

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 713 OF 2021

Bid Services Division (Mauritius) Limited)
Presently having its office at Level 9,)
Tower B, 1 Cybercity, Ebene, Mauritius)
PAN No. AADCB7893E)...Petitioner

V/s.

1. Authority for Advance Ruling (Income Tax))
Mumbai Bench, Having its office at 5th Floor)
Hoechst House, 193, V.K. Shah Marg,)
Nariman Point, Mumbai-400 021.)
)
2. Assessing Officer of the Petitioner)
Assistant Commissioner of Income Taxation)
(International Taxation) - 1(1)(2), E-2 Block,)
Dr. S.P. Mukherjee Civic Centre, Minto Road,)
New Delhi-110 002)
)
3. Director of Income Tax (International)
Taxation)-1, New Delhi, 4th Floor, Block)
E-2 Tower, Civic Centre, New Delhi-110 002)
)
4. Director/Commissioner of Income Tax)
(International Taxation & Transfer Pricing),)
Hyderabad, Room No. 412, 4th Floor, A Block,)
IT Towers, A.C. Guards, Hyderabad-4.)
)
5. Union of India)
Ministry of Finance, Department of Revenue)
Room No. 46, North Block, New Delhi-110 001)...Respondents

Mr. P. J. Pardiwalla, Senior Advocate with Ms. Aarti Sathe and Ms. Aasavari Kadam for Petitioner.

Mr. Suresh Kumar, for Respondents.

**CORAM : DHIRAJ SINGH THAKUR &
ABHAY AHUJA, JJ.**

PRONOUNCED ON : 8th MARCH 2023

JUDGMENT :

1. By this Petition, Petitioner challenges ruling dated 10th February, 2020 denying the benefit of the Mauritius Double Taxation Avoidance Agreement (the “ Mauritius DTAA”) to the Petitioner.

2. Petitioner, a private limited company incorporated under the laws of the Republic of Mauritius on 23rd August, 2005, is a wholly owned subsidiary of Bid Services Division (Proprietary) Limited, South Africa the ultimate holding company being the Bidvest Group Limited in South Africa (“Bidvest”). The Petitioner is holder of Category-I Global Business Licence issued by the Finance Services Commission, Mauritius as well as a valid Tax Residency Certificate

(“TRC”) issued by the Mauritius Revenue Authority certifying that the Petitioner is a tax resident of Mauritius and is entitled to avail the benefits of the Mauritius DTAA. The Petitioner files its corporate tax returns in Mauritius and is a non-resident under the provisions of the Income Tax Act, 1961. The Petitioner does not have any permanent establishment/fixed place of business nor any business connection/operations in India.

3. Pursuant to the Government’s approval of restructuring and modernisation of the Delhi and Mumbai airports, the AAI issued an invitation to Register Expression of Interest (“ITREOI”) on 17th February, 2004 which set out the requirements to be satisfied by the interested parties in order to participate in the international competitive bidding process.

4. In response, the GVK-SA Consortium consisting of GVK Industries Ltd. and SA Airport Operators (SA Airport Operators is a joint venture of Airports Company South Africa Limited (ACSA), Old

Mutual Life Assurance Company South Africa Limited and the Bidvest Group Limited (BidVest))¹ filed their expression of interest on 20th July, 2004, with the AAI for both the Mumbai and Delhi airports. Bidvest is one of the parties to the joint venture which in turn is a part of the Consortium. Subsequently, the AAI issued a Request for Proposal (“RFP”) document to the pre-qualified bidders on 1st April, 2005. It is submitted in the Petition that the Consortium addressed various letters dated 24th May, 2005, 3rd June, 2005, 7th July, 2005 and 12th July, 2005, to the AAI seeking clarification to confirm the proposed change in the consortium structure. It is also submitted that Bidvest informed AAI vide letter dated 9th September, 2005 that BSDM would hold 27% of the total share capital of the Joint Venture Company (the “JVC”) if the Consortium was selected as the successful bidder. The Consortium submitted the technical and financial bid to the AAI providing complete details as required by the RFP on 12th September, 2005. The AAI in consultation with the Ministry of Civil Aviation, Government of India

1 It was also stated in the EOI that the final holdings of the three SA Airport Operators’ members would be finalized once the requirement of the RFP is issued but in any event ACSA’s holding would not be less than 10%.

(“GOI”) sent a letter dated 4th February, 2006 selecting the Consortium as the successful bidder for modernisation and development of the Mumbai airport (the “Project”). Subsequently, Mumbai International Airport Limited (“MIAL”) was incorporated on 2nd March, 2006.

5. The Consortium agreement dated 2nd April, 2006 was entered into to record their respective *interse* rights and obligations in relation to the management and functioning of the Consortium vis-a-vis the JVC, wherein the Petitioner was a party. On 4th April, 2006, the AAI also entered into an Operation, Management and Development Agreement (the “OMDA”) and on the same day shareholders agreement was entered into between AAI, MIAL and the prime members i.e. GVK Airport Holdings Pvt. Ltd. (“GAHPL”), Petitioner and AGL, which recorded the terms and conditions that govern their relationship as the shareholders of the JVC and recorded their respective rights and obligations. Under the shareholders agreement, the Petitioner agreed to subscribe and acquire 27% of

the total issued and paid up share capital of MIAL. This 27% share capital of MIAL comprised of 216,000,000/- shares, which was acquired in five tranches between the years 2006 and 2012 by the Petitioner as follows:-

Date of Allotment	No. of shares	Face value for share (INR)
19 April 2006	103,850	10
19 May 2006	53,863,150	10
14 March 2009	54,000,000	10
15 December 2009	54,000,000	10
14 October 2010	54,000,000	10
Total	216,000,000	

6. The balance equity shares in MIAL are subscribed to by GAHPL (37%), AGL (10%) and AAI (26%) respectively.

7. The Board of Directors of the Petitioner vide board meetings held on 20th February, 2011 and 28th February, 2011 in Mauritius decided to transfer the shares to GAHPL.

8. On 1st March, 2011, the Petitioner entered into a Share Purchase Agreement (“SPA”) alongwith subsequent addendums with GAHPL and GVK Industries Limited, both of which are companies incorporated under the Companies Act, 1956, whereby the Petitioner agreed to sell and transfer to GAHPL and GAHPL agreed to purchase and acquire from the Petitioner the shares constituting 13.5% of the total paid up share capital, comprising of 108,000,000 shares of MIAL for the purchase price of USD 287,222,000. The shareholding post divestment of stake in MIAL by the Petitioner would be as under:-

Sr. No.	Name of the Shareholder	% of shareholding in MIAL	
		Before transfer	Post transfer
1	AAI	26%	26%
2	GAHPL	37%	50.50%
3	BSDM (i.e. Petitioner)	27%	13.50%
4	AGL	10%	10%
	Total	100%	100%

9. On 18th April, 2011, Petitioner made an application under Section 197(1) of the Act to the Assistant Director of Income Tax Circle-1(1) (International Taxation), New Delhi for obtaining a “Nil” withholding tax certificate and was issued a certificate dated 20th May, 2011, authorising GAHPL to make payment/remittance of USD 287,222,000 to the Petitioner for the transfer of shares without deduction of any tax at source under Section 195 of the Act.

10. Subsequently, vide 9th addendum to the SPA dated 3rd October, 2011, the sales consideration for the sale and purchase of the abovementioned offered shares was reduced to US\$ 231,000,000 due to change in payment mechanism and other changes to waive certain procedural aspects and payment was to be done upfront which was duly communicated to the concerned tax authorities vide letter dated 5th October, 2011 filed with Assistant Director of Income Tax (International Taxation) Circle-1(1), New Delhi intimating the change in the sale consideration and enclosing a copy of the 9th Addendum to the SPA respectively.

11. The said transfer of shares was completed in the financial year i.e. 2011-2012.

12. On 10th February, 2012, Petitioner filed an application under Section 245Q(1) before Respondent no.1 to determine the correctness of its belief that the capital gains that arose in the hands of the Petitioner by virtue of the sale of shares held by it in MIAL having regard to the provisions of the India-Mauritius DTAA would not be taxable in India. The Petitioner raised the following question for determination before Respondent:

“Whether on the facts and circumstances of the case, the gains arising from the transaction from sale of shares, to be effected pursuant to the share purchase agreement dated 1st March, 2011, held by the Petitioner in Mumbai International Airport Pvt. Ltd would be liable to tax in India having regard to the provisions of Art 13 (4) of the India-Mauritius Double Taxation Avoidance Agreement?”

13. By letter dated 5th January, 2015, the office of the Respondent no. 4 objected to the admission of the application filed by the Petitioner before Respondent No.1, *inter alia* on the following grounds:

a) It was alleged that at the time of bidding for the purposes of the modernisation and development of Mumbai airport, the parent company, of the Petitioner i.e. Bidvest was a part of the Consortium and not the Petitioner. It was also submitted that the technical and financial bid filed by the Consortium had taken into account the technical expertise and competence of the constituents of the Consortium including that of the South African parent company of the Petitioner.

b) It was also submitted that the Petitioner was not in existence when the EOI was filed by the Consortium in July, 2004 and it came in existence only in August, 2005. It was further submitted that only after the successful bid was given in favour of the Consortium that the Petitioner was brought into the Consortium in place of their parent company, Bidvest. It was therefore submitted that there was no economic/commercial purpose for making investment in the name of the Mauritian Group Entity, i.e. the Petitioner except for avoidance of tax in India as the Petitioner wanted to take the benefit of the Mauritius DTAA provisions for any subsequent divestment of their investment in the JVC. Several other objections were also made to oppose the admission of the aforesaid application and it was alleged that the entire transaction was designed prima facie for tax avoidance as per Clause (iii) of proviso to Section 245R (2) of the Act.

