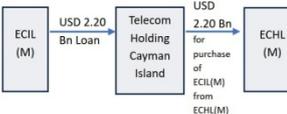
			<p>e) In view of the above, ETHL was unable to borrow money due to various regulatory restrictions and because of overly leveraged balance sheet. Therefore, the argument of the Revenue that the money ought to have been borrowed in India on the strength of VEL shares is baseless and contrary to the evidence on record.</p> <p>f) The Assessee further submits that since the money could not be borrowed in India on favourable terms, the only other option was to borrow money at the level of holding company in Mauritius since that would allow full utilization of value of VEL shares for the purpose of borrowing which were held by Ecom & ETIL at one go. As submitted above, the increase in FDI cap to 74% allowed the borrowing of funds outside India. It is further incorrect to say that the money borrowed was not utilized by the</p>	
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			<p>entities in Mauritius. As submitted on multiple occasions, out of USD 1.1 billion loan, ~USD 525 million was infused by ECML in ECL (Point B, Page1707 of ECL ITAT PB) of which USD 145 million was infused in Ecom and USD 330 million was infused in ETIL (as also USD 50 million by ECL to repay EIHL for short term loan taken by ECL for investing in ETIL). Therefore, the argument of the Revenue that the borrowed money was not authorised by the companies in Mauritius is without any basis and is contrary to the evidence on record. (Para 174-177, Page 111 of ECL ITAT PB)</p> <p>g) As mentioned in this note and earlier submissions as well, incorporation of ETIL, transfer of VEL shares to ETIL from ETHL, loan borrowings by Mauritius entity, liquidation of ETIL</p>	
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			<p>etc. were all transactions undertaken for commercial/ business reasons and it is incorrect on the part of the Revenue to allege that the entire arrangement was farcical and loan arrangement was a camouflage, which is contrary to the evidence on record. (Para 123-128, Page 82 and Para129-134, Page 85 of ECL ITAT PB)</p>	
	<p>iii) Secondly, a vehicular movement has been structured by migrating the ETHL shares out of India through ETIL to ECL, Mauritius. It is important to highlight that besides settling the loan, balance monies were again for the benefit of the Ruia family</p>	Page 13	<p>a) It is submitted that the contention that monies were again for the benefit of the Ruia family is being raised for the first time and has not been raised by the lower authorities in the orders passed by them. As submitted above, the contention of the Revenue ought not to be taken authorisation of and the same is liable to be rejected.</p> <p>b) Without prejudice to the above, it is submitted that the transition of shares from ETIL to ECL was by virtue of the loan agreement with</p>	

			<p>SCB. The lenders wanted a direct pledge on the shares of VEL which were held by ETIL. An application was made to RBI for pledge of the VEL shares for loan taken by ECML from SCB however, the approval of RBI was not forthcoming and eventually the application made by ETIL was rejected by the RBI. In view of the rejection by the RBI, there was no option left but to liquidate ETIL as in the absence of pledge of VEL shares the loan agreement could be cancelled by the lenders. The Assessee submits the fact that an application was made to the RBI for a pledge demonstrates that the first intention of the Assessee was not to transfer the ownership to a Mauritius entity byway of liquidation and the liquidation was driven by circumstances beyond its control. Hence, the argument of the Revenue that</p>	
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			vehicular movement has been structured for migrating the shares outside India for tax avoidance reasons is baseless and contrary to the evidence on record. (Para 136-137, Page 89 and Point C, Page 1708 of ECL ITAT PB)	
(III) Loan transactions and loans and borrowings conducted through various trusts to Ruia family				
	Diagrammaticre presentation of use of USD 1.4 billion Loan dated 29.6.2007	Page 14	<p>a) The chart referred clearly demonstrates that the loan borrowed of USD 1.4 billion was 234 uthoriz for the purpose of business and not a single rupee has gone to the Ruia family members and the Revenue has not brought any evidence on record to prove that such monies have actually gone to the Ruia family members.</p> <p>b) The use of the funds raised vide the loans was explained to the AO as referred to on page 231 of the assessment order</p>	<p>a) The chart at page 15 of the Revenue's submissions dated 11th March, 2025 is merely a pictorial/ diagrammatic representation of the assessee's submission that is mentioned by the AO on page 231 of the AO's order.</p>

<p>Loan of USD 3.59 billion taken by the ECIL(M) on the pledge of HEL/VEL shares owned by the Group (onshore & offshore: no distinction)</p> <ul style="list-style-type: none"> Balance of 2.20 Bn  <pre> graph LR ECIL["ECIL (M)"] -- "USD 2.20 Bn Loan" --> THCI["Telecom Holding Cayman Island"] THCI -- "USD 2.20 Bn for purchase of ECIL(M) from ECHL(M)" --> ECHL["ECHL (M)"] </pre>	Page 14	<p>a) It is submitted that the contention that monies were given to 8 family members of the Ruia family is being raised for the first time and has not been raised by the lower authorities in the orders passed by them. As submitted above, the contention of the Revenue ought not to be taken authorised and the same is liable to be rejected.</p> <p>b) Without prejudice to the above, it is submitted that out of the USD 3.59 billion loan taken by ECML, USD 1.4 billion was used to repay the loan of USD 1.4 billion to SCB, UK (USD 1.1 billion loan was refinanced to USD 1.4 billion). Copies of loan agreements for USD 1.1 billion, USD 1.4 billion and USD 3.59 billion are attached at Page 642 to 962 of ECL ITAT PB.</p> <p>c) The balance funds of USD 2.18 billion were lent by ECML to Telecom Holdings (Cayman) Limited, Cayman Island ('THCL') to acquire shares of ECML (and consequently indirectly shares of Ecom and the</p>	
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			<p>Assessee) from ECHL in line with the requirement of the lenders to have a separate standalone structure which could be efficient from a security enforceability standpoint such as there being no other liabilities, better conditions for invocation of pledge, etc. The money ultimately went to EGFL, Cayman Islands as dividend declared by its subsidiary ECHL. (Para 180, Page 113 and Page 1719 of ECL ITATPB)</p> <p>d) The loan agreement further provided that the money received by EGL as a dividend would be used for general investment and corporate purpose (Clause 3 Page at Page 878 of ECL ITAT PB). The same is also evident from the cash flow statement of EGFL for Financial Year ('F.Y.') 2007-08 which shows that the money has been used for investment in subsidiaries and group companies and corporate purposes (refer cash flow statement of EGFL at Page 1597 of ECL</p>	
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			<p>ITAT PB). (Para 180, Page 113 of ECL ITAT PB)</p> <p>Therefore, the argument of the Revenue that the amount of dividend given to EGFL has benefitted Ruia family members is factually incorrect and contrary to the evidence on record. The Assessee further submits this contention has been raised for the first time before the Tribunal without any basis and the same was not raised by any of the authorities below.</p>	
	<p>Page 15</p>	<p>a) As stated above, the allegation round tripping has not been raised by the lower authorities and has been raised for the first time before the Tribunal. Since this allegation was not made by the lower authorities, the Revenue is not permitted to raise the same before the Tribunal for the first time.</p> <p>b) Without prejudice to the above, there is no round tripping of funds (i.e. circular movement of funds originating from India, movement abroad and inflow of such funds back into India to claim treaty benefits/ tax avoidance scheme)</p>		

			involved in the facts of the present case. All transactions i.e. borrowings in India and outside India, pledge of VEL shares, liquidation of ETIL, sale of VEL shares and application of such funds for repayment of borrowings, have been undertaken for commercial/ business reasons i.e. monetizing the value of VEL shares and utilizing the same to fund expansion of the business (as explained above). Accordingly, the allegation of the Revenue as stated in the diagram is entirely misplaced and is overlooking the business/ commercial realities.	
	5. This is again a perfect case of round tripping. What is taken as a loan by ECIL (M) converts into an income in the hands of Telecom Holding Caymen Island when ECHL (M)the parent entity has sold the shares of the subsidiary which is the borrowing entity, and as a	Page 16	a) At the time of execution of loan agreement, ECML was held by Essar Communications Holdings Limited, Mauritius (ECHL) (parent) and EGL (grand parent). ECHL was the holding company for passive telecom infrastructure business and, EGL was the holding company for all the businesses of the group and further had huge borrowings and	The issue has been discussed in above paras, hence, no comment is required.

	<p>result, it now becomes an income of USD 2.20 billion in the hands of Telecom Holding Caymen Island.</p>		<p>other obligations as a flagship company of the group. Therefore, the lenders under the loan agreement required that the VEL shares basis which the loan was being taken, to be held under a separate structure and not under the umbrella of EGL from security enforceability stand point. Accordingly, various steps were undertaken in line with the loan agreement, to separate the holding of VELshares and house it under an independent structure. Therefore, the argument of the Revenue that the same is round tripping is perverse and without any basis in law since the steps were undertaken with commercial substance and to meet the requirement of the lenders. (Page 1719, 1737 and 1739 of ECL ITAT PB)</p> <p>b) It is further submitted that there is no “round tripping” as explained by Supreme Court in case of Vodafone International (supra) and JPC Report and the allegation has been</p>	
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			made by the Revenue without any material in support of the same.	
	6. Telecom Holding Cayman Island conveys this USD 2.20 billion as dividend to Essar Global Caymen Island through various beneficiaries entities situated in BVI and they in turn pass on the entire USD 2.20 billion to the eight Ruia family members.	Page 16	<p>a) This allegation is factually incorrect as dividend of USD 2.18 billion was distributed by ECHL to EGL and not by THCL. It is further submitted that the dividend of USD 2.18 billion was not at all passed on to the eight Ruia family members and as explained above the same was used by EGL for investment and corporate purpose in India and outside India. It is further submitted that no dividend has been actually declared by EGL. The Revenue apart from making a bald allegation has not adduced any material which suggests that the loan amount was passed on to the Ruia family members.</p> <p>b) Without prejudice to the above, it is submitted that the issue before the Tribunal is regarding taxability of shares under Article – 13 of</p>	The issue has been discussed in above paras, hence, no comment is required.

			India-Mauritius DTAA and the above allegation has no bearing on the issue which arises for consideration of the Tribunal.	
	e) The whole financials transaction undergoes the following mutations:			The issue has been discussed in above paras, hence, no comment is required.
	a. It initially partakes the colour and character as a loan. It becomes an income in the second stage without any underlying commercial purpose.	Page 16	a) The explanation for the commercial purpose of the loan by ECML to THCL has been provided in response to Sr (III).5 of the Revenue submission above	
	b.It mutates into dividend through a very complexstructure withasoleideatobe nefit the 8 Ruia family members and ultimately the consideration arising out of the sale of shares of these two Assesseees before this Hon'ble Tribunal is again used to payback all the pending loan across the Essar Group entities where	Page 16	a) This allegation is factually incorrect as submitted above, the amount of USD 2.18 billion was used by EGL for various business purposes and not a single penny has gone to the Ruia family members or repayment of loans across entities where Ruia family members have direct interest. As submitted above, the loan agreement provided that the amount of USD 2.18 billion was to be used for general investment and corporate purpose	The issue has been discussed in above paras, hence, no comment is required.

	<p>Ruia family has a direct interest</p>		<p>and as evident from the cashflow statement of EGL for the relevant year, the amount has been used for the same purpose. Further, the Revenue has not produced any evidence to support their allegation and in fact, the allegation is contrary to the evidence on record and is therefore liable to be rejected. (Page 878 and 1597 of ECL ITAT PB)</p> <p>b) It is also submitted that the amount received on sale of VEL shares was 242 million to pay back the loan of USD 3.59 billion taken by ECML since the Assessee was a guarantor to the loan. However, the same does not bar the Assessee from claiming the benefit of Article-13 of India-Mauritius DTAA. (Para 248, Page 149 and Page 1717 of ECL ITAT PB)</p>	
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	<p>c. Most importantly, a commercial loan secured for business purposes ends up as family dividend for the Ruia family and the shares held through substance less entities namely the two Assesseees are sold to payback the loans.</p>		<p>a) This allegation is factually incorrect as submitted above, the amount of USD 2.18 billion was used by EGL for investment and business purposes and the same was not at all distributed as dividend to the Ruia family members. Neither any material is produced, nor any details are given by the Revenue for making this allegation. Therefore, in the absence of any material in support the aforesaid allegation, the same is liable to be rejected.</p> <p>b) It is further submitted that the Assessee cannot be termed as a “substance less” entity since it is an investment holding company and have been undertaking requisite investment holding activities in Mauritius (Page 1711 of ECL ITATPB). Further, there are qualified people on the Board of directors (the Board) who have taken decisions concerning the affairs of the Assesseees, in Mauritius (Page 280-283 of ECL ITAT PB). The entities have also facilitated raising of substantial loans (from</p>	<p>The issue has been discussed in above paras, hence, no comment is required.</p>
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			<p>third party lenders). The directors are required to discharge obligations and undertake various duties under the Mauritian laws. Accordingly, the existence of these entities should be respected by the Revenue. Without prejudice to the above, if the Revenue alleges that the Assessee is substance less then the income (for taxability of income from sale of VEL shares) ought not to have been taxed in its hands. Reliance in this regard is placed on Vodafone International (supra) [Para 98], Sri Meenakshi Mills Ltd. [1967] 63 ITR 609 (SC), Aditya Birla Nuvo Ltd. (342 ITR 308)(Bom) and Alibaba.Com Singapore E-Commerce (P.) Ltd. [2023]459 ITR 508 (Bombay). Accordingly, the capital gain charged by the AO in the hands of the Assessee is incorrect and bad in law.</p>	
	d.The net effect of the whole transaction can be reduced to a one liner – Essar Group entities have loans to be	Page 17	a) As submitted above, the loan was taken by ECML with a view to monetize the value of VEL shares and use the funds for expansion of	The issue has been discussed in above paras, hence, no comment is required.

	<p>discharged in various group companies. These loans ultimately got discharged by selling the Essar shares held by the Ruia family. The shares belong to an Indian entity. Ruia family are residents of India. Whereas, illusionary superimposing entities where created in Mauritius to migrate and monetize the share, the sale and its consideration without paying taxes</p>		<p>business [Refer response to Sr. (II). 1 to 6 of Revenue submission and response to Sr. (III).7(b) of Revenue submission]. Therefore, the conclusion of the Revenue that loan to be discharged by various entities was discharged by selling shares of Essar is factually incorrect.</p> <p>b) It is further submitted that the conclusion of the Revenue that the shares belong to an Indian entity and entities were created in Mauritius to migrate and monetize the shares without paying taxes is factually incorrect and contrary to the evidence on record. As explained above, due to various regulatory restrictions, the money was borrowed outside India as the terms and conditions of the loan were far more favourable and, the shares held by ETIL were transferred to ECL on liquidation due to a requirement under the loan agreement regarding direct pledge of shares which was rejected by the RBI. Therefore, the argument</p>	
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			<p>of the Revenue ignores the compelling circumstances which led to migration of shares to Mauritius. [Refer response to Sr.(II).1 to 6 of Revenue submission]. Without prejudice to the above, the benefit of India-Mauritius DTAA was available even without the migration of VEL shares to Mauritius as the Assessee could have sold the shares of ETIL or ECML could have sold the shares of ECL. (Para 123-128, Page 82 and Para 129-134, Page 85 of ECL ITAT PB)</p> <p>c) It is further submitted that the conclusion of the Revenue that all the family members of Ruia family are residents in India is again factually incorrect as Mr .Ravikant Ruia (A.Y. 2010-11 onwards) and Mr. Rewant Ruia (A.Y. 2011-12 onwards) were not residents in India for the year under consideration therefore, assuming without admitting, even then the whole of control and management of the company is not in India. Consequently, the Assessee cannot be</p>	
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			considered as a resident in India under section 6(3) of the Act.	
	<p>e. Most importantly, it needs to be highlighted that there is no foreign investment or any other investment coming into India. This is a reverse transaction. Indian shares worth USD 3.2 billion is migrated and authorisation outside India through sham transactions and colourable devices.</p>	Page 17	<p>a) The Assessee submits that this allegation is factually incorrect. ECL had infused USD 400.61 million in ETIL (Point A, Page 1706 of ECL ITAT PB) which was partly from the borrowings of USD 1.1 billion and partly from the borrowings from overseas group companies. (Page 5 of ECL ITAT PB)</p> <p>b) The Assessee has already explained the rationale behind migration of VEL shares from ETIL to ECL (Please refer response to Sr.(III).7(d) of the Revenue submission)</p> <p>c) Therefore, the contention of the Revenue that there is no FDI coming into India and this is reverse transaction of shares being migrated through sham transactions and colourable devices is without any basis and bad in law.</p>	The issue has been discussed in above paras, hence, no comment is required.

	<p>f. Loan taken on the pledge of shares owned by Ecom (M) and ECL(M)/ETIL (India)/ETHL (India) has gone as dividend income in the hands of key holding company of the entire Ruia Group i.e., Essar Global Limited Cayman Islands. This company is held by eight of Ruia family members as beneficiaries of various trusts created in B.V.Island.</p>	Page 17	<p>a) As explained above, the funds received as dividends were used by EGL, Cayman Islands for investment and business purposes and the same was not passed on to the Ruia family members. [refer response to Sr. (III).7(b) of the Revenue submission]</p> <p>b) It is submitted that the entities above EGL, Cayman Islands have no role to play and are not relevant for the transaction under consideration in the present appeal as no transactions have taken place with those entities by the Assessee. In any case, the Assessee further submits that the rationale behind the aforesaid structure was explained to the lower authorities during the course of proceedings. (Page 1735-1740 of ECL ITAT PB).</p> <p>c) For completeness, it is further submitted that EGL, Cayman Island is not held by the members of Ruia Family but the shareholders are the private companies which in turn are held by discretionary trusts (some of the</p>	The issue has been discussed in above paras, hence, no comment is required.
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			<p>beneficiaries are private companies of which Ruia family members are shareholders) incorporated under Star laws of Cayman Island and not British Virgin Islands as contended by the Revenue. (Para 27, Page 24 of ECL ITAT PB)</p> <p>d) Without prejudice to the above, it is submitted that the aforesaid allegation made by the Revenue has no bearing on the question that arises for consideration of the Tribunal in the present appeal i.e. taxability of capital gains in the hands of the Assessee under Article – 13 of India-Mauritius DTAA.</p>	
	<p>g. If this amount of USD 2.20 billion had gone directly as loan from ECML (M) to ECHL (M), it could not have paid the same to EGL Cayman Island as dividend income because the dividend income is only paid out of income or reserves on account of income.</p>	Page 17	<p>a) Out of the USD 3.59 billion loan taken by ECML, USD 1.4 billion was used to repay the loan of USD 1.4 billion to SCB. Balance funds of USD 2.18 billion were lent by ECML to THCL to acquire shares of ECML from ECHL in line with the requirement of the lenders to have a separate standalone structure which could be efficient from a security enforceability</p>	<p>The issue has been discussed in above paras, hence, no comment is required.</p>

			<p>standpoint. (refer response above to diagram (III), Page 14 of the Revenue submission)</p> <p>b) In order to effectuate this separation, the lenders had required that THCL acquire from ECHL the aforesaid vertical and hence they required the USD 2.18 billion to be paid for as sale consideration for ECML shares (to transfer the vertical).</p> <p>c) The transactions were undertaken for commercial reasons and it is not open to the Revenue to rewrite/compare the transactions consummated with a hypothetical one such as a loan from ECML to ECHL.</p> <p>d) Without prejudice to the above, whether the dividend was given out of income or reserves or not has no bearing on the issue arising for consideration in the present appeal i.e. eligibility of the Assessee to claim benefits of India-Mauritius DTAA.</p>	
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	<p>h. It is self-evident from the above that not a single USD/ Rupee out USD 3.59 billion has not been 251 uthoriz by ECL/Ecom/ETIL nor ECML/ECIL.</p>	Page 17	<p>a) It is incorrect to say that the money borrowed was not utilized by the entities in Mauritius. As submitted above, the loan 3.59 was used to pay the loan of USD 1.1 billion loan of which USD 525 million was infused by ECML in ECL of which USD 145 million was infused in Ecom and USD 330 million was infused in ETIL (as also USD 50 million by ECL to repay Essar Infrastructure Holdings Limited, Mauritius (EIHL or EGL, Mauritius) for short term loan taken by ECL for investing in ETIL). Therefore, the argument of the Revenue that the borrowed money was not 251 uthoriz by the companies in Mauritius is without any basis and is contrary to the evidence on record. (Point B, Page 1707 of ECL ITAT PB)</p>	The issue has been discussed in above paras, hence, no comment is required.
	<p>i. These have been used as mere conduits in transferring the monies from one entity to another and ultimately serving to the benefit of the</p>	Page 17	<p>a) As submitted above at response in point (a) to allegation at Sr.5, Page 16 of the Revenue submission, the Assessee or any of the group companies cannot be termed as conduits since all the transactions</p>	The issue has been discussed in above paras, hence, no comment is required.

	<p>various other Essar groups.</p>		<p>have been carried out with commercial substance and as explained above, the money was transferred from one group company to another with a business purpose. (Page 1735-1740 of ECL ITAT PB)</p> <p>b) It cannot be said that the entities involved in the transactions were conduits for the reason also that their genuineness was recognized by the providers of the loan. The lenders would not have required for the transactions to have been undertaken between the parties (and treated such transactions as the purpose of the use of funds in clause 3 of the facility agreement) unless the transactions were real, had commercial purpose and legal consequences.</p> <p>c) The Revenue has made bald allegation without bringing any material on record to controvert the commercial reasons for carrying out various transactions. Therefore, it is submitted that in the absence of any material in support of its allegation, the bald</p>	
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			allegation made by the Revenue ought to be rejected.	
j.	Two things are critical- asset pledged remains to be VEL shares with situs in India and secondly, the entire borrowings have not been of any use to any of the entities referred above.	Page 18	a) While there is no dispute that the VEL shares were pledged and their situs was in India, it is factually incorrect to say that the borrowings were not used by the entities referred to by the Revenue, as the Assessee too received and invested from the loan proceeds as explained above. (Para 174-176, Page 111 of ECL ITAT PB)	The issue has been discussed in above paras, hence, no comment is required.
(IV) Voluntary Liquidation of ETIL				
	<ol style="list-style-type: none"> 1. ETIL was incorporated in November 2004. 2. ETIL was liquidated on 28.07.2008. 3. The intent of so-called voluntary liquidation of ETIL was clear from a loan agreement dated 31.01.2007 to which ETIL was not even a party and was rather happily talking about its business expansion 	Page 19	<ol style="list-style-type: none"> a) From a greater security enforceability stand point, the lender (SCB, UK) had kept the route of liquidation of ETIL as a possible option to the pledge of VEL shares by ETIL. b) ETIL made an application for pledge of VEL shares to RBI on 12 February 2007 (under the USD 1.1 billion loan agreement) which shows that ECL did not want to liquidate ETIL straight away without exploring the option of pledging of shares. As no approval was 	<ol style="list-style-type: none"> a) The voluntary Liquidation is discussed from Page 44- 63 of assessment order of ECL, however, there is no mention of assessee filing any document with respect to the RBI approval or the supposed business intent of Liquidation. Likewise, the CIT(A) order discusses Voluntary Liquidation from Page 30-43, wherein there is no mention of assessee furnishing any RBI document. b) On the contrary, the intent to liquidate ETIL first appears in Loan

			<p>forthcoming from the RBI even 6 months after the application was made, in the USD 3.59 billion loan agreement (which was more than 3 times the USD 1.1 billion loan), the consortium of lenders required liquidation of ETIL in order to migrate VEL shares to ECL so that the same could be pledged with the lenders with RBI's approval which was possible if the shares were held by a non-resident. Hence, the intent was to perfect the security for the lenders. Infact, the concerns of the lenders came true when the RBI vide letter dated 4 October 2007 finally and officially rejected the application made by ETIL to pledge VEL shares. Therefore, the only way to secure lenders interest was to liquidate ETIL and provide pledge of the shares. (refer Page 1708 of ECL ITAT PB)</p> <p>c) It is important to note that in July 2008 ETIL was liquidated and the share were distributed to ECL by the</p>	<p>agreement dated 31.1.2007 of ECIL(M) with Standard Chartered Bank wherein Permitted Dissolution is discussed.(Page 51 of ECL assessment order, Page 31 of CIT(A) order). This is prior to the supposed application of the assessee to RBI dated 12.2.2007, as claimed by the assessee, which it has not furnished. Hence, the intent to Voluntarily Liquidate ETIL was already there ,whichwas subsequently acted upon.</p> <p>c) Further, the board of ETIL was unaware of such stipulation as is evident from the Minutes dated 15.01.2007 of ETIL(Page 32 and 36 of CIT(A) order).</p> <p>d) The assessee has referred to clause 18.20 of Pg 725 of its paperbook on Page 1708.It needs to be noted that Clause 18.20 has been discussed in detail in assessment order Page 52-53 and CIT(A) order Page32-34, wherein it has been held that this voluntary dissolution of ETIL is a colourable device.</p> <p>e) Therefore, there was no commercial intent in liquidation of ETIL. It was merely a colourable</p>
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			liquidator after receiving the approval from the Income- tax Department vide letter dated 14 July 2008 [refer Page 284 of ECL ITAT PB]. After which an application was made again to the RBI for pledging of shares and it was only after the shares were transferred to ECL pursuant to liquidation, the RBI granted permission to pledge VEL shares in favour of the lender, vide approval dated 14 November 2008, in view of liquidation of ETIL. (Page 1708 of ECL ITATPB)	device created to transfer the VEL shares from onshore to offshore.
4. None of the companies–ECL/ ETIL were party to loan borrowed on the strength of the assets owned by them 5. They were not aware about pledging of shares owned by them	Page 19	a) It is submitted that ECL was aparty to the loan agreement to the USD 3.59 billion loan agreement as a guarantor and had given Non-disposable Undertakings to the lenders for USD 1.1 billion, USD 1.4 billion for ETIL shares and pledge of Ecom and VEL shares to the lenders for USD 3.59 billion. In view of the above, it is incorrect to say that ECL was not aware of the pledging of shares owned by	a) ETIL held the shares of VEL till its dissolution in 28.07.2008, and ETIL was not party to the Loan agreements, on whose asset's strength these loan were taken. b) All these 3 Loan agreements have Voluntary Liquidation condition of ETIL(AO page 87-91). c)The AO Page 139-141,clearly state that only one agreement of USD 1.4bn was signed by Sh. Amit Gupta, on behalf of assessee's and he was Indian Resident (AO page -113). Further, the loan agreement of USD 3.59bn is unsigned by the assessee.	