14. That, in response to the objections filed by the department, the Petitioner vide its letter dated 25th February, 2015 filed its detailed response as under :

*“a. In respect of substituting the Petitioner instead of the South African entity, the Petitioner submitted as follows:-
 “After shortlisting of the Consortium as pre-qualified bidders, on 1st April, 2005 the AAI issued RFP document. In response to the RFP document, in September, 2005 the Consortium submitted its offer, i.e. Technical and Financial Bid for Mumbai Airport. The ownership structure in the Technical and Financial bid clearly mentioned the facts that GAHPL, ACSA Global and BSDM shall hold 37%, 10% and 27% respectively in the JVC while the remaining 26% will be held by AAI. This fact is further supported by the following documents, which form a part of the Technical and Financial bid:*

- Proposed shareholding pattern in MIAL*
- Board resolution passed by BSDM for submission of a bid and financial offer as part of the Consortium.*
- Complete details of bidders and other parties such as place of incorporation, registered officer address, director details, etc.*
- Statement confirming no liquidation /receivership and Solvency of BSDM issued by Standard Bank Trust Company (Mauritius) Limited.*
- Category 1 Global Business License issued by Financial Services Commission.*
- Certificate of Incorporation of Bid Services Division Mauritius Limited.*
- Equity commitment from BSDM that it will hold 27% of the total share capital of proposed JVC.*

Further, it is also pertinent to note that the Ministry of Civil Aviation, Government of India and AAI which is a statutory body incorporated under an act of Parliament i.e. Airport Authority of India Act, 1994 has thoroughly evaluated the Technical and Financial Bid documents containing the structure details of Bidvest and only then the Consortium was eventually declared as the successful bidder for the Mumbai Airport vide its letter dated 2nd

February, 2006.

b. In respect of investing through the Petitioner allegedly for the purposes of avoiding tax, it was submitted as follows;

-Bidvest is engaged into various business lines and has over 300 subsidiaries (direct plus indirect) spanning over 5 continents.

-It is a general commercial practice on the part of any ultimate holding company of a group of companies to bid for projects in its own name so as to highlight the financial and technical competency of the group as a whole. However, while routing its investments in various projects, separate companies are formed which in commercial parlance is termed as Special Purpose Vehicles (SPVs).

-SPVs are formed for commercial reasons as such for hedging business, political and economic risk of a country, mobility of investments, ability to raise loans from diverse investments, valuation from growth perspective and tapping global funds for listing purposes, facilitate specialisation and undivided attention on the project in hand. Hence, ease of doing business and supportive business environment is an important criterion in determining the jurisdiction of setting up of such SPVs.

c. In respect of increase of value of shares by merely ten times within a short span of less than six months from the date of last tranche of the investment, it was submitted as follows:

“as required under the RFP and as agreed by the Consortium members under the Technical and Financial Bid which was binding in nature, the Consortium members were required to und for the first seven years by way of equity bank guarantee provided by the

Consortium members. Hence, towards its share of equity commitment, BSDM made regular equity infusion into MIAL during the year 2006-2012 whenever the equity cash calls were made by MIAL.

-The consideration for the transfer was arrived after taking into account the valuation of the business of MIAL using appropriate valuation method”

d. In respect of observation of Respondent No.4 in paragraph 1(i) and (ii) of letter dated 5th January, 2015 it was submitted as follows:-

-“Government of India had undertaken restructuring and modernisation of Mumbai airport with the key objectives of world class development, expansion and management of the Airport. The JVC had to ensure the timely provision of high quality airport infrastructure.

-The selection of the Consortium by the Ministry of Civil Aviation/AAI largely depended upon the past credentials with regard to successful completion of similar airport projects worldwide, operational expertise, managerial and financial capabilities, financial commitments and commitment to provide quality airport services. The objective and requirement were clearly mentioned in the RFP issued by AAI.

-ACSA and Bidvest had requisite technical and management expertise in airport development and operation. Conversely, on an independent evaluation GVK did not meet the qualification criteria mentioned in the RFP.

-Therefore, in order to meet the criterion laid down by AAI, GVK, Bidvest and ACSA collectively as a Consortium offered their bid to AAI bringing technical and financial capabilities together on the basis of which they were able to win the bid.

*e. The Petitioner also relied upon the decisions of **Azadi Bachao Andolan reported in (2003) 132 Taxmann 373 (SC), D.B.Zwrin Mauritius Trading No.3 Limited (AAR No.878/2010)***

f. The Petitioner therefore submitted that in view of the above factual and legal position, the application filed by the Petitioner before Respondent No. 1 deserved to be admitted.”

15. That Petitioner attended the hearing on 25th February, 2015, wherein the Petitioner once again reiterated the above submissions and once again prayed that the application be admitted by Respondent No.1. The matter was adjourned to a further date on the request of the office of the Respondent No.4.

16. By letter dated 27th March 2015 addressed through their authorised representatives to Respondent no.1, the Petitioner submitted that the contention of the department with regard to substitution of Bidvest by the Petitioner was incorrect and they once again filed a letter dated 25th February 2015 along with the annexures reiterating the correct facts in respect thereof. They also submitted that they had repeatedly, during the course of various

hearings before Respondent no.1, submitted that the additional details sought for by the office of the Respondent no.4 were not relevant for the purpose of determining whether the application filed by the Petitioner should be admitted in terms of Section 245R(2) of the Act. They further submitted that most of the details sought for by the Respondent no.4 were already there before the Respondent no.1 and there was no requirement to file any additional details / documents.

17. Respondent no.4 submitted their reply on 16th April 2015 on the admissibility under Section 245R(2) of the Act before Respondent no.1.

18. Vide letter dated 15th July 2015 Petitioner through their authorised representative submitted their paragraph wise reply to the aforesaid final report. The matter was heard on 27th July 2015 and the application filed by the Petitioner was admitted.

19. As the office of Respondent no.1 fell vacant in the year 2015, the matter was refixed in January 2007 whereafter various Benches were set up in the cities including Mumbai to which Bench Petitioner's matter was transferred. Thereafter again, the office of AAR fell vacant post February 2018 and the matters were refixed for hearing in May 2018 when the Bench was constituted again. The matter came up for hearing on 16th July 2019. During this period, once again, some more documents were requested for from the Petitioner, which the Petitioner supplied. Thereafter, Respondent no.4 filed a final report with the following contentions :

“(i)The GVK – SA Consortium did not include the BSDM as one of the members during the entire Stage 1 and for most part of the Stage 2 of bidding process i.e. issue of ITREOI by AAI, filing of EOI by the GVK-SA Consortium, shortlisting of prequalified bidders by AAI, issue of RFP to prequalified bidders by AAI, airport visits and sight inspection by prequalified bidders, discussions with the government agencies by prequalified bidders etc., but was brought in just before the filing of the Technical and Financial Bid at the far end of the Stage 2 of the bidding process. Infact, the entity BSDM was not even in existence during Stage 1 and for most part of Stage 2 of the bidding process. It was incorporated just two weeks prior to the submission of binding bid by GVK-SA Consortium.

(ii) No prior approval of the AAI was taken by the Consortium regarding constitution of Bidvest with any other entity at any stage before the submission of the Technical and Financial Bid, which was the requirement as per paragraph 6.4 of the REF and paragraph 6.1 of the ITREOI.

(iii) If the Bidvest group wanted an SPV to undertake the project efficiently, commercial and business sense indicates that Mumbai or South Africa would have been the best alternatives but not some third tax jurisdiction like Mauritius. The only advantage the jurisdiction of BSDM, a Mauritian entity, in the Consortium lacked commercial substance and bonafide business purpose but was a clear design to avoid paying legitimate tax to the Indian Government, as it is a tax avoidance scheme. The Mauritius entity needs to be overlooked and the Indian-South Africa DTAA brought in, thereby making the capital gains taxable in India.

(iv) As per the provisions Section 93 of the Act, the capital gains arising out of the sale of 13.5% equity stake in MIAL by BSDM to GAHPL is deemed to be the income in the hands of the ultimate holding company of BSDM i.e. Bidvest. As per the provisions of the Indian Income Tax Act, 1961 and as per the provisions of Article 13(4) of the DTAA between India and South Africa, this income is chargeable to tax in India.”

20. The matter was finally heard on 22nd August 2019 before Respondent no.1, whereat, the Petitioner reiterated the submissions made by the Petitioner regarding the non-taxability of the gain

arising from the transaction of sale of the shares, effected pursuant to the SPA dated 1st March 2011 held by the Petitioner in MIAL having regard to the provisions of Article 13(4) of the Mauritius DTAA.

21. Pursuant to the hearing, the submissions made by the Petitioner at the time of hearing were summarized by the Petitioner by way of written submissions dated 4th September 2019 and filed by the Petitioner before Respondent no.1.

22. Mr. Pardiwala, learned Senior Counsel for the Petitioner, would submit that on the basis of the ITREOI, EOI and RFP it was clear that the AAI had permitted use of the special purpose vehicle structured for the purposes of submitting the technical and financial bid as well as for holding shares in the MIAL. He would submit that the technical and financial bid submitted by the Consortium gave the share holding pattern in the proposed joint venture company which contained the name of Petitioner as one of the parties that would hold direct interest in the proposed joint venture company. Learned

Counsel would submit that the bid listed out the financial and technical capabilities of the Petitioner with specific reference to the definition of prime member and evaluated entity as contained in the RFP. Learned Senior Counsel would submit that therefore Petitioner is neither a shell nor a conduit nor an entity interposed as a device to evade taxes in India.

23. Mr. Pardiwala has also drawn the attention of this Court to the provisions of Section 90(2) of the Act as well as Article 13(4) of the Mauritius DTAA to emphasize that the gains arising from the transaction of sale of shares effected pursuant to the Share Purchase Agreement dated 1st March 2011 held by the Petitioner in MIAL would not be liable to tax in India. Learned Senior Counsel would submit that since Petitioner is incorporated in Mauritius, it is liable to tax in Mauritius. He submits that, besides, Petitioner held Category 1 Global Business License and also a valid TRC issued by the Mauritian Authorities establishing the fact that it was a tax resident of Mauritius and would be entitled to the beneficial provisions of the Mauritius DTAA.

24. Learned Senior Counsel has also drawn the attention of this Court to Circular No.682 dated 30th March 1994 issued by the Central Board of Direct Taxes (“CBDT”) which mentions that capital gains arising to a resident of Mauritius on transfer of shares in an Indian company would be liable to tax only in Mauritius.

25. Learned Senior Counsel has further placed reliance upon Circular No.789 dated 13th April 2000 issued by the CBDT which clarifies that companies which are resident in Mauritius would not be taxable in India on income from capital gains arising in India on the sale of shares as per Article 13(4) of the Mauritius DTAA. He further submits that the said circular also clarifies 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 the double taxation avoidance convention. Learned Senior Counsel has also relied upon Press Release dated 1st March, 2013 with respect to the TRC. Learned Senior Counsel relies upon the decision of *Union of*

*India & Anr. v. Azadi Bachao Andolan and Anr.*² in support of his contentions. Learned Senior Counsel also refer to the decision in the case of *Vodafone International Holding B.V. v. Union of India*³ relied upon by the Revenue as well as the Authority and would submit that the decision of *Vodafone International Holding B.V. v. Union of India (supra)* would in fact support the case of the Petitioner. Learned Senior Counsel would submit that *Vodafone International Holding B.V. v. Union of India (supra)* read as a whole leads to a conclusion that the Ruling is completely contrary to the principles affirmed therein. He would submit that the allegation of interposing Petitioner for tax evasion has only been raised at the time of sale of the shares and not earlier. With respect to the observations that incorporation of Petitioner lacked economic /commercial rationale, learned Senior Counsel drew the attention of this Court to paragraph 4.3 of the written submissions and to the decision in the case of *Vodafone International Holding B.V. v. Union of India (supra)*. Mr. Pardiwala would submit that nowhere the impugned Ruling establishes tax evasion. No material has been brought on record to demonstrate the

2 [2003] 263 ITR 706 (SC)

3 [2012] 341 ITR 1 (SC)

same. Learned Senior Counsel would submit that only paragraph 98 of the decision in the case of *Vodafone International Holding B.V. v. Union of India (supra)* has been quoted by the Authority whereas paragraph 97 of the said decision has been conveniently omitted. Learned Senior Counsel takes us to the said paragraph to make his point that paragraph 97 upholds Circular 789 on residence and beneficial ownership in the absence of Limitation of Benefits (LOB) clause, which is admittedly not applicable in the present case as Article 27A to the Mauritius DTAA was inserted with effect from 1st July 2017 whereas the sale transaction pertains to Financial Year 2011-2012. Learned Senior Counsel would therefore submit that the Treaty benefit should have been given to Petitioner. Learned Senior Counsel also refers to Press Release dated 29th August, 2016 by the CBDT and submits that investments made before 1st April, 2017 have been grandfathered and will not be subject to capital gains taxation in India.

26. Learned Senior Counsel would submit that surprisingly, Respondent no.1-Authority did not accept the contentions raised on

behalf of the Petitioner regarding the non-taxability of the gain arising from the transaction of sale of shares to be effected pursuant to the SPA dated 1st March, 2011 held by the Petitioner in MIAL, by virtue of Article 13(4) of the Mauritius DTAA and passed ruling dated 10th February, 2020 rejecting the contentions raised by the Petitioner holding that the Petitioner is not entitled to the benefits under Article 13(4) of the Mauritius DTAA.

27. Aggrieved by the aforesaid Ruling, Petitioner has filed this Petition for the following principal reliefs:

(a) That this Hon'ble Court may please to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the impugned ruling dated 10th February 2020;

(b) That this Hon'ble Court may please to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction, directing the Respondent no.1 to rule that the gain arising on the sale of shares of MIAL to GAHPL would not be chargeable to tax in India having regard to the provisions of Article 13(4) of the Mauritius DTAA.

28. Mr. Suresh Kumar, learned standing Counsel for the Respondents supports the impugned Ruling and submits that the transaction by the Petitioner is sham and bogus. He would submit that entire structure of incorporation of Petitioner and Petitioner's introduction is a device to avoid taxation. Learned Counsel refers to the Affidavit-in-reply dated 5th May 2022 filed on behalf of the Respondents in support of his contentions. Mr. Suresh Kumar reads through the impugned decision and submits that interposing an entity for taking benefit of a tax treaty, even from the beginning, is not permitted. Learned Counsel refers to paragraph 59 of the impugned decision and submits that the Petitioner is a shell and a sham. It has no employees, no assets. He would submit that it is a device only interposed for taking tax benefit under the Mauritius DTAA and to evade taxes in India. Learned Counsel refers to paragraph 67 of the impugned Ruling. Learned Counsel also draws the attention of the Court to paragraphs 66 and 67 of the judgment in the case of *Vodafone International Holding B.V. v. Union of India (supra)*. He would submit that in jurisdiction under Article 226 this

Court cannot review the view taken by an authority. Learned Standing Counsel, therefore, submits that the Petition ought to be dismissed.

29. We have heard Mr. Pardiwalla, learned Senior Counsel for the Petitioner and Mr. Suresh Kumar, learned standing Counsel for the Respondents and with their able assistance we have perused the papers and proceedings and have considered the rival contentions.

30. Before proceeding further it would be appropriate to set forth the “Decision” in paragraphs No. 55 to 76 of the impugned Ruling as under:-

“55. We have carefully considered the contentions of the applicant, arguments and objections of the Revenue and the response thereof the applicant. We have also perused the documents on record and the factual matrix of the case. The basic facts have been elaborated in the submissions of applicant and revenue above.

56. Applicant (in short BSDM) was incorporated in Mauritius on 23-8-2005 i.e. two weeks before submission of technical and financial bid by GVK – SA Consortium. When EOI was filed by the consortium on 20-7-2004, the BSDM was not even in existence. Right

from issue of ITREOI, filing of EOI, shortlisting of pre-qualified bidders by AAI, issue of RFP to pre-qualified bidders, airport visits, site inspection and discussions with Govt. agencies, etc., Bidvest was involved as member of consortium. Only at Stage 2 of the bidding process, Bidvest was substituted by BSDM. It is also a fact that no prior approval of AAI was obtained by consortium at any stage before filing of technical and financial bid which was a requirement as per para 6.4 of RFP and para 6.1 of ITREOI. The evaluated entities at pre-qualified bidding stage were GVK-ACSA and Bidvest. GVK is a major business group of India and Bidvest is an international investment holding company based in South Africa with investment in food service, trading, distribution, etc. Both these groups have financial muscle and management capabilities to undertake such project. ACSA has necessary technical expertise and experience in the field of operation and maintenance of airport. The two business groups and ACSA complete the competences required to bid for the project. The consortium was declared as successful bidders by AAI on 04-02-2006 based on financial and management capabilities and experience in air force management of the evaluated entities.

57. GVK group is based in India. The bid services group is based in South Africa. The ACSA (in which government of South Africa has stake) is the only technical expert in the consortium in the field of airport and maintenance is also based in South Africa. GVK, ACSA and Bidvest were the evaluated entities as pre-qualifying bidding stage.

58. Just ten days prior to filing of technical and financial bid in September, 2005, the applicant [BSDM] was brought in the consortium. After AAI declared GVK

consortium as successful bidder for undertaking the modernisation of Mumbai airport vide letter dated 4.2.2006, the Mumbai International Airport Pvt. Ltd. (MIAL), the capital JV company was incorporated on 2.6.2006. GAHPL, BSDM, AGL and AAI were designated as prime members of the joint venture and a shareholder agreement between the four entities and MIAL was entered into on 4.4.2006.

59. The GVK group committed to provide 37% equity in the JV through GAHPL and Bidvest group committed to provide 27% equity funding required to be invested by BSDM, whereas capital ACSA committed 10% of funding through AGL. What in effect change is the routing of funds of Bidvest group through Mauritius. The other two groups i.e. GVK and ACSA continued to have their head quarters in India and South Africa respectively. So in the JV there is a Shell company, without any tangible assets, employees, space, etc. which was incorporated few days before the bidding. It has no management experts or financial advisers on its pay roll or on hire. Further, Mauritius unlike London or New York is not a known financial center or a vibrant business hub from where capital can be sourced at cheaper rates or top quality professionals' engineers/consultants could be employed. Neither Mauritius can boast of being seat of civil aviation experts. We thus, failed to appreciate what purpose the applicant is serving being in the JV or what is the economic or commercial rationale for roping in the applicant in the JV. Did it hire finance professionals who could arrange finance or did the entity have collaterals for raising funds or did it provide a meeting ground where active, cerebral discussions could take place during the development process of the project or from where difficulties encountered during implementation

phase could be addressed. Did it discuss critical needs of the project in the board meetings? The answer to all these above crucial questions were 'no'. We ask ourselves the questions that if GAHPL or ACSA are missing from JV, can the project still operate, the answer is 'no'. But if the applicant is missing and the Bidvest provides the funding alone, would the JV survive, the answer is 'yes'.