			<p>them and was not a party to the aforesaid agreements. (Page 1711 of ECL ITAT PB)</p> <p>b) ECL agreed to pledge the ETIL and Ecom shares and the pledge agreements were tabled in the meeting of the Board of ECL held on 24 January 2007, 8 June 2007 and 16 August 2007 and were approved by the Board for further execution [Page 117 (Sr. 8) and Page 118 (Sr. 12,15) of AO order and Annexure L of submission dated 20 June 2016 filed with the AO]. (Para 183, Page 114 of ECL ITAT PB)</p> <p>c) ETIL agreed to pledge the VEL shares and the pledge agreements were tabled in the meeting of the Board of ETIL held on 15 January 2007, 8 June 2007 and 16 August 2007 [Page 128 (Sr. 19), 129 (Sr. 24 and 28) of the AO order and Annexure A of submission dated 20 June 2016 filed with the AO].</p> <p>The aforesaid events clearly show that ECL/ETIL have</p>	<p>Hence, clearly the assessee was not privy to loan agreements and pledging of their shares.</p> <p>D) The discrepancies in Board minutes have been discussed by the AO in its order from Page 144 to 163, hence, they are not reliable evidence. (CIT(A)- Page 92-138).</p>
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			considered the relevant loan and security documents in their Board meetings and approved/auctioned obligations under such agreements. Therefore, it is incorrect to say that ECL/ETIL were not aware of the pledging of shares and were not parties to loan agreements is factually incorrect.	
	<u>Key Inferences being drawn from the Voluntary Liquidation of ETIL:</u>			
	A) No control over one's own creation or dissolution	Page 19	a) As mentioned above, in the USD 3.59 billion loan agreement, the liquidation of ETIL was mandated by the lenders (third party) in order to have a direct holding of the VEL shares as it provided an enhanced enforceability of security to the lender. Further, the failure to liquidate ETIL as per the loan agreement was, inter alia, would have resulted into default with loan agreement and cancellation of loan leading to amount becoming immediately payable to the lenders (Page 914 of ECL ITAT PB). Therefore, the liquidation of ETIL was driven by commercial considerations as seen	a) The intent to liquidate ETIL first appears in Loan agreement dated 31.1.2007 of ECIL(M) with Standard Chartered Bank wherein Permitted Dissolution is discussed. (Page 51 of ECL assessment order, Page 31 of CIT(A) order). However, the minutes of the board of ETIL dated 15.1.2007, do not discuss the same. b) The Board minutes are silent of dissolution before the loan agreement dated 29.06.2007 of USD 1.4 bn (Page 51 of Assessment order)

			<p>from the aforesaid sequence of events. The said liquidation was in the interest of these parties, whoin the absence of such liquidation would have been regarded as defaulters. Given this, ETIL noted in its resolution that the same is inter alia in the best interest of the shareholders. (Para 139, Page 90 of ECL ITAT PB)</p> <p>b) It should also be noted that liquidation of a company is a shareholder's function and there is no provision under the Companies Act, 1956 which empowers a company to restrict its shareholders from voluntarily dissolving a company. Therefore, the argument of Revenue that ETIL did not have control over its own liquidation is without any basis andbadin law. Further, it is submittedthat after the Assesseeinameeting of its Board passed aresolution for liquidating ETIL, the same was subsequently discussed in the Board meeting of ETIL and further proceeded with</p>	<p>c) The Board minutes were drawing long term growth strategy vide minutes dated 16.8.2007, despite voluntary dissolution clause . The Voluntray dissolution is discussed first time in board meeting dated 12.10.2207 (Page 53 and 55 of Assessment order, Page 36 of CIT (A))</p>
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			<p>the liquidation. (Para 140, Page 90 of ECL ITAT PB)</p> <p>Given the above, the Assessee would like to submit that the liquidation was driven by commercial considerations accordingly, no adverse inferences can be drawn against the Assessee.</p>	
	B)No control over pledging one's own shares and in what manner	Page 19	Refer response to Sr(IV).5 of the Revenue submission	
	C) The owners of the shares had been denied the rightful claim and use of the money borrowed based on one's own pledged shares	Page 19	<p>a) As submitted above, ECL/ETIL have discussed in the Board meeting the loan agreements and security agreements that were required to be executed in order to borrow money under the various loan agreements. Therefore, it is incorrect for the Revenue to contend that ECL/ETIL have been denied the rightful claim and use of the money borrowed basis the pledged shares and did not have control over decision to sell shares and its proceeds since the aforesaid are the consequences of agreeing to such arrangements. (refer response to Sr. (IV). 4-5 of the Revenue</p>	<p>a)The discrepancies in Board minutes have been discussed by the AO in its order from Page 144 to 163, hence, they are not reliable evidence.(CIT(A)- Page 92-138).</p> <p>b) ECL did not retain the sale proceeds in its account for even a day (Page –13-14 of assessment order, Page – 10-11 of CIT(A)), hence, clearly, the assessee did not avail any benefit from the transaction.</p> <p>c)The Loan was taken on strength of VEL shares which was not used by assessee, and similarly the loan liability was paid of by the assessee.</p>

			<p>submission)</p> <p>b) It is further submitted that in fact ECL has benefitted out of the loans taken by ECML because out of the loan of USD 1.1 billion taken in January 2007 from SCB UK, USD 526 million was paid by ECML to ECL as share application money on behalf of ECML. ECL in turn used the funds so received to infuse capital in ETIL and in Ecom (which was effectively used by ETIL to acquire VEL shares and repay its existing debts taken to acquire VEL shares and by Ecom to repay its existing debts taken to acquire VEL shares) (Page111 and 112 of ECL ITAT PB).</p> <p>c) In large multinationals, it is normal for companies to support one another to maximize overall benefit to all in the group. Further, it would be appreciated that it is natural for a subsidiary company to act for the benefit of its holding company. Maximizing shareholders' wealth is</p>	<p>d) The application of loan facility is discussed on AO page 92-95 and CIT(A) page 67-74, which clearly highlights that assessee was not beneficiary of these loans.</p>
	<p>D) Owners did not have control over decision to sell share, and how to sell the shares and its proceeds</p>	<p>Page 19</p>		

		<p>the ultimate objective of any company (Page 112 of ECL ITAT PB).</p> <p>d) The investments in VEL by ECL yielded significant gains/value to ECL and ECL was able to support/assist its overseas group entities to make other investments. It may also be noted that various group entities have supported/assisted ECL. Illustratively, when ECL required funds for acquiring ETIL shares, ECL obtained funds in the form of interest-free and temporary loans from EIHL, Mauritius (the then shareholder of ECL) and EGFL, Cayman Islands (the then indirect shareholder of ECL). Further, group entities also provided non-monetary support to ECL such as assistance/support of different personnel with relevant expertise in various fields. The group entities cooperated with each other for reciprocal/mutual benefit and interest (Page 112 of ECL ITATPB).</p> <p>e) The sale of the shares</p>	
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		held in VEL has been discussed by the Board of directors of the Assessee. Kindly refer Sr C of positive case sheet attached as Exhibit A on Page 1727 of ECL ITAT PB.	
E) More importantly, owners did not have right to utilize the sale proceeds, which has been used by various other companies of this group	Page 19	f) As regards authorisation of sale proceeds, it may be noted that the Assessee was a guarantor to the 3.59 billion loan granted to ECML by a consortium of lenders led by SCB, UK in August 2007 (Page 1711 of ECL ITAT PB). As the loan was to be repaid and ECML (the borrower) did not have the funds to repay, the Assessee sold its VEL shares in order to meet its obligations under the loan agreement towards repayment of the facility (Para 184, Page 115 of ECL ITATPB). The tax authorities cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder – Vodafone International	a) It needs to be noted that the USD 3.59 bn loan agreement is unsigned by ECL(Pg 142 of Assessment order, Pg 95 of CIT(A)). b) ECL did not retain the sale proceeds in its account for even a day (Page –13-14 of assessment order, Page – 10-11 of CIT(A)), hence, clearly, the assessee did not avail any benefit from the transaction.

			<p>(SC) (supra) (Para 97 of Radhakrishnan), Becton Dickinson (Mauritius) Ltd (434 ITR 180) (AAR) and E*Trade Mauritius Limited (2010) 324 ITR 1 (AAR) (Para 188-189, Page 116 and Page 1717 of ECL ITAT PB)</p> <p>g) The transactions were undertaken for commercial reasons and it is not open to the tax authorities to step into the shoes of the Board of directors and question the business purpose of a transaction. The Assessee had also benefited from the various loans that were raised on the basis of ETIL/VEL shares and therefore, it is incorrect for the Revenue to argue the aforesaid as it is contrary to the facts on record. (Para 184-187, Page 116 of ECL ITAT PB)</p>	
	F) Decision making and authority does not lie with ECL/Ecom			

	<p>a) Cerebral Control in India: All the vital/cerebral functions of ECL and Ecom being centrally controlled and managed from India by Essar Group executives based in India at the instance of Ruias.</p>	Page 19	<p>a) The Revenue has failed to appreciate that:</p> <p>i) All the directors on the Board for A.Y.2012-13 were residents of Mauritius except Ms. Dina Wadia (Para16, Page 21 of ECL ITAT PB) who was appointed by the lenders.</p> <p>ii) None of the directors on the Board for A.Y. 2007-08 to A.Y. 2012-13 were residents of India except Ms. Dina Wadia (Page 1626 of ECL ITAT PB) who was lender's nominee director on the Board.</p> <p>iii) The Board of directors have taken relevant decisions in the meeting and thereafter have passed resolutions authorised various personnels of group companies for execution of agreements and security documents. This fact has also been accepted by the</p>	<p>a) The Revenue has taken cognizance and rebutted the following –</p> <p>i. The Directors had nominated employees of Essar in India to take all the decisions on behalf of them (Assessment order page - 130-142,CIT(A)-89-107).</p> <p>ii. The discussion on key management executives who took decisions were based out of India.(CIT(A)-139-140).</p> <p>iii. The key decisions were taken by Essar executives based in India, hence, the control and management was in India.</p> <p>iv. The agreements were signed by the key Essar executives in India.(Assessment order page -130-142,CIT(A)-89-107).</p> <p>b) Hence, all the control</p>
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			<p>AO and CIT(A) that the group personnels were authorised by the Assessee. [Page 92-95 of ECL CIT(A) order and Page 116-118 of ECL Assessment Order] (Page 1712 of ECL ITAT PB)</p> <p>iv) The agreements and security documents have been signed and executed outside India. (Para34-39, Page 28 and Page 1712 of ECL ITAT PB)</p> <p>v) There is no evidence or material which shows that any decision was taken by personnel of group companies or much less that the decisions were taken in India at the instance of Ruia family members. (Para 34-39, Page 28 and Page 1712 of ECL ITAT PB)</p> <p>vi) Typically, the relevant boards of the respective entities authorised the directors along with experienced</p>	<p>and management is executed from India.</p>
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			<p>personnel of the group with relevant expertise, for executing the documents under delegated authority for administrative convenience. This is not at all uncommon amongst large business houses/ groups and helps authorisation cost and bring efficiencies.</p> <p>b) The only basis of Revenue's conclusion that the control and management of the Assessee is in India is that the agreements and security documents have been signed by the personnel of group companies who were residents in India.</p> <p>c) The Assessee submits that the argument of the Revenue is incorrect and unsustainable in law for the following reasons:</p> <p>i) According to the Revenue the person signing and executing the documents is same as the Board of directors who have authorised to do</p>	
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			<p>so.This is directly in contradiction with the law laid down by Bombay High Court in case of Narottam Pereira Ltd (1953) (23 ITR 454) which has held that the control and management is with the Board of directors and not with the persons who have been delegated certain functions.</p> <p>ii) In any case, the Revenue has not brought any material on record to even suggest that the decisions have actually been taken or emanated from India and much less at the instance of Ruia family members. On the contrary, all the meeting for A.Y.2012-13 and for earlier years have taken place in Mauritius.</p> <p>Therefore, the argument of the Revenue that the cerebral control is in India is perverse, baseless and contrary to the evidence on record.</p>	
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	<p>f) Unified Central Command is obvious when viewed holistically: Entire process i.e. creation of various entities, consolidation of shares (of VEL/HEL) in various entities – with varying percentages of onshore and offshore, borrowings for the benefit of Essar Group and to fund share acquisition by pledging the very shares of V EL, passing on benefit of rights issue to a subsidiary without consideration, creation and dissolution of ETIL to make onshore shares as offshore, the impugned transactions of transfer/ sale of shares in 2011 and use of sale proceeds to repay the loans and for the benefit of Essar Group is a</p>	Page 19	<p>a) The Assessee submits that the argument of the Revenue that here is a unified Central command when viewed holistically is also unsustainable and without any evidence in support. As explained above, the evidence on record shows that the control and management of the Assessee rests with the Board of directors in Mauritius. Further, the Revenue has not found any evidence or material to support its conclusion that the decisions have been taken by Unified Central command and not by the Board of Directors. The argument of the Revenue is based on following allegations/ inferences:</p> <p>i) <u>Creation of various entities:</u> Entities have been incorporated for business and commercial reasons as explained before the AO and CIT(A)(Para 152-153, Page 94 and Page 1735-1740 of ECL ITAT PB)</p> <p>ii) <u>Consolidation of</u></p>	<p>a) There is no commercial reason for establishment and dissolution of the companies. (Assessment order page -44-63) and CIT(A)- 30-43).</p> <p>b) The application of loan facility is discussed on AO page 92-95 and CIT(A) page 67-74, which clearly highlights that assessee was not beneficiary of these loans.</p> <p>c) The assessee has not disputed that the fact that it pledged VEL shares to raise loans, and ultimately sell it to repay the loans taken for the benefit of Essar group.</p>
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	<p>unified exercise controlled and managed centrally in India by the Essar Group and not isolated independent decisions taken by the entities concerned.</p>		<p><u>shares in various entities with varying percentage onshore and offshore:</u></p>	
			<p>This allegation is factually incorrect and there is no consolidation of VEL shares onshore and offshore. The shares of VEL held by ETIL were migrated on liquidation due to various regulatory and commercial reasons as explained above.</p> <p>iii) <u>Borrowing for the benefit of Essar group:</u> The borrowing based on the VEL shares was for the benefit of the Assessee and also the group. The same is permissible in law and does not show lack of control and management as held by Vodafone International (supra) (Para 79)</p> <p>iv) <u>Funding of VEL</u></p>	<p>d) The intent to liquidate ETIL first appears in Loan agreement dated 31.1.2007 of ECIL(M) with Standard Chartered Bank wherein Permitted Dissolution is discussed.(Page 51 of ECL assessment order, Page 31 of CIT(A) order). This is prior to the supposed application of the assessee to RBI dated 12.2.2007, as claimed by the assessee, which it has not furnished during the assessment proceedings. Hence, the intent to Voluntarily Liquidate ETIL was already there ,which was subsequently acted upon.</p>

			<p><u>shares by pledging the shares of VEL:</u> The same is a normal transaction which takes on day to day basis in the commercial world. For example, an individual buys a house with borrowed money by pledging the same house (which he is buying) with a bank.</p> <p>v) <u>Passing on benefit of rights issue to subsidiary without consideration:</u> These facts pertain to the appeal of Ecomand therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p> <p>vi) <u>Creation and dissolution of ETIL to make onshore shares as offshore:</u> The Assessee submits that the very transfer of shares to ETIL and application to RBI for pledging of VEL shares by ETIL shows that the Assessee did not want to transfer the VEL</p>	
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			<p>shares outside India and the same was done only after the rejection by RBI of the pledge application. (Para 136-137, Page 89 and Point C, Page 1708 of ECL ITAT PB)</p> <p>vii) <u>Use of sale proceeds to repay the loans and for the benefit of Essar group:</u></p> <p>The loan was taken for the benefit of the Assessee and for the expansion of the group. Therefore, the repayment of the same from the sale of shares does not in any manner show that the Assessee is not in control of the affairs of the company.</p> <p>Supreme Court in case of Vodafone International (supra) has specifically held that the same is permissible and there is nothing incorrect about it in law. (Para 248-251, Page 149 of</p>	
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			ECL ITAT PB)	
	<p>c) No role in decision making : mere ratification, acquiescence to the direction given by executives of Essar Group from India by the Board of Mauritian Companies.</p>	<p>Page 20</p>	<p>a) It is incorrect on the part of the Revenue to allege that there is ratification and acquiescence to the directions issued by executives of Essar group from India. As explained above, the Revenue has not produced any material/ evidence to show that directions have been issued by executives of Essar group and such directions have been issued from India. As already submitted, the decisions have been taken by the Board of directors in the meeting held in Mauritius as evident from various material/ evidence on record.</p>	<p>a) The Directors had nominated employees of Essar in India to take all the decisions on behalf of them (Assessment order page -130-142,CIT(A)-89-107).</p> <p>b) The discussion on key management executives who took decisions were based out of India.(CIT(A)-139-140).</p> <p>c) The key decisions were taken by Essar executives based in India , hence, the control and management was in India.</p> <p>d) The agreements were signed by the key Essar executives in</p>

			Therefore, the contention/ allegation of the Revenue is without any basis and is liable to be rejected in law. (Para 99, Page 65 and Page 1712 of ECL ITAT PB)	India.(Assessment order page -130-142,CIT(A)-89-107).
	d) Three Agreements for acquisition of HEL/VEL shares in the name of Ecom by the Essar Group. (i) Share Purchase Agreement dated 03.07.2004 between Distacom India Co.Limited and Ecom(formerly Essar Telecom India Holdings Limited) and Essar Global Limited Mauritius (now EIHL). The agreement with Distacom has been signed by Neeraj Gupta, an India based employee of Essar Group. This person has no authorised relationship (as evident from the meagre	Page 20	a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.

	expenditure on this account in the Financial Statement) or contractual relationship (as evident from the Board minutes).			
	(ii) The (Share Purchase Agreement dated 03.07.2004 between Distacom India Co. Limited and Ecom) agreement has Essar Global Ltd. Mauritius as co-contracting party and requires Essar Global Mauritius to ensure that Ecom fulfils all the conditionalities of the agreement. The role of Essar Global limited,	Page 20	a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.

	<p>Mauritius being pivotal to the affairs of Ecom(M) and ECL(M), the Board minutes of Ecom(M) were examined to understand the role assigned to this company. However, there is no mention, discussion, agreement or understanding with regard to Essar Global Ltd., Mauritius assuming such role in acquisition of shares from Distacom.</p>			
	<p>(iii) Various decisions for complying to Clause 2 of the agreement has not been taken by the Board of Ecom(M). It is not known as to who has taken this vital decision in respect of acquisition of shares of Hutchison Max Telecom Pvt.</p>	Page 21	<p>a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.

	Ltd. India (HMTL), even though the same is claimed by the Applicants to be acquired by Ecom(M).			
	(iv) Share Purchase Agreement dated 16 July 2004 between Ecom (formerly Essar telecom India Holdings Limited) and Hutchison Tele-communication (India) Limited (HTIL-BVI). The acquisition of 19.60% shares of HMTL, as sequel to the Agreement with Distacom by Ecom is for a consideration of promissory note issued by HTIL (BVI) in favour of Essar for an amount of USD 76,633,333.	Page 21	a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.
	(v) The agreement has been signed by	Page 21	a)These facts pertain to the appeal of Ecom and therefore they are not	No comments required.

	Vikash Saraf, Sr. Executive of Essar Group in India. This person has no employment relationship (as evident from the meager expenditure on this account in the Financial Statement) or contractual relationship (as evident from the Board minutes).		relevant to decide the issue arising in the appeal of ECL before the Tribunal.	
	(vi) Share Purchase Agreement dated July... 2004 (date not provided) between Ecom and HTIL (BVI) Holdings Limited. (This agreement has not been provided by the Assessee).	Page 21	a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.

	<p>(vii) As regards the acquisitions of 2,12,54,008 of HMTL from Distacom by Ecom in 2004, the source of acquisition issued to be loan from Amaranth LLC and ADRC Limited vide their agreement dated 20 July 2004 with Essar Global Ltd, Mauritius (presently EIHL) as the guarantor and Ecom(M) as the borrower. In this agreement, Essar Global Limited, Mauritius has entered into agreement jointly with Ecom, even while it has been designated as guarantor. The responsibilities of Essar Global Limited Mauritius is absolute towards the</p>	Page 22	<p>a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.
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	<p>performance of the Agreement required to be done by Essar Group which could be understood from para 15 of the agreement. However, there is no deliberation with regard to such overarching role of Essar Global Ltd Mauritius in the relevant Board minutes of Ecom.</p>			
	<p>(viii) Some of the noteworthy definitions as defined in para 1.1 of the agreement and applied to the stipulations in the agreement are as under:</p> <ul style="list-style-type: none"> ○ “Essar Group means the groups of companies affiliated with the Ruia family”. 	Page 22	<p>a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.

	<ul style="list-style-type: none"> ○ Control means the power to direct the management and the policies of an entity whether through the ownership of voting capital, by contract or otherwise. ○ Clause 7.2 of the agreement stipulates that upon change of control of the Ruia family, the loan facility for acquisition of shares from Distacom ceases to have effect 			
	<p>(ix) The agreement has been signed by Neeraj Gupta, an Essar Group Senior Executive based in India on behalf of both Ecom Mauritius and Essar Global Mauritius.</p>	Page 23	<p>a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.

	<p>(x) From the contents of the agreement it is clear that all decision and actions have been taken by Senior Executives of Essar Group in India and the loan is based on the foundation of control, management and affiliation by 'Ruia family'</p>	Page 23	<p>a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.
	<p>(xi) Subsequent acquisition of 4,397,381 shares of HEL on account of right issue of HEL- HEL has issued Right issue for subscription of 6/29 shares by its shareholders. Ecom Mauritius by virtue its ownership of 6.19% share in HEL is eligible to avail of Right issue. However, even while its newly</p>	Page 23	<p>a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.

	<p>acquired subsidiary ECHL (M) has not made any payment towards this rights issue, the share acquired through the right issue have been transferred in its favour. The Board has not deliberated upon commercial substance of this transfer.</p>			
	<p>g) Rights shares having been transferred to the wholly owned subsidiary, without payment of any consideration and without the Board discussing and deciding to this effect, leads to the inference that the various corporate entities among the group companies lack their separate corporate identity.</p>	Page 23	<p>a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.

	<p>f) Another striking feature observed from the Board minutes corresponding to the loan facility dated 20.07.2004 is that While the minutes suggest the possible source of subscription to the right issue as loan from Essar Infrastructure Holding Ltd., in actual practice the right issues has been subscribed out of short-term loan from American Express Bank.</p>	Page 23	<p>a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	No comments required.
	<p>V. Role of key executives starts from para 33 (internal Page 87 of CIT(A) order upto Page 134) (None of which was disputed before the Hon'ble Tribunal)</p>	Page 24	<p>a) The Assessee submits that the allegations made by the AO in the assessment order which have been repeated by the CIT(A) in its order were rebutted in detail before the CIT(A) by way of written submission filed by the Assessee and were referred to at the time of hearing before the Tribunal. Therefore, the contention of the Revenue that relevant aspects have not been disputed by the Assessee is incorrect</p>	<p>a) The AO has rebutted the arguments of the assessee vide page 111- 142 of the assessment order, establishing that the key executives of Essar who are based in India, are controlling and managing the company.(CIT(A)Page 87-107)</p>

			and contrary to the evidence on record.	
	h) Para 33 – 33.3 of CIT(A) order deals broadly on the above aspect including the references of key Persons individually	Page 24	a) Here the CIT(A) has provided profiles of persons authorised by the board of ECL. The profiles themselves show that the persons appointed are qualified people having relevant expertise.	a)The persons authorized by board of assessee are Residents of India.(CIT(A)- 139-140).
	i) Page 92 of CIT(A) order contains a table of Persons authorised as per Board minutes for ECL(M).	Page 24	a) The learned AO/CIT(A) have also accepted the fact that various people have been authorized by the Board of the directors of the Assessee. [Page 92-95 of ECL CIT(A) order and Page116-118 of ECL assessment order]. Further, it is submitted that there is a significant difference between taking decisions (which are taken by the Board) and execution of documents (done by authorised signatories under delegated authority by the Board). It is a legally accepted that a decision maker may be an executor of the said decision, however, the executor of a decision may not be the same person/ individual who has the	a) The assessment order (page -111-142) and CIT(A) order (page -87-119) have established the fact that the decisions were taken by key executives of Essar Group based in India, who also executed the agreements on behalf of the assessee.
	3. Page 92–95 of CIT(A) order refers to the person authorised as per Board minutes along with purpose of authorization in the case of Essar Power India Holdings Limited which later became Ecom.	Page 24		

			<p>authority to take a decision. Therefore, the facts on record show that the decision have been taken by the Board of directors, and they have 285 uthorizat relevant persons for execution of transactions. (Para 37, Page 29 and Page 1712 of ECL ITAT PB)</p> <p>b) Name of Essar Power India Holdings Ltd was subsequently changed to Essar Communications Limited (on 12 December 2005)</p>	
	4. Page 96 of CIT(A) order refers to the same in the case of Ecom.	Page 24	a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.
	5. Page 104 of CIT(A) order refers to ECML Mauritius.	Page 24	a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.
	6. Page 105-107 of CIT(A) order refers to ECIL.	Page 24	a) These facts pertain to the appeal of ECL before the Tribunal.	
	7. Page 107 – 119 of CIT(A) order refers to ETIL which transferred its onshore holding in VELto ECL and migrating it into offshore	Page 24	a) As submitted above, the migration of shares by ETIL to ECL was due to reasons beyond the control of the Assessee and was necessitated as a consequence of the failure to obtain pledge approval from RBI, in order to achieve the commercial purpose of 285 uthorizat the value	a)The Liquidation of ETIL had no commercial prudence but was a colourable device use to transfer shares from onshore to offshore .(Page 44-63 of ECL assessment order, Page 30-43 of CIT(A) order).

			of VEL shares by raising offshore loans.	
	8. Page 120 and 121 of CIT(A) order – Date wise chart of Board minutes / written resolutions of ECL, Ecom, ECML and ETIL	Page 24	a) The Mauritius Company law allows the Board to conduct the business of the companies through written resolutions. As per Section 158 read with Eighth Schedule of the Companies Act, 2001, in Mauritius a written resolution is as valid and effective as if it had been passed at a meeting of the Board duly convened and held. Further, as per the settled judicial position on the subject, it is only the control and management of the year in which the income is earned that is relevant for determining the residential status of that year. In the present case, the Assessee held 11 Board meetings discussing various affairs of the company in detail and taking decisions key to its affairs, during the year under consideration i.e. F.Y.2011-12 (and no written resolutions were issued during that year. (Para 65, Page 46 of ECL ITAT PB)	The CIT(A) order page - 116-127, elucidated the discrepancies in the minutes of meeting of the board. This further established that the control and management of the assessee was done from India by its key executives.

	<p>9. Page 121 – 124 of CIT(A) order – Serious discrepancies in Board minutes of ECL Mauritius up to 16.08.2007 – Incidents casting doubt over CMC in Mauritius.</p>	<p>Page 24</p>	<p>a) It is submitted that there are no discrepancies in the Board minutes but only clerical/ administrative errors that have been pointed out by the lower authorities and the same have been explained by the Assessee before the lower authorities. (Responses to the errors pointed by CIT(A) Page 121-124 of ECL CIT(A) order – refer Sr. No. 1-19 of Exhibit B on Page 1729 of ECL ITAT PB)</p> <p>b) These minutes do not relate to the year under consideration and have no bearing on availability of India – Mauritius DTAA benefits for determining taxability of capital gains arising from sale of the VEL shares in the hands of the Assessee. However, the Assessee in any case have provided clarification before the lower authorities. (Page 1712 and 1725 of ECL ITAT PB)</p>	<p>a) The CIT(A) order page -116-127, elucidated the discrepancies in the minutes of meeting of the board. This further established that the control and management of the assessee was done from India by its key executives.</p> <p>b) The execution of this tax evasion planning cannot be viewed in isolation, hence, the discussion on all the years is critical to establish that control and management of the assessee is in India.</p>
	<p>10. Page 124–126– Serious discrepancies in Board minutes of Ecom Mauritius up to 16.08.2007 –</p>	<p>Page 24</p>	<p>a) These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.</p>	<p>No comments required.</p>

	Incidents casting doubt over CMC in Mauritius.			
	11. Page 127 – 133 – Board minutes of ECL and Ecom for the F.Y. 2010-11 and 2011-12 (observations/ instances casting serious doubt over the genuineness of the meetings and the recording of minutes)	Page 24	<p>a) For responses to the errors pointed by CIT(A) Page127-138 of ECL CIT(A) order–refer Sr.No.20-27 of Exhibit B on Page 1731 of ECL ITAT PB</p> <p>b) In response to Revenue’s allegation in para 34.2 of the CIT(A) order [Page 134 of ECL CIT(A) order], it is submitted that it is evident from the due diligencere port from BLC Chambers, the Board minutes of ECL for F.Ys 2010-11 and 2011-12 had been contemporaneously shared with BLC Chambers and the report of BLC Chambers was contemporaneously provided to the MRA vide the application dated 26 April 2012. The report also summarizes the said minutes (refer Page 1649 of ECL ITAT PB). It is also relevant to note that extracts of various Board meetings including for the relevant year have been contemporaneously shared with BLC Chambers, third party</p>	<p>a) The CIT (A) has rebutted the assessee’s submission vide page 134-138, wherein it is clearly established that the Minutes of the meetings were not reliable and sole purpose was creation of evidence.</p>
	12. Page 134 to 138 brings out again the minutes for the F.Y. 2010-11 and F.Y. 2011-12 for doubtful authenticity.	Page 24		

			lenders, Vodafone and Assessee auditor. Hence to allege that the Board minutes of F.Y.2010-11 and 2011-12 are of doubtful authenticity, is completely misplaced and should be rejected. (Para 234, Page 144 and Page 1714 of ECL ITAT PB)	
	13. Page 141 of CIT(A) order- CIT(A) reiterates the findings of the AO as to the list of documents which were not submitted by the Assessee for F.Y. 2010-11 and 2011-12 even during the hearing on 6 April 2017 before the AAR.	Page 25	a) Kindly refer to response at Page172-175 and Page 1724 of ECL ITAT PB	These documents were not furnished by the assessee during the assessment proceedings of during CIT(A).(CIT(A) page -141)
<u>Board of Directors of the Group Companies Abdicating Responsibility related to the Affairs</u>				
A	As is evident, from the minutes of the Board, discussed supra, and also the Board minutes of ECL(M), that the decision for voluntary liquidation has not taken place in Board minutes of any of the relevant Companies, that is ECL and ETIL. The entire decision has been taken	Page 25	a) The contention of the Revenue is factually incorrect as the decision regarding liquidation of ETIL was taken by ECL in its Board meeting held on 10 September 2007 (Page 633 of ECL ITAT PB) and was further noted by the Board of directors of ETIL on 12 October 2007. Therefore, it is incorrect to say that the	a) The ETIL dissolution was decided vide loan agreement of USD 1.1.bn between ECIL(M) and SCB(Assessment order page 51 , 139). Hence, clearly the decision of liquidation of ETIL was not taken by ECL or ETIL. b) The intent to liquidate ETIL first appears in Loan agreement dated

	centrally by the Essar Group and executed by and through the employees of the Essar Group in India		<p>decision regarding liquidation of ETIL was not taken by ECL or ETIL. (Para 129, Page 85 and Point B, Page 1726 of ECL ITAT PB)</p> <p>b) In fact, the Revenue has not produced any evidence which demonstrates that the decision regarding liquidation of ETIL was taken by any other person than the directors of ECL and ETIL. Therefore, the argument of the Revenue that the decision has been taken centrally by the Essar group is perverse and contrary to the evidence on record.</p>	<p>31.1.2007 of ECIL(M) with Standard Chartered Bank wherein Permitted Dissolution is discussed.(Page 51 of ECL assessment order, Page 31 of CIT(A) order).However, the minutes of the board of ETIL dated 15.1.2007, do not discuss the same.</p> <p>c) The Board minutes are silent of dissolution before the loan agreement dated 29.06.2007 of USD 1.4 bn (Page 51 of Assessment order)</p> <p>d) The Board minutes were drawing long term growth strategy vide minutes dated 16.8.2007, despite voluntary dissolution clause . The Voluntray dissolution is discussed first time in board meeting dated 12.10.2207 (Page 53 and 55 of Assessment order, Page 36 of CIT (A))</p>
B.	Acquisition of shares of ETIL is an important event so far as the affairs of ECL is concerned. However, in the minutes Book of the	Page 25	<p>a) The contention of the Revenue is incorrect because the application made by ETIL was pending for approval of FIPB which was received only on 11</p>	<p>a)The AO has recorded in assessment order page 58-60, which clearly states that there is no mention in minutes of the board regarding it on page 59.</p>

	ECL, there is no mention with regard to this affair as on the date of the FIPB Application. In fact, on 5 January 2007 that is almost after 6 months of the submission of FIPB Application for investment by ECL(M) into ETIL(India) shareholding, there is mention for the first time in the Board meetings:		December 2006 and immediately thereafter, the Board of directors have discussed the matter of receipt of FIPB and investment to be made in ETIL on 5 January 2007. Therefore, the argument of the Revenue that an important event relating to investment in ETIL is not found in minutes is incorrect and bad in law. (Para 72, Page 49 and Page 1709 of ECL ITAT PB)	
C.	In the Board minutes of ECL(M), the recording of fact with regard to ETIL holding 15.85 % shares of HEL and VEL on relevant date is wrong. In fact, on 5 January 2007, only 49,706,826 shares were with ETIL and not 15.85 % as recorded. Thus, the directors are completely unaware of the correct set of facts. The Board of ECL(M) had no idea with regard to its proposed investment in ETIL while letter had already been issued to FIPB on behalf of the applicant company	Page 25	a) From the extract of the minutes for the meeting on 5 January 2007, it is clear that the stake of VEL then held by ETIL was not considered by the Board of ECL as 15.85% but that ETIL wished to increase the stake to 15.85%. The relevant extract is below: <i>“He suggested that with respect to the above, it would be good idea to consider investment in the Indian group company Essar Telecom Investment Limited (ETIL) which currently holds equity stake in Vodafone Essar Limited and wishes to increase the</i>	A) The AO has recorded in assessment order page 59-60, which clearly states that there is no mention in minutes of the board regarding investment in ETIL before 5.1.2007, when the process of investment by ECL in ETIL started on 18.7.2006. Hence, clearly the decisions of assessee company were being taken in India and the board of the ECL was informed post facto. (CIT(A)-page 37-40)

			<p><i>holding upto 15.85%”</i></p> <p>b) The allegations by the Revenue is entirely misplaced. (Para 49, Page 37 of ECL ITAT PB)</p>	
D.	<p>While ETIL has allotted shares to ECL on 02 February 2007 and 26 February 2007 totalling 154625210 in numbers, the Board of ECL has got to know about this vide minutes dated 7 March 2007</p>	Page 26	<p>a) On 5 January 2007 the Board of ECL had 292 uthorizat any director to explore and make investments in ETIL. Subsequently, investments into ETIL were made on the 292 uthorization of director of the Assessee on 8 January 2007. The Assessee would like to respectfully submit that once the decision to make investment into ETIL was already made by the Board, no further deliberations was required by the Assessee’s Board for any future allotment other than taking the allotment of ETIL’s shares on record. It would be appreciated that allotment is a process that is undertaken by the investee company and hence the same was merely noted by the Assessee as a</p>	<p>a) The AO has recorded in assessment order page 59-60, which clearly states that there is no mention in minutes of the board regarding investment in ETIL before 5.1.2007, when the process of investment by ECL in ETIL started on 18.7.2006. Hence, clearly the decisions of assessee company were being taken in India and the board of the ECL was informed post facto.(CIT(A)-page 37-40)</p> <p>b) The Assessment order clearly states on page 59 that Sh. Vikas Saraf had written letter to FIPB on behalf of ETIL regarding ECL investment . Hence, ECL Board was not aware about investment proposal in ETIL.</p>

			<p>shareholder of ETIL in its subsequent Board meetings.</p> <p>b) The written resolution of the directors dated 7 March 2007 of the Assessee only records the fact of allotment of equity shares by ETIL, the last of which allotment was on 26 February 2007. Based on this written resolution of 7 March 2007, it cannot be said that the Board of directors of ECL came to know about the investment in ETIL only on 7 March 2007. (Para 103, Page 66 and Point G, Page 1710 of ECL ITAT PB)</p> <p>Hence, it cannot be said that the Assessee's Board was unaware of allotment of shares by ETIL and accordingly, no adverse inference could be drawn from the aforementioned allegation.</p>	
E.	The next most important event of ECL(M) is – investment into the Share Application money of Ecom(M) amounting to USD 153.177 million on 3 March 2007. There is no mention about	Page 26	a) On 3 August 2006, the Assessee had authorised any director to seek shareholder support and to fund Ecom at its request. The Board of directors of ECL discussed that Ecom had borrowed funds from parties leading to high	a) The AO has discussed on page 61-63 of the assessment order discusses how the Board minutes reflect that the ETIL Liquidation and transfer of situs of 15.85% shares of VEL was a colorable device

	<p>these important affairs in the Board minutes for the whole of F.Y.ending 31 March 2007 even while the amount has been received and utilized inter alia for repayment of loan facility for USD140 million along with interest.</p>		<p>borrowing costs and that Ecom wished to raise funds by way of equity to repay its existing borrowings and to fund operations.</p> <p>Accordingly, this shows that ECL was well aware about repayment requirement of the loan of Ecom. Hence, the allegation of the department is baseless, since they have ignored the authorization of 3 August 2006. (Para 68, Page 48 and Page 1732 of ECL ITAT PB)</p>	<p>meant for avoidance of tax in India.(CIT(A)-page 41-43)</p>
F.	<p>After the close of the F.Y., that is on 27 April 2007, the matter with regard to receipt of share application money of USD 558.786 has been ratified by the Board. This implies that the Board of ECL(M) was neither aware of (i) Investment into the share application money of ECom(M) nor aware of (ii) Investment by ECML (M) into the Share Application money of the applicant.</p>	Page 26	<p>a) In the Board meeting of ECL held on 5 January 2007, it was resolved to estimate the requirement of funds for investment in ETIL and authorization any one director of ECL to discuss with shareholder regarding requirement of funding by way of equity.</p> <p>b) Therefore, the Board of directors of the Assessee was well aware of the investments into Ecom and ETIL and the written resolution dated 27 April 2007 merely ratifies the investment into Ecom and of investment of ECML into ECL which was already decided.</p>	<p>a) The AO has discussed on page 61-63 of the assessment order discusses how the Board minutes reflect that the ETIL Liquidation and transfer of situs of 15.85% shares of VEL was a colorable device meant for avoidance of tax in India.(CIT(A)-page 41-43)</p>

			<p>c) Hence, the argument of the Revenue that the Assessee was not aware of the investment in Ecom and investment by ECML in the Assessee is factually incorrect and bad in law. (Para 68, Page 48 of ECL ITAT PB)</p>	
G.	<p>Similarly, the Board minutes of ECML(M), ratifies the investments into ECL on 27 April 2007, i.e. a date subsequent to the investment of such huge amount out of the loan proceeds facilitated on the basis of pledge of HEL/VELshares owned by ETIL India and Ecom(M).</p>	Page 26	<p>a) In this regard, it is respectfully submitted that these allegations made by the Revenue are not applicable in the present case. The observations of the Revenue do not pertain to the Assessee. (Para 119, Page 78 of ECL ITAT PB)</p> <p>b) In any case, on 29 January 2007, the Board of directors of ECML held meetings and discussed to make investment in ECL wherein it was informed to the Board that the subsidiary of the company i.e. ECL had approached the company for finance in the form of equity shares in order to enable ECL to make downstream investments and its business operations. Hence, the Board of directors of ECML was aware about</p>	<p>a) The AO has discussed on page 61-63 of the assessment order discusses how the Board minutes reflect that the ETIL Liquidation and transfer of situs of 15.85% shares of VEL was a colorable device meant for avoidance of tax in India.(CIT(A)-page 41-43)</p>

			investment into ECL.	
H.	Even, the Board minutes of Ecom(M), ratifies the investments received from ECL on 27 April 2007, i.e. a date subsequent to the investment of such huge amount out of the loan proceeds facilitated on the basis of pledge of HEL/VEL shares owned by ETIL India and Ecom(M).	Page 26	a) a)These facts pertain to the appeal of Ecom and therefore they are not relevant to decide the issue arising in the appeal of ECL before the Tribunal.	No comments required.
I.	It is noteworthy to know, that various decisions for complying to Clause 2 of the agreement has not been taken by the Board of Ecom(M). It is not known as to who has taken this vital decision in respect of acquisition of shares of HMTL, even though the same is claimed by the Applicants to be acquired by Ecom(M).	Page 26	Refer response at Sr.No. (IV). F.(d)(iii) of the Revenue submission	No comments required.
J	Point J on Page 27 of the submission	Page 27	Refer response to Page 31 of the Revenue submission	No comments required.

<p>VI – Core aspects relevant to the case brought out in the order of the CIT(A) approving the order of the AO (None of which was disputed before the Hon’bleTribunal)</p>		<p>a) The Assessee submits that the allegation made by the AO in the assessment order which have been repeated by the CIT(A) in its order were rebutted in detail before the CIT(A) by way of written submission filed by the Assessee and were referred to at the time of hearing before the Tribunal. Therefore, the contention of the Revenue that relevant aspects have not been disputed by the Assessee is incorrect and contrary to the evidence on record.</p>		
	<p>1.No decision making for transfer of shares (Page142)</p>	<p>Page 29</p>	<p>a) The allegation is that Ecom and ETIL have not raised any question regarding ECML being given the put option for the VEL shares. The contention of the Revenue is without any substance since the put option agreement also provided for direct sale of VEL shares by Ecom and ETIL which was in their interest accordingly, there was no occasion/reason for Ecom and ETIL to</p>	<p>a)The Put option was agreed dated 24 August, 2007. This agreement was amended and restated on 22nd September, 2009 between Vodafone International Holdings BV (“Vodafone”) (ii) Vodafone Group Plc, UK (“Guarantor”) (iii) Essar Communications (India) Limited, Mauritius (“ECIL”) & (iv) Essar Global Limited, Cayman Island (“Essar Global”). (AO page -96-106, CIT(A) page -74 -81)</p>

			<p>raise any dispute regarding this. The alternative put option under which ECML could sell the shares of ECL and consequently the entire structure under it, was agreed by the parties in the event the transaction was to be done at the holding company level.</p> <p>b) In fact, it is important to note that when the parties wanted to directly sell the shares of VEL the consent of the lenders for direct sale of VEL shares was not coming through and ECML was compelled to exercise the alternative put option whereby shares of ECL were to be sold to Vodafone (Page 577 of ECL ITAT PB). Therefore, the option of indirect sale of shares by ECML was kept under the agreement to deal with such unforeseen circumstances. (Page 1712 of ECL ITAT PB)</p>	
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		<p>c) A put option is merely the right to sell, without the obligation to sell and hence there is no question of the decision to sell having been made merely on account of entering into an option agreement. Commercially, the exercise of option was subject to various considerations, inter alia, to the value of the shares at the time of determining whether to exercise the option. If the value of shares at the said time was in excess of the option price, the Board wouldn't have exercised the option for all shares and could have either sold some of the shares under the fair value put option or decided to refinance the USD 3.59 billion loan after continuing to hold the shares and letting the put option expire. In fact, the fair value in 2011 was below the underwritten put option price which was deliberated upon by the Board of ECL and hence they preferred the underwritten put option. (Para 42, Page</p>	<p>b) ECL and ECOM were not party to even the onshore and offshore put option agreement as novated, amended and restated on 22 September, 2009</p> <p>c) The agreement places unreasonable business restrictions upon the target companies viz ECOM/ECL/ETIL showing the totally sub-servient position of these companies in the Essar group</p>
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			<p>32 of ECL ITAT PB)</p> <p>d) In any case, Supreme Court in Vodafone International (supra) has held that group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Therefore, there is nothing incorrect or unusual in the present case. (Point 3, Page 1715 of ECL ITAT PB)</p> <p>e) The direct sale of VEL shares was thoroughly evaluated by ECL which has been explained in positive case sheet (refer Sr.C of Exhibit A at Page 1727 of ECL ITAT PB).</p>	
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	2.No decision making for valuation for transfer (Page143)	Page 29	<p>a) The allegation is factually incorrect as in the financial statements the Assessee has valued the put option agreement under which VEL shares were to be sold and, in the Board minutes, the valuation aspect that has been discussed is regarding the 3G spectrum bidding. Therefore, the two points are completely different and distinct.</p> <p>b) The fair valuation of options reflected in the financial statements is a requirement under the applicable accounting framework which have been confirmed by the auditors and subsequently approved by the board of directors in its meeting. (Para 41, Page 30 and Page 1715 of ECL ITAT PB)</p> <p>c) The allegation about no discussion in the Board minutes about Market Value put option is factually incorrect. The fair market value put option amendment agreement protected the rights of the Assessee and provided that any excess bidding by Vodafone for 3G spectrum leading to fall in value of VEL shares</p>	<p>a) The Assessment order and CIT(A) order have discussed in detail the lack of decision making in Valuation of transfer .(CIT(A) page -143 – 144, 216 , Para 118.1 of page 240 ,Assessment order page -page 176-177,184-191)</p> <p>b) The details of the valuation process which was a precondition for exercise of FMV Put Option was also not provided during assessment proceedings.</p>
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			<p>would be compensated to the Assessee. The aforesaid aspect of excess bidding for 3G spectrum was specifically discussed by the Board of Directors in the Board meetings held on 10 September 2009, 2 March 2010, 28 July 2010 and it was decided that the Assessee would be protesting against the excess bidding by Vodafone and will also request Vodafone to compensate for the fall in value of VELshares. Therefore, it is incorrect to allege that the aforesaid aspect is not found in the Board minutes. (Page 1727 of ECL ITAT PB)</p> <p>d) It is further submitted that the minutes of ECML discuss the agreement in detail and the same brings out that the concern of the Assesseees were taken care of in the Fair Market Value Put Option amendment agreement therefore, the allegation that there is no discussion in the minutes of Ecom, ECL and ECML is factually incorrect and bad in law.</p>	
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	3. No participation in spectrum auction (Pg.144)	Page 29	<p>a) The contention that there was no participation by the Assessee in 3G spectrum auction is factually incorrect. As the aspect of 3G spectrum bidding was discussed by the Board in the following Board minutes:</p> <ul style="list-style-type: none"> • On 10 September 2009—Mr. Uday Gujadhur was authorized to obtain 3G valuation in consultation with ECHL India • On 2 March 2010 meeting 3G valuation report tabled before the Board • On 28 July 2010 the Board approved the compensation of Rs.3404 million on account of 3G impact (Page 1715 and 1727 of ECL ITAT PB) 	<p>a) The Assessment order has rebutted the assessee's argument in Para 44 of Page 187, wherein it is mentioned that the , "However the Assessee Company even while transferring the shares have not participated in this aspect as shareholders except for a brief information in the Board Minutes. The process of participation in the Spectrum Auction is an important, detailed and involved affair comprising of voluminous documentation and complex processes. The Board Minutes do not show any such involvement by the Assessee Company. Thus, control and management on this count too does vest in India."(Para 37.8 of Page 144 of CIT (A)).</p>
	4. Mere acquiesce to the consideration without any participation (Pg.144).	Page 29	<p>a)The price of USD 3.8 billion agreed under the Put Option Agreement was in line with the value at which</p>	<p>a) The Assessment order and CIT(A) order have discussed in detail the lack of decision</p>

			<p>Hutchison had sold its stake to Vodafone group and further, there was an option agreed under the put option agreement wherein if the fair market value was higher than the fixed price then the shares would be sold at fair market value. Therefore, there was no occasion for the Assessee to raise any question on the price as the interest of the Assessee was completely protected. In any case, the put option was merely a right to sell and not an obligation to sell the VEL shares.</p>	<p>making in Valuation of transfer.(CIT(A) page -143 – 144, 216 , Para 118.1 of page 240, Assessment order page -page 176-177,184-191)</p>
	<p>5. Non-evaluation of tax payments by the Appellants and done by other entities (Pg. 145).</p>	<p>Page 29</p>	<p>j) The allegation that the Board of directors were not aware of the application filed before the AAR by Vodafone is incorrect as the Board minutes of the Assessee for the meetings on 28 July 2010, 23 November 2010 and 30 March 2011 clearly show that the Board of ECL were aware of the application unilaterally filed by Vodafone to the AAR.</p>	<p>a) The AO and CIT(A) have clearly established in the orders that assessee had not evaluated tax payments in its consideration(AO Pg 188-189, CIT(A)-Page 144)</p>

			<p>b) The other allegation that the Assessee was not aware of the nominee of Vodafone group till 15 May 2011 is also incorrect as the option to sell the shares was exercised by the Assessee only on 30 March 2011 and thereafter the Board of directors were informed about the nomination of Euro Pacific Securities Limited ('EPSL') as noted in the minutes dated 15 May 2011.</p> <p>c) The Assessee further submits that as evident from the above mentioned Board minutes, the Board of directors have discussed the issue of tax dispute with Vodafone and were aware that an application is pending with AAR therefore, immediately after exercise of option, the Assessee filed an application for intervention before the AAR which was signed by one of the Directors Mr. Sushil Kumar Baid and was also discussed in the Board minutes dated 15 May 2011. (Para 57-58, Page 42 and Page 1716 of ECL ITAT PB)</p>	
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	<p>6.No role for the Assessee in giving effect to the transfer (Page 145 and 146)</p>	<p>Page 29</p>	<p>a) The contention of the Revenue that the Board minutes of the Assessee do not speak of the manner in which various responsibilities as stipulated in shareholder term sheet are to be carried out is incorrect and contrary to the evidence on record. It should be noted that the Board in their meeting dated 24 June 2011 has considered the settlement that was proposed by Vodafone and authorized, <i>inter alia</i>, Sushil Baid and Uday Gujadhur (both directors to the Assessee) to execute various agreements in connection with such settlement which included the agreement to settle and terminate the shareholder term sheet.</p> <p>b) Further, postthe exit of the Assessee fromVEL it is but natural that the members nominated would resign from the Board of VEL and the same does not require any discussion in the Board meetings of the Assessee. (Para 59, Page 43 of ECL ITAT PB)</p> <p>c) It should also be</p>	<p>a) The AO and CIT(A) have clearly established that there was no role of assessee in giving effect to the transfer and the Board Minutes do not speak of the manner in which exit from various responsibilities as stipulated in Shareholder Term Sheet are to be carried out. The absence of such important function in the Board Minutes only goes to prove that the Board is not participative in the decision making process pertaining to its own affairs. (AO Pg 189-190, CIT(A)-Page 145-146)</p>
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			<p>appreciated that ECL has nominated representatives to attend various meetings, and the Board has taken important decisions in relation to VEL (refer Exhibit E to submission before CIT(A) dated 9 November 2021) including sale. (Page 1716 of ECL ITAT PB)</p> <p>d) Given the above, it is incorrect on the part of the Revenue to allege that Assessee has no role to play in giving effect to the transfer and is in fact contrary to the evidence on record.</p>	
	7. Assessee neither received consideration or applied the same for its use (Pg.146).	Page 29	<p>a) The Revenue has erred in alleging that the Assessee has neither received consideration nor applied the same for its use.</p> <p>b) It is an admitted fact that the sale consideration has been received by the Assessee in its bank account. Thereafter, the proceeds were utilized towards discharge of USD 3.59 billion loan taken by ECML in respect of which the Assessee was a guarantor and the payment so made was reflected as receivable in its books of accounts, which was later</p>	<p>a) The AO and CIT(A) have clearly established that the assessee has neither received consideration nor applied the same of its use as both the companies i.e. ECL(M) and Ecom(M) in their Financial Statements have shown huge interest expenditures in the past on account of the loans by virtue of which it has incurred losses as there are no income in any year apart from notional income on account of valuation of derivative. The Assessee Company have not even retained such expenditure incurred by them in past on account of such loans. Thus, the</p>

			<p>converted into preference shares.</p> <p>c) As regards 308 authorization of sale proceeds, it may be noted that the Assessee was a guarantor to the USD3.59 billion loan granted to ECML by a consortium of lenders led by SCB, UK in August 2007 (Page 1711 of ECL ITAT PB). As the loan was to be repaid and ECML (the borrower) did not have the funds to repay, the Assessee sold its VEL shares in order to meet its obligations under the loan agreement towards repayment of the facility (Para 184, Page 115 of ECL ITAT PB). The same has been discussed by the Assessee's Board in its Board meetings dated 3 March 2011 (Page 572 of ECL ITAT PB), 25 May 2011 (Page 208 of ECL ITAT PB) and 24 June 2011 (Page 214 of ECL ITAT PB).</p> <p>d) In any case, the Assessee was a party to the USD3.59 billion loan agreement that has been approved by the Board, wherein the Assessee acted as a guarantor to such loan.</p>	<p>entire setup including interest payments has been created merely for the benefit of the Group. (AO Pg 190-191, CIT(A)- Page 146)</p>
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			<p>(Para 184, Page 115 and Page 1711 of ECL ITAT PB)</p> <p>e) The tax authorities cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder–Vodafone International (SC) (supra) (Para97 of Radhakrishnan), Becton Dickinson (Mauritius) Ltd (434 ITR 180) (AAR). The transactions were undertaken for commercial reasons and that is the legitimate objective of an SPV like the Assessee i.e. to maximize benefit to the shareholder. (Page 1717 of ECL ITAT PB)</p> <p>Accordingly, it is incorrect on the part of the Revenue to make such a bald allegation.</p>	
	8.Decisions with regards to assets, liabilities and income and expenditure not taken by the Assessee (Pg.147-148)	Page 29	a) The Board of directors of ECL had discussed the conversion of receivables from ECML into preference shares and the same is forming part of the audited financial statements approved	a) The AO and CIT(A) have clearly established that the assessee had not taken decisions with regard to assets, liabilities and income and expenditure as it is seen that the entire liability has been converted merely by book entry into

			<p>by the Board of directors. A mere omission by the secretarial team to record a discussion is being used by the Revenue to create prejudice against the Assessee. (Page 1731 of ECL ITAT PB)</p> <p>b) It is submitted that conversion to preference shares was indeed a non-cash transaction. (Reference by the lower authorities to debentures appears to be an error). Once repatriation of sale proceeds cannot be frowned upon, in view of Vodafone International (supra), a legal mode of such ploughing back cannot be questioned. (Page 1717 of ECL ITAT PB)</p> <p>c) It is further submitted that the allegation pertaining to ECML and THCL is not relevant to the issue arising for consideration of the Tribunal.</p>	<p>convertible debenture in favour of ECML(M). It is noteworthy that the Board ECL(M) has not even discussed this important matter even while the Financial Statements speak of such conversion. (AO Pg 191-192, CIT(A)-Page 147-148)</p>
	9.Even compliance to Government Regulations were not handled by the Assesseees (Pg. 148)	Page 29	<p>a) The Revenue has erred in alleging that exit by the Assessee from the telecom business of VEL required approval from FIPB, RBI etc</p> <p>b) It should be noted that</p>	<p>a) The AO and CIT(A) have that compliance to Government Regulations were not handled by the Assesseees (AO Pg 192, CIT(A)- Page 148)</p>

			<p>the sale of VEL stake was by one non-resident company i.e. the Assessee to another foreign company (EPSL) and it did not require approvals from FIPB/RBI etc on the part of the sellers. Hence there was no need for any deliberation on any FIPB/RBI related approvals by the board of ECL. (Para 60, Page 44 of ECL ITAT PB)</p> <p>c) This is another example of the bald allegation that is being raised by the Revenue, which is not sustainable in the facts of the present case.</p>	
	10. Breach of the lock in period on sale of equity of promoters of Assessee's shares (Pg. 148).	Page 29	<p>a) The Revenue has erred in alleging that there is a breach of the lock in period under Unified Access Service ('UAS') license conditions.</p> <p>b) It is respectfully submitted that the Revenue cannot judge the legality of transfer when the Department of Telecom has not raised any objection.</p> <p>c) In any case, there is a specific exclusion from the lock-in condition in cases where the holder of license holds license for multiple circles which VEL did and hence this condition is not applicable in the facts of the present case. (Page 1694 of ECL ITAT PB)</p>	<p>a) The AO and CIT(A) have established breach of the lock in period on sale of equity of promoters of Assessee's shares (AO Pg 192-193, CIT(A)-Page 148-149)</p>

			<p>d) The Assessee would also like to mention that this issue is not germane to the issue of taxability of income on sale of VEL shares in the hands of the Assessee by virtue of Article 13(4) of the India Mauritius DTAA and is liable to be rejected.</p> <p>(Point E, Page1709 of ECL ITAT PB)</p>	
	VII-Tax Residency Certificate ('TRC') (None of which was disputed before the Hon'ble Tribunal)		<p>a) As submitted above, the contention of the Revenue is incorrect and contrary to the facts on record, the allegation and contentions of the lower authorities have been specifically rebutted by the Assessee.</p>	
	<p>1. Vide para 39 (Page150 and 151) of the CIT(A) order, the authority had concluded that TRCs for F.Y. 2004-05 to 2009-10 were not produced during the assessment proceedings and no application was filed under Rule 46A for admission of any fresh evidence even after an adverse view was drawn by the AO</p>	Page 30	<p>a) It is submitted that during the course of the assessment proceedings, the AO had called for the TRC for the year under consideration vide notice dated 7 May 2014 which TRCs the Assessee furnished vide letter dated 4 June 2014 and further informed the AO that the Assessee has been a resident of Mauritius since inception however, the AO did not call upon the Assessee</p>	<p>a) Assessee has not provided TRC for FY 2004-05 to 2009-10 to prove that it has been a tax resident since its inception as claimed by it. (Refer to page 257 of Assessment order and page 150 & 151 of CIT (A) order)</p> <p>b) The claim of the assessee that only the TRC for year under consideration is relevant for deciding the taxability of income</p>

	<p>on this issue. Therefore, the issue of TRC is actually a non-issue and could not have been raised before this Hon'ble Tribunal for consideration.</p>		<p>to produce the TRC for the earlier years thereafter (Page 1611 and Page 1718 of ECL ITAT PB).</p> <p>b) It was for the first time in the assessment order that the AO stated that the Assessee had not submitted the TRC for the earlier years, in response to that allegation the TRC for the earlier years were produced by the Assessee before the CIT(A). Therefore, the contention of the Revenue that the TRCs for the earlier years were not produced before the AO and no application was filed under Rule 46A is incorrect.</p> <p>c) In any case, the TRCs for the earlier years are not relevant since the resident status for each year has to be decided separately and TRCs of earlier years have no bearing on the year under consideration. (Page 1713 of ECL ITAT PB)</p>	<p>during the year was rebutted in CIT (A) order (page 151), wherein it was held that TRC is not a sole and conclusive proof to claim DTAA benefits. Rather more credence shall be given to "Substance over the Form" principle. Therefore, TRC is actually a non-issue.</p>
	<p>2. Vide Para 40-41, Page 151 – 154, the CIT(A) concurring with the AO catalogues the list</p>	<p>Page 30</p>	<p>a) The Assessee submits that the allegation made by the AO in the assessment order which have been repeated by the</p>	<p>a) CIT (A) in its order, vide para 39-41, has held that credence shall be given to substance over form rather than just TRC.</p>

	<p>of factual conclusions none of which were disputed during the hearing.</p>		<p>CIT(A) in its order were rebutted in detail before the CIT(A) by way of written submission filed by the Assessee and were referred to at the time of hearing before the Tribunal. Therefore, the contention of the Revenue that relevant aspects have not been disputed by the Assessee is incorrect and contrary to the evidence on record.</p>	<p>Further CIT(A) has concluded that Assessee has used a colorable device to avoid payment of taxes.</p>
<p>(VIII) Joint Assignment Agreement (JAA) dated 31st January 2007 between Essar Group Companies: Conducting of loan proceeds taken on the basis of pledge of impugned shares, as income in favour of Group Company</p>				
	<p>k) The assignment agreement is based on the premise that EIHL(M) has an income of USD 532 million receivable from ECML(M) towards the sale consideration of ECL(M) shares acquired by it 6 days back for USD 1 from another Group Company ECHL(M). No valuation exercise is seen to be carried out as per The Board</p>	<p>Page 31</p>	<p>a) It is submitted that the transaction referred to by the Revenue does not concern the Assessee or in any way is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. Therefore, the allegation made by the Revenue basis this transaction is wholly unsustainable and bad in law.</p> <p>b) Without prejudice to the above, it is submitted that the transfer of ECL</p>	<p>a) Assessment order (refer to page no 82 to 86) and CIT(A) order (refer to para 19 on page 63-67) has discussed how the stated objective of Joint Assignment Agreement for taking the loan of USD 1.1 billion in the name of ECML(Mauritius) was that the Essar parties had certain position of receivables/ payables from ECML(M) and the group as a whole</p>