60. As per Indo-South Africa DTAA, the capital gain on share sale is taxable in India. If applicant was not interposed the Bidvest group would have to pay capital gain tax in India on the share sale transaction. By incorporating Mauritian entity benefit of Indo-Mauritius DTAA is sought under Article 13(4) under which capital gain is not taxable in India. Further, there is no capital gain tax in Mauritius. The entire value creation activities were happening in India which was also the basis for steep rise in share valuations subsequently.

61. Let us examine, what is the real role of applicant in the JV. It served as conduit for routing funds for South African based holding companies. The shares of joint venture were bought in the name of applicant though the beneficial owners were the holding companies in South Africa. The applicant kept on noting and endorsing decisions of the holding company in the Board meetings without any contribution or discussion about the decision making process. In short, the applicant is not in a position to create any value for the joint venture.

62. One can claim that holding company will always be predominantly controlling all vital decisions of subsidiary company and that latter may be implementing such decisions. This may be true but if an

entity claims treaty benefits it must establish the economy rationale and substance for treaty entitlement. Treaty shopping is well known for international tax planning whereby an entity is interposed in a country with favourable tax laws. Lately, the world over it is reckoned that improper nature of treaty shopping structure is created if the following factors are satisfied i.e., the beneficial owner of the treaty shopping entity does not reside in the country where entity is created; the interposed entity has minimal or no economic activity in the jurisdiction where it is located and lastly its income is subject to minimal tax in the country of location.

63. The doctrine of substance over form mandates taxing transaction pursuant to its economic effect rather than its form and that a valid transaction must have both a substantial purpose apart from reduction of tax liability.

64. The India-Mauritius treaty and India-South Africa treaty are based on OECD model convention and article 13 on capital gains are adopted from the same convention. In fact, India-South Africa treaty is wider in terms. The Model Tax Convention on Income and on Capital, CONDENSED VERSION (as it read on 15 July 2014) in its commentary on Art. 1 has mentioned:

Improper use of the Convention.

7. The principal purpose of double taxation conventions is to promote, by eliminating international double taxation, exchanges of goods and services, and the movement of capital and persons. It is also a purpose of tax conventions to prevent tax avoidance and evasion.

7.1 Taxpayers may be tempted to abuse the tax laws of a State by exploiting the differences between various countries' laws. Such attempts may be countered by provisions or jurisprudential rules that are part of the domestic law of the State concerned. Such a State is then unlikely to agree to provisions of bilateral double taxation conventions that would have the effect of allowing abusive transactions that would otherwise be prevented by the provisions and rules of this kind contained in its domestic law. Also, it will not wish to apply its bilateral conventions in a way that would have that effect.

8. It is also important to note that the extension of double taxation conventions increases the risk of abuse by facilitating the use of artificial legal constructions aimed at securing the benefits of both the tax advantages available under certain domestic laws and the reliefs from tax provided for in double taxation conventions.

9. This would be the case, for example, if a person(whether or not a resident of a Contracting State), acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly. Another case would be an individual who has in a Contracting State both his permanent home and all his economic interests, including a substantial, shareholding in a company of the State, and who, essentially in order to sell the shares and escape taxation in that State on the capital gains from the alienation (by virtue of paragraph 5 of Article 13), transfers his permanent home to the other Contracting State, where such gains are subject to little or no tax.

9.5 It is important to note, however, that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. A guiding principle is that the benefits of a double taxation convention should not be available where a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. (emphasis supplied)

It would be apparent that the OECD prescriptions (supra) fit the factual matrix of case in hand.

*65. The Hon'ble Supreme Court in the case of **Vodafone Intl. Holding v. Union of India** has laid down various test to determine whether a transaction is used principally as a colourable device, one such test is the business purpose test and in that connection it is held by the Apex court at para 67 that if there is abuse of organization form without legal business purpose which result in tax avoidance, then Revenue may disregard the form and impose tax on actual controlling non-resident entity. Further at para 98 of the same decision Hon'ble Supreme Court has held-*

98. LOB and look through provisions cannot 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. 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. 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 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 the OCB in the entire transaction.

66. Though decision of Hon'ble Apex Court referred to in the interposing of entity just before sale of shares, the pith and substance of the statement by Apex court is that merely holding of TRC cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax.

*67. It is a text book case, where an interposed entity satisfies to a 'T', the tests laid down by the Hon'ble apex court in **Vodafone International Holding BV case (17 taxmann.com 202)** to ascertain whether a structure or device is created for tax avoidance. In the instant case, the applicant was incorporated few days before the JV was formed and has no independent sources of funds or sources of income nor has any fiscal independence. All*

the funds are with the holding companies. The applicant has no tangible assets, business activities except for owning the shares of the JV. Subjecting the facts to various tests i.e. Fiscal nullity Test, Commercial/business substance Test, “Look at” Principle Test, Investment Participation Test, Time duration Test, Business operations Period in India Test, Generation of taxable revenues in India Test, Scheme and dominant purpose test etc., the applicant fails the tests being a tax avoidance device, the dominant purpose of its interposing is to avoid taxes in India.

68. It is emphasised before us by the learned AR that introduction of BSDM helped in doing business and providing supportive business environment. BSDM is an entity created two weeks before the filing of bid, it has no financial background, past experience or other unique skill to facilitate the instant business venture. The applicant could not provide any rational or commercial basis for interposing of entity at fag end of the bidding process. The learned AR also could not provide any evidence as to how the BSDM help in doing business for providing support for the project. The points in its favour of applicant seem to be that it is tax resident of Mauritius holding a valid TRC and legal owner of shares which it disposed subsequently.

69. We are unable to agree with the logic that the entity was brought in for ease of doing business or for operational reasons and to provide supportive business environment. The reason proffered by learned AR lacks substance and merit.

70. In its rejoinder, the applicant has contested two main objections of the revenue. The first objection of the revenue was admission of new entity at later stage was

not ordained by EOI. The learned AR has indicated that in the EOI filed by the Consortium, it was stated that the final share holdings by three SA, Airport operators will be finalized once the requirement of RFP are known and that GVK and the SA Airport operators submitted the names of the respective entities in the legally binding technical and financial bid which was accepted by AAI. We are in agreement with the revenue that nowhere in the EOI it was mentioned that a new member would be brought in at a later stage. The uncertainty was only limited to the shares of three SA Airport Operators i.e., SCSA, Old mutual and Bidvest and not to the composition of the Consortium per se.

71. The second objection of the revenue was the interposing of the applicant was without any commercial reason. The learned AR has argued that it is a general practice on the part of MNCs to highlight the financial and technical competency of the group as a whole and while investing separate SPVs are found for commercial reason, ease of doing business and supported business environment in determining the jurisdiction of SPV. Having considered the facts in totality and discussed in preceding paragraphs, we do not see any commercial or economic rationale or ease of doing business in incorporating the applicant in Mauritius and interposing it in the JV.

72. The other plea of the learned AR is that AAI has approved the bid being duly aware that BSDM was prime member of the JV entry. The plea is not germane to issue at hand as AAI is not concerned with the interpretation of treaty and interposing of any entity for tax avoidance and therefore acceptance of bid by AAI is not an endorsement or justification for granting treaty benefit to the applicant.

73. *The alternate plea of the learned AR is that even if it is assumed without admitting that the acquisition of shares in MIAL was done by applicant, solely with a view to take advantage of the beneficial provisions of Indo-Mauritius DTAA, the benefit cannot be denied as there is no limitation of benefit provision (LOB) in the DTAA. The plea is not tenable for the reason that the facts point towards a tax avoidance device and the Hon'ble Apex Court in the case of **Vodafone** has clearly mentioned that though LOB and look through provisions cannot be read into a tax treaty but if it is established that the Mauritian company is 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 would be subjected to tax.*

74. *We have perused the decisions cited by both sides. But we are primarily guided by decision of Apex court in the case of **Vodafone Intl Holding v. Union of India** and the peculiar facts of the case. It is trite law that the decisions are to be applied in the context of the facts of the case. In the case of **Padmasundara Rao (Decd.) and Ors. vs. State of Tamil Nadu and Others (2002) 70 CCH 0235 ISCC**, the Hon'ble Supreme court has held that :
 "Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in the legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.*

75. Having regard to the aforesaid peculiar facts and circumstances and our conclusions thereto, the other urgings of the Revenue i.e. application of Section 93, non-supply of certain documents by the applicant, valuation of shares of JV entity, etc. are not discussed here.

76. In view of foregoing, we are of the considered opinion that the applicant is not entitled to benefit under Article 13(4) of the Indo-Mauritius DTAA in regard to gains arising from the transaction of sale of shares.”