<p>minutes of ECL(M) and ECML(M) for this astronomical enhancement. It is also seen that as a general practice the Group is engaged in transferring the ownership of these offshore companies for USD 1 irrespective of the value of assets of such companies. Thus, the transfer of ownership of ECL(M) is a colorable device to transfer USD 532.7 Million as income to EIHL(M) which through a maze of assignment transactions without commercial substance among Essar Communication (India) Ltd Mauritius, Essar Infrastructure Holding Limited (EIHL) Mauritius, Copper Canyon</p>		<p>shares by ECHL to EIHL was a reversal of a transfer of ECL shares by EIHL to ECHL three months prior and accordingly was undertaken at the same price as the earlier transaction that is USD 1</p> <p>c) In this regard, it is submitted that Hybrid had taken a loan of USD 413 million from SCBUK and had provided a loan of USD 398 million to Essar Oil & Gas Limited ('EOGL'). Further, ECML had payable of USD 532 million to EIHL for purchase of the Assessee's shares.</p> <p>d) Net payable/ receivable positions were as below:</p> <p>i) SCB had receivable of USD 413 million from Hybrid</p> <p>ii) Hybrid had receivable of USD 398 million from EOGL</p> <p>iii) EIHL had receivable of USD 532 million from ECML</p> <p>e) SCB agreed to provide a loan of USD 1.1 billion to ECML on the basis that Hybrid loan is repaid in full to reduce its overall exposure to Essar. If ECML had</p>	<p>wanted to simplify the receivables/payables position.</p> <p>b) However, the real reason is that the group wanted further funds for its business, i.e. to repay the loans of USD 413 million taken by Hybrid Capital PTE, a British Virgin Island Group Company. The loan could have been easily obtained on the strength of VEL shares held by ECL/ECOM, Mauritius. However, there was no commercial rationale for ECL/ECOM as an individual company to pledge their shares to SCB for loan.</p> <p>c) Further the Essar group used various intermediary layers to move funds amongst various group companies to pay loans of Hybrid Capital.</p> <p>d) In order to give this transfer of</p>
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<p> Holding Ltd. Cayman Island ('CCHL'), Kettle River Holding Ltd. Cayman Islands (KRHL), Essar Global Ltd. Grand Cayma n, Essar Energy Holding Ltd. Mauritius, Vadina rOil Mauritius, Hybrid Capital Pte Ltd. British Virgin Islands ('Hybrid') is applied for repayment of loan amounting to USD 413 million taken by Hybrid. </p> <p> 2. Joint Assignment Agreement dated 31 January 2007 between Essar Communication (India) Ltd Mauritius, Essar Infrastructure Holding Limited (EIHL) Mauritius, Copper Canyon Holding Ltd. Cayman Island, Kettle River Holding Ltd. Cayman Islands, Essar Global Ltd. Grand Cayman, </p>		<p> lent USD 398 million directly to Hybrid, the receivables/ payables would have been: </p> <p> i) Hybrid would continue to have a receivable of USD 398 million from EOGL </p> <p> ii) Hybrid would have a payable of USD 398 million to ECML </p> <p> iii) EIHL would continue to have a receivable of USD 398 million (out of the USD 532 million) from ECML </p> <p> f) In order to simplify the receivables/payables among the group entities, the JAA was entered into under which following steps were undertaken: </p> <p> i) Step 1: SCB granted a loan of USD 1.1 billion to ECML against security of shares of the Assessee and Ecom </p> <p> ii) Step 2: ECML paid EIHL USD 398 million against outstanding payable </p> <p> iii) Step 3: EIHL provided loan of USD 199 million each to KRHL & CCHL </p> <p> iv) Step 4: KRHL and CCHL infused USD 199 million each into their EGL as equity in 50:50 proportion </p> <p> v) Step 5: EGL infused USD 398 million into its 100% subsidiary EEHL as equity </p> <p> vi) Step 6: EEHL infused </p>	<p> funds a colour of income, ECML(M) acquired the shares of ECL(M) from EIHL(M) for mere USD 1 on 18.01.2007. </p> <p> However, on 24.1.2007, the consideration was enhanced to USD 532.712 million, and EIHL(M) transferred the ownership of ECL(M) to ECML(M) for USD 532.712 Million. No valuation exercise was carried out as per the Board Minutes of ECL(M) and ECML(M) for this astronomical enhancement. </p> <p> e) In this process even while the value of USD 1 mentioned as the transaction value in the Board Minutes of ECML(M) on 23.01.2007 the same has been rewritten in the Minutes dated 30.3.2007 as USD 532.7 Million. </p> <p> However the register of </p>
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	<p>Essar Energy Holding Ltd. Mauritius, Vadinar Oil Hybrid, is applied for repayment of loan amounting to USD 413 million taken by Hybrid.</p>		<p>USD 398 million into its 100% subsidiary EOGL as equity</p> <p>vii) Step 7: EOGL repaid USD 398 million to Hybrid against outstanding payable to Hybrid</p> <p>viii) Step8: Hybrid repaid loan of SCB</p> <p>g) Net payable/ receivable position was as below:</p> <p>i. SCB loan was repaid by Hybrid</p> <p>ii. Hybrid loan was repaid by EOGL</p> <p>iii. EIHL receivable settled by ECML</p> <p>h) Accordingly, the JAA was fully explained to the learned AO/CIT(A), the purpose of the transactions and how the commercial objective of cleaner inter-company balances between various Essar entities was achieved. This is diagrammatically explained by way of chart attached at Page 1596 of ECL ITAT PB. The slides explaining the transactions and the objective have been also reproduced by the learned AO and the CIT(A) in their orders.</p> <p>i) Further, reliance is placed on the case of Aditya Birla Telecom Ltd. [2019] 105</p>	<p>shareholders printed on 5th June 2007 which is a statutory document placed on shows the consideration for such transfer taken place for USD 1.</p> <p>f) This, the transfer of ownership of ECL(M) was a colorable device to transfer USD 532.7 Million as income to EIHL which is an umbrella company of the Essar Group. This income has been transported through a maze of transactions for repayment of loan to SCB amounting to USD 413 million taken by Hybrid Capital PTE, a British Virgin Island based Essar Group Company.</p> <p>g) The commercial objective of cleaner inter-company balances between various Essar entities was therefore a veil to transfer the funds to a group entity</p>
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			<p>taxmann.com 206 (Bombay High Court) (SLP dismissed – [2021] 125 taxmann.com 85), wherein, it was held that merely because several corporate structures were either created or came into play in routing the investment in the assessee through a specially constituted Mauritius based company would not be sufficient to brand the transaction as invalid.</p> <p>j) It is quite natural for group entities to streamline inter-company balances by eliminating them to the extent possible. The Revenue has also failed to appreciate that the transactions were all amongst non-Indian entities, with no Indian tax / regulatory implications, including an independent reputed foreign bank. (Para 168 to 171, Page 107 of ECL ITAT PB)</p>	<p>through a colourable device.</p> <p>h) Assessee has contended that transaction referred to by the Revenue does not concern the Assessee nor in any way is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. The contention is not tenable, as the transaction clearly shows that there was no independent decision making in the hands of Assessee despite the fact that it was their shareholding of VEL which was pledged to get loans. This proves that the management of the assessee was a dummy management and the decision making lied somewhere else i.e. in India, which is a crucial fact to determine the</p>
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				taxability of gains from sale of VEL shares in India.
	<p>3. Even while the value of USD 1 is mentioned as the transaction value in the Board minutes of ECML(M) on 23 January 2007, the same has been recorded in the minutes dated 30 March 2007 as USD 532.7 million. However, the register of shareholders printed on 5 June 2007 which is a statutory document placed on (Page 399, Vol-5) shows the consideration for such transfer taken place for USD 1.</p>	Page 32	<p>a) It is submitted that the transaction referred to by the Revenue does not concern the Assessee nor in anyway is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. Therefore, the allegation made by the Revenue basis this transaction is wholly unsustainable and bad in law.</p> <p>b) Without prejudice to the above, it is submitted that the consideration for transfer of the Assessee was USD 532 million and not USD 1. This is evident from the financial statements of ECML for F.Y. ended on 31 March 2007 (refer Page 581 of ECL ITATPB) for relevant extract) and Boardminutesof ECML dated 30</p>	

			<p>March 2007. Due to an inadvertent error in ECML resolution dated 23 January 2007, consideration was erroneously mentioned as USD 1 (i.e. the same as the face value). Consequently, consideration in stock transfer form and the shareholder register was also mentioned as USD 1.</p> <p>c) In August 2006, SCB, UK had given a loan of USD 413 million to Hybrid. In January 2007, after acquiring the Assessee, ECML was looking to raise further funds against the underlying value of its assets. The purpose of the loan taken by ECML from SCB, UK included use of the proceeds of the loan by ECML to pay EIHL towards payment of purchase consideration due from ECML to EIHL for the acquisition of the above referred ECL shares, which sum would be used by EIHL to provide funds to Hybrid, which in turn would use the proceeds to repay in full its loan</p>	
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			<p>from SCB, UK.</p> <p>d) The above explanation also evidences that the purchase consideration payable by ECML to EIHL could not have been USD1. The amount that was paid was Indeed USD 532 million and has been accounted for accordingly by ECML and EIHL. The reference to USD1 in the register of members is to the face value of the shares transferred and not the value at which they were transferred. This inadvertent error was rectified by an agreement and the same was filed with the Registrar General of Mauritius and Registrar of Companies, Mauritius.</p> <p>e) In any case, the Assessee was not a party to the said arrangement and hence the same is not relevant for determining the taxability on sale of VEL shares in its hands for the relevant year (i.e. F.Y. 2011-12).</p> <p>(Para 104 to 108, Page 67, 68 of ECL ITAT PB)</p>	
IX– Intragroup Arrangements and Agreements demonstrating melting of corporate veil				

	<p>1.The Assessee ECL, Mauritius or its precursor Avatar, as well as Ecom, Mauritius were not party to the Put option agreements dated 24 August 2007 (before deed of amendment dated 1 July 2011)</p>	Page 34	<p>a) As per the agreement, the put options were available in two forms—direct and alternative (which was indirect). The alternative underwritten put option was for sale of shares of holding companies instead of VEL shares directly. Such an option could be exercisable only by an indirect holding company, such as ECML. (Page 1714 of ECL ITAT PB)</p> <p>b) Kindly see structure chart to explain business logic (commercial rationale) (refer Exhibit D at Page 1735 to 1740 of ECL ITAT PB)</p> <p>c) It is usual for multinational companies to not have multiple companies in the group run negotiations with third parties for achieving the same objective. The subsidiary companies could agree to the outcome as their objectives were being met. Hence, the subsidiaries which were VEL shareholders were not required as parties to the agreement. Accordingly, ECL was not a party to such agreement. (Para 192, Page 119 of ECL ITAT PB)</p> <p>d) The direct sale of VEL shares was thoroughly</p>	<p>a) The assessment order (vide page 96-106) and CIT (A) order (vide para 29 on page 74) explains how ECOM/ECL has no role in deciding the future of VEL shares.</p> <p>b) ECL/ECOM, which claim to be the legal owners of VEL shares, were not even parties to the Put option agreement dated 24.07.2007. The agreement placed restrictions on the target companies i.e. ECL/ECOM as they were restricted from commencing any operations, from acquiring or disposing any asset, and from incurring any expenditure other than routine expenses.</p> <p>c) The put agreement shows that the role played by the ECOM/ECL was minimal in deciding sale of VEL shares and the real control lay with Essar group companies.</p> <p>d) Initiating assessment proceedings against the assessee and recognizing the assessee to be legal and beneficial owners of the VEL shares are different things. While it is true that the VEL shares are sold by the applicant, the control and management of applicant</p>
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			<p>evaluated by ECL which has been explained in positive case sheet (refer Page 1714 and Sr.C of Exhibit A at Page 1727 of ECL ITAT PB).</p> <p>e) Upon exercise of the direct put option, ECL became a party to the put-option agreement vide Board resolution on 24 June 2011 (Page 214 of ECL ITAT PB) and then executed the deed of amendment on 1 July 2011 (Page 343 of ECL ITAT PB), pursuant to which the sale of VEL shares have taken place. (Page 1716 of ECL ITAT PB)</p> <p>f) It may be noted that the Revenue has conducted assessment proceedings and sought to assess the capital gains to tax in the hands of the Assesseees. Thus, the Revenue itself has thereby recognized the Assesseees as the legal and beneficial owners of the VEL shares. Hence, the contention that the Assesseees are sham/dummy entities and that the corporate veil should be lifted cannot be made by the Revenue. Reliance in this regard is placed on Vodafone International (supra) [Para 67], Sri Meenakshi Mills Ltd. [1967] 63 ITR 609</p>	<p>remains in India. This means that the treaty benefits should be denied to the assesseeas it used a colourable device to avoid paying taxes in India.</p>
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			<p>(SC), Aditya Birla Nuvo Ltd. (342 ITR 308) (Bom) and Alibaba.Com Singapore E-Commerce (P.) Ltd. [2023] 459 ITR 508 (Bombay)</p> <p>g) In any case, ECML had taken loans of USD 1.1/1.4/3.59 billion and was a party to Put option agreements. Without prejudice, it is also submitted that ECML is also a tax resident of Mauritius inceptis inception (holding valid TRCs issued by the MRA since inception) and would be eligible for the benefits of Article 13(4) of the India-Mauritius DTAA as such. (Para 56, Page 41 of ECL ITAT PB)</p>	
	<p>2. Shri Vikas Saraf has signed the settlement Agreement on behalf of all the Essar Group parties.</p>	<p>Page 34</p>	<p>a) This allegation is not relevant to ECL.</p> <p>b) The Board of directors of ETIL in their meeting held on 14 March 2007 have authorized Vikash Saraf to execute the Settlement agreement. Therefore, the decision to enter into the Settlement Agreement was taken by the Board of directors of ETIL on that date and only the action of signing and executing the agreement was carried out by the personnel of the group</p>	<p>Vikas Saraf, based out of India, signing settlement Agreements on behalf of Essar parties, shows that the effective control and management of the applicant lay in India.</p>

			companies (after 325 uthorization from the Assessee)	
	<p>m) Both the Assessee companies have assigned the benefit arising to other Essar Group on Settlement with Hutchison Group to ECIL(M), amounting to US\$ 373.5 million for no consideration. The facts relating to the objection before FIPB, its withdrawal has not been discussed in the Board of the Assessee Companies. The Board of Applicant have not deliberated upon abdication of this Authority in favour of ETHL.</p>	Page 35	<p>a) It is submitted that the transaction referred to by the Revenue does not concern the Assessee nor in any way is connected with the sale of VEL shares on which benefit under India-Mauritius DTAA has been claimed by the Assessee. Therefore, the allegation made by the Revenue basis this transaction is wholly unsustainable and bad in law.</p> <p>b) It is further submitted that the amount referred to herein has already been brought to tax by the Revenue in the hands of ETHL.</p> <p>c) Without prejudice to the above, it is submitted that Hutchison was in discussions with various other parties to sell its equity stake in HEL representing 67% of equity shareholding.</p> <p>d) ETHL, Ecom and ETIL while being vitally concerned as to who the acquirer may be but they did not have the capacity to raise or borrow requisite funds independently in India or from abroad</p>	<p>a) CIT(A) ECL order, vide para 13(vii) page 27-29 , has demonstrated that money invest by the applicant, ECL(M) into ETIL has ultimately gone to the flagship company of the Essar Group viz. ETHL and GIPL (Girishan)</p> <p>b) CIT (A) ECL order, vide para 13 page 37, mentions how the Board of ECL(M) had no idea about the investment to be made in ETIL, while a letter had already been issued on its behalf to FIPB.</p> <p>c) CIT(A) order explains that ETIL, vide agreement dated 17/01/2006 entered into with ETHL(India), become the owner of 10.05% shares of VEL. Subsequently, on account of various internal restructurings, ETIL became the owner of 15.85% shares of VEL. On 18.07.2006, a letter was addressed to FIPB by ETIL(India) seeking the approval for investment by ECL (M) into the ownership of ETIL (India). This letter</p>

				<p>has been signed by Shri Vikas Saraf as Director of ETIL.</p> <p>d) A letter dated 18.07.2006, filed before AAR, was addressed by ECL(M) to FIPB, written on the letterhead of ECL(M) and signed by Mr. Amar Fadia on behalf of ECL (M) with regards to clearance given by ECL(M).</p> <p>e) Further, on the last page of the application addressed by ETIL, it is also inter alia mentioned that the consent letter from the investor that is, ECL (M) has been enclosed as Exhibit E to the Application)</p> <p>f) However in the minutes of meetings of ECL(M), there is no mention of making an application to the FIPB. The first mention regarding FIPB application was on 05.01.2005, almost 6 months after the application.</p> <p>It showed that Board of ECL(M) had no idea with regard to investment in ETIL, proving that the affairs of the company were controlled from India and not by its Board of directors.</p>
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		<p>e) Also, any such bid would have entailed very significant risks. In order to protect their mutual interest and to enable a friendly bidder, EGL, to make a credible bid for Hutchison's stake in HEL, the Essar shareholders (ETHL, ETIL and Ecom) decided to enter into arrangement with EGL to make a bid, which had a strong balance sheet at that time and could try and raise the necessary funds required for acquisition of Hutchison's 67% stake in VEL.</p> <p>f) EGL was entitled to the benefits on account of the following:</p> <p>i) EGL, being the only entity with a net-worth of circa USD 6 billion (in F.Y.2006-07), had presence in several countries around the world. It was able to get a commitment to raise finance to the tune of USD 14 billion from Citi Group and based on their commitment letter, could make a binding offer for acquisition of VEL shares.</p> <p>ii) Essar shareholders benefitted by leveraging EGL's ability to raise finance and the</p>	
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			<p>assurance that the alliance would maximize the long-term value of its holdings in VEL. Further, the arrangement clearly contemplated that all the risks (and therefore benefits) of financing were to EGL's account. EGL at a huge cost and risks arranged the necessary funding for the acquisition of the Hutch's stake and for all related legal and other costs. It also took full responsibility of protecting Essar shareholders against any downside to their investment in VEL and provided full cost indemnification and protection of minority rights.</p> <p>iii) EGL's involvement helped Essar shareholders to negotiate a fresh shareholder agreement dated 15 March 2007 with Vodafone which protected rights of Essar shareholders including the Assessee and also benefited them to obtain put option with an attractive floor price from Vodafone. Also, ECL/ Ecom/ ETHL became parties to</p>	
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			<p>shareholders terms sheet and got minority protection as well.</p> <p>iv) These benefits were reaped by them without incurring any cost or risks. All the cost was incurred and risks taken by EGL.</p> <p>v) Accordingly, following negotiations between Hutchison, Essar Shareholders together with ECML, entered into a Settlement Agreement with Hutchison under which a consideration of USD 415 million was paid to EGL for its efforts and for the risks undertaken.</p> <p>g) It is submitted that the draft settlement agreement was tabled in the meeting of board of directors and cognizance of the same was taken by the board.</p>	
	<p>The tax amount was to be shared between EPSL and ECL/Ecom (Para 31, 31.1–Page 80 CIT(A)– ECL)</p>	Page 36	<p>a) Under the Put option agreement, it was the Assessee's position that the consideration for transfer of VEL shares was to be received without any deduction of taxes. There was a dispute between the parties on withholding of Indian taxes which was settled by the Assessee vide agreement dated 1 July 2011, wherein the Assessee agreed for</p>	<p>a) CIT(A) order, vide para 31–page 80, and Assessment Order (refer page 103) has shown that the Vodafone and Essar group, vide deed of amendment dated 01.07.2011, have tried to artificially increase the put option price so that the impact of withholding tax is nearly equally share between Vodafone and Essar parties.</p> <p>b) Further, the amendment deed dated 01.07.2011 had</p>

			<p>deduction of taxes as against increase of consideration for transfer of VEL shares from USD 3.8 billion to USD 4.201 billion.</p> <p>b) It is submitted that the said allegation of the Revenue is misplaced and is not relevant in deciding the issues arising in the present appeal before the Tribunal.</p> <p>c) Without prejudice to the above, it is respectfully submitted that there was a clear understanding in the agreement with Vodafone that there fund of the taxes would belong to ECL and Ecom.</p> <p>d) In any case, under the income-tax law, refund of any taxes withheld by the buyer shall belong and be claimed by the seller and further, it is ECL and Ecom that have claimed the refund in their respective tax returns and recorded the refund recoverable as an asset in their financial statements.</p> <p>e) In view of the above, the allegation of Revenue is liable to be rejected. (Para 112, Page 70 and Page 1716 of ECL ITAT PB)</p>	<p>a confidentiality clause which raises question that if the Essar parties were clear about their intentions regarding tax obligations.</p>
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Note: Many of the above do not relate to the year under consideration and/or do not relate to the Assessee and have no bearing on availability of India –Mauritius tax treaty benefits for determining taxability of capital gains arising from sale of the VEL shares in the hands of the Assessee. However, the information/responses have been provided on a without prejudice basis in order to allay the learned CIT(A) and Assessing officer's concerns and/or address their various allegations, to the extent details are available with the Assessee.

81. Ld. AR of the assessee finally submitted rebuttal to the rebuttal to the Revenue's legal submissions dated 5th May, 2025 as under :-

“1. Reliance on AAR Ruling and Written submission before the AAR:

a. The reliance placed on the AAR's findings and order is incorrect since the High Court vide order dated 19 December 2019 (para 5 of the High Court order Page 600 of ECom ITAT PB) has categorically observed that the findings of the AAR are only prima facie which means they are not final and binding, and that they have not been arrived at after detailed examination hence, they can have no precedential value and would have to be disregarded when this Tribunal adjudicates upon the issue. Without prejudice to the above, the AAR specifically observed that they are declining to comment on merits of the questions posed before them (Para 190 of AAR's order).

b. The submissions filed before the AAR are not part of the records of the present proceedings and hence, it is impermissible to rely upon the same.

c. The lower authorities have incorporated in their orders the relevant parts of the submission filed before the AAR and therefore, the validity of the order passed by them is to be decided by the Tribunal based on the reasons and contents of such orders.

d. The admission by the Revenue that the lower authorities have relied on the submissions filed before the AAR and the findings vitiates the orders passed by the AO and CIT(A) as the same is contrary to the order of the High Court (para 6 of the High Court order Page 600 of ECom ITAT PB) wherein the authorities were directed to arrive at their own finding upon appreciation of the evidence and materials placed on record.

Further, various allegations of the lower authorities have already been dealt with by the Assessee in its written submissions/ rebuttals filed with the Hon'ble Tribunal (including those referred to in the paper books) by the Assessee.

2. Judgment of Supreme Court in Azadi Bachao Andolan (2003) 263 ITR 706 (SC)

a. Circular No. 789 does not restrict the applicability thereof only to Foreign Institutional Investors (FII) or investment funds registered with SEBI which is evident from the below:

i. Subject line of the circular nowhere refers to FIIs or Investment funds:

ii. Para - 2 which states that doubts have been raised regarding taxation of "investors";

iii. The circulars specifically uses the words FII, etc.;

iv. There are no exceptions provided or even envisaged by the circular to restrict its applicability only to FIIs or investment funds registered with SEBI.

v. The prayer before the High Court specifically uses the words NRIs, FIIs and "such other interlopers".

b. The principal enunciated in Circular No. 789 is not caveated in any manner whatsoever unlike some other circulars (For Eg. Circular No.4/2024, Circular o. 612016) issued by the Central Board of Direct Taxes (CBDT) which restrict their applicability to cases which are expressly carved out and hence, the same cannot be created/ read into the circular as suggested by the Revenue.

c. Circular 682 was issued by CBDT that emphasized that any resident of Mauritius deriving income from alienation of shares of Indian company would be liable to tax only in Mauritius. Such circular is applicable to all residents of Mauritius without any exception.

d. It is observed in Azadi Bachao (supra) that in spite of Circular No. 682, tax authorities started issuing show cause notices to FIIs in the backdrop of which CBDT issued Circular No. 789 to clarify the position granting benefits of the India-Mauritius Double Taxation Avoidance Agreement (India-Mauritius DTAA) in respect of capital gains even to FIIs as well.

e. Similarly, Press Release dated 1 March 2013 does not restrict the applicability of TRC only to FIIs and investment funds.

f. Various High Courts (Serco BPO 379 ITR 256 and ISH Mauritius 84 Taxmann. com 37), different benches of the Tribunal (MIH India ITA No 1023/DeV2022, Reverse Age 147 Taxmann.com 358) and AAR (Castleton 24 Taxmann.com 150, Becton Dickinson 110 Taxmann.com 291 etc) have read the circular as applicable even to investors other than FIIs, granted the treaty benefits to such investors and such orders have been accepted by the Revenue. The circular has also been relied on for deciding beneficial ownership for the purpose of Royalty (Universal International Music B V 31 taxmann.com 223) and Interest (HSBC Bank Mauritius 96 taxmann.com 544).

g. The judgment of the Supreme Court clearly records that notices were issued by the Assessing Officer to FIIs alleging that they were shell companies incorporated in Mauritius whose main purpose was investment of funds in India and it was further alleged that these companies were controlled and managed from countries other than

Mauritius and as such they were not residents of Mauritius (similar allegation have been made by the Revenue in the present case). It was in these circumstances that Circular No. 789 was issued by the CBDT clarifying that the Tax Residency Certificate (TRC) is sufficient evidence of status of residence. Therefore, it is incorrect for the Revenue to contend that Circular No. 789 is applicable only to FIIs and investment funds registered with SEBI.

h. For the purposes of Article 13 of tile India Mauritius DTAA, there is no difference between the capital gain arising on sale of shares by FII or by any other investor. Therefore, tile distinction created by the Revenue is artificial and without any basis.

I. The Revenue has sought to draw an inference that the judgment of Azadi Bachao (supra) dealt with legal regime of Mauritius Offshore Business Act, 1992 (MOBA) and the same did not dealt with the current regime of Financial Services Act. 2007 (FSA) applicable to Mauritius companies, the principles laid down therein is inapplicable in the present case. The Assessee submits that the principles laid down in Azadi Bachao (supra) namely that a person who is a resident of Mauritius (as demonstrated by the TRC issued by the Mauritian Revenue Authority [MRA]) is not liable to tax in India on the capital gains that arises to it on sale of shares of an Indian company is not predicated on tile resident of Mauritius being governed by the MOBA. Therefore, the Assessee submits that tile principles laid down by Azadi Bachao (supra) is equally applicable under tile FSA regime as well. In fact, the FSA regime was brought to simplify the regulatory regime with an increased focus on market conduct, anti-money laundering, combating tile financing of terrorism requirements, corporate governance, etc. which should not impact the eligibility to claim benefits of India-Mauritius DTAA for the companies who are in compliant with FSA provisions.

3. Judgment of Supreme Court in Vodafone International Holdings (2012) 341 ITR 1 (SC) :

a. The observations of the Supreme Court on India-Mauritius DTAA and Circular No. 789 is not an "obiter dicta":

i. The point of India Mauritius DTAA was argued by the Revenue and was answered by CJI S.H. Kapadia in his judgment at Para 80 wherein he has held that the capital gains were not chargeable in view of India-Mauritius DTAA.

ii. The judgment of K.S. Radhakrishnan J. has also recorded that the Revenue argued that the benefits of TRC were restricted only to dividend income and not capital gains (para 41). Accordingly, this argument of TRC was addressed by K.S. Radhakrishnan J. It is important to note that the Judgment specifically approves of the arguments of Mr. Aspi Chinoy on Circular NO.789 and the consequential benefits flowing under the India-Mauritius DTAA (Para 96 of Judgment by K.S. Radhakrishnan)

iii. A point which has been argued by the Assessee and the Revenue and thereafter decided by the Supreme Court cannot be termed as an "obiter dicta".

b. In any case, the Revenue in its submission at Para - 12 and 13 accepts that the obiter dicta of the Supreme Court is binding on all Courts thereby even assuming contrary to what is submitted herein before that the observations of the Supreme Court are obiter, the same would be binding on the Hon'ble Tribunal.

c. Further, as highlighted in our earlier submissions, all the transactions have been undertaken by the Assessee for business and commercial reasons which has been time and again reiterated before the lower authorities and before the Hon'ble Tribunal. Accordingly, the references to substance over form doctrine, lifting of corporate veil, colourable device, relying on the judgment of Vodafone (supra) is entirely misplaced and is contrary to the facts and evidence on record. In fact, the judgment of Supreme Court in Vodafone (supra) supports the case of the Assessee which has already been highlighted in various written submissions/ rebuttals filed by it.

4. Legislative History of section 90 and provisions of Mauritius law:

a. The proposal to amend section 90(5) and withdrawal of the same followed by issue of a Press Release by Ministry of Finance does not leave any doubt regarding the conclusiveness of the TRC.

b. The amendments to DTAA in 2017 which grandfathers the investments made prior to the year 2017 clearly proves that no capital gain is chargeable in the hands of a Mauritius company before 2017. Further, Circular No. 112025 dated 21 January 2025 clarifies that the Principal Purpose Test (PPT) will apply prospectively and further states that the grandfathering provisions in India-Mauritius DTAA are outside the purview of PPT.

c. The Revenue has referred to amendments made to section 73A of the Mauritius Income Tax Act, 1995 which introduced the test of POEM and CMC in 2018 and 2019 respectively. However, the same are not applicable for the year under consideration. In fact, for the year under consideration section 73A provided that "only GBL 2 companies will be treated as non-residents ". It is reiterated that the Assessee herein is registered with Financial Service Commission of Mauritius as GBL 1 companies.

d. The Revenue has referred to section 71 (3) of the FSC Act, 2007 which provide for indicative criteria to determine control and management of a company however, for the year under consideration section 71(4) was applicable which contained the same criteria.

5. Issues and Propositions:

a. Determination of Tax Residency under Article - 4(1):

i. The TRC read with clarification issued by MRA states that the Assessee is treated as resident of Mauritius on the basis that their control and management is in Mauritius.

ii. The Assessee has produced the board minutes. books of accounts (FS) agreements, relevant bank statements etc. which are all maintained in Mauritius

iii. The composition of the board of directors of the Assessee reveals that the directors are the persons of credibility and

qualification and except one Ms. Dina Wadia. the other directors are not residents of India (majority being residents of Mauritius).

iv. The Assessee is regularly assessed to tax in Mauritius by MRA as residents of Mauritius.

v. The Assessee maintains its bank accounts in Mauritius and its financial statements are audited in Mauritius.

vi. The Revenue has not brought any material on record to show that the Assessee is not resident of Mauritius.

vii. It is incorrect on the part of the Revenue to rely on Klaus Vogel commentaries and foreign judgments to suggest that the Indian authorities can determine the residential status of a company under foreign law. In fact, the commentary of Klaus Vogel cited by the Revenue refers to two different views taken by two different countries. The contention of the Revenue is contrary to Circular No. 682, 789, the judgments of the Supreme Court in *Azadi Bachao* (supra) and *Vodafone* (supra). The residential status of the Assessee under Mauritius law can be determined only by MRA and the Revenue is not empowered to administer the same and determine the rights and obligations under foreign law.

viii. The Assessee further submits that in view of the various circulars issued by the CBDT and the judgments of Supreme Court in the case of *Azadi Bachao* supra) and *Vodafone* (supra), the Assessee should be granted treaty benefits in the capital gains arising to it on sale of VEL shares. This is what India has agreed with Mauritius by exercising its sovereign rights and the same should be respected by the Revenue authorities. An interpretation to the contrary would thereby nullify the agreement reached between two sovereign states that the capital gains arising from transfer of shares acquired prior to 1 April 2017 would not be chargeable to tax in India.

ix. It is respectfully submitted that the provisions of Article 4(3) are not applicable in the present case as the Revenue authorities have not been able to prove that the Assessee is also a tax residents of India by virtue of the provisions of Section 6(3) of the Act (refer below point).

x. The Assessee would like to submit that since all the transactions have been undertaken for commercial and business reasons which has been explained in the submissions made before the Tribunal, the contention of the Revenue regarding invocation of Judicial Anti Avoidance Rule is unsustainable and contrary to settled principles of law.

xi. The judgment of Supreme Court in Mansarovar Commercial Pvt Ltd. (2021) 8 SCR 452 supports the case of the Assessee that a foreign company is a resident of India under section 6(3) of the Act only when the whole of control and management is situated in India.

h. Whether Control and Management Test is applicable:

The provisions of section 6(3) of the Act provides that a foreign company is resident of India for a year if its control and management is situated wholly in India during that year. Reference in this regard could be inter alia placed on the following:

- Nandlal Gandlal 40 ITR 1 (SC);
- Erin Estate v CIT 34 ITR 1 (SC);
- Narottam Periera Ltd 23 ITR 454 (Born);
- Radha Rani Holdings P. Ltd 110 TTJ 920 (Del IT AT) ;
- Memorandum explaining Finance bill 2015 to give background the way pre-amended Section 6 (3)(ii) of the Act was understood by the legislature

In the present case, the same has not been satisfied for the reasons mentioned below:

1. The decisions to purchase VEL shares, borrow money for purchase and sale of VEL shares have been taken by the board of directors.
2. The board meetings of the Assessee have been held at its office in Mauritius since inception.
3. The board of directors of the Assessee are residents of Mauritius/non- residents of India except Ms. Dina Wadia who has been appointed by the overseas lenders.

4. The employees of the group companies were authorised by the board of directors to execute the transaction - this fact has been accepted by the AO and CIT(A).

5. The Revenue has not brought any material on record to demonstrate that the decisions have not been taken by the board of directors of the Assessee and much less such decisions have been taken in India. Therefore, the control and management is not wholly based in India.

c. Colourable Device:

i. Voluntary Liquidation of ETIL-

While the Revenue has alleged liquidation of ETIL and the consequent migration of the ownership of the shares from a resident to a non-resident as a colorable device in the case of ECL, the same is not relevant for ECom and accordingly, there is no colorable device in the case of ECom.

ii. Colourable holding structure of Essar Group:

1. The allegation related to Paradise Papers have been made for the first time.

2. By making a reference to Paradise Papers, an inference has been sought to be drawn that the creation of trusts was illegal meant to create an opaque structure. It is submitted that each of the members of the Ruia Family have disclosed in the Return of Income their interest in the companies which are beneficiaries of the trust. The said structure has also been disclosed to the exchange control authorities in India and global regulators as well.

3. The trust structure has been disclosed by the Assessee in the assessment proceeding and the rationale has been explained to the lower authorities (para 129-134, Page 83 of ECom ITAT PB).

4. The Paradise papers have nothing to do with the Assessee and transaction under consideration.

5. No proceeding has been initiated by Indian authorities against the Essar group based on the Paradise Papers.

6. With respect to DRI proceedings, the Assessee would like to submit that the Principal Commissioner (Adjudication), Mumbai in May 2023 has dropped all the proceedings against all the notices issued to the Essar entities. Further, on the subsequent appeal by the Commissioner of Custom, the CEST!IT in the order pronounced on 3 April 2025 has found no merit in the appeal and have decided the issue in favor of the Essar entities. In any case, such proceedings are not against the Assessee and accordingly, no adverse inference should be drawn in order to decide the present appeals.

iii. No operations in Mauritius. Assessee is only paper company to hold investments- Refer the response in Point 7(c) Pg 6 of ECom Rebuttal

iv. No role of BOD related to borrowings - Refer para 33 and 34 on Pg. 26/27 of ECom ITAT PB

v. Analysis of financial statements of the Assessee show that Assessee company is a colourable device- Refer the response in Para 179-184 Pg. 107 of ECom ITAT PB

vi. Key executives of Essar Group performed all crucial activities- Refer the response in point (F) a. Pg 9 of ECom Rebuttal

vii. Discrepancies in Board minutes clearly establishing the colourable device - Refer the response in Point 10 Pg. 15 of ECom Rebuttal

viii. Puppet Directors - Refer the response in Pg 242 to 251 of ECom ITAT PB and Point (b) [reply to Point 7(c)] on Pg. 6 of ECom Rebuttal

ix. Vodafone tests - Refer the response in Pg 1473 of ECom ITAT PB

Summary:

The Assessee being a foreign company reiterates that:

- its control and management are situated outside India, i.e. in Mauritius since inception;
- it is a tax resident of Mauritius holding valid TRCs;
- the various transactions undertaken by it was based on commercial expediency and cannot be termed as colourable device/ design to avoid taxes by any stretch of imagination.

In light of the explanations and documentary evidence on record, the Assessee is eligible for the benefits of Article 13(4) of the India-Mauritius DTAA. Accordingly, the capital gains that have arisen to it on the sale of shares of VEL are not liable to tax in India and the matter is squarely covered, inter alia, by:

- Azadi Bachao Andolan (2003) 263 ITR 706 (SC);
- Vodafone International Holding B.Y. v VOI (2012) 341 ITR 1 (SC);
- Circular Nos 789 and 682 issued by the Central Board of Direct Taxes;
- Proposal to amend section 90(5) and withdrawal of the same followed by issue of a Press Release by Ministry of Finance dated 1 March 2013;
- Amendments to India-Mauritius DTAA in 2017 which grandfather the investments made prior to the year 2017; and
- Circular No. 112025 dated 21 January 2025 clarifies that the Principal Purpose Test (PPT) will apply prospectively and further states that the grandfathering provisions in India-Mauritius DTAA are outside the purview of PPT.

Further, the Assessee would like to respectfully submit that the Revenue has completely erred in making allegations relating to control and management of the Assessee being wholly situated in India lack of decision making by the board, existence of colorable device/ tax avoidance etc. In this regard, the Assessee would like to submit that there must be concrete/sound material on record as evidence to arrive at any such conclusion by the Revenue and the

same cannot be based on suspicion, conjecture and irrelevant, factually incorrect considerations as has been done by the Revenue authorities.

It is also submitted that the submissions made by the Revenue dated 5 May 2025 relies heavily on the amendments carried out by the Mauritian authorities under their domestic laws in the year 2018.2019. Further, the submission of the Revenue also relies heavily on the subsequent changes made in the India-Mauritius DTAA in the year 2017. The Assessee would like to submit that the present appeals are concerned with AY 2012-13 and the subsequent changes in Mauritius Income Tax Act, FSA, India- Mauritius DTAA etc are not applicable to the Assessee. In fact, the said subsequent changes support the fact of the Assessee that prior to such amendments, the capital gains arising to the Assessee from the sale of VEL shares could not be chargeable to tax in India.

In view of the above and the fact that the Assessee is not a tax resident of India and being a tax resident of Mauritius, it is submitted to your Honour that the Assessee is entitled to the benefits of Article 13(4) of the India-Mauritius DTAA and therefore inter alia the capital gains on sale of VEL shares are not chargeable to tax in India.

Note: The Assessee would like to respectfully submit that many of the arguments raised by the Revenue in their submissions dated 5 May 2025 were not raised by the lower authorities and were no/ argued before the Hon 'ble Tribunal. Further, the same has no bearing on availability of India - Mauritius DTAA benefits for determining taxability of capital gains arising from sale of the VEL shares in the hands of the Assessee. However, the information/responses have been provided on a without prejudice basis to address the various allegations raised. Further, this rebuttal is being additionally submitted and should be read in conjunction with all earlier submissions/rebuttals (including referred to in the paper books) filed by the Assessee.”

82. Considered the rival submissions and detailed submissions made by both the parties including rejoinders and various case law relied upon. We observed

that the Assessee is a company, which was incorporated in Mauritius on 13 October 2005 as Essar Power India Holdings Limited and on 12 December 2005, its name was changed to Essar Communications Limited. Its registered office is located at Essar House, 10, Frere Felix de Valois Street, Port Louis, Mauritius. The principal activity of the Assessee is to make and hold investments. As per the record submitted before us, the Assessee holds valid Tax Residency Certificates (TRC) issued by the Mauritius Revenue Authority ('MRA') and Category 1 Global Business License ('GBL') issued by the Financial Services Commission, Mauritius since its inception. The Assessee is a non-resident in India and does not have a permanent establishment in India.

83. The back ground of the transactions are, Essar Telecom Investments Limited ('ETIL'), an Indian company, held a total of 6,56,34,887 equity shares in Vodafone Essar Ltd ('VEL'), an Indian company, constituting 15.85% of the ordinary share capital of VEL. Pursuant to the approval obtained by ETIL on 11 December 2006 from Foreign Investment Promotion Board ('FIPB'), the Assessee infused USD 400.61 million into ETIL in various tranches during January 2007 and February 2007.
84. It is fact on record that the majority of the funding for the investment by the Assessee in ETIL was from funds infused in the Assessee by Essar Communications (Mauritius) Limited ('ECML'). The source of the aforesaid funds was a loan taken by ECML of USD 1.1 billion from Standard Chartered Bank ('SCB'), UK, in January 2007, which was subsequently refinanced and upsized to USD 1.4 bn in June 2007 and then to USD 3.59 billion in August 2007 from a consortium of banks led by SCB, UK. For the aforesaid loans, VEL shares held by the Assessee and Essar Com Limited ('ECom') were effectively pledged as security.

85. It was submitted that in order to have greater enforceability over security of VEL shares, the lenders wanted direct pledge on the VEL shares. Accordingly, an application for direct pledge of VEL shares was made in February 2007, to the Reserve Bank of India ('RBI'), by ETIL, pursuant to the USD 1.1 bn loan agreement. Since no approval from the RBI was forthcoming for such pledge, the consortium of lenders of the USD 3.59 bn loan required liquidation of ETIL in order to migrate shares to the Assessee, so that the VEL shares can be directly pledged with the lenders. The RBI vide letter dated 4 October 2007 rejected the application made by ETIL to pledge VEL shares (RBI letter on page 1682 of the Paper book). Thereafter, in order to address the Lenders stipulations, ETIL was liquidated in July 2008 against the USD 3.59 bn loan agreement. Pursuant to such liquidation, the VEL shares were distributed to the Assessee and it became a direct owner of VEL shares. Subsequently, an application for pledge of VEL shares was filed by the Assessee with the RBI, in line with the loan agreement. The same was approved by the RBI vide letter dated 14 November 2008 (page 1697 of the Paperbook).
86. Under an Offshore Underwritten Put Option Agreement dated 24 August 2007 (as amended and restated on 22 September 2009) between Vodafone and Essar, ECML had a put option to sell shares of the Assessee, thereby effectively transferring the VEL shares or procure sale of VEL shares by ECom and the Assessee. Pursuant to negotiations with Vodafone, the put option agreement was amended by Deed of Amendment dated 1 July 2011, wherein revised consideration for VEL shares was agreed by the Assessee.
87. Accordingly, the Assessee sold all the shares it held in VEL to Euro Pacific Securities Limited ('EPSL') (a non-resident company nominated by Vodafone International Holdings B.V) for a total consideration of USD 3,02,05,21,511. The gross consideration was received by the Assessee after

deduction of tax at source @ 21.012% i.e., INR 28,21,21,70,693. The Assessee, in the return of income it filed on 29.09.2012 claimed that the capital gain (Rs. 11,772 crores i.e USD 2.647 billion) arising on the sale of aforesaid shares was not chargeable to tax in India by virtue of Article 13(4) of the India - Mauritius Double Taxation Avoidance Agreement (“DTAA”). Consequently, a refund of the tax deducted at source of INR 28,21,21,70,693 was claimed by the Assessee in the return of income filed for the year under consideration.

88. Subsequently, the Assessee’s case was selected for scrutiny and notices were issued by the AO. In response to the said notices, the Assessee furnished various details/ explanations from time to time during the course of the assessment proceedings. In the final assessment order, the AO denied benefits under Article 13(4) of the tax treaty by treating the Assessee as resident in India. On appeal, the CIT(A) confirmed the action of the Assessing Officer.
89. Further, the Assessee is a wholly owned subsidiary of Essar Communications (Mauritius) Limited (‘ECML’) [earlier known as Essar Communications (India) Ltd. (‘ECIL’)]. The Assessee holds 100% stake in Essar Com Limited (‘ECom’). ECom and ECML are also investment holding companies. All the three companies are companies incorporated in and tax residents of Mauritius. Essar Com Limited, Mauritius (ECom, in short) which is 100% subsidiary company of ECL also held 6.19% equity holding in VEL. Thus, together ECL and ECom held 22.04% in VEL. ECom had also sold its stake in VEL to EPSL during FY 2011-12. The capital gain on sale of such shares was also claimed exempt by ECom which is also subject matter of appeal before us.

90. We observe that the AO and CIT(A) have denied the benefit claimed by the Assessee under Article 13(4) of the India-Mauritius DTAA by holding as under:
- a. The Assessee is a resident of India under section 6(3) of the Income-tax Act, 1961 ('Act') as the control and management of its affairs is wholly situated in India. The board of directors of the Assessee is for namesake only and all the decisions in respect of the Assessee were taken by Ruia family and executed through the key persons of Essar group in India and as such the control and management of the Assessee always lay in India. The AO concluded that the Assessee is a tax resident of India and as such it is not entitled to the benefit claimed under the tax treaty; and
 - b. The Assessee has no substance and is a sham entity incorporated only to take benefit of India-Mauritius DTAA.
91. Aggrieved by the above impugned order, the Assessee has filed the present appeal. In view of multiple allegations made by the lower authorities, the same have been dealt with in the ensuing paragraphs, in a manner that related allegations are dealt with together.
92. The various arguments and allegations of the Id.AO/CIT(A) and Department Representative made vide submissions dated 17th January 2023, 18th December 2023, 26th February 2024, 11th March 2025, 5th May 2025 and 19th May 2025, were rebutted by the Assessee's Counsel in the course of various hearings and also vide submissions dated 6th April 2023, 7th May 2025 and 8th May 2025. The Assessee has inter-alia expressly placed reliance on the Paperbook (PB) filed before this bench which inter-alia contains various submissions made before the CIT (A), constitution documents, TRCs, various documents related to the Assessee or of its associates pertaining to purchase and sale of shares of VEL, financial statements, minutes of board meetings, statutory provisions and circulars relied on by it, etc.

93. We observe that the AO/CIT(A) and the Department Representatives have heavily based on the findings/ observations on the order dated 10 October 2019 passed by the Ld. AAR despite the Hon'ble High Court directed that the AO and other statutory authorities are to arrive at their own findings for tax avoidance upon appreciation of the evidence and materials placed on record and they should not be bound by the prima facie findings of the AAR in relation to tax avoidance. Copy of the Hon'ble High Court's order dated 19 December 2019 is placed at Page 391 of the Paper book. Given the specific directions of the Hon'ble High Court as stated above, the AO's/CIT(A)'s relied on the said observations of the AAR. In any case, the Assessee also vehemently objected to these allegations. In our view, the AO/CIT(A) have only made sweeping allegations without substantiating in any manner that the control and management of the Assessee for the relevant year, i.e. FY 2011-12, was in India, leave aside wholly in India.
94. The issue before us is, whether the assessee is a resident of India as its control and management is situated wholly in India or not and further, the residential status has to be determined every year or not. In this regard, it is relevant to refer section 6(3)(ii) of the Act (as applicable for the year under consideration), a company which is not incorporated in India is considered to be a resident of India only if, during the previous year, the control and management of its affairs is wholly situated in India. The relevant portion of the section 6(3) is reproduced as under:

“6. For the purposes of this Act, —

(3) A company is said to be resident in India in any previous year, if—

(i) it is an Indian company; or

(ii) during that year, the control and management of its affairs is situated wholly in India.”

From the above, the words “previous year” and “during that year” employed in the provision clearly bring out that the residential status of an assessee company is to be ascertained each year considering the control and management of the company during the previous year. However, the lower authorities have determined the residential status of the Assessee based on events and documents pertaining to earlier years which is wholly incorrect and contrary to the express provisions of section 6(3)(ii) of the Act which require that the residential status is to be ascertained based on the events pertaining to the previous year. In this regard, reference is made to the judgments of *Wallace Brothers & Co. Ltd v CIT (1945) 13ITR 39 (FC)*, *Sri Raja K.V. Narsimha Rao Bahadur v CIT (1950) 18ITR 181 (Madras)*, *Girdharlal Ghelabhai v CIT (1964) (53 ITR 23) (Gujrat)* wherein the courts have taken a view that the residential status under provisions analogous to section 6(3) of the Act is to be determined for the relevant previous year in which the income arises and it is the control and management during such year alone that is relevant to determine the residential status under the Act. In view of the above, the contention of the lower authorities that to decide the residential status, the events and documents relating to earlier years are required to be considered is unsustainable and bad in law.

95. Further, it was submitted before us that even if the earlier years' events and/or documents are to be considered for the purpose of determining the residential status of the Assessee for the year under consideration, as sought to be done by the lower authorities, it would still qualify as a non-resident, since at least a part of the control and management of the Assessee was situated in Mauritius, which is evident from the fact that the board meetings have taken place in Mauritius. In this regard, we observed

that the assessee has taken various decisions in relation to acquisition, subscription of rights, sale and important decisions in relation to VEL and of other decisions taken in earlier years, the same was brought to our notice in Assessee's submission vide letter dated April 05, 2023.

96. Thus, we observed that the Assessee was controlled and managed by its board of directors. All the meetings of the board of directors of the Assessee (including those during FY 2011-12) were convened, chaired and conducted in Mauritius. All decisions concerning the affairs of the Assessee have been taken by the board of directors of the Assessee. From inception till FY 2011-12, the Assessee has held all 82 board meetings in Mauritius. This is also evident from copy of board minutes of the Assessee for Financial Year ('FY') 2011-12 furnished in this regard. The board of directors of the Assessee has comprised of people with significant qualification and experience who were non-residents of India, except the nominee director appointed by lenders. List of directors of the Assessee from FY 2006-07 (year of acquisition of Essar Telecom Investments Limited ('ETIL') shares) to FY 2011-12 have also been furnished in this regard. Further, TRCs from MRA/ certificate from Multiconsult Limited/ self-declarations in relation to the tax residence of the directors and brief profiles of directors for FY 2011-12 have also been furnished before us.
97. We observed that it was for the first time in the assessment order that the AO stated that the Assessee had not submitted the TRC for the earlier years, in response to that allegation the TRC for the earlier years were produced by the Assessee before the CIT(A). Therefore, the contention of the Revenue that the TRCs for the earlier years were not produced before the AO and no application was filed under Rule 46A is incorrect. In any case, the TRCs for the earlier years are not relevant since the resident

status for each year has to be decided separately and TRCs of earlier years have no bearing on the year under consideration. (Page 1713 of PB).

98. The next issue is whether the control and management is “wholly” situated in India or not. As per the provisions of section 6(3)(ii) of the Act, a company incorporated outside India can be considered as a resident of India only when the control and management is “wholly” situated in India. Therefore, if any part of the control and management is situated outside India, the company cannot be considered a resident of India. The word “Wholly” has not been defined in Act. In this regard, it relevant to refer to the following dictionary meaning of the word ‘wholly’

- As per the Webster Dictionary, the word “wholly” means “1. entirely; totally; altogether; quite 2. To the whole amount, extend, etc. 3. So as to comprise or involve all.”
- According to Black’s Law Dictionary the word “wholly” is defined as “Not partially. In a whole or complete manner; entirely; completely; perfectly. Exclusively; to the exclusion of other things. Equally. Totally; fully.”
- The Lexicon Law dictionary defines the word “wholly” as “the word wholly means entirely, completely, fully, totally and in every respect ...”

From the above dictionary meanings of the word “wholly”, when applied in the context of Section 6(3) of the Act denote that the control and management of the company is to be seen in entirety and not in piecemeal or partially. In this regard, reliance is placed on *Narottam Pereira Ltd. vs. CIT* (1953) 23 ITR 454 (Bom), *CIT vs. Nandlal Gandadal* (1960) 40 ITR 1 (SC), *Radha Rani Holdings (P.) Ltd. vs. ADIT* (2007) (110 TTJ 920) (Delhi ITAT) wherein the courts/tribunals have held that a company incorporated outside India will not be considered as a resident of India if any part of the control and management is situated outside India.

99. We observed that this is further amplified by the Explanatory Memorandum to the Finance Bill, 2015 which reaffirms the aforesaid legal position. The relevant part of the memorandum is reproduced as under:

“The existing provisions of Section 6 of the Act provides for the conditions under which a person can be said to be resident in India for a previous year. In respect of a person being a company the conditions are contained in clause (3) of Section 6 of the Act- Under the said clause, a company is said to be resident in India in any previous year, if-

- (i) it is an Indian company; or*
- (ii) during that year, the control and management of its affairs is situated wholly in India.*

Due to the requirement that whole of control and management should be situated in India and that too for whole of the year, the condition has been rendered to be practically inapplicable. *A company can easily avoid becoming a resident by simply holding a board meeting outside India.* However, in the instant case, the Assessee is controlled and managed by its board of directors. All decisions concerning the affairs of the Assessee are taken by the board of directors in meetings held at the registered office of the Assessee in Mauritius. During the previous year relevant to the A.Y. 2012-13, the board of directors held all 11 meetings at the registered office of the Assessee in Mauritius in which various decisions, including in respect of sale of VEL shares, were taken which proves that the control and management of the Assessee was situated in Mauritius. It is relevant to note that the Assessee had nine directors during the year and all of them, except Ms. Dina Wadia, who was a nominee director appointed by the lenders, were residents of Mauritius/non-residents of India. Therefore, the Assessee is not a resident of India as the control and management of the Assessee was not

situated wholly in India and, on the contrary, the same was wholly in Mauritius. In this regard a brief profile of the directors and also a summary of the 11 board meetings which took place in F.Y. 2011-12 have been furnished as the part of submission dated April 5, 2023.

100. As held in the case of CIT vs Bank of China (154 ITR 617), the Hon'ble Calcutta High Court held that the control and management of a company is situated at a place where meetings are held by the board of directors. In the instant case, all the decisions relating to the affairs of the company have been taken by the board of directors in the meeting held at its registered office in Mauritius and the tax authorities have not brought any material on record which shows that persons other than the directors have taken any decision, let alone any person based in India.
101. We observed that the lower authorities relied on the judgment of **De Beers Consolidated Mines Limited vs Howe (5 TC 198) (HL)** have held that the word "control and management of affairs wholly situated in India" used in section 6(3) of the Act is equivalent to "central control and management" and would satisfy the requirements of section 6(3) even if a part of the control and management is situated outside India. The contention of the lower authorities is incorrect as the House of Lords in the case of De Beers Consolidated Mines limited (supra) was not concerned with the provisions similar to the provisions found in section 6(3) of the Act which specifically provide that the control and management has to be "wholly" situated in India. The test of central control and management had evolved by the House of Lords to determine the residency of a company in the absence of any specific condition in the Income-tax Act, 1853 (UK). Therefore, the same cannot be applied while determining the residency of a company under section 6(3) of the Act.

102. We observed, as per the argument of the Revenue that there is a unified Central command when viewed holistically is also unsustainable and without any evidence in support. The evidence on record shows that the control and management of the Assessee rests with the Board of directors in Mauritius. Further, the Revenue has not found any evidence or material to support its conclusion that the decisions have been taken by Unified Central command and not by the Board of Directors. The argument of the Revenue is based on allegations/ inferences and have analysed the same alongwith the relevant allegations below:

(i) Creation of various entities:

The entities have been incorporated for business and commercial reasons, the Assessee has explained the same before the AO and CIT(A) (**Para 152-153, Page 94 and Page 1735-1740 of PB**). In our view, it is normal practice in the case of multinational companies to expand their business by creating multi-level operations and in order consolidate their business activities. If it is carried on as per the law of land, there cannot be any issues in creating various entities.

(ii) Consolidation of shares in various entities with varying percentage onshore and offshore:

We observed that the shares of VEL held by ETIL were migrated on liquidation process due to various regulatory and commercial reasons.

(iii) Borrowing for the benefit of Essar group:

The borrowing based on the VEL shares was for the benefit of the Assessee and also the group. In our view, the same is permissible in law and does not show lack of control and management as held by **Vodafone International Holdings BV vs Union of India (2012)(SC) 341 ITR 1**

“79. When a business gets big enough, it does two things. First, it reconfigures itself into a corporate group by dividing itself into a multitude of commonly owned subsidiaries. Second, it causes various entities in the said group to guarantee each other's debts. A typical large business corporation consists of sub-incorporates. Such division is legal. It is recognized by company law, laws of taxation, takeover codes etc. On top is a parent of a holding company. The parent is the public face of the business. The parent is

the only group member that normally discloses financial results. Below the parent company are the subsidiaries which hold operational assets of the business and which often have their own subordinate entities that can extend layers. If large firms are not divided into subsidiaries, creditors would have to monitor the enterprise in its entirety. Subsidiaries reduce the amount of information that creditors need to gather. Subsidiaries also promote the benefits of specialization. Subsidiaries permit creditors to lend against only specified divisions of the firm. These are the efficiencies inbuilt in a holding structure. Subsidiaries are often created for tax or regulatory reasons. They at times come into existence from mergers and acquisitions. As group members, subsidiaries work together to make the same or complementary goods and services and hence they are subject to the same market supply and demand conditions. They are financially inter-linked. One such linkage is the intra-group loans and guarantees. Parent entities own equity stakes in their subsidiaries. Consequently, on many occasions, the parent suffers a loss whenever the rest of the group experiences a downturn. Such grouping is based on the principle of internal correlation. Courts have evolved doctrines like piercing the corporate veil, substance over form etc. enabling taxation of underlying assets in cases of fraud, sham, tax avoidant, etc. However, genuine strategic tax planning is not ruled out.”

(iv) *Funding of VEL shares by pledging the shares of VEL:*

In our view, the same is a normal transaction which takes on day to day basis in the commercial world.

(v) *Passing on benefit of rights issue to subsidiary without consideration:*

These facts pertain to the appeal of ECom and therefore they are not relevant to decide the issue arising in the appeal of ECL. Since, we are dealing with both the appeals together, it is relevant to explain here.

We observe that the AO alleged that the acquisition of rights issue of VEL shares and transfer to group company and immediate transfer back without any consideration by way of internal restructuring has no commercial substance during the assessment proceedings. In this regard, the assessee has responded in detail. The relevant portion of the submission is reproduced below for the brevity from page 87 of the EssarCom Limited paper book:

140.

- EIHL was unable to provide funds to the Appellant and accordingly, EIHL arranged funds for the Appellant on 9 January 2006 (short term facility from Amex - directly remitted by Amex to VEL on behalf of the Appellant for subscription to the rights shares).
- In this regard, reference is made to the remittance confirmation letter dated 16 March 2010 from SCB (refer Page 131 of the Paperbook) and foreign inward remittance certificate issued by HSBC dated 16 January 2006 confirming the remittance made by Amex directly to VEL towards subscription of rights issue by VEL (refer Page 132 of the Paperbook).
- The Appellant transferred the right shares to its subsidiary, ECHL, vide Share Purchase Agreement dated 16 January 2006 with a condition that if ECHL would not be able to complete the financing within 120 days from the effective date being 16 January 2006,
- ECHL will promptly sell VEL shares back to the Appellant. A copy of the Share Purchase Agreement between the Appellant and ECHL is attached as Page 133 and 134 of the Paperbook. .
- ECHL could not obtain loan from Lehman, i.e. arrange for the funds within 120 days. Accordingly, ECHL retransferred the VEL rights shares back to the Appellant on 15 May 2006. Reference in this regard is also made to the written resolution dated 15 May 2006 wherein acquisition of such VEL shares was approved to be acquired by the Appellant (refer Page 851 of the Paperbook).
- EIHL provided funds to the Appellant on 9 February 2006.
- Utilizing the funds received from EIHL, ECom repaid short term facility of Amex of USD 24.78 mn on 9 February 2006.
- Hence, in nutshell, the ultimate source of funds for the VEL rights issue subscription (USD 24.6 million) was from the loan facility of USD 140 million (as mentioned at para 136

above) raised by the Appellant from Lehman and DKR Soundshore Oasis Holdings Fund Limited, i.e., overseas lenders.

141. In view of the above detailed explanation, your Honour would appreciate that the source funding for subscription to the right shares and board minute dated 23 November 2005 stand completely explained. It is respectfully submitted that in any case this was a transaction between the Appellant and its then wholly owned subsidiary and accordingly, no adverse inference should be drawn in the facts of the present case.”

(vi) *Creation and dissolution of ETIL to make onshore shares as offshore:*

We observed that the very transfer of shares to ETIL and application to RBI for pledging of VEL shares by ETIL shows that the Assessee did not want to transfer the VEL shares outside India and the same was done only after the rejection by RBI of the pledge application. **(Para 136-137, Page 89 and Point C, Page 1708 of PB)**

(vii) *Use of sale proceeds to repay the loans and for the benefit of Essar group:*

We observed that the funds were infused into the assessee company by the holding company and subsequently the loan was taken for the benefit of the Assessee and for the expansion of the group. Therefore, the repayment of the same from the sale of shares does not in any manner show that the Assessee is not in control of the affairs of the company. Supreme Court in case of Vodafone International (supra) has specifically held that the same is permissible and there is nothing incorrect about it in law.”

103. We observed that during assessment proceedings, the LdAO has raised similar issues and the assessee had responded to the query and the relevant responses are reproduced below: (Extracted from page 149 of paper book)

“AAAAAA. Funds received on sale did not stay in Mauritius bank account of the Appellant even for a single day. Further, any independent business concern would negotiate with other companies on arm's length basis before parting with huge funds. However, that was not the case here. [Page 254 of the assessment order}

BBBBBB. All the benefits on account of the loan facility and also on account of sale of VEL shares have immediately gone for the repayment of loan taken for the benefit of Essar Group Companies. Sale proceeds have been retained neither by the Appellant or ECom. [Page 210 of the assessment order]

Response

248. It is submitted that the amounts involved were very huge and it would be commercially imprudent to keep the funds idle. Sale consideration was required for discharge of the loan taken by ECML which was immediately due. In fact, the sale itself was, to a large extent, driven by the need to repay the loan of USD 3.59 bn due to the lenders, for which ECL was an obligor/guarantor. The interest cost of retaining funds for a single day would have been about USD 700,000. Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors- reference could be drawn from the decision of S.A. Builders Ltd. v. Commissioner of Income-tax (Appeals) (2007) 288ITR 1 (SC) [Para 34].

249. It is submitted that such allegation has been considered in Vodafone International Holdings BV v UOI & Anr (2012) 341 ITR 1 (SC), wherein the SC held that the Revenue cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder as explained above.

250. In fact a commercial decision to sell assets to repay liabilities/ debts (i.e. to deleverage and so to say reduce "risks") is not at all uncommon for companies. There have been multiple instances wherein Mauritius treaty benefit was upheld notwithstanding the fact that the consideration on transfer of shares was not retained but distributed as dividend within a short span of time. Reference in this regard may be made to the case of Co pal Research Ltd (2014) 371ITR 1141270 CTR 223 (Delhi HC) and E.*trade Mauritius Limited (2010) 324ITR 1 (AAR).

251. Given the above, it is clear that the Appellant made prudent business decisions by not keeping any funds idle. In view of the above, the allegation of the learned AO needs to be rejected.”

104. Further we observed that even if the test of central control and management as contended by the lower authorities is to be applied, the whole of the central control and management of the Assessee company is situated in Mauritius which is evident from board meetings that have taken place at the registered office of the company in Mauritius for the year under consideration and for the earlier years. The lower authorities have not brought any material on record to substantiate that the central control and management of the Assessee is situated in India. As held in the case of **Nandlal Gandlal (supra)**, the Supreme Court in the context of Section 4A(b) of the Indian Income-tax Act, 1922, which considered a partnership firm non-resident in India if the control and management was “situated wholly” outside India. The Supreme Court interpreting the word “situated wholly” held that the control and management being partly inside and partly outside India does not satisfy the requirement of it being “situated wholly” outside India. Similarly, the Bombay High Court in case of **Narottam Pereira (supra)**, after considering the Judgment of House of Lords in **De Beers Consolidated Mines Limited (supra)** has unequivocally held that if any part of the control and management is situated outside India, the company would not be resident in India. Therefore, the Assessee submitted that the reliance placed by the lower authorities on the judgment of **De Beers Consolidated Mines Limited (supra)** to hold that the requirements of section 6(3) is complied with even when a part of the control and management is situated outside India is incorrect and bad in law.
105. Therefore, in our view, the control and management of the Assessee was situated in Mauritius and by no stretch of imagination it can be said that the control and management of the Assessee was wholly in India for the year under consideration.