31. In short, the Authority has observed that the Petitioner was incorporated in Mauritius on 23rd August 2005 i.e. two weeks before submission of technical and financial bid by the GVK-SA Consortium. That when the expression of interest was filed by the Consortium on 20th July 2004, the Petitioner was not even in existence. That, right from the issue of ITREOI, filing of expression of interest, short listing of pre-qualified bidders by AAI, issue of RFP to pre-qualified bidder, Airport visits, site inspection and discussions with government agencies etc., Bidvest i.e. the ultimate holding company, was involved as member of the Consortium and not the Petitioner. That, it is only at Stage 2 of the bidding process that the Petitioner was substituted in place of Bidvest. That, no prior approval of AAI was

obtained by the Consortium at any stage before filing of technical and financial bid which was the requirement as per paragraph 6.4 of the RFP and paragraph 6.1 of ITREOI. The evaluated entities at pre-qualified bidding stage were GVK, ACSA and Bidvest. That, it is GVK as well as Bidvest holding company and not Petitioner who have the financial muscle and management capabilities to undertake the project and ACSA had the necessary technical expertise and experience in the field of operation and maintenance of the airport. That, the two business groups and ACSA had the complete competency required to bid for the project. On the basis of their financial and management capabilities and experience in airport management and on the basis that they were the evaluated entities, the Consortium was declared as successful bidder by the AAI on 4th February 2006. However, just ten days prior to filing of technical and financial bid, the Petitioner was brought into the Consortium. That the Mumbai International Airport Private Limited (MIAL) and the JV company was incorporated on 2nd June 2006. That the GVK group was committed to provide 37% equity through GAHPL and

Bidvest provided 27% equity funding required to be invested by BSDM and ACSA was committed to funding 10% through AGL. That, despite this, the Bidvest group changed its routing of funds through the Petitioner through Mauritius, the Petitioner company being a shell company without any tangible assets, employees, office space etc. being incorporated a few days before the bidding. It has no management experts or financial advisers on its pay roll or on hire. That, as per the Indo-South Africa DTAA, the capital gains on share sale is taxable in India and if the Petitioner was not interposed, the Bidvest group would have to pay capital gains tax in India on the share sale transaction. By incorporating the Mauritian entity, the benefit of the Indo-Mauritius DTAA is sought under Article 13(4) as capital gain is not taxable in India under the same. Also, there is no capital gain tax in Mauritius. That, the Petitioner has been noting and endorsing decisions of the holding company in the Board meetings without any contribution or discussion about the decision making process, and therefore, not in a position to create any value for the joint venture. There is neither any economic rationale and

substance for the treaty entitlement. That, it is clearly a case of treaty shopping and Petitioner has been incorporated and introduced in the Consortium for obtaining tax benefits.

32. It emerges that the entire plank of the Advance Ruling Authority's decision to deny benefit of Article 13(4) of the Mauritius DTAA in regards to the gains arising to Petitioner from the transaction of sale of shares is that Petitioner is an entity incorporated only two weeks before the technical and financial bid by GVK-SA consortium having neither financial nor management capabilities of its own and is therefore interposed only as a device to avoid tax.

33. Although settled law suggests that scrutiny in writ jurisdiction of orders passed by Advance Ruling Authorities is minimal, however the same can be interfered with if the Ruling is without considering the entire material on record or the submissions made on behalf of the parties or the Ruling suffers from a fundamental error or is absurd or perverse.

34. Mr. Pardiwala, learned Senior Counsel had relied upon Article 13 of the Mauritius DTAA to submit that in view of Circular 789 income from capital gains arising in India on sale of shares would not be taxable in India in view of Article 13(4) of the Mauritius DTAA. For ease of reference the said Article 13 is quoted as under :

“

ARTICLE 13
CAPITAL GAINS

- 1. Gains from the alienation of immovable property, as defined in paragraph (2) of Article 6, may be taxed in the Contracting State in which such property is situated.*
- 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.*
- 3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*

43A. Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.

43B. However, the tax rate on the gains referred to in paragraph 3A of this Article and arising during the period beginning on 1st April, 2017 and ending on 31st March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated;

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

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

35. We note from Article 13 with respect to capital gains that gains derived by a resident of a contracting State from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of the Article shall be taxable only in that State i.e. in the present case in Mauritius and not in India.

4 Paragraphs 3A and 3B inserted by Notification No.SO 2680(E) {NO.68/2016 (F.No.500/3/2012-FTD-II)}, dated 10-8-2016, w.e.f. **1-4-2017 (Assessment Year 2018-19)**.

5 Paragraph 4 substituted by Notification No. SO 2680(E) {NO.68/2016 (F.No.500/3/2012-FTD-II)}, dated 10-8-2016, w.e.f. **1-4-2017 (Assessment Year 2018-19)**. Prior to its substitution, said paragraph read as under :

“4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.”

36. The Petitioner has placed reliance upon Circular No.682 dated 30th March 1994 issued by the CBDT which mentions that capital gains arising to a resident of Mauritius on the transfer of shares in an Indian Company would be liable to tax only in Mauritius. The relevant extract of Circular No.682 is reproduced below:

“1605B. Clarification regarding agreement for avoidance of double taxation with Mauritius

1.

2.

3. Paragraph 4 deals with the taxation of Capital gains arising from the alienation of any property other than those mentioned in the proceedings paragraphs and gives the right of taxation of capitals gains only to that State of which the person deriving the capital gains as a resident. In terms of paragraph 4, capital gains derived by residents 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”

37. It is clear from the aforesaid that capital gains derived by a resident of Mauritius by alienation of shares of companies shall be taxable in Mauritius only and will not have any capital gains tax liability in India.

38. Further, reliance was placed upon another Circular No.789 dated 13th April 2000 issued by the CBDT which clarified that companies 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 of Mauritius DTAA. An extract of Circular No.789 is reproduced below:

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

1. The provisions of the Indo-Mauritius DTAC of 1983 apply to ‘residents’ of both India and Mauritius. Article 4 of the 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 Mauritius Tax law and are, therefore, to be

considered as residents of Mauritius in accordance with the DTAC.

2. 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 the DTAC, 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 Mauritius resident. Under the Income-tax Act, 1961, tax was deductible at source at the rate specified under section 115A, 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 the DTAC accordingly.

3. 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.

Circular : No.789, dated “13-4-2000”

39. Circular No.789 of 2000 dated 13th April 2000 clearly suggests that certificate of residence issued by Mauritian Authorities will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for the purposes of the

Mauritius DTAA and that capital gains arising from sale of shares would not be taxable in India. It is not in dispute that Circular No.789 dated 13th April 2000 continued to be in force between India and Mauritius at the relevant time.

40. A press release dated 1st March 2013 from the Finance Ministry which is quoted as under also unequivocally declares that the TRC produced by resident of a contracting State will be accepted as evidence that he is a resident of that contracting State and the Income Tax Authorities will not go behind the TRC and question his residence status.

“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.”

(emphasis supplied)

41. As can be seen, the transaction of sale by Petitioner is of the period of 2011 and the press release is of 1st March 2013. That being the position, we are unable to comprehend the logic of the findings of the Advance Ruling Authority impugned in this Petition.

42. It is also not in dispute that the decision of Apex Court in ***Azadi Bachao Andolan (supra)*** has not only upheld Circular No.682 of 1994 but also Circular No.789 of 2000. Paragraphs 49 and 50 of the said decision is usefully quoted as under :

“49. As early as on March 30, 1994, the CBDT had issued circular no.682 in which it had been emphasised that any resident of Mauritius deriving income from alienation of shares of an Indian company would be liable to capital gains tax only in Mauritius as per Mauritius tax law and would not have any capital gains tax liability in India. This circular was a clear enunciation of the provisions contained in the DTAC, which would have 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 DTAC.

50. We do not think the circular in any way takes away or curtails the jurisdiction of the assessing officer to assess the income of the assessee before him. In our view, therefore, it is erroneous to say that the impugned circular

No.789 dated 13.4.2000 is ultra vires the provisions of section 119 of the Act. In our judgment, the powers conferred upon the CBDT by sub-sections (1) and (2) of section 119 are wide enough to accommodate such a circular.”

43. Paragraphs 97 and 98 of the decision in the case of ***Vodafone International Holding B.V. v. Union of India (supra)*** which also clearly uphold Circular No.789 and the conclusivity of the TRC are also usefully quoted 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% 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 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.

98. LOB and look through provisions cannot 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. 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. 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 the OCB in the entire transaction.”

44. Although paragraph 98 of the ***Vodafone International Holding B.V. v. Union of India (supra)*** has been quoted in the impugned

ruling, however, paragraph 97 which is also relevant, appears to have been missed out by the authority.

45. No doubt mere holding of a TRC cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax. However, the decisions of the Apex Court cited above have clearly upheld the conclusivity of the TRC absent fraud or illegal activities. Nowhere in the impugned ruling the existence of TRC has been denied. In fact in paragraph 2 of the impugned Ruling, the Authority has itself set out the existence of a valid TRC in the name of the Petitioner. Further, except bald allegations, no material has been placed on record to demonstrate or establish that Petitioner was a device to avoid tax or that there was fraud or any illegal activity. There is hardly any discussion in the impugned Ruling on the applicability of the said Circulars No. 682, 789 or the Press Releases by the CBDT / Ministry of Finance discussed above.

46. From the facts on record it cannot be said that the Indian Authorities were not aware of the change or the introduction of the

Petitioner as part of the Consortium. Parties arrange their affairs in a manner as to make their businesses viable and profitable and it is part of that exercise that the Petitioner appears have been introduced into the Consortium with full knowledge of all the authorities concerned. The entire structure as well as the transaction of sale was in the full knowledge of the Indian Authorities including the tax authorities.

47. Reference has been made to Article 27A of the Mauritius DTAA on LOB which was inserted by Notification dated 10th August, 2016 by amending the said DTAA pursuant to which shell/conduit companies claiming residence of a contracting State shall not be entitled to the benefits of the convention. The said Article is usefully quoted as under:-

“

ARTICLE 27A

LIMITATION OF BENEFITS

1. A resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention if its affairs were arranged with the primary purpose to take advantage of the benefits in Article 13(3B) of this Convention.

2. A shell/conduit company that claims it is a resident of a Contracting State shall not be entitled to the benefits of Article 13(3B) of this Convention. A shell/conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.