106. We observed that the lower authorities have come to the conclusion that the control and management of the Assessee is in India, have held that the agreements and the documents have been executed by employees of other Essar Group entities that are based in India and therefore the control and management of the Assessee is wholly situated in India. Consequently, the Assessee becomes a resident of India in terms of section 6(3) of the Act. The lower authorities have failed to appreciate that the making of a decision is different from the execution of the decision. To determine the residential status under section 6(3) of the Act, the Assessing Officer is required to ignore circumstances where action is taken by personnel in India that has been delegated or authorised by the Assessee's board of directors. In the instant case, the Assessing Officer has in fact observed that the personnel in India executed the transaction only after they were duly authorised by the board of directors of the Assessee.
107. In this regard, the reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Narottam Pereira Ltd. (supra) wherein the High Court has observed that the board of directors had delegated authority to implement certain decisions and gave directions for same from time to time does not mean that the control and management does not vest with the directors. The relevant portion of the judgment is extracted as under:
- “But it is equally clear from the minutes of the meetings of the board of directors which are also before us that the central management and control has been kept in Bombay and has been exercised by the directors in Bombay. The minutes deal with various matters which are delegated to these two managers and yet the directors from a proper sense of responsibility to the company have retained complete control over these matters and have from time to time given directions to the managers as to how things should be done and managed....”*
108. We observed that the lower authorities came to the conclusion that the control and management was not with the board of directors of the

Assessee and have relied on clauses of various loan agreements by stating that the change of control clauses in various loan agreements bring out that control on VEL shares is of Shashikant, Ravikant and Prashant Ruia because as per the said clause, change of control will occur if these persons together with persons and entities controlled by them (directly or indirectly) and who are promoters of the borrower cease to have control over the VEL shares.

109. In our view, the lower authorities have failed to appreciate that there exists difference between management control and shareholder control. For the purpose of section 6(3) of the Act, what is required to be seen is de facto control, i.e., where the control and management is actually exercised. In the instant case, it is very clear that the control and management was exercised by the board of directors in Mauritius since all the 11 meetings during the previous year relevant to A.Y. 2012-13 were held in Mauritius. The lower authorities have not produced a single document which in any manner shows that members of the Ruia family have taken any decision with regard to the Assessee in any capacity other than as director of the Assessee. Therefore, the control and management of the Assessee is with the board of directors in Mauritius and the allegation made by the lower authorities is baseless and contrary to evidence on record.
110. Further, it was alleged that members of the Ruia family are controlling and managing the affairs of the Assessee (and the Mauritius Board has no role to play) and that too wholly from India when several of the Ruia family members are non-residents. The reasoning of the AO is purely based on conjectures and surmises, and no shred of evidence has been brought on record by the learned AO to prove that the Assessee is controlled and managed wholly by the family members and that too

wholly in India. Apart from the fact that multiple members of the Ruia family are non-residents [including Mr. Ravikant Ruia who was also on the Board of the Assessee in FY 2011-12 (resigned in November 2011)], it is entirely misplaced and also even assume that the entire control and management of the vast number of overseas entities within Essar (including the Assessee) would vest with few family members and that too wholly in India. Since, there is no material placed on record contrary to the above submissions, we have no reason to accept the allegations of the tax authorities.

111. Further, The AO/CIT(A) alleged that Ravikant Ruia is mentioned as KMP of the Assessee in the financial statements for FY 2007-08. It is submitted that there is no such disclosure in its financial statements for FY 2007-08. In fact, to the contrary, the directors of the Assessee were disclosed as KMP therein. Without prejudice, in the financial statements of subsequent years, including FY 2011-12 (the year under consideration, which is the only year for which the control and management of the Assessee is relevant for the purposes of the present appeal), the directors of the Assessee have been disclosed as KMPs and the AO has ignored the same. The financial statements from FY 2007-08 to FY 2011-12 are attached at **Page 397 to 548 of the Paperbook**. Since, no other contrary material was placed on record, we have no reason to accept the allegation of the authorities below.
112. In our view, there is clear difference between management control and ownership control, similar view was expressed in the decision of **Universal Cargo Carriers Inc. vs CIT (1993) (205 ITR 215)**, Hon'ble Calcutta HC inter-alia held that the control and management is certainly different from the concept of ownership. Similarly, it was held in the case of **Erin Estate Galah Ceylon vs CIT (1958) 34 ITR 1 (SC)**

“...It is true that the control and management which must be shown to be situated at least partially in India is not the merely theoretical control and power, not a de jure control and power but the de facto control and power actually exercised in the course of the conduct and management of the affairs of the firm”.

113. In our view, the control and management of the Assessee is situated wholly in India during the relevant year has not been satisfied for the reasons mentioned below:
- (a) The decisions to purchase VEL shares, to borrow money for purchase and sale of VEL shares have been taken by the board of directors.
 - (b) The board meetings of the Assessee have been held at its office in Mauritius since inception.
 - (c) The board of directors of the Assessee are residents of Mauritius/non-residents of India except Ms. Dina Wadia who has been appointed by the overseas lenders.
 - (d) The employees of the group companies were authorised by the board of directors to execute the transaction - this fact has been accepted by the AO and CIT(A).
 - (e) The Revenue has not brought any material on record to demonstrate that the decisions have not been taken by the board of directors of the Assessee and much less such decisions have been taken in India. Therefore, the control and management is not wholly based in India.
114. We observe that as per the provisions of Section 6(3) of the Act a company is resident in India for a year if its control and management is wholly situated in India during that year. Hence, for the Assessee (which is admittedly a company incorporated in Mauritius) to be regarded as resident in India, it needs necessarily to be demonstrated that “during that year the control and management of its affairs is situated wholly in India” i.e. the only way the Assessee can be regarded as resident in India for the subject AY if the entire control and management of its affairs is situated wholly in India in that year. Accordingly, even if part of the control and

management of the affairs of a Company is situated outside India during the said tax year, the said Company would NOT be regarded as RESIDENT in India for the purposes of the Act. This is a clearly established position under the Act and also supported by several judicial precedents. The judgment of Supreme Court in **Mansarovar Commercial Pvt Ltd. (2021) 8 SCR 452** cited by the Ld DR rather supports the case of the Assessee that a foreign company is a resident of India under section 6(3) of the Act only when the whole of control and management is situated in India. Thus, as per facts brought on record, it is evident that the control and management of the Assessee cannot be said to be wholly in India. Thus, in light of the above observations, the Assessee clearly qualifies as non-resident in India under the provisions of Section 6(3) of the Act for the year under consideration.

115. We observed that the lower authorities have denied treaty benefits to the Assessee on the basis that the investment has been made through Mauritius with a singular motive of claiming the benefits of not being liable to pay tax in India on the capital gains and having regard to the provisions, as they then stood, of the capital gain tax under India-Mauritius DTAA.
116. We observe that the Essar Group is a multinational group with more than 200 companies which had a net worth in excess of USD 10 bn and had a presence in more than 25 countries across the 5 continents (in 2011-12). It operates in several sectors such as shipping, oil & gas, power, steel, exploration and production of oil and gas, ports etc. It had raised a debt of over USD 5 billion from reputed overseas lenders and the shares of some of the entities in the group were listed on stock exchange India and the UK (including on the FTSE100). Further, the Essar Group has its presence in Mauritius since 1992, i.e., even before mobile telephony

started in India. It is submitted that first investment by the Essar Group from Mauritius was made way back in the year 1992 when Essar Energy Holdings Ltd (earlier known as Prime Finance Co. Ltd) and Essar Steel Holdings Ltd (earlier known as Prime Holding Ltd) were incorporated. By the year 2012, Essar Group has invested, through Mauritius, approx. USD 6 bn in India and USD 2.5 bn in various business carried out in countries other than India. The sector holding companies of steel business, oil business, power business as well as the telecom business were based in Mauritius. It was submitted that The President of Mauritius, in a speech given on 17 August 2010, has recognised the fact that the Essar Group has made significant investments through Mauritius in various businesses internationally which has helped in the development of its economy. Further, the Assessee was incorporated in Mauritius in 2005 which also supports the fact that the Assessee was not set up in Mauritius only for availing the treaty benefits on sale of shares, which it acquired only in 2008. It was also submitted that the sector holding companies of the Essar Group mainly operate from Mauritius even some foreign companies of the group are headquartered from Mauritius (e.g., Essar Energy PLC – a UK listed Company) (**refer page 1621 of the Paperbook**). Further, it was submitted that the Assessee cannot be termed as a “substance less” entity since it is an investment holding company and have been undertaking requisite investment holding activities in Mauritius (**Page 1711 of PB**). Further, there are qualified people on the Board of directors (the Board) who have taken decisions concerning the affairs of the Assessee, in Mauritius (**Page 280-283 of PB**). The entities have also facilitated raising substantial loans (from third party lenders). The directors are required to discharge obligations and undertake various duties under the Mauritian laws. Accordingly, the

existence of these entities should be respected by the Revenue.

117. Therefore, in our view, the contention of the lower authorities that the Assessee is a sham entity and the investment in Mauritius was made only for the purpose of claiming benefits of India-Mauritius DTAA is baseless and without any substance.
118. We observe that the lower authorities have denied treaty benefits to the Assessee on the basis that the Assessee was nothing but a shell company which had been used as a conduit with the sole objective of avoidance of tax on capital gain that arose on sale of VEL shares. The lower authorities have not to appreciate that the principal purpose test of incorporating the company in Mauritius for capital gain exemption purpose was brought in for the first time by the insertion of the LOB clause w.e.f. 1 April 2017 and, therefore, the capital gain exemption claimed by the Assessee cannot be denied on this ground. We observe that the decision of the Hon'ble Supreme Court in the case of **Vodafone International Holding B.V. (supra)** supports the submissions of the Assessee, wherein it has been held that claiming of treaty benefit is one of the relevant factors of making investment through the Mauritius route. The relevant portion of the judgment is extracted as under:

“97. We are, therefore, of the view that in the absence of LOB clause and the presence of Circular No. 789 of 2000 and TRC certificate, on the residence and beneficial interest/ownership, Tax Department cannot at the time of sale/disinvestment/exit from such FDI, deny benefits to such Mauritius companies of the treaty by stating that FDI was only routed through a Mauritius company, by a company/principal resident in a third country; or the Mauritius company had received all its funds from a foreign principal/company; or the Mauritius subsidiary is controlled/managed by the foreign principal; or the Mauritius company had no assets or business other than holding the investment/shares in the Indian company; or the

foreign principal 100 per cent shareholder of Mauritius company had played a dominant role in deciding the time and price of the disinvestment/sale/transfer; or the sale proceeds received by the Mauritius company had ultimately been paid over by it to the foreign principal/its 100 per cent shareholder either by way of special dividend or by way of repayment of loans received; or the real owner/beneficial owner of the shares was the foreign principal company. Setting up of a WOS Mauritius subsidiary/SPV by principals/genuine substantial long term FDI in India from/through Mauritius, pursuant to the DTAA and Circular No. 789 can never be considered to be set up for tax evasion.”

119. Further, the lower authorities have failed to appreciate that the Assessee is an investment holding company and its principal activity was investing in the telecom sector in India. It is akin to other sector holding company structures within the group. There is no aberration in the Assessee being an investment holding company in Mauritius. The only way an investment holding company can monetize its investments is either to sell them or pending sale, raise funds based on such investments to further promote the group interests. Based on this rationale, ECML monetized the indirect investments it held in VEL by raising loans on the strength of the shares. The loan agreements prohibited the Assessee from doing any other business, other than being in the business of holding VEL shares so as to ensure that the security provider (i.e., the Assessee) did not undertake any activity that dilutes the lender's security. SPVs/ investment companies are very common in holding structures and have been accepted as a legitimate business practice in various judicial precedents. It is relevance to observe similar views in the following decisions:

Vodafone International Holdings B-V. (supra)

“79. When a business gets big enough, it does two things. First, it reconfigures itself into a corporate group by dividing itself into a multitude of commonly owned subsidiaries. Second, it causes various entities in the said group to guarantee each other's debts. A typical large business corporation consists of sub-incorporates. Such division is legal. It is recognized by company law, laws of taxation, takeover codes etc. On top is a parent or a holding company. The parent is the public face of the business. The parent is the only group member that normally discloses financial results. Below the parent company are the subsidiaries which hold operational assets of the business and which often have their own subordinate entities that can extend layers. If large firms are not divided into subsidiaries, creditors would have to monitor the enterprise in its entirety. Subsidiaries reduce the amount of information that creditors need to gather. Subsidiaries also promote the benefits of specialization. Subsidiaries permit creditors to lend against only specified divisions of the firm. These are the efficiencies inbuilt in a holding structure. Subsidiaries are often created for tax or regulatory reasons. They at times come into existence from mergers and acquisitions. As group members, subsidiaries work together to make the same or complementary goods and services and hence they are subject to the same market supply and demand conditions. They are financially inter-linked. One such linkage is the intra-group loans and guarantees...”

“44. Corporate structure created for genuine business purposes are those which are generally created or acquired: at the time when investment is being made; or further investments are being made; or the time when the Group is undergoing financial or other overall restructuring; or when operations; such as consolidation, are carried out, to clean-defused or over-diversified. Sound commercial reasons like hedging business risk, hedging political risk, mobility of investment, ability to raise loans from diverse investments, often underlie creation of such structures. In transnational investments, the use of a tax neutral and investor-friendly countries to establish SPV is motivated by the need to create

a tax efficient structure to eliminate double taxation wherever possible and also plan their activities attracting no or lesser tax so as to give maximum benefit to the investors. Certain countries are exempted from capital gain, certain countries are partially exempted and, in certain countries, there is nil tax on capital gains. Such factors may go in creating a corporate structure and also restructuring.”

Sanofi Pasteur Holdings SA (2013) 354ITR 316 (AP).

“No curial or academic authority is placed before us to hazard a conclusion that a corporate entity must necessarily involve itself either in manufacture or marketing/trading in/of goods or services to qualify for the ascription of being in business or commerce. Creation of wholly owned subsidiaries or joint ventures either for domestic or overseas investment is a well established business/commercial organizational protocol; and investment is of itself a legitimate, established and globally well recognized business/ commercial avocation.

ShanH is a special purpose joint venture investment vehicle, established initially by MA and co-adopted in due course by GIMD and eventually by Mr. Georges Hibon, to facilitate investment by way of participation in the shareholding of SBL. That is a ShanH business and its commercial purpose.”

120. In our view, the Courts have recognised the use of tax efficient SPVs and that corporate structures are created for genuine business purposes generally at the time when investment is being made. Multinational companies develop corporate structures, joint ventures for operational efficiency, tax planning, risk, mitigation etc. such that better returns can be offered to their shareholders. The burden is entirely on the Revenue to demonstrate that such incorporation has been affected to achieve a fraudulent, dishonest purpose to defeat the law. In this regard, reliance is placed on **Bid Services Division (Mauritius) (supra)**, wherein the

Bombay High Court has followed the judgment in Vodafone International Holding B.V. (supra). It is quite usual for related (and even unrelated) parties to collaborate for mutual benefit. Mere collaboration by related parties for mutual benefit / enhanced bargaining power cannot lead to an inference that the parties surrender their rights / decision making ability to one another. Such contracts and agreements are especially not unusual in the context of shareholders / investors in a company where one frequently sees “shareholder agreements” having been entered into for mutual benefits. Entering into any contract results into rights and obligations for the parties. In the given case, ECML, ECom (the offshore put option holder) and the Assessee collaborated with ETHL Communications Holdings Limited (‘ECHPL’) (the onshore put option holder) for their collective best interests in relation to the agreements/arrangements with Vodafone. Given the above, there is nothing unusual in the fact that the investment in VEL shares is itself the legitimate business of the Assessee. Accordingly, it cannot be said that the Assessee is a conduit and has not undertaken any business activity or that there was lack of commercial/ business substance in the present case.

121. We observe that the lower authorities have also denied the treaty benefits on the basis that no benefit of the loans taken on the strength of the VEL shares was obtained by the Assessee and further the sale consideration from the VEL shares was not utilised by the Assessee. It is relevant to appreciate the facts pertaining to purchase of VEL shares by ETIL, source of funding of the Assessee for acquisition of shares of ETIL / VEL, circumstances leading to liquidation of ETIL, sale of shares of VEL by the Assessee and utilization of the sale proceeds to decide whether these acts / decisions were genuine business / commercial activities or not.

Sale of VEL shares by ETHL to ETIL

- (a) We observed that ETHL was holding 26.82% shares in VEL, however, it was heavily leveraged and there were defaults made by ETHL in complying with the listing agreements with various stock exchanges. In November 2005, 1.95% of VEL shares were monetized and borrowings of Rs. 200 crores were made from Infrastructure Development Finance Company Ltd. ('IDFC'). Similarly in December 2005, 3.85% was monetized by taking a loan of Rs 395 crores from Telecom Opportunities Trust ('TOT'). However, due to overly leveraged balance sheet and listing defaults on the part of ETHL, it was finding it difficult to monetize the value of VEL shares on favourable terms from the lenders. Further, the existing regulatory framework [Reserve Bank of India ('RBI') & The Foreign Exchange Management Act, 1999 ('FEMA') regulations], was making it difficult to monetize the value of VEL shares.
- (b) Further, FDI in telecom sector was relaxed in November 2005 up to 74% foreign shareholding from 49% earlier. Hutch and ETHL were in discussions for utilization of this excess foreign shareholding percentage ($74\% - 49\% = 25\%$) wherein it was agreed that ETHL will continue to hold 10.97% VEL stake in India, which would be counted towards the FDI sectoral cap. Further, under the FDI regulation, the resident Indian promoter was required to hold at least 10% shareholding. Also, under the shareholders agreement with Hutch, ETHL was required to have a minimum 10% shareholding in order to enjoy certain rights. Essar group was keen to monetize its VEL stake by raising funds in and outside India funds on favourable terms.

- (c) Given the above reasons, ETHL transferred 10.05% of VEL shares to a new entity namely, ETIL so that it could monetize the value of VEL shares in a new company having a clean balance sheet. The shares were transferred to ETIL for a value of Rs. 1,032 crores and debentures of the same value were issued to ETHL (Point A, Page 1706 of PB) which helped ETHL in deleveraging its Balance Sheet (redemption of debentures – redeemed out of loan proceeds). ETIL also, acquired the aforementioned stakes in VEL (1.95% from IDFC and 3.85% from TOT)
- (d) Thereafter, ETIL was able to monetise the value of VEL shares, since it was a clean company and raised Rs. 545 crores as a loan from Standard Chartered Investments and Loans (India) Limited ('SCILL'). From the loan proceeds, ETIL redeemed part of the debentures that had been issued to ETHL. **(Point B, Page 1707 of PB).**
- (e) While funds were raised to some extent from the Indian NBFC as explained above, the regulatory restrictions constrained the ability to unlock the entire value of the VEL shares by raising of loans on favourable terms. With the opening of FDI cap as explained above, it was thus contemplated to bring eligible VEL holding (in accordance with the proportion of foreign holding agreed with Hutch) under Essar group's normal investment pattern (i.e. holding through Mauritius). It is submitted that holding of the VEL shares in a foreign-owned vertical would enhance the value of the shares since a foreign telecom holding is more marketable than an Indian telecom holding. This is because the foreign holding being held in compliance with FDI norms could be sold either to a foreigner or to an Indian party whereas Indian holding could be sold to a

foreigner only if such transfer would not breach FDI caps. Further, the ability to raise finance would also be increased through a foreign-owned vertical since overseas debt markets had far greater depth than Indian markets, borrowing rates were lower overseas and raising loans overseas against security of foreign-owned Indian shares wasn't constrained with regulatory restrictions. Accordingly, ETIL approached Foreign Investment Promotion Board (FIPB) for seeking permission to receive foreign funding from ECL.

- (f) Once FIPB approved and the investment was made by ECL, ECML [earlier known as Essar Communications (India) Ltd. ('ECIL')] obtained a loan of USD 1.1 billion (on the strength of VEL shares inter alia held by ETIL) which could be used by the group for expansion of other businesses. Out of the aforesaid loan, ~USD 330 million and USD 70 million (worth of intra group loans), ECL infused USD 400.61 million in ETIL as share capital. **(Point B, Page 1707 and Point B, Page 1726 of PB)**. The correct Rupee equivalent of the USD 400.61 million was Rs. 1,767.88 crores as mentioned in Annexure C to the submission dated 15 March 2016 filed by the Assessee to the AO.
- (g) The aforesaid USD 400.61 million was utilised by ETIL **(Point A, Page 1706 of PB)**:
- to repay loan of SCILL which was utilized to purchase the stake of 1.95% of VEL from IDFC and to redeem part of debentures issued to ETHL amounting to Rs. 275.24 crores
 - to pay off the balance debentures which were issued to ETHL and

- to acquire the stake of 3.85% of VEL from TOT for Rs. 421.27 crores (**Page 101 of PB**)

(h) FDI in ETIL enabled monetization of the VEL shares resulting in raising of loan of USD 1.1 billion from overseas lender.

122. In our view, all the above-mentioned transactions have been undertaken for commercial/ business reasons, and it is incorrect for the Revenue to allege that ETIL was a paper entity with no resources and had nothing to pay for the acquisition of VEL shares or to draw any negative inference from the transactions that were undertaken. Accordingly, ETHL raised funds by sale of VEL shares to ETIL and utilized the funds for repayment of its existing loans and interest. It is natural that money went to ETHL, since it was the seller of the VEL shares to ETIL.
123. Further it was submitted that since the money could not be borrowed in India on favourable terms, the only other option was to borrow money at the level of holding company in Mauritius since that would allow full utilization of value of VEL shares for the purpose of borrowing which were held by ECom & ETIL at one go. As submitted above, the increase in FDI cap to 74% allowed the borrowing of funds outside India. It is further incorrect to say that the money borrowed was not utilized by the entities in Mauritius. We observe that on multiple occasions, out of USD 1.1 billion loan, ~USD 525 million was infused by ECML in ECL (**Point B, Page 1707 of PB**) of which ~USD 145 million was infused in ECom and ~USD 330 million was infused in ETIL. Therefore, the argument of the Revenue that the borrowed money was not utilised by the companies in Mauritius is without any basis and is contrary to the evidence on record. (**Para 174-177, Page 111 of PB**)
124. **Acquisition of VEL shares by the Assessee**

ETIL, an Indian company, held a total of 6,56,34,887 equity shares in VEL, an Indian company, constituting 15.85% of the ordinary share capital of VEL since February 2007. ETIL was also in need of funds to redeem the debentures issued by it and to also fund/ settle debts in relation to purchase of VEL shares. It was submitted that the Assessee on the other hand was keen to make investment into Indian telecom assets. Further, it was much easier to borrow funds in overseas market against shares due to the mature financial market and that too at a lower cost of borrowing. For instance, ECML raised USD 1.1 billion at a lower rate of interest. Further, foreign direct investment had sectoral cap for the telecommunications sector at the relevant time and overseas holding structure offered a wider investor reach through access to the global market for shares under foreign ownership at the time of potential future exit or fund raise.

124.1. ETIL had made an application to the Foreign Investment Promotion Board ('FIPB') for issue of shares to the Assessee (due to downstream investment in VEL being in telecom sector). Pursuant to the approval obtained by ETIL on 11 December 2006 from FIPB, the Assessee infused USD 400.61 million into ETIL in various tranches.

124.2. Majority of the funding for the investment by the Assessee in ETIL was from share application money received from ECML. ECML in turn had obtained a loan of USD 1.1 billion from Standard Chartered Bank ('SCB'), UK in January 2007, which was subsequently refinanced and upsized to USD 1.4 bn in June 2007 and then to USD 3.59 billion in August 2007 from a consortium of large reputed international financial institutions.

124.3. The foreign lenders insisted that the Assessee must hold the shares of VEL directly and not through an Indian subsidiary (ETIL). Accordingly,

in the loan agreement for USD 3.59 billion, there was a stipulation by the lenders wherein, it was required that “ECL must” appoint a liquidator to liquidate ETIL forthwith and complete the liquidation latest within 18 months of the execution of the agreement. Therefore, it became necessary for the Assessee to become the direct owner of 15.85% shares of VEL and thus, ETIL went into voluntary liquidation in July 2008. ETIL’s liquidator sought permission from the Indian Income-tax Department for distribution of shares held by ETIL in VEL to the Assessee. The Income-tax Department granted permission under Section 281(1)(ii) of the Act on 14 July 2008 to ETIL’s liquidator to distribute/transfer VEL shares and other assets held by ETIL to ECL (**copy of permission under Section 281(1)(ii) dated 14 July 2008 placed on record**). Accordingly, the Assessee being 100% shareholder of ETIL, received 6,56,34,887 shares (representing 15.85% stake) in VEL on 18 July 2008.

125. The liquidation was insisted upon by the lenders as a direct holding of the valuable asset used as security (the VEL shares) by a foreign entity (the Assessee) provided an enhanced enforceability of security to the lender than if the VEL shares were held by an Indian entity (ETIL). There would have been severe adverse consequences for the borrower/ guarantor if the liquidation of ETIL was not completed within 18 months (lenders had the right to cancel the entire loan and/or make it immediately due, levy additional penal interest – (in terms of paras 19.17 and 8.4 of the loan agreement). The Assessee was an obligor/guarantor (schedule 1 of the USD 3.59 Bn loan agreement) and would have faced serious consequences.
126. We observe that liquidation of a company is a shareholder’s function and there is no provision under the Companies Act, 1956 which empowers a company to restrict its shareholders from voluntarily dissolving a

company. Therefore, the argument of Revenue that ETIL did not have control over its own liquidation is without any basis and bad in law. Further, after the Assessee in a meeting of its Board passed a resolution for liquidating ETIL, the same was subsequently discussed in the Board meeting of ETIL and further proceeded with the liquidation. (Para 140, Page 90 of PB)

127. In our view, there is no basis for the learned AO to allege that the situs of VEL shares was changed to save tax. The situs of shares of VEL continued to be in India in view of the shares being of an Indian company. It is also submitted that there was no shifting of shareholding for tax purposes whatsoever in the present case. Even in the absence of liquidation, if the Assessee had sold the shares of ETIL the capital gains arising to the Assessee would have been non-taxable in India under Article 13(4) of the India-Mauritius tax treaty. In fact, even if ECML had exercised the alternative put option and sold shares in ECL, there would have been no tax liability in India under the Act itself and further, ECML would have been entitled to the benefits of the India Mauritius tax treaty as well. Hence it cannot be said that the motive of the liquidation was tax avoidance as no tax benefit was obtained by ECL by undertaking the liquidation.
128. Thus, the conclusion of the Revenue that the shares belong to an Indian entity and entities were created in Mauritius to migrate and monetize the shares without paying taxes is factually incorrect and contrary to the evidence on record. As explained above, due to various regulatory restrictions, the money was borrowed outside India as the terms and conditions of the loan were far more favourable and, the shares held by ETIL were transferred to ECL on liquidation due to a requirement under the loan agreement regarding direct pledge of shares which was rejected

by the RBI. Therefore, the argument of the Revenue ignores the compelling circumstances which led to migration of shares to Mauritius. **[Refer response to Sr. (II). 1 to 6 of Revenue submission, filed by the Assessee on 7th May 2025]**

129. The Id.AO has alleged that there is a serious anomaly in the claim of exemption of capital gains under the India Mauritius tax treaty in FY 2011-12. The Assessee has shown in its Mauritian accounts for the year 2008-09, a gain of USD 2.33 billion on account of liquidation of subsidiary. The value of the shares has been accounted for at fair market value of the shares of VEL. [Page 14 of the assessment order]. In this regard, we observe that the liquidation of ETIL (during FY 2008 09) and the sale of VEL shares by the Assessee to EPSL (during FY 2011-12) are two separate events. Therefore, the gain referred to by the learned AO arose during FY 2008-09 on account of liquidation of subsidiary of the Assessee (i.e. ETIL). The gain was recorded as per the applicable Accounting Standard in the books of the Assessee. The Assessee was a Mauritius tax resident and that it held TRCs for the year in which the liquidation took place (i.e. FY 2008-09) as well. Accordingly, the capital gains realized by the Assessee upon liquidation of ETIL was not taxable in India by virtue of Article 13(4) of the India-Mauritius tax treaty read with section 90(2) of the Act.
130. In our view, the liquidation of ETIL in FY 2008-09 and the subsequent sale to EPSL in FY 2011-12 being two separate transactions, there is no anomaly in the claim of the Assessee. It is also important to note that in computing the capital gains on sale of the VEL shares to EPSL during FY 2011-12, the Assessee has conservatively not taken benefit of the enhanced cost of acquisition on account of fair market value recorded in the books of the Assessee. Even the learned AO has only considered the

lower cost of acquisition claimed by the Assessee and computed capital gains and consequential refund accordingly. In light of this, there is no anomaly in the claim of the Assessee, hence, the allegation of the learned AO is entirely misplaced.

131. It is relevant to understand the Source of funding of VEL shares ECL had infused USD 400.61 million in ETIL as per below details:

- USD 330.15 million from funds received by the Assessee as share application money from its parent ECML, which was in turn sourced out of the aforementioned loan of USD 1.1 billion taken by ECML from SCB, UK;
- USD 50 million from a short-term loan taken by the Assessee from Essar Infrastructure Holdings Ltd ('EIHL'), Mauritius [formerly known as Essar Global Limited ('EGL'), Mauritius], and
- USD 20.46 million from a short-term loan taken by the Assessee from Essar Global Limited ('EGL') [later known as Essar Global Fund Limited, ('EGFL')], Cayman Islands.

Thus, the Assessee used the aforesaid funds received to effectively infuse capital in ETIL which was effectively used by ETIL to acquire VEL shares and repay their existing debts taken to acquire VEL shares. In light of the above facts, the allegation made by the lower authorities is factually incorrect as the source of funds used for the investments was from outside India and the ultimate source was mainly a loan from SCB UK i.e. a large reputed international financial institution.

132. We observe that in large multinationals, it is normal for companies to support one another to maximize overall benefit to all in the group. Further, it would be appreciated that it is natural for a subsidiary company to act for the benefit of its holding company. Maximizing shareholders' wealth is the ultimate objective of any company. We observed that the investments in VEL by the Assessee yielded significant gains/ value to the Assessee and the Assessee was able to support/assist its overseas group entities to make other investments. It may also be

noted that various group entities have supported/ assisted the Assessee, when the Assessee required funds for acquiring ETIL shares, the Assessee obtained funds in the form of interest-free and temporary loans from Essar Infrastructure Holdings Limited ('EIHL'), Mauritius (the shareholder of the Assessee) and Essar Global Fund Limited ('EGFL'), Cayman Islands (the then indirect shareholder of the Assessee). Further, group entities also provided non-monetary support to the Assessee such as assistance/ guidance/ support of different personnel with relevant expertise in various fields. The group entities co-operated with each other for reciprocal/ mutual benefit and interest.

133. The Assessee sold the VEL shares under an Offshore Underwritten Put Option Agreement dated 24 August 2007 (as amended and restated on 22 September 2009) between Vodafone International Holdings B.V., Vodafone Group Plc, Essar Global Limited, Cayman Island [later known as Essar Global Fund Limited, Cayman Island ('EGFL')] and ECML, ECML had acquired from Vodafone International Holdings B.V., an irrevocable and unconditional right to require Vodafone International Holdings B.V. or its nominees to procure either the purchase of VEL shares from the direct shareholders ('Direct Put Option') or the purchase of shares of the intermediate holding companies themselves ('Alternative Put Option'). On 30 March 2011, ECML exercised the Alternative Put Option. Subsequently, on 12 May 2011 with the consent of all the concerned parties, ECML exercised the Direct Put Option in place of the Alternative Put Option. Further, the said Put Option agreement was further amended by a Deed of Amendment dated 1 July 2011 between Vodafone International Holdings B.V., Vodafone Group Plc, EPSL, ECML, EGFL, ECom and the Assessee. On 1st June 2011 and 1st July 2011, the Assessee sold all the shares it held in VEL to EPSL for a total

consideration of USD 3,02,05,21,511 and realised capital gains thereon. The Assessee was also paid an interest of USD 3,50,176 towards delay in payment of the sum due to the Assessee as per the said Put Option agreement. The gross consideration (including interest) was received by the Assessee after deduction of tax at source at 21.012%.

134. The learned AO's notions that the put option agreement entered into in the earlier years resulted in the transfer of the shares and that the decision taken at the time of entering into the option agreement was merely implemented in FY 2011-12 is incorrect. A put option is merely the right to sell, without the obligation to sell and hence there is no question of the decision to sell having been made merely on account of entering into an option agreement. Commercially, the exercise of option was subject to various considerations, inter alia, to the value of the shares at the time of determining whether to exercise the option. If the value of shares at the said time was in excess of the option price, the Board wouldn't have exercised the option for all shares and could have either sold some of the shares under the fair value put option or decided to refinance the USD 3.59bn loan after continuing to hold the shares and letting the put option expire. In fact, the fair value in 2011 was below the underwritten put option price which was deliberated upon by the board of the Assessee and hence they preferred the underwritten put option. There were detailed deliberations by the Board during meetings held such as on 10 September 2009, 2 March 2010, 28 July 2010, 23 November 2010, 8 February 2011, 17 February 2011, 3 March 2011 and 30 March 2011 in relation to the exercise of put options. This itself shows that lot of factors needed to be carefully weighed in by the Board before actually agreeing to sell the shares at the put price. The fact that the Board of the Assessee has carefully weighed these factors has been conveniently ignored by the

learned AO. The steps which ultimately led to consummation of the transaction of sale to EPSL have conveniently been ignored by the learned AO. Also, as is evidenced by the 1 July 2011 Deed of Amendment to the Option Agreement that was approved by the Board of the Assessee, there was an ongoing dispute in relation to interpretation of the option agreement and there were several negotiation points and commercial points (including revision of the consideration itself from USD 2.73bn to USD 3.02bn), which substantiate that the transaction did not consummate earlier but in fact required significant decision making in FY 2011-12 by the Board of the Assessee. During the relevant FY 2011-12 as many as 11 board meetings were held by the Assessee in Mauritius and all the decisions including in respect of sale of VEL shares have been made by the Board of Directors.

135. As regards the allegation about immediate use of sale proceeds, it is submitted that the amount involved were very huge and it would be commercially imprudent to keep the funds idle. Sale consideration was required for discharge of the loan taken by ECML which was immediately due. In fact, the sale itself was, to a large extent, driven by the need to repay the loan of USD 3.59 bn granted to ECML by a consortium of lenders led by SCB, UK in August 2007 for which the Assessee was a guarantor (**Page 1711 of PB**). As the loan was to be repaid and ECML (the borrower) did not have the funds to repay, the Assessee sold its VEL shares in order to meet its obligations under the loan agreement towards repayment of the facility (**Para 184, Page 115 of PB**). The tax authorities cannot deny treaty benefits to Mauritius companies by stating that the sale proceeds received by the Mauritius company had ultimately been paid over by it to the shareholder - **Vodafone International (SC) (supra) (Para 97 of Radhakrishnan)**,

Becton Dickinson (Mauritius) Ltd (434 ITR 180) (AAR) and E*Trade Mauritius Limited (2010) 324 ITR 1 (AAR) (Para 188-189, Page 116 and Page 1717 of ECL ITAT PB).

136. In our view, the transactions were undertaken for commercial reasons and it is not open to the tax authorities to step into the shoes of the Board of Directors and question the business purpose of a transaction. The Assessee had also benefited from the various loans that were raised on the basis of ETIL/VEL shares and therefore, it agreed to pledge its holding in ETIL/VEL shares (**Para 184-187, Page 116 of PB**).
137. All statutory books of accounts and records of board meetings etc. are maintained and kept at the Assessee's registered office in Mauritius. The Assessee had leased office premises in Mauritius from which it operated. We observed from the record that in 2012, it purchased a commercial property using loan proceeds from a Mauritian bank, wherein it started generating revenues in the form of rent in later years. This in turn demonstrates that the allegation of the learned AO is baseless and factually incorrect that the Assessee has been reduced to empty box after such sale. The Assessee is regular in filing its tax returns in Mauritius, which are regularly verified by the MRA.
138. We observed that the authorities below have not considered all the factual documents/ evidence provided by the Assessee at the time of assessment as well as appellate proceedings and they have arrived at conclusions/ drawn adverse inferences at several places in the order without any documentary evidence. The authorities below have merely undertaken a fault-finding exercise rather than concluding the assessment/appellate proceedings objectively basis the documents/ evidences furnished by the Assessee over the years.
139. We observed that the Liquidation of ETIL was pursuant to lenders

requirement and rejection of pledge of VEL shares by the RBI, however, the lower authorities have denied treaty benefits to the Assessee on the basis that the liquidation of ETIL was undertaken with a view to shift the locus of shares from India to Mauritius without any commercial purpose and, was a colourable device to avoid capital gains tax in India.

140. Further, the lower authorities have failed to appreciate the commercial purpose behind the liquidation of ETIL, viz., the same would enable a direct pledge of VEL shares to the lenders resulting in greater enforceability of VEL shares as a security, which was not possible so long as the VEL shares were held by ETIL in view of the provisions of Foreign Exchange Management Act, 1999. The same is evident from the rejection by the RBI vide its letter dated 4 October 2007 of the application made for pledge of VEL shares by ETIL (**refer RBI letter on page 1682 of Paperbook**).
141. The lower authorities have also failed to appreciate that there was no intention to liquidate ETIL in the first place as is evident from the application dated 12 February 2007 made by ETIL for pledge of VEL shares to the RBI. Accordingly, the option of liquidation of ETIL provided under the USD 1.1 bn loan agreement was not preferred by the Assessee.
142. The lower authorities failed to appreciate that while the application dated 12 February 2007 for pledge of VEL shares was pending, ECML was in the process of obtaining a loan of USD 3.59 bn i.e., more than 3 times the loan already obtained. Since the approval of RBI was not forthcoming, the lenders in the loan agreement dated 17 August 2007, specifically stipulated that ETIL must, necessarily, be liquidated and the shares of VEL must be directly held by the Assessee so that the same can be pledged with the lenders directly.

143. The lower authorities failed to appreciate that after execution of the loan agreement dated 17 August 2007 for USD 3.59 bn, the application made to the RBI for pledging of VEL shares by ETIL was rejected vide letter dated 4 October 2007 (in respect of USD 1.1 bn loan). Further, the pledge of the VEL shares was allowed by the RBI only after holding of the shares by the Assessee (post liquidation of ETIL), which is evident from the approval dated 14 November 2008 granted by the RBI subsequent to liquidation of ETIL [**refer page 1697 of Paperbook**].
144. Before us, the Assessee submitted that the liquidation of ETIL was not carried out with a view to claim the benefit of India-Mauritius DTAA, because, even in the absence of liquidation, the benefit of India-Mauritius DTAA was available to the Assessee as the Assessee had the option of selling the shares of ETIL, the gains arising whereof would have been exempt from tax under Article 13(4) of the India-Mauritius DTAA. In fact, even if ECML had sold shares of the Assessee, there would have been no tax liability in India under the Act itself and further, ECML would have been entitled to the benefits of the India - Mauritius DTAA as well. (on alternate plea filed by the assessee in pages 635 to 637 of the Paperbook). From the facts available on record, the above submissions of the assessee are, in our view, reasonable.
145. In view of the above, it cannot be said that the motive behind the liquidation of ETIL was tax avoidance as it was undertaken for a commercial purpose and further no tax benefit was obtained by the Assessee by undertaking the liquidation. Accordingly, the same cannot be termed as a colourable device and the inference drawn by the lower authorities is incorrect and devoid of any merit.
146. Whether the TRC issued by the MRA is conclusive proof of beneficial ownership of the shares sold by the Assessee consequently, the benefit of

India-Mauritius DTAA can be denied or not, we observed that the MRA has issued TRCs to the Assessee from the inception of the Assessee and even for the years subsequent to the sale of the shares by the Assessee, certifying that the Assessee is a tax resident of Mauritius since its inception including for the year under consideration. The MRA vide their letter dated 20 May 2012 has further clarified that the TRC was issued to the Assessee not only on the basis of the incorporation of the company in Mauritius but also on the basis of the control and management of the Assessee being in Mauritius (**page 186 of the Paperbook**). In this regard, we refer to Circular No. 789 dated 13 April 2000 issued by the Central Board of Direct Taxes (CBDT) clarifying that wherever a certificate of residence is issued by the MRA such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the provisions of DTAA. Accordingly, the capital gain arising on sale of shares by a resident in Mauritius would not be taxable in India.

147. As held in the case of **UOI vs. Azadi Bachao Andolan (263 ITR 706) (SC)** wherein the validity of Circular No. 789 dated 13 April 2000 was in question, the Supreme Court has held that the CBDT was justified in issuing the aforesaid circular, since the action of the tax authorities bringing to tax the capital gains earned by Mauritian residents was contrary to the provisions of Article 13(4) of India-Mauritius DTAA. Therefore, the Hon'ble Supreme Court held that the CBDT was correct in issuing the aforesaid circular directing the Assessing Officers that wherever the TRC is issued by the MRA, the benefit of India-Mauritius DTAA is available to the taxpayer.
148. In the aforesaid landmark decision of **Azadi Bachao Andolan**, the Supreme Court has given categorical guidance concerning the relevance

of treaty preambles within the context of tax law. In doing so, the Hon'ble Court placed a significant credence to the principle that a Double Tax Avoidance Agreement's ("DTAA") preamble can be a determinative factor in deciphering its underlying purpose and guiding its interpretation. The ruling in above decision explicitly endorses the Assessee's position of its equity investment participation: that the preamble of the India-Mauritius DTAA, by stating its goal as the "*encouragement of mutual trade and investment*," establishes a fundamental interpretive principle. This objective by preamble serves a very important significance in treaty construction. The aforesaid decision/ruling aligned with established principles of international treaty interpretation, as embodied in the Vienna Convention on the Law of Treaties. Article 31(1) and Article 31(2), expressly mandates consideration of a treaty's preamble, alongside its context and object and purpose, for interpretative purposes.

149. The Hon'ble Supreme Court in its decision in Azadi Bachao case extensively examined the underlying purport in which the tax treaties were negotiated and the international law governing tax treaties and their interpretation. Quelling the concerns of treaty shopping flagged by the High Court, the SC made the following path-breaking observations:

"125. There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the respondents over the so called "abuse" of "treaty shopping", perhaps, it may have been intended at the time when Indo-Mauritius [Tax Treaty] was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper."

150. As regards the rationale and effect of the Circular issued by CBDT, the Hon'ble Supreme Court made insightful observations, which require advertence, and are to the following effect:

“49. ... This circular was a clear enunciation of the provisions contained in the [Tax Treaty], which would have an overriding effect over the provisions of Sections 4 and 5 of the Income Tax Act, 1961 by virtue of Section 90(1) of the Act. If, in the teeth of this clarification, the assessing officers chose to ignore the guidelines and spent their time, talent and energy on inconsequential matters, we think that the CBDT was justified in issuing “appropriate” directions vide Circular No. 789, under its powers under Section 119, to set things on course by eliminating avoidable wastage of time, talent and energy of the assessing officers discharging the onerous public duty of collection of revenue. The Circular No. 789 does not in any way crib, cabin or confine the powers of the assessing officer with regard to any particular assessment. It merely formulates broad guidelines to be applied in the matter of assessment of assessee covered by the provisions of the [Tax Treaty]. (emphasis added)”

151. Further, the validity of Circular No. 789 dated 13 April 2000 arose once again before the Hon'ble Supreme Court in the case of **Vodafone International Holdings B.V. vs UOI (341 ITR 1)** wherein the Supreme Court held that the presence of Circular No. 789 and TRC (which proves the residency and beneficial ownership of the person) is adequate/sufficient for grant of benefits under the India-Mauritius DTAA to a taxpayer. It was further held that the tax department cannot at the time of sale/disinvestment/exit from such investments deny benefits of the DTAA to such Mauritius companies inter alia where such Mauritius company is not a fly by night operator.
152. Further, the Finance Bill 2013 had proposed an amendment to section 90 of the Act which provided that a TRC issued by a competent authority of another country is not sufficient to claim benefits of a DTAA notified under section 90 of the Act. The aforesaid amendment would have diluted the benefit available under Circular No. 789 which provides that the TRC

issued by MRA is a sufficient proof of residency and beneficial ownership for the purpose of Article 13(4) of the DTAA. However, the amendment proposed by the Finance Bill, 2013 was never implemented and on the contrary, a clarification was issued by the CBDT on 1 March 2013 stating that the TRC produced by a resident of a Contracting State will be accepted as evidence that it is a resident of a Contracting State and that tax authorities will not go behind the TRC and question the residential status. In the case of Mauritius, Circular No. 789 dated 13 April 2000 continues to be in force. In the present case, the finding given by the lower authorities is contrary to a circular issued by the CBDT which is binding on them and such a course of action on his part cannot be countenanced.

153. We observed that the judgment of the Hon'ble Delhi High Court in the case of Blackstone Capital Partners (Singapore) VT FDI Three Pte. Ltd. W.P.(C) 2562/2022 & CM APPL. 7332/2022 and the Hon'ble Bombay High Court in the case of Bid Services Division (Mauritius) Ltd. (WP No. 713 of 2021) has reiterated that the tax authorities cannot go behind the TRC issued by the other tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residential status and legal ownership. Therefore, the benefits of DTAA cannot be denied to the Assessee ignoring the TRC issued by the competent authority.
154. Further, the Coordinate bench in the case of MIH India (Mauritius) Ltd. [ITA No.1023/Del/2022] and in the case of Reverse Age Health Services Pte. Ltd. [ITA No. 1867/Del/2022] has reiterated the legal position that as per Circular No. 789, where a TRC is issued by the foreign tax authorities, it will constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership for the purpose of claiming treaty benefits.

155. The submissions dated 5th May 2025 made by the Revenue have also been rebutted by the Assessee vide submissions dated 8th May 2025, which interalia, state as under-

Regarding Judgment of Supreme Court in Azadi Bachao Andolan (2003) 263 ITR 706 (SC):

- (a) Circular No. 789 does not restrict the applicability thereof only to Foreign Institutional Investors (FII) or investment funds registered with SEBI which is evident from the below:
- (b) The principal enunciated in Circular No. 789 is not caveated in any manner whatsoever unlike some other circulars (For Eg. Circular No.4/2024, Circular No. 6/2016) issued by the Central Board of Direct Taxes (CBDT) which restrict their applicability to cases which are expressly carved out and hence, the same cannot be created/ read into the circular as suggested by the Revenue.
- (c) Circular 682 was issued by CBDT that emphasized that any resident of Mauritius deriving income from alienation of shares of Indian company would be liable to tax only in Mauritius. Such circular is applicable to all residents of Mauritius without any exception.
- (d) It is observed in Azadi Bachao (supra) that in spite of Circular No. 682, tax authorities started issuing show cause notices to FIIs in the backdrop of which CBDT issued Circular No. 789 to clarify the position granting benefits of the India-Mauritius Double Taxation Avoidance Agreement (India-Mauritius DTAA) in respect of capital gains even to FIIs as well.
- (e) Similarly, Press Release dated 1 March 2013 does not restrict the applicability of TRC only to FIIs and investment funds.
- (f) Various High Courts (**Serco BPO 379 ITR 256 and JSH Mauritius 84 taxmann.com 37**), different benches of the Tribunal (MIH India ITA No 1023/Del/2022, Reverse Age 147 taxmann.com 358) and AAR (**Castleton 24 taxmann.com 150, Becton Dickinson 110 taxmann.com 291** etc) have held that Circular applies even to investors other than FIIs, granted the treaty benefits to such investors and such orders have been accepted by the Revenue. The same has also been relied on for deciding beneficial ownership for the purpose of Royalty (**Universal International Music BV 31 taxmann.com 223**) and Interest (**HSBC Bank Mauritius 96 taxmann.com 544**).
- (g) The judgment of the Supreme Court clearly records that notices were issued by the Assessing Officer to FIIs alleging that they were shell companies incorporated in Mauritius whose main purpose was investment of funds in India and it was further alleged that these companies were

controlled and managed from countries other than Mauritius and as such they were not residents of Mauritius (similar allegation have been made by the Revenue in the present case). It was in these circumstances that Circular No. 789 was issued by the CBDT clarifying that the Tax Residency Certificate (TRC) is sufficient evidence of status of residence. Therefore, it is incorrect for the Revenue to contend that Circular No. 789 is applicable only to FIIs and investment funds registered with SEBI.

(h) For the purposes of Article 13 of the India Mauritius DTAA, there is no difference between the capital gain arising on sale of shares by FII or by any other investor. Therefore, the distinction created by the Revenue is artificial and without any basis.

(i) The Revenue has sought to draw an inference that the judgment of Azadi Bachao (supra) dealt with legal regime of Mauritius Offshore Business Act, 1992 (MOBA) and the same did not deal with the current regime of Financial Services Act, 2007 (FSA), applicable to Mauritius companies, the principles laid down therein is inapplicable in the present case. The Assessee submits that the principles laid down in Azadi Bachao (supra) namely that a person who is a resident of Mauritius (as demonstrated by the TRC issued by the Mauritian Revenue Authority [MRA]) is not liable to tax in India on the capital gains that arises to it on sale of shares of an Indian company is not predicated on the resident of Mauritius being governed by the MOBA. Therefore, the Assessee submits that the principles laid down by Azadi Bachao (supra) is equally applicable under the FSA regime as well. In fact, the FSA regime was brought to simplify the regulatory regime with an increased focus on market conduct, anti-money laundering, combating the financing of terrorism requirements, corporate governance, etc. which should not impact the eligibility to claim benefits of India-Mauritius DTAA for the companies who are in compliant with FSA provisions.

156. The above submissions of the assessee on rebuttal to the points raised by the revenue are also discussed by us in the earlier paragraph, in our view, the points of rebuttal submitted before us are proper based on the various judicial precedents brought on record. Therefore, we are inclined to accept the same.

157. With regard to rebuttal on the Judgment of Supreme Court in Vodafone International Holdings (2012) 341 ITR 1 (SC), we observed that

(a) The observations of the Supreme Court on India-Mauritius DTAA and Circular No. 789 is not an “obiter dicta”:

(i) The point of India Mauritius DTAA was argued by the Revenue and was answered by CJI S.H. Kapadia in his judgment at Para 80 wherein he has held that the capital gains were not chargeable in view of India-Mauritius DTAA.

- (ii) The judgment of K.S. Radhakrishnan J. has also recorded that the Revenue argued that the benefits of TRC was restricted only to dividend income and not capital gains (Para 41). Accordingly, this argument of TRC was addressed by K.S. Radhakrishnan J. It is important to note that the Judgment specifically approves of the arguments of Mr. Aspi Chinoy on Circular No.789 and the consequential benefits flowing under the India-Mauritius DTAA (Para 96 of Judgment by K.S. Radhakrishnan)
- (iii) A point which has been argued by the Assesseees and the Revenue and thereafter decided by the Supreme Court cannot be termed as an “obiter dicta”.
- (b) However, the Revenue in its submission dated 5th May 2025 at Para – 12 and 13 accepted that the obiter dicta of the Supreme Court is binding on all Courts thereby even assuming contrary to what is submitted herein before that the observations of the Supreme Court are obiter, the same would be binding on us.
- (c) Further, all the transactions have been undertaken by the Assessee for business and commercial reasons. Accordingly, the references to substance over form doctrine, lifting of corporate veil, colorable device, relying on the judgment of Vodafone (supra) is entirely misplaced and is contrary to the facts and evidence on record. In fact, the judgment of Supreme Court in Vodafone (supra) supports the case of the Assessee.

158. With regard to Legislative History of section 90 and provisions of Mauritius law, we observed that

- a. The proposal to amend section 90(5) and withdrawal of amendment followed by issue of a Press Release by Ministry of Finance does not leave any doubt regarding the conclusiveness of the TRC.
- b. The amendments to DTAA in 2017 which grandfathers the investments made prior to the year 2017 clearly proves that no capital gain is chargeable in the hands of a Mauritius company before 2017. Further, Circular No. 1/2025 dated 21 January 2025 clarifies that the Principal Purpose Test (PPT) will apply prospectively and further states that the grandfathering provisions in India-Mauritius DTAA are outside the purview of PPT.
- c. The Revenue has referred to amendments made to section 73A of the Mauritius Income Tax Act, 1995 which introduced the test of POEM and CMC in 2018 and 2019 respectively. However, the same are not applicable for the year under consideration. In fact, for the year under consideration section 73A provided that “only

GBL 2 companies will be treated as non-residents". It is reiterated that the Assessee herein is registered with Financial Service Commission of Mauritius as GBL 1 company and is a tax resident of Mauritius.

159. With regard to Determination of Tax Residency under Article – 4(1), we observed that

- i. The TRC read with clarification issued by MRA states that the Assessee is a resident of Mauritius on the basis that their control and management is in Mauritius.
- ii. The Assessee has produced the board minutes, books of accounts, agreements, relevant bank statements etc. which are all maintained in Mauritius.
- iii. The composition of the board of directors of the Assessee reveals that the directors are persons of credibility and qualification and except one Ms. Dina Wadia, (who is represented for the lenders) the other directors are non residents of India (majority being residents of Mauritius).
- iv. The Assessee is regularly assessed to tax in Mauritius by MRA as a tax resident of Mauritius.
- v. The Assessee maintains its bank accounts in Mauritius and its financial statements are audited in Mauritius.
- vi. The Revenue has not brought any material on record to show that the Assessee is not a tax resident of Mauritius.
- vii. It is incorrect on the part of the Revenue to rely on Klaus Vogel commentaries and foreign judgments to suggest that the Indian authorities can determine the residential status of a company under foreign law. In fact, the commentary of Klaus Vogel cited by the Revenue refers to two different views taken by two different countries. The contention of the Revenue is contrary to **Circular No. 682, 789**, the judgments of the Supreme Court in **Azadi Bachao (supra) and Vodafone (supra)**. The residential status of the Assessee under Mauritius law can be determined only by MRA and the Revenue is not empowered to administer the same and determine the rights and obligations under foreign law.
- viii. Further, in view of the various circulars issued by the CBDT and the judgments of Supreme Court in the case of Azadi Bachao (supra) and Vodafone (supra), the Assessee should be granted treaty benefits on the capital gains arising to it on sale of VEL

shares. This is what India has agreed with Mauritius by exercising its sovereign rights and the same should be respected by the Revenue authorities. An interpretation to the contrary would thereby nullify the agreement reached between two Sovereign States that the capital gains arising from transfer of shares acquired prior to 1 April 2017 would not be chargeable to tax in India.

160. Therefore, as discussed above, in our view, the provisions of Article 4(3) are not applicable in the present case as the Revenue authorities have not been able to prove that the Assessee is also a tax resident of India by virtue of the provisions of Section 6(3) of the Act.
161. In our considered view, disregarding the relevance of TRC by the Revenue is contrary to legislative intent. We observed that the lower tax authorities' reluctance to accept the TRC as the final word on the tax residency in the case of India-Mauritius tax treaty is that the Mauritius entities claiming the tax residency of Mauritius, were merely shell entities having no business operations in Mauritius and were set up only for claiming the capital gains exemption under the India-Mauritius tax treaty. Further the tax authorities contend that allowing the benefits of the India-Mauritius tax treaty to these entities, results into double non-taxation since the capital gains on sale of shares are exempt from tax in Mauritius. It is apparent that the Lower authorities made only general submissions regarding the merits and did not endeavour to substantiate them on the basis of the documents or any other evidence or to correlate the evidence with its submissions. We observe that there is not a single hard fact brought on record that the transaction/arrangement in this case was designed for avoidance of income tax in India and/or the Assessee company is a shell company.
162. On the other hand, the Assessee has brought on record the relevant documentary evidence to establish the commercial substance of the investment activities namely, decision making, minutes of the board

meetings, fund flows, commercial purpose of the Mauritius companies and commercial expediency of the transactions etc. which are necessary for determining the true nature of the transactions. Further, we observed that the Assessee/ETIL have invested in 2007/2005 and as such there is nothing to suggest that investments and subsequent sale was made with an intention to earn profits from sale of VEL shares or that the sale of VEL shares in the financial year 2011-12 by the Assessee was conceived at the time of investment in ETIL in the financial year 2006-07. There is nothing on record to demonstrate how the assessee company will foresee the transaction and control the purchase consideration in advance at the time of investment itself.

163. It is also vital to note that section 90 of the Act was amended via the Finance Act, 2003 to empower the Central government to enter into tax treaties for inter-alia granting relief in respect of income-tax chargeable under the Act "to promote mutual economic relations, trade or investment". Thus, the Central Government is empowered to enter into tax treaties for non-tax considerations also. Thereafter the section 90 of the Act was further amended by the Finance Act, 2012 to provide that TRC containing the prescribed details, would be mandatorily required to be furnished by a non-resident for claiming tax treaty benefits. In addition, the explanatory memorandum to the Finance Bill, 2012 introducing these provisions, mentioned that the TRC would be a necessary but not a sufficient condition for the purposes of availing the tax treaty benefits. This caused severe anxiety amongst the non-residents since it seemed to suggest that the TRC would not be the last word on the tax treaty benefits and the tax authorities can tear the veil of TRC and examine the factual matrix. This was sought to be addressed by a press release issued by the then Finance Minister stating that the TRC would be

accepted for evidence of the tax residence under the tax treaty and the tax authorities would not go behind the TRC to examine the residential status. The press release also reiterated the Circular No.789 would still be applicable. This was reflected by an amendment to section 90 in the very next year by Finance Act, 2013 which dropped the requirement of furnishing the TRC with the prescribed details. Instead, a provision was inserted in section 90 requiring the taxpayers to provide such particulars separately along with a TRC, for availing the tax treaty benefits.

164. Thus the entire attempt of the ld. Lower authorities and the ld. Department representative in seeking to question the TRC is wholly contrary to the Government of India's repeated assurances to foreign investors by way of CBDT circulars as well as press releases and legislative amendments and decisions of the Courts in **Union of India v. Azadi Bachao Andolan; Vodafone International Holdings BV v. Union of India; CIT v. JSH (Mauritius) Ltd; Sanofi Pasteur Holding SA v. Department of Revenue, Ministry of Finance and Serco BPO (P) Ltd. v. Authority for Advance Rulings** - wherein after tracing the entire history of CBDT circulars, legislative amendments and judicial pronouncements, it was held that TRC is sufficient to claim relief under the DTAA. The P&H judgment of the High Court in Serco BPO (P) Ltd. has been accepted by the Tax Department and it was not challenged before the Supreme Court. Further, since on the basis of repeated assurances by the Government of India which have been upheld by the Supreme Court, the Assessee had invested in India, the Revenue cannot now argue to the contrary. The entire attempt of the revenue in seeking to question the TRC is wholly contrary to the Government of India's repeated assurances to foreign investors by way of CBDT Circulars as well as press releases and legislative amendments and decisions of the

Courts. Accordingly, the Revenue cannot go behind the TRC issued by the Mauritius tax jurisdiction as the same is sufficient evidence to claim treaty eligibility, residence status, legal ownership and accordingly there is no capital gain earned by the Assessee liable to tax in India in terms of Article 13(4) of the DTAA between India-Mauritius.

165. Though, the Revenue has referred to certain observations of the Supreme Court in case of Vodafone International Holdings B.V. v. Union of India, however, no material has been brought on record to establish that there is round-tripping of money or any other illegal activities. Further, the Revenue has failed to establish by hard facts that the Assessee claiming benefit on the strength of the TRC is a shell/conduit company. In the facts of the present appeal, except making vague allegations, the lower authorities have failed to bring on record any cogent material to substantiate their allegations that the Assessee is merely a paper company, hence, cannot be treated as a genuine tax resident of Mauritius. The reasons, on which, the departmental authorities have denied Assessee's claim of benefit under Article 13(4) of the tax treaty are not proper and not justified. It is evident, in course of proceedings before the departmental authorities, the Assessee has furnished all materials and evidence to establish its residential status, bank statements reflecting details of investments made in foreign currency, minutes of board meetings and various other documents have been submitted by the Assessee before the departmental authorities. Whereas neither the Assessing Officer, nor CIT(A), except making vague allegations regarding the status of the directors and the structure of the company have held that since the assessee is a mere conduit company, it is not entitled to treaty benefits

166. Therefore, in view of Article 13(4) of the India-Mauritius tax treaty,

including, inter alia, TRCs of the Assessee issued by the MRA and the clarification letter dated 29 May 2012 issued by the MRA, Circular No 789 dated 13 April 2000 and Circular No. 682, dated March 30, 1994 issued by the CBDT, and Hon'ble Supreme Court judgement in Azadi Bachao Andolan (2003) 263 ITR 706 (SC), the capital gains arising on sale of VEL shares to EPSL by the Assessee are not taxable in India and the denial of benefit of Article 13(4) by the lower authorities is incorrect and is bad in law.