3. A resident of a Contracting State is deemed to be a shell/conduit company if its expenditure on operations in that Contracting State is less than Mauritian Rs.1,500,000 or Indian Rs. 2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.

4. A resident of a Contracting State is deemed not to be a shell/conduit company if:

(a) it is listed on a recognized stock exchange of the Contracting State; or

(b) its expenditure on operations in that Contracting State is equal to or more than Mauritian Rs.1,500,000 or Indian Rs.2,700,000 in the respective Contracting State as the case may be, in the immediately preceding period of 12 months from the date the gains arise.

Explanation : The cases of legal entities not having bona fide business activities shall be covered by Article 27A(1) of the Convention.

48. It is observed that this Article disentitles benefits of Article 13(3B) if the affairs were arranged for the primary purpose to take advantage of the benefits of Article 13(3B). The Article has been

inserted with effect from 1st April 2017. According to this Article, with effect from 1st April 2017, a shell or a conduit company that claims to be a resident of a contracting State shall not be entitled to benefits of Article 13(3B).

49. The Petitioner has also made reference to Press Release dated 29th August 2016 issued by the CBDT post amendment to Mauritius DTAA which was effective from 1st April 2017. The said Press Release is quoted as under:-

“
*Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes*

PRESS RELEASE

New Delhi, 29th August, 2016.

Subject: Notification of Protocol for amendment of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, and for the encouragement of mutual trade and investment between India and Mauritius - regarding

The Protocol for amendment of the Convention for the avoidance of double taxation and the prevention of

fiscal evasion with respect to taxes on income and capital gains between India and Mauritius was signed by both countries on 10th May, 2016. After completion of internal procedures by both countries, the Protocol entered into force in India on 19th July, 2016 and has been notified in the Official Gazette on 11th August, 2016.

The Protocol provides for source-based taxation of capital gains arising from alienation of shares acquired on or after 1st April, 2017 in a company resident in India with effect from financial year 2017-18. Simultaneously, investments made before 1st April, 2017 have been grandfathered and will not be subject to capital gains taxation in India. Where such capital gains arise during the transition period from 1st April, 2017 to 31st March, 2019, the tax rate will be limited to 50% of the domestic tax rate of India. Taxation in India at full domestic tax rate will take place from financial year 2019-20 onwards.

The benefit of 50% reduction in tax rate during the transition period shall be subject to the Limitation of Benefits Article, whereby a resident of Mauritius (including a shell / conduit company) will not be entitled to benefit of 50% reduction in tax rate, if it fails the main purpose test and bonafide business test. A resident is deemed to be a shell / conduit company, if its total expenditure on operations in Mauritius is less than Rs. 2,700,000 (Mauritian Rupees 1,500,000) in the immediately preceding 12 months.

The Protocol further provides for source-based taxation of interest income of banks, whereby interest arising in India to Mauritian resident banks will be subject to withholding tax in India at the rate of 7.5% in respect of debt claims or loans made after 31st March, 2017. However, interest income of Mauritian resident banks in respect of debt-claims existing on or before 31st March,

2017 shall be exempt from tax in India as per existing provisions in the Convention.

The Protocol also provides for updating of the Exchange of Information Article as per the international standard, provision for assistance in collection of taxes, source-based taxation of other income, amongst other changes.

The Protocol will tackle treaty abuse and round tripping of funds attributed to the India-Mauritius treaty, curb revenue loss, prevent double non-taxation, streamline the flow of investment and stimulate the flow of exchange of information between the two Contracting Parties. It will improve transparency in tax matters and will help curb tax evasion and tax avoidance.

*(Meenakshi J Goswami)
Commissioner of Income Tax
(Media and Technical Policy)
Official Spokesperson, CBDT.”*

50. The said press release expressly provides for grandfathering of capital gains exemption provided under the erstwhile Mauritius DTAA. The protocol provides for source based taxation of capital gains arising from alienation of shares acquired with effect from 1st April 2017 in a company resident in India viz. from Financial year 2017-18. Investments made before 1st April 2017 have been grandfathered and will not be subject to capital gains taxation in India.

51. The Authority appears to have clearly missed the clear import of this Circular as the entire sale by Petitioner was prior to 1st April, 2017. The arguments of the Revenue with respect to shell company/ conduit can only be considered for investments with effect from 1st April 2017 and not case at hand.

52. Therefore, to say that in the JV, Petitioner is a shell company without any tangible employees, space, assets, etc., incorporated only a few days before bidding or that it has no management experts or financial advisors on its payroll, thereby the Petitioner having no economic or commercial rationale would not be relevant as the concept of LOB in cases of shell company / conduit would become applicable to investments with effect from 1st April 2017 only.

53. Therefore, for the Authority to hold that if Petitioner was not interposed, the Bidvest group in accordance with the Indo-SA DTAA would have to pay capital gains on the share sale as the same is taxable in India is misplaced as not relevant as the investment is by the Petitioner. As noted above, the Petitioner has been incorporated

in Mauritius, holds a TRC which is sufficient proof of its residence in Mauritius, which as noted above, cannot be enquired into unless there is a fraud or illegal activity, which in this case, has neither been alleged nor demonstrated. Even if as observed by the Authority that the entire value creation activities are happening in India leading to rise in share valuations, in our view absent any element of fraud or illegality that cannot be a reason to hold the Petitioner's investment as a device to evade tax. The suggestions / findings with respect to shell company / conduit, in our view, would apply only in accordance with Article 27A of the Mauritius DTAA which is applicable for investment with effect from 1st April 2017 and not prior to that, and therefore, same would have to be reconsidered in that light.

54. True that there may have been abuse of tax treaty laws and contracting States have taken corrective measures to prevent abusive transactions by amending the bilateral conventions, however, as noted above, the amendments to the Mauritius DTAA for plugging such transactions have been made effective from 1st April 2017,

unless there is a fraud or any illegal activity involved. Infact, as noted above, the investments prior to 1st April 2017 have been grandfathered and are not subject to capital gains taxation in India. The Press Release dated 29th August 2016 quoted above also takes care of the transition period from 1st April 2017 to 31st March 2019 where the tax rate has been limited to 50% of domestic tax rate in India. That taxation in India at full domestic rate is stated to take place from financial year 2019-20 onwards, subject to other conditions.

55. Although the observations of the Authority in paragraph 62 with respect to the claim of treaty shopping of as well as the doctrine of substance over form in paragraph 63 cannot be faulted with, however, it needs to be emphasized that the LOB clause has been made effective for investments only from 1st April 2017. As noted above, even the press release dated 29th August 2016 confirms that investments made before 1st April 2017 will not be subject to capital gains taxation in India. That being the position these observations of the authority appear to be misplaced.

56. The investment by Petitioner in the JVC was with the knowledge and consent of the Government of India Authority viz., AAI. As noted above, Bidvest, the ultimate holding company, had informed AAI vide its letter dated 9th September 2005 that Petitioner would hold 27% of the share capital of JVC if the Consortium was selected as successful bidder. Not only that, it was submitted that the Consortium has addressed various letters dated 24th May 2005, 3rd June 2005, 7th July 2005 and 12th July 2005 to AAI seeking clarification to confirm the proposed change in the Consortium structure. Neither the Revenue nor the Authority have denied or disputed the aforesaid facts.

57. Mr. Pardiwalla, learned Senior Counsel had drawn our attention to paragraph 6.1 of the ITREOI annexed to the Petition on page 102 quoted as under which clearly enables changes in Consortium membership :

“6.1 CHANGES IN CONSORTIA MEMBERSHIP
Proposed changes or additions to the Prospective Bidder’s composition following lodgement of EOI are subject to both the prior approval of AAI and to new

Entities in the Consortium of the Prospective Bidder executing Confidentiality Deeds as referred to in Section 6.2. Such changes should not affect the quality and operational capability of the Prospective Bidder.”

58. Any change or addition to the prospective bidder's composition following lodgement of expression of interest is clearly permitted and to new entities in the Consortium of the prospective bidder, provided that such changes do not affect the quality and operational capability of the prospective bidder. The expression 'prospective bidder' has been defined in paragraph 1.21 to mean an Entity or a Consortium that submits a formal EOI in response to the ITREOI. Where the Prospective Bidder is a Consortium, references to Prospective Bidder should be read as applying to each Entity constituting the said Consortium. The Consortium that expressed its interest is the GVK-SA Consortium which consists of four highly reputable companies statedly having complementary strengths and resources to partner the Government of India for modernizing India's primary air transport hubs. The Consortium led by GVK Industries Limited and partners with SA Airport Operators. SA Airport

Operators is a joint venture of Airports Company South Africa Limited (ACSA). Old Mutual Life Assurance Company South Africa Limited and the Bidvest Group Limited (BidVest). It is not in dispute that the GVK-SA Consortium filed the expression of interest on 20th July, 2004 in response to the AAI's ITREOI dated 17th February, 2004 clearly disclosing the ownership structure of the JV company. Clause 1.6 of the ITROI is relevant and is quoted as under :

“1.6 Ownership Structure (ITREOI para 5.2.5)

- a) The proposed ownership structure of the JV Company will be 74% GVK-SA and 26% held by Government of India. GVK-SA is a Consortium equally held by GVK Industries Limited and SA Airport Operators. SA Airport Operators in turn, is held by ACSA, Old Mutual and Bidvest. The final holdings by the three SA Airport Operators' members will be finalised once the requirement of the RFP are issued but in any event ACSA's interest in the JV Company will not be less than 10%.*
- b) The foreign ownership will take the form of the SA Airport Operator's Investment in GVK-SA representing 37% in the JV Company.*
- c) It is not proposed that there will be any airline ownership of the JV Company.*
- d) Other than the 26% shareholding in the JV*

Company by the Government of India it is not proposed that there will be any other government ownership of the JV Company. As a point of clarify the South African Government has a 74.6% shareholding in ACSA.”

59. Thereafter, on 1st April 2005, RFP was issued by AAI to pre-qualified bidders and the GVK-SA Consortium was one of them. In the said RFP (on page 152 to the Petition) there is a definition of the term ‘evaluated entity’ which is quoted as under :

*“**Evaluated Entity** – shall in relation to a Prime Member that is a special purpose vehicle (“SPV”), mean the Entity*
(a) whose qualifications have been attributed as the qualification of the Prime Member for the purpose of evaluation;
(b) that is proposing to have a beneficial ownership of 10% or more in the JVC; and
(c) that is in control of such Prime Member”

60. The definition of ‘Prime Member’ is also useful and quoted as under:

*“**Prime Member** - Those Entities comprising the bidder that propose equity of 10% or more in the JVC and whose capabilities or its evaluated entities’ capabilities are being assessed for the purpose of the transaction. It is clarified that AAI and / or GOI public sector entities shall not be treated as Prime Member(s) irrespective of their percentage equity holding.”*

61. A conjoint reading of the aforesaid two expressions clearly suggests that GVK Industries Ltd., ACSA and Bidvest (the ultimate holding company of Petitioner) are the evaluated entities on the basis of whose evaluation the bid of the Consortium was considered according to the evaluation criteria mentioned in the RFP.

62. Clause 6.4 (on page 184) also contemplates changes to the bidding consortia. Clause 6.4 is quoted as under :

“6.4 Changes to Bidding Consortia

Any proposed changes or additions to any of the Consortium Members of the PQB in Stage 2 are subject to the written approval of AAI, and the satisfaction of the prescribed probity and security requirements in relation to such party. Request for such approval should be directed through ABN AMRO and will be considered at the absolute direction of AAI. The last day for receipt of any application for a change in of PQB to participate in the bidding process was on the basis of the consortia membership described by PQB in their respective EOIs and any new member or withdrawal of an existing member will be assessed in terms of the impact on the quality and capability of the PQB.”

63. The RFP itself contemplates change of a prime member and an evaluating member. Clause 6.12 on page 185 which refers to other rights of AAI is also pertinent to quote :

“6.12 Other AAI Rights

AAI / GOI reserves the right, in its absolute discretion without liability and at any stage during the transaction process, to:

- *Add to, or remove parties from, any shortlist of PQBs or bidders;*
- *Require additional information from any PQB or Bidders;*
- *Vary its tender requirements;*
- *Terminate further participation in the transaction process for any PQB or Bidder;*
- *Change the structure and timing of the transaction process;*
- *Accept or reject any offer at any time for any reason;*
- *Not provide PQBs or Bidders any reasons for any actions or decisions it may take including in respect of the exercise by AAI of any or all of the above mentioned rights; and*
- *Take such other action as it considers, in its absolute discretion, appropriate in relation to the transaction process for the airport.”*

64. Pursuant to the RFP, the Consortium submitted the technical and financial bid on 12th September 2005 making an offer for the modernisation of Mumbai Airport. As can be seen from page 227 of the Petition, the bid was submitted by GVK-SA Consortium comprising of the following members :

“The GVK-SA Consortium, comprising the following entities had submitted the expression of interest to AAI in respect of

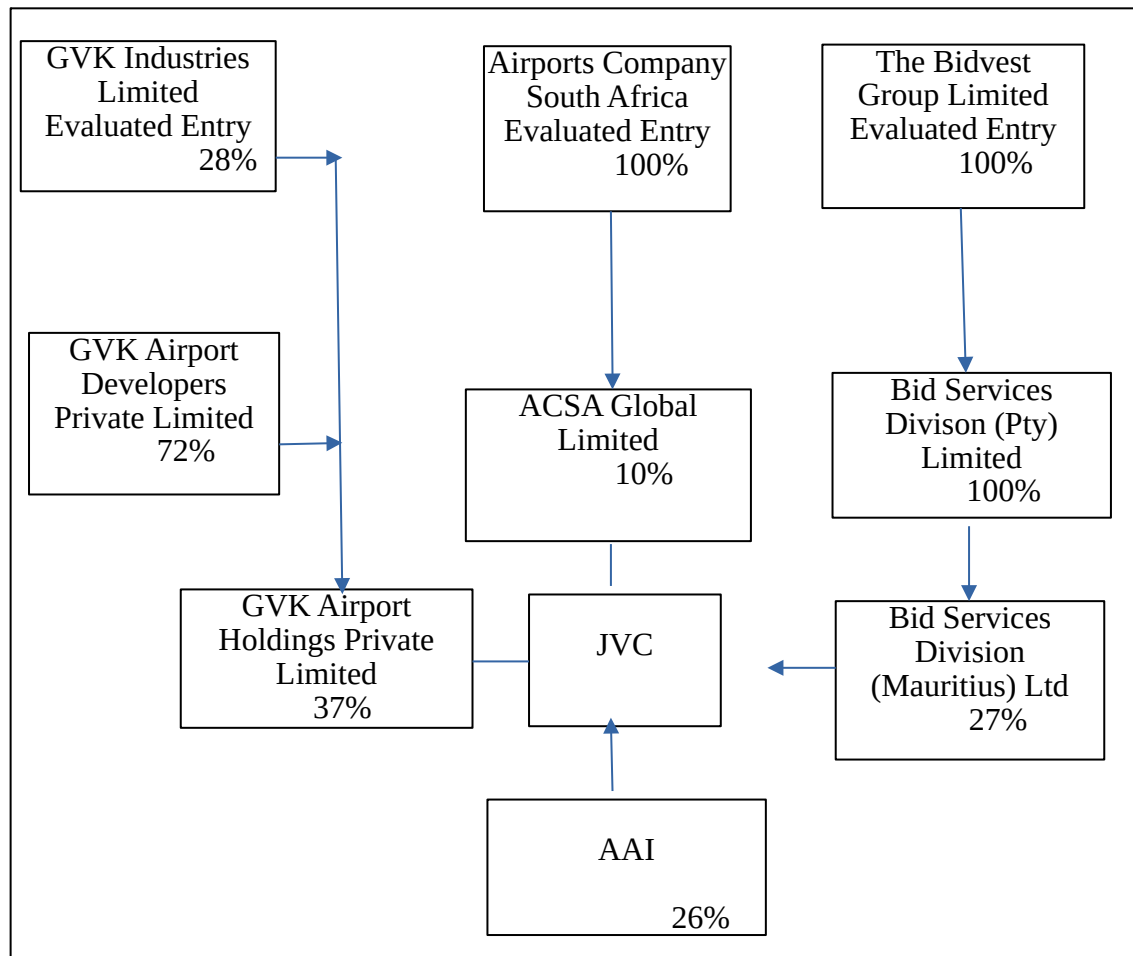
the transaction on 20 July 2004 :

- *GVK Industries limited*
- *Airport Company South Africa Limited*
- *Old Mutual Life Assurance Company South Africa Limited*
- *The Bidvest Group Limited*

Subsequently, the terms of the criteria specified in the request for proposal dated 1 April 2005, GVK-SA Consortium vide letters dated 24 May 2005 and 3 June 2005, sought certain clarification from AAI / ABN AMRO regarding structuring of Consortium and requested AAI to confirm the proposed change in the Consortium structure. However, AAI did not convey its clarification and /or approval to GVK-SA Consortium.

Thereafter, vide letter dated 12 July 2005 of M/s. Crawford Bayley and Co. (the legal advisor to the GVK-SA Consortium for the purpose of transaction) it was conveyed to AAI /ABN AMRO that in absence of any communication from AAI in respect of the above dated letters, Old Mutual Life Assurance Company South Africa Limited shall not be a part of GVK-SA Consortium.”

65. Share holding pattern of the said Consortium has been set out at page 228 of the Petition which was submitted as part of the RFP is reproduced as under :



It can be seen from the above that Petitioner would invest 27% in the JVC as the prime member, the Bidvest group being the evaluated entity.

66. As part of the said offer, the compliance of various conditions were also submitted. The submission on page 231 with respect to the Petitioner is also pertinent and quoted as under :

*“A.2(d) Conditions**GVK*

GVK Airport Development Company Limited and GVK Holdings Private Limited have been registered as a companies under the Companies Act, 1956. Since these are specific investment vehicles incorporated for the purpose of investment by GVK Industries Limited and GVK entities in the proposed airport, JVC, the initial capitalization has been kept at a lower rupee value to avoid a higher issuance of shares value Rs.2 crores, each, at the stage of bid and locking up of funds. Immediately on the GVK-SA Consortium being declared successful, the above companies propose to file for the status of a non-banking financial company as per the rules and regulations prescribed by the Reserve Bank of India.

ACSA and Bidvest

ACSA and Bidvest have obtained the initial approvals from South African Reserve Bank for issuance of the necessary bid bonds, debt and equity commitment letters and equity investment. On the Consortium being declared the successful bidder, ACSA and Bidvest shall obtain specific approval of the South African Reserve Bank for each transfer of funds to India for the purpose of investment in the JVC. The approvals are expected within four weeks of seeking each such approval.

All necessary approvals have been obtained for the Mauritian subsidiaries (ACSA Global Limited and Bid Services Division (Mauritius) Limited).”

67. The offer also contained various resolutions of the share holders including Petitioner. Also on pages 278 to 280 of the Petition, the proposed ownership structure of the joint venture company also suggests that Petitioner would hold 27%. The structure of the evaluated entities viz. GVK as well as ACSA is also provided therein.

68. After consideration of the technical and financial bid by the Consortium, the GVK-SA Consortium was selected as the successful bidder for the purposes of the project viz., modernization and development of the Mumbai Airport vide communication dated 4th February 2006. That, the Petitioner is one of the members of the offerer Consortium. Share holders agreement dated 4th April 2006 between the AAI, MIAL, GVK Airport Holdings Private Limited and Bid Services Division - Petitioner and ACSA Global Ltd., which is annexed to the Petition clearly indicates that the Petitioner is a shareholder of the JV Company i.e. Mumbai International Airport (Private) Limited. The Petitioner has statedly invested Rs.270 crores on the acquisition of 27 crore shares of MIAL. The AAI and MIAL have entered into an OMDA to undertake the project of designing, developing, constructing, financing, managing, operating and maintaining the Mumbai Airport. Perusal of the same nowhere indicates nor even remotely suggests that the Petitioner is an entity created or interposed to evade tax. The Schedule I of the said agreement at page 1522 also refers to Petitioner being one of the

participants as prime member which are referred to as prime members at the time of submission of the RFP.

69. It is in this background, that the Authority ought to have applied its mind before suggesting that the Petitioner was a sham or a shell or a conduit incorporated only for the purposes of evading tax in India or as a device. The entire bidding structure as well as the bid has been evaluated by the AAI and pursuant to the evaluation the AAI has entered into the OMDA for modernization of the Mumbai Airport. Neither the AAI nor the Government of India nor any other person have objected to the Petitioner's introduction or investment. It is also not the case of the Revenue nor is there any finding from the Authority that the investment by Petitioner did not have the necessary compliances. There does not appear to be any irregularity in complying with the Bid documents. And even if there was any irregularity, that was a matter between the AAI and the Consortium, which in our view would have been deemed waived, as not only the GVK-SA Consortium was declared a successful bidder but Petitioner has invested in the JV viz. in MIAL but the AAI has also entered into

the OMDA with the Consortium for the purposes of the project of modernization of the Mumbai Airport.

70. At their meetings on 20th February 2011 and 28th February 2011 the Board of Directors of the Petitioner authorized the transfer of 13.5% of the paid up capital out of 27% held by it to GAHPL for a consideration of US\$ 287,222,000. The Share Purchase Agreement dated 1st March 2011 was entered into in this regard. On 18th April 2011 Petitioner made an application under Section 197 of the Income Tax Act to obtain a NIL withholding tax certificate on the basis that the gain would not be chargeable to tax in India. On 20th May 2011 an order under Section 197 was passed whereby GAHPL was authorized to pay full sale consideration to Petitioner without any deduction of tax at source. Thereafter, on 3rd October 2011 a Addendum to the Share Purchase Agreement was entered into as a consequence of which the consideration was reduced to US\$ 231,000,000. This was intimated to Respondent no.2 Assistant Commissioner of Income Tax (International Taxation) by the

Chartered Accountant. If there was any doubt on the Petitioner's investment or activities etc., there was no necessity of permitting the purchases of shares, to granting permission to the purchaser to make payment to Petitioner without deducting TDS.

71. In transnational investments, the use of tax efficient special purpose vehicles is not unknown. Corporations are primarily created for business and commercial purposes. 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. Corporate structures are created for genuine business purposes generally at the time when investment is being made. These structures are created to avoid double taxation as certain countries are exempted from capital gains. It is not prohibited for the Revenue or the courts to examine the genuineness and the sound commercial purpose of these investment vehicles but the burden is entirely on the Revenue to demonstrate that such incorporation has been effected to achieve a fraudulent,

dishonest purpose to defeat the law. Therefore, for the authority to find that Petitioner was incorporated in Mauritius on 23rd August 2005 i.e. just two weeks before the submission of the technical and financial bid by the GVK-SA Consortium, when the expression of interest was filed on 20th July 2004 does not appear to be something unusual or suggesting that the same was to defraud the Revenue or perpetrate any illegal activity, especially when the AAI has not only not raised any objection to the Petitioner's investment but entered into OMDA with MIAL into which Petitioner has invested approximately 270 crores. It is clear on the basis of ITREOI, EOI and RFP that the AAI had permitted use of special purpose vehicle structured for the purposes of submitting the technical and financial bid as well as for holding shares in MIAL. We have seen above from the shareholding pattern that Petitioner was part of the technical and financial bid submitted by the GVK-SA Consortium which would hold shares in the proposed joint venture company i.e. MIAL. Bidvest, the ultimate holding company was the evaluated entity and Petitioner is the prime member. Infact, as noted above, the Income Tax Director,

International Taxation, New Delhi, had also issued a “Nil” withholding tax certificate to GAPHL who is the purchaser of the 13.5% shares from Petitioner to make payment / remittance of the purchase consideration to Petitioner for transfer of shares without TDS under Section 195 of the Act. Therefore, for the authority to hold that Petitioner’s involvement at the stage of bidding process was without the approval of the authorities appears to be without substance.

72. In this regard, paragraphs 43 to 46 of the decision rendered by Justice K.S. Radhakrishnan in the ***Vodafone International Holding B.V. v. Union of India (supra)*** are also usefully quoted as under :

“43. Corporate structure is primarily created for business and commercial purposes and multi-national companies who make offshore investments always aim at better returns to the shareholders and the progress of their companies. Corporation created for such purposes are legal entities distinct from its members and are capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. Multi-national companies, for corporate governance, may develop corporate structures, affiliate subsidiaries, joint ventures for operational efficiency, tax avoidance, mitigate risks etc. On incorporation, the corporate property belongs to the

company and members have no direct proprietary rights to it but merely to their "shares" in the undertaking and these shares constitute items of property which are freely transferable in the absence of any express provision to the contrary.

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.

45. Corporate structure may also have an exit route, especially when investment is overseas. For purely commercial reasons, a foreign group may wind up its activities overseas for better returns, due to disputes between partners, unfavourable fiscal policies, uncertain political situations, strengthen fiscal loans and its application, threat to its investment, insecurity, weak and time consuming judicial system etc., all can be contributing factors that may drive its exit or restructuring. Clearly,

there is a fundamental difference in transnational investment made overseas and domestic investment. Domestic investments are made in the home country and meant to stay as it were, but when the trans-national investment is made overseas away from the natural residence of the investing company, provisions are usually made for exit route to facilitate an exit as and when necessary for good business and commercial reasons, which is generally foreign to judicial review.

46. Revenue/Courts can always examine whether those corporate structures are genuine and set up legally for a sound and veritable commercial purpose. Burden is entirely on the Revenue to show that the incorporation, consolidation, restructuring etc. has been effected to achieve a fraudulent, dishonest purpose, so as to defeat the law.”

73. Paragraph 65, 66, 67 and 68 of the ***Vodafone International Holding B.V. v. Union of India (supra)*** relied upon by Counsel for the

Respondents are also usefully quoted as under :

“65. In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle.

66. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation,

is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence vis-a-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. 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.

Furthermore, shareholders / participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding /participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers.

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 Non-Resident Enterprise (NRE) 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 Non-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).

68. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members. It is the decision of the House of Lords in Salomon v. Salomon (1897) A.C. 22 that opened the door to the formation of a corporate group. If a "one man" corporation could be incorporated, then it would follow that one corporation could be a subsidiary of another. This legal principle is the basis of Holding Structures. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in

Indian companies through an interposed foreign holding or operating company, such as Cayman Islands or Mauritius based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e., without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. However, taxation of such Holding Structures very often gives rise to issues such as double taxation, tax deferrals and tax avoidance. In this case, we are concerned with the concept of GAAR. In this case, we are not concerned with treaty-shopping but with the anti-avoidance rules. The concept of GAAR is not new to India since India already has a judicial anti-avoidance rule, like some other jurisdictions. Lack of clarity and absence of appropriate provisions in the statute and/or in the treaty regarding the circumstances in which judicial anti-avoidance rules would apply has generated litigation in India. Holding Structures are recognized in corporate as well as tax laws. Special Purpose Vehicles (SPVs) and Holding Companies have a place in legal structures in India, be it in company law, takeover code under SEBI or even under the income tax law. 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 the application of a judicial anti-avoidance rule, the Revenue may invoke the "substance over form" principle or "piercing the corporate veil" test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidant. To give an example, if a structure is used for circular trading or round tripping or to pay bribes then such transactions, though having a legal form, should be discarded by applying the test of fiscal nullity. Similarly, in a case where the Revenue finds that in a Holding Structure

an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such inter-positioning of that entity. However, this has to be done at the threshold. In this connection, we may reiterate the "look at" principle enunciated in Ramsay (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. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device."

74. As can be seen, the said paragraphs of the *Vodafone International Holding B.V. v. Union of India (supra)* support the case of the Petitioner and the Revenue's reliance on the same does not aid the case of the Revenue in the facts of this case.

75. The Advance Ruling Authority appears to have completely lost sight of paragraphs 65 and 66 of the *Vodafone International Holding B.V. v. Union of India (supra)*.

76. In our view, the logic that Petitioner was brought in for ease of doing business or for operational reasons and to provide supportive business environment appears to find favour with the aforesaid observations of the Hon'ble Apex Court.

77. The reliance by the authority on the case of *Padmasundara Rao(Decd.) and Ors. vs. State of Tamil Nadu and Others (supra)* also appears to be misplaced in view of the aforesaid discussion. The observations of the Hon'ble Apex Court in the case of *Union of India & Anr. v. Azadi Bachao Andolan and Anr.* as