167. Further we observed that Ld DR submitted that the arrangement made by the assessee and E Com Ltd with the VEL to sell the shares held by it based on the initial negotiations agreed for purchase consideration. VEL had filed an application with the AAR to determine the taxability of the above transactions under Article 13(4) by tagging both the Assessee also to the above said application. Subsequently, the application was withdrawn and VEL had deducted the relevant TDS with the mutual consent and deposited the same. He submitted that the same was carried out with the understanding that the transaction is taxable in India.
168. Ld DR Submitted that subsequently the assessee had filed fresh application before the AAR and pleaded that the same transaction is not taxable in India under Article 13(4). He did submit that the transaction is completed duly following the FDI regulatory requirements by the Group. He strongly objected to the activities of the Assessee in filing the reference before AAR seeking and contending exemption under Article 13(4) for the same transaction wherein the VEL had deposited the due taxes and compensated the purchase consideration. After considering the submissions made before us, in our view, what is relevant for consideration is, whether the transaction under consideration is taxable under article 13(4)/under the Income Tax Act, 1961 or not. It is irrelevant

for the revenue to consider the mutual agreements reached between two private parties, the reasons for such agreements are best known to them. We have considered the relevant facts on record and adjudicated the relevant question raised before us in the appeal and further addressed the various allegations made by the lower authorities before us appropriately.

169. The next issue is, in the absence of limitation of Benefit (“LOB”) clause, whether the benefit of India- Mauritius DTAA can be denied or not.
170. We observed that the DTAA between India and Mauritius as it was in force for the year under consideration did not contain any LOB clause which restricted the benefit available under Article 13(4) of the DTAA nor provided for any condition to be fulfilled for claiming the benefit of Article 13(4) of the DTAA.
171. It is important to note that under the India-USA DTAA (executed in 1989), Article 24 specifically provides that a company can claim the benefit of the India-USA DTAA only when 50% shares of that company is held by individuals who are residents of either India or USA. Similarly, Article 24 of the India-Singapore DTAA (executed in 1994) provided that the exemption or lower rate of tax provided under the DTAA for income arising in a Contracting State will be restricted to the amount considered for taxation on receipt or remittance basis in the other Contracting State. The protocol executed between India and Singapore on 1 August 2005 further provides that the benefits provided under the DTAA shall not be available if the affairs of a resident were arranged with the primary purpose of claiming benefit of the DTAA and further, the company will be treated as a shell/conduit company if the annual expenditure incurred on the operations is less than SD 2,00,000.
172. Similarly, Article 29 of the India - UAE DTAA (executed in 2007) and Article 29 of the India — Luxemburg DTAA (executed in 2008) provide

that the benefit of the DTAA will not be available to the residents of a Contracting State if the main purpose or one of the main purposes of incorporating a company was to obtain benefits of the DTAA.

173. However, the India-Mauritius DTAA did not have any of the clauses incorporated by India in the DTAA executed with other countries and, therefore, in the absence of any restriction placed in the India-Mauritius DTAA, the treaty benefits cannot be denied by the tax authorities invoking the conditions which are not part of the DTAA. In this regard, the judgment in the case of Vodafone International Holding B.V. (supra) is relied wherein the Hon'ble Supreme Court held that in the absence of a LOB clause in the India- Mauritius DTAA, there is no justification in prohibiting the incorporation of companies in Mauritius for deriving benefits of the DTAA. The absence of LOB clause makes the scope of the DTAA positive from the perspective of a special purpose vehicle ('SPV') created specifically to route investments into India and, the tax authorities cannot at the time sale/disinvestment deny benefit on the ground that the investment was only routed through Mauritius.
174. We observed that similar argument was raised by the Revenue before the Supreme Court in the case of Azadi Bachao Andolan (supra) wherein it was contended that the companies incorporated in Mauritius are shell companies as they don't carry on any business and are incorporated in Mauritius with the motive of treaty shopping. The Supreme Court rejected the argument of the Revenue and held that if the intention was to preclude a person from the third state from claiming benefits of the DTAA, then a suitable term of limitation to that effect should have been incorporated therein, and that in the absence of a limitation clause, such as the one contained in Article 24 of the India-USA DTAA, there are no disabling or disentitling conditions under the India-Mauritius DTAA

prohibiting the benefits thereunder. The Supreme Court further held that the motives with which the companies have been incorporated in Mauritius is wholly irrelevant and cannot in any way affect the legality of the transaction. And, that there being nothing like equity in a fiscal statute, which applies by its own force independently or it does not.

175. Further, the LOB clause was inserted as Article 27A in the India-Mauritius DTAA only w.e.f. 1 April 2017 which provided for restriction on the benefits available under Article 13 of the DTAA that a company shall not be entitled to the benefits of Article 13 if the primary purpose was to take advantage of the DTAA and the company is a shell company incurring expenditure on operations of less than Mauritian Rs. 1.5 mn in Mauritius. The CBDT press release dated 10 May 2016 and 29 August 2016 further clarify that the amendments made to the India-Mauritius DTAA will be applicable only from A.Y. 2018-19 that too on capital gains arising on the securities purchased after 1 April 2017.
176. Therefore, the said Article 27A does not apply to A.Y. 2012-13 i.e., the year under adjudication for entitlement of DTAA benefits to the Assessee, even if the principle laid down in the LOB clause found in the India-Mauritius DTAA is applied for the earlier year, it is fact on record that the threshold of a minimum spend in Mauritius is easily met by the Assessee as the Assessee has incurred expenses in excess of Mauritian Rs.1.5 mn for the year under consideration. The workings and the extract of profit and loss account for the financial year ended 31 March 2012 (which has comparative figures for 2011) are at **page 1683 to 1684 of the Paperbook.**
177. Hence, in view of the above, the orders passed by the lower authorities denying the benefit of Article 13(4) of India-Mauritius DTAA for the A.Y. 2012-13 is unsustainable and bad in law.

178. In the given case, whether the capital gain arising on the securities purchased before 1 April 2017 has been grandfathered and can be brought to tax in India or not
179. We observed that with effect from 1 April 2017 amendments have been made to Article 13 of the India-Mauritius DTAA whereby Article 13(3A) has been inserted which provides that capital gain arising on transfer of shares, acquired on or after 1 April 2017, will be taxable in the country in which the company whose shares are sold is resident. Article 13(38) further provides that the capital gain arising, on shares acquired on or after 1 April 2017, during the period 1 April 2017 and 31 March 2019 will be chargeable to tax @50% of the rate it is ordinarily taxed in the residence country of the company whose shares are being alienated.
180. The Article 13(4) has been substituted and provides that any capital gain arising from alienation of any property other than Article 13(1) (Capital gain on immovable property), 13(2) (Capital gain on movable property of Permanent Establishment), 13(3) (Capital gain on ships and aircrafts), 13(3A) (Capital gain on shares acquired after 1 April 2017), 13(36) (Capital gain on shares between 1 April 2017 to 31 March 2019), will be taxable only in the country in which alienator is a resident. Therefore, the amended Article 13(4) effectively provides that the capital gain arising on alienation of shares acquired before 1 April 2017 cannot be brought to tax in India in any situation. Hence, the jurisdiction to tax capital gain in India is vested only w.e.f. 1 April 2017, that too only for the capital gain arising on alienation of shares acquired on or after 1 April 2017.
181. Therefore, in these circumstances, it is not open to the Revenue to deny the benefit of the DTAA for an assessment year prior to A.Y. 2017-18. The capital gain arising from the shares purchased before 1 April 2017 would not be chargeable to tax in India and the provisions of Article

13(4) would continue to protect the assessee. Therefore, the denial of benefit of Article 13(4) to the Assessee is without jurisdiction and bad in law. The aforesaid position has been clarified by the CBDT vide press release dated 29 August 2016 wherein it has been provided that the amendment made to India-Mauritius DTAA which provides for capital gains arising on transfer of shares on or after 1 April 2017 will be restricted to the shares purchased on or after 1 April 2017 and the capital gain arising on transfer of shares which were acquired before 1 April 2017 have been grandfathered and will not be subject to capital gain taxation in India.

182. In view of the above, the orders passed by the lower authorities taxing the capital gains on the shares which were sold in FY2011-12, which is much before 1 April 2017, is unsustainable and bad in law.
183. Whether the Commercial transactions based on commercial expediency can be termed as colourable device or not. The same are discussed as under:
184. The tax authorities have raised the allegation that ECL has sold the VEL shares which were initially held by an Indian entity and subsequently transferred to ECL by adopting the voluntary liquidation route. We observed that even in the absence of liquidation of ETIL, ECL could have sold shares of ETIL to Vodafone and availed such treaty benefits, which are sought in the present appeals. Accordingly, there cannot be said to be any tax motive (i.e. colorable device) for undertaking the liquidation and the same was driven for commercial reasons by following the proper legal and approval procedure.
185. Further allegation of Colourable holding structure of Essar Group were raised by the revenue, the same are dealt with as under:

- i. The allegation of the Revenue vide submission dated 5th May 2025 relating to Paradise Papers have been made for the first time.

By making a reference to Paradise Papers, an inference has been sought to be drawn that the creation of trusts was illegal meant to create an opaque structure. It is submitted before us that each of the members of the Ruia Family have disclosed in the Return of Income their interest in the companies which are beneficiaries of the trust. The said structure has also been disclosed to the exchange control authorities in India and global regulators as well.

- ii. Further, as brought to our notice, the trust structure has been disclosed by the Assessee in the assessment proceeding and the rationale has been explained to the lower authorities (Para 161-166 Pg. 105 of PB).
- iii. As per the records brought on record, the Paradise papers have nothing to do with the Assessee and transactions under consideration. Even otherwise no proceeding has been initiated by relevant authorities against the Essar group based on the Paradise Papers.
- iv. With respect to DRI proceedings, it is submitted that the Principal Commissioner (Adjudication), Mumbai in May 2023 has dropped all the proceedings against all the notices issued to the Essar entities. Further, on the subsequent appeal by the Commissioner of Custom, the CESTAT in the order pronounced on 3 April 2025 has found no merit in the appeal and have decided the issue in favor of the Essar entities. In any case, such proceedings are not against the Assessee and accordingly, no adverse inference can be drawn in order to decide the present appeal under consideration.

186. With regard to various allegations in Revenue legal submissions dated 5th May 2025, we observed that the Assessee has already rebutted the allegations relating to a) no operations in Mauritius, b) No role of BOD

related to the borrowings, c) it is colourable device, d) Key executives of the group performed all crucial activities e) discrepancies in the board minutes and f) the directors are puppet. We observed that the issues are properly addressed in the rebuttal of the assessee and also, we have dealt all the issues in the paragraphs above. We observed that all the transactions have been undertaken for commercial and business reasons and business exigencies in order to address the lenders concerns, the contention of the Revenue regarding invocation of Judicial Anti-Avoidance Rule is unsustainable and contrary to settled principles of law.

187. Further, the Revenue has made allegations regarding use of colourable device/ transactions designed to avoid income tax without any specific evidence of any lapse on the part of the Assessee. In the present case, the transactions undertaken by the Assessee were all ordinary commercial transactions based on commercial expediency and cannot be termed as colourable device/ design to avoid taxes by any stretch of imagination nor can it be said that there was lack of commercial / business substance. Further, there is no basis to allege that the situs of VEL shares is deliberately changed. The situs of shares of VEL continued to be in India in view of the shares being of an Indian company. It was submitted that there was no deliberate shifting of shareholding for tax purposes whatsoever in the present case. Accordingly, there is no element of any tax avoidance in the facts of the present case. It may also be noted that there is a conceptual difference between transactions undertaken for tax avoidance purposes, on one hand, and transactions which evidence investment participation in India. This has been clearly laid down by the SC in Vodafone's (supra) case as follows:

“68.....When it comes to taxation of a Holding Structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of

such structure(s)..... In this connection, we may reiterate the "look at" principle enunciated in W.T. Ramsay Ltd. case (supra) in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature [See Craven (Inspector of Taxes) (supra) which further observed that genuine strategic tax planning has not been abandoned by any decision of the English Courts till date].

Applying the above tests, we are of the view that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment, the duration of time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device.....

73. At the outset, we need to reiterate that in this case we are concerned with the sale of shares and not with the sale of assets, item-wise. The facts of this case show sale of the entire investment made by HTIL, through a Top company, viz. CGP, in the Hutchison Structure. In this case we need to apply the "look at" test. In the impugned judgment, the High Court has rightly observed that the arguments advanced on behalf of the Department vacillated. The reason for such vacillation was adoption of "dissecting approach" by the Department in the course of its arguments. W.T. Ramsay Ltd. case (supra) enunciated the look at test. According to that test, the task of the Revenue is to ascertain the legal nature of the transaction and, while doing so, it has to look at the entire transaction holistically and not to adopt a dissecting approach. One more aspect needs to be reiterated. There is a conceptual difference between preordained transaction which is created for tax avoidance purposes, on the one hand, and a transaction which evidences investment to participate in India. In order to find out whether a given transaction evidences a preordained transaction in the sense indicated above or investment to participate, one has to take into account the factors enumerated hereinabove, namely, duration of time during which the holding structure existed, the period of business operations in India, generation of taxable

revenue in India during the period of business operations in India, the timing of the exit, the continuity of business on such exit, etc.”

188. From the above decision, the said parameters/ tests stand satisfied by the assessee as explained hereinafter:

Time duration test

ECL was incorporated on 13 October 2005 and is still in existence. ECL acquired the shares of ETIL in FY 2006-07 which in turn held shares of VEL at that time. Hence, ECL had been holding the investments in ETIL/VEL for a period of more than 4 years prior to the sale.

Business operations in India test

The test was applied by the SC in Vodafone's decision to the investee, VEL. In the present case, it is the same investee. VEL has a pan India presence in the telecom sector in India, with substantial turnover and profits and paid direct and indirect taxes in India.

Generation of taxable revenues in India test

The test was applied by SC in Vodafone's decision to the investee, VEL. The same investee is the investee in the present case. The SC recognised the extent of operations carried on by VEL and the taxes paid by it.

Timing of exit

ECL held shares of ETIL/VEL for more than 4 years prior to sale of the VEL shares. The sale of the shares by ECL was out of economic necessity and for repayment of loan taken by ECML. Further, ECL found a good opportunity/ valuation to exit and accordingly, its Board took the decision of exiting VEL. The entire transaction is purely commercial in nature.

Continuity of business on exit

The test was applied by SC in Vodafone's decision to the investee, VEL. In the present case, it is the same investee. VEL today too has a pan India presence in the telecom sector in India. This is a well-known fact.

189. Therefore, As the transaction in the present case satisfies all the parameters of investment to participate laid down by the Supreme Court, it is clearly evident that the transaction cannot be said to be for the

purpose of tax avoidance. In view of the above, the approach to be adopted is to 'look at' and not 'look through' an arrangement/ transaction to determine whether or not a colourable device exists. Adopting this approach, in the present case, there is no question of a colourable device as the Assessee is a genuine Mauritian corporation holding valid TRC and was formed for genuine investment business. Further, even if there had been a reduction of tax arising out of the liquidation and other transactions referred to by the learned AO (which were undertaken for legitimate business purpose as explained above), the tax treaty benefits of the Assessee should not be impacted since under the Indian income-tax jurisprudence, arrangements which do not contravene provisions of existing statutes, and are within the four corners of law, cannot be faulted and are to be treated as legitimate tax planning. In other words, tax planning within the four corners of law is held to be legitimate right of a taxpayer and hence, to be respected.

190. The AO has alleged that USD 2.2 bn has been finally moved to EGFL, Cayman as dividend. If this amount had gone directly as loan from ECML to ECHL, it could not have paid the same to EGFL, Cayman as dividend income because the dividend income is only paid out of income or reserves on account of income. (Page 92 (Para ix and x) of the assessment order). We observed that out of the USD 3.59 bn loan taken by ECML, USD 1.4 bn was used to repay the loan of USD 1.4 bn to SCB, UK (USD 1.1 bn loan was refinanced to USD 1.4 bn). Copies of loan agreements for USD 1.1 bn, USD 1.4 bn and USD 3.59 bn have been furnished and part of the paper book. The balance funds of ~ USD 2.18 bn were lent by ECML to Telecom Holdings (Cayman) Limited, Cayman Island to acquire shares of ECML (and consequently indirectly shares of ECom and the Assessee) from ECHL in line with the requirement of the

lenders to have a separate standalone structure which could be efficient from a security enforceability standpoint such as there being no other liabilities, better conditions for invocation of pledge, etc. It was submitted before us that the money ultimately went to EGFL, Cayman Islands as dividend declared by its subsidiary ECHL. EGFL used the said funds for investments in various businesses across the world. e.g. Steel business in the US and Canada, Power business in Canada, Telecom business in Kenya - (cash flow statement of EGFL furnished in the Paperbook). Further, the AO cannot step into the shoes of the businessman and decide what needs to be done etc. - the decision making has been made by the board of the directors of the respective companies and the same should be respected. Reference could be drawn from the decision of S.A. Builders Ltd. v. Commissioner of Income-tax (Appeals) (2007) 288 ITR 1 (SC).

191. Accordingly, all the transactions were undertaken for commercial reasons, and it is not open to the learned lower authorities to rewrite on mere suspicions and on vague allegations. In light of the above, in our view, there is no colourable device adopted or avoidance of tax attempted in the Assessee's case.
192. In light of the findings and with the support of documentary evidence submitted before us, we are of the view that it is eligible for the benefits of exemption from capital gains tax as provided under Article 13(4) of the India-Mauritius DTAA. Accordingly, the capital gains that have arisen to it on the sale of shares of VEL are not liable to tax in India. Therefore, the Assessee is not a tax resident of India, rather it is a tax resident of Mauritius and is entitled to the benefits of Article 13(4) of the India-Mauritius DTAA and therefore inter alia the capital gains on sale of VEL shares in FY2011-12 are not chargeable to tax in India.
193. In the result, appeal filed by the assessee is allowed.

ITA NO.339/DEL/2022 (ESSAR COM LIMITED)

194. The assessee has raised the following grounds of appeal :-

“On the facts, in law and in circumstances of the case, the learned CIT(A):

General

1. erred in holding that the capital gains earned by the Appellant on the sale of Vodafone Essar Limited (VEL') shares by the Appellant to Euro Pacific Securities Limited ((EPSL') are taxable in India;

Holding that the Appellant was tax resident of India and that its control and management is situated wholly in India

2. erred in treating the Appellant as tax resident of India under the provisions of section 6(3) of the Act

3. erred in disregarding the settled law with respect to tax residency of a foreign company under the provisions of section 6(3) of the Act as established through various judicial precedents on this aspect as well as provisions of memorandum of Finance Bill, 2015 introducing the provisions of place of effective management;

4. was not justified in ignoring the fact that control and management of the Appellant was with the board of directors of the Appellant, that all the decisions concerning the affairs of the Appellant have been taken by its board of directors outside India and in ignoring the supporting documentary evidence and justifications filed before the learned CIT(A) in this regard including letters from Mauritian government authorities;

5. erred in disregarding the settled principle of law that the test of tax residence is to be applied based on the facts of the relevant year alone, as upheld by various judicial precedents;

Denying the benefits of Article 13(4) of India-Mauritius tax treaty ('tax treaty') to the Appellant

6. erred in holding that the Appellant was not entitled to the benefits of Article 13(4) of the tax treaty on the sale of VEL shares by the Appellant to EPSL;

7. erred in ignoring the facts that the Appellant was incorporated in Mauritius, holds tax residence certificates, global business license etc and that the Appellant was entitled to the benefits of Article 13(4) of the tax treaty:

8. erred in disregarding settled law based on various judicial precedents in this regard;

9. erred in not following the Central Board of Direct Taxes (CBDT) Circular No 789 which is squarely applicable to the Appellant's case and erred in relying upon inapplicable Circular 1 of 2003 issued by the CBDT and on Article 4(3) of the tax treaty to hold that treaty benefits are not available to the Appellant:

10. erred in holding that the capital gains earned by the Appellant on the sale of VEL shares were related to assets located in India in telecommunication sector which derived its value based on the economic activity and value creation in India, without appreciating that this is not a criterion to determine taxability of the gains from the sale of shares under the tax treaty

Holding that the Appellant was a conduit company set up for availing tax benefits and for avoidance of tax

11. erred in holding that the Appellant had contrived to devise a scheme to show that the control and management vests in Mauritius with the sole purpose of claim of exemption from capital gains taxation in India under Article 13(4) of the tax treaty on the transfer of shares in VEL

12. erred in relying on findings/ observations in the order dated 10 October 2019 passed by the Authority of Advance Rulings which was non-binding in nature;

13. erred in rejecting the without prejudice argument of the Appellant that if it is alleged that Essar Communications (Mauritius) Ltd (ECML') was the decision maker and the beneficial owner of the VEL shares, the consequence would be that the capital gains on sale of VEL shares would belong to ECML and further erred in holding that whether it is the Appellant who is liable for taxation on capital gains was not an issue to be decided in the appeal before the learned CIT(A).

Others

14. erred in drawing adverse inferences/ reaching conclusions without any evidence or material and only based on suspicion, conjecture and irrelevant, factually incorrect considerations and without appreciating the correct nature of various events, transactions, facts on records, the context thereof, including non-tax commercial aspects involved therein even though the same were explained and demonstrated to the learned CIT(A) in detail by the Appellant (for the sake of brevity a few instances are illustratively summarised hereunder):

- the Mauritian directors of the Appellant were for name sake only and the directors had no control over its affairs;
- the affairs of the Appellant and all the decisions were taken by the senior executives of Essar Group in India;
- agreements and financial statements show that the Ruia family /Essar Infrastructure Holdings Ltd had a significant role to play in the affairs of the Appellant:
- business of the Appellant is run by way of written resolutions without any discussion or deliberations; there are discrepancies in board minutes: the board minutes Submitted by the Appellant for Financial Years 2010-11 and 2011-12 are of doubtful authenticity
- analysis of financial statements of the Appellant clearly shows that the Appellant was only a paper company without any substance as it was not involved in any significant business activities and its income/ expenditure was minimal in quantum and also as per the

terms of the loan agreement and put option agreement the Appellant was restricted from carrying on any business activity:

- all the benefits on account of the loan facility and also on account of sale of VEL Shares have immediately gone for the repayment of loan taken for the benefit of the group companies;
- the Appellant has not exercised/ discharged any shareholder functions with respect to VEL shares;
- frequent changes in holding structure of upstream and downstream companies internal restructuring of ownership of VEL shares were to finally shift the situs of shares to Mauritius which show that it was a colorable device for the purpose of availing exemption under Article 13(4) of the tax treaty;
- acquisition of the right issue shares in VEL and their transfer to the group companies and reacquisition without any consideration by way of internal restructuring have no Commercial substance and the board has not deliberated upon the commercial substance of this transfer.

15. erred in failing to consider explanations l submissions made by the Appellant from time to time before the learned CIT(A) that ought to have been considered (for the sake of brevity a few instances are illustratively summarised hereunder):

- Essar has its presence in Mauritius since 1992 and that Essar group sector holding companies majorly operate from Mauritius and accordingly, the Appellant was not incorporated in Mauritius to avail treaty benefits on sale of VEL shares;
- the directors of the Appellant always comprised of people with significant qualifications and experience (as reflected by their profiles submitted), who were non-residents of India, except the nominee director appointed by lenders;
- the board minutes of the Appellant for FYs 2010-11 and 2011-12 had been contemporaneously maintained and shared with BLC Chambers and the report of BLC Chambers which was provided to the Mauritius Revenue Authority:

- the investment in VEL was made through the Appellant for legitimate commercial / business reasons;
- the explanation as to how the Appellant's case satisfies the tests/parameters laid down by the Hon'ble Supreme Court in Vodafone International Holdings BV v UOI (341 ITR 1) (SC) for Investment participation in India.

16. erred in incorrectly stating that the Appellant has made general submissions and that the Appellant has not disputed the facts brought on record and erred in incorrectly stating that the Appellant has failed to rebut various specific findings made by the AO;

17. erred in holding that the Appellant has not filed certain information and erred in drawing an inference that the Appellant had something to hide which is inconvenient to its claim for seeking exemption of capital gains from taxation, without appreciating all the details and submissions filed before the CIT(A) during the course of the appellate proceedings;

Taxing worldwide income

18. erred in upholding the taxability of interest income earned by the Appellant during the subject AY.

Each of the above grounds is independent and without prejudice to one another.”

195. The relevant facts of the case are, the assessee was incorporated in Mauritius on 9 March 2001. Its registered office is located at Essar House, 10, Frere Felix de Valois Street, Port Louis, Mauritius. The principal activity of the assessee is to make investments and act as investment holding company. The name of the assessee at the time of incorporation was namely, Clickforsteel Holdings Limited which was changed to Essar Telecom India Holdings Limited and later on to Essar Com Limited.

196. During the year under consideration, the assessee was a wholly owned subsidiary of Essar Communications Limited ('ECL'). The board of directors of assessee company for the year under consideration comprised of 6 directors out of which 5 directors were not residents of India (all 5 directors were residents of Mauritius) and 1 director, which was appointed by the overseas lenders, was a resident of India. The board meetings of the assessee have been chaired, convened and conducted in Mauritius. The assessee is regularly filing tax returns in Mauritius, which are assessed by the MRA. All statutory books of accounts and records of board meetings etc. are maintained and kept at the assessee's registered office in Mauritius. The assessee operates from an office premises taken on lease in Mauritius which subsequent to the sale of stake in YEL shares was purchased by the assessee in November 2012.
197. The MRA vide letter dated 13 March 2012 has issued a TRC for the year under consideration certifying that the assessee is a resident of Mauritius. Subsequently, the MRA vide letter dated 29 May 2012 has issued a clarification certifying that the TRC was issued on the basis that the assessee is a company incorporated in Mauritius and the control and management of the company is in Mauritius. The aforesaid clarification was based on a recommendation made by the Financial Services Commission, Mauritius.
198. Initially, the assessee acquired 2,12,54,008 shares of Hutchison Max Telecom Private Limited ('HMTL') [subsequently known as Hutchison Essar Limited ('HEL') and thereafter VEL] which at that time constituted 19.6% of HMTL. The aforesaid stake was acquired by the assessee executing the following agreements:
- Agreement dated 3 July 2004 executed between the assessee and Distacom BVI for purchase of 40% stake in Hutch Cayman Island for a consideration of USD 76.6 million

- Agreement executed between the assessee and Hutch BYI for transfer of the aforesaid 40% stake in Hutch Cayman Island in return of promissory notes of USD 76.6 million issued by Hutch BVI
- Agreement dated 16 July 2004 executed between the assessee and Hutch Mauritius for transfer of 19.6% stake in YEL against assignment of the aforesaid promissory notes

199. The aforesaid acquisition of shares was funded by the assessee taking a loan of USD 76 million from Amaranth Advisors LLC and ADRC Limited vide agreement dated 20 July 2004.
200. The shareholding of 19.6% in HMTL was reduced to 6.19% in February 2005 pursuant to the consolidation of various telecom operating companies (holding stakes in different telecom circles) into HMTL. Against such consolidation, further shares were issued by HMTL to the shareholders of such telecom operating companies. Accordingly, ECom's shareholding of HMTL (i.e. 2,12,54,008 shares held as stated above) became 6.19% of the enlarged share capital of HEL post-consolidation.
201. On 9 December 2005, HEL made a rights issue and the assessee subscribed to its entitlement and thus acquired further 43,97,381 shares of HEL on payment of USD 24.6 million. The aforesaid acquisition of right shares was funded by the assessee by borrowing money from American Express Bank which was arranged by the group company of the assessee. Subsequently, the assessee transferred the right shares of VEL to its then subsidiary Essar Communications Holdings Limited ('ECHL') (at the rights price of USD 24.6 million) with the understanding that ECHL will raise money and pay ECom within 120 days. If ECHL could not pay within 120 days, it was to promptly resell the shares to ECom. Since the

transaction of raising funds by ECHL did not consummate, it transferred the rights share back to the assessee on 15 May 2006.

202. Under an Offshore Underwritten Put Option Agreement dated 24 August 2007 (as amended and restated on 22 September 2009) between Vodafone International Holdings B.V., Vodafone Group Pic, Essar Global Limited, Cayman Island [later known as Essar Global Fund Limited, Cayman Island ('EGFL')] and ECML under which ECML had acquired an irrevocable and unconditional right to require Vodafone International Holdings B.V. or its nominees to procure either to purchase of VEL shares from the direct shareholders ('Direct Put Option') or the purchase of shares of the intermediate holding companies themselves ('Alternative Put Option').
203. On 30 March 2011, ECML exercised the Alternative Put Option. Subsequently, on 12 May 2011 with the consent of all the concerned parties, ECML exercised the Direct Put Option in place of the Alternative Put Option. There was a dispute between the parties in respect of withholding of taxes under section 195 of the Act from the consideration payable to the assessee which was resolved by a Deed of Amendment dated 1 July 2011 between Vodafone International Holdings B.V., Vodafone Group Plc, EPSL, ECML, EGFL, the assessee and ECL, wherein the parties agreed further consideration for transfer of shares and that Vodafone will deduct tax at source under protest and deposit the same with the Government.
204. On 1 July 2011, the assessee sold all the shares it held in VEL to EPSL for a total consideration of USD 1,18,04,78,489 and realized capital gains thereon. The assessee was also paid an interest of USD 3,68,913 towards delay in payment of the sum due to the assessee as per the said Put

Option agreement. The gross consideration (including interest) was received by the assessee after deduction of tax at source at 21.012%.

205. The facts in the above appeal are exactly similar to the facts in the case of Essar Communications Ltd. Since the facts are exactly similar to assessee's appeal in Essar Communications Ltd, our findings in the case of Essar Communications Ltd are applicable *mutatis mutandis* in the case of Essar Com Ltd. also and accordingly, the appeal in the case of Essar Com Limited is allowed.

206. To sum up : both the appeals filed by the assessee are allowed.

Order pronounced in the open court on this 30th day of June, 2025.

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Dated: 30.06.2025
TS

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(Appeals).
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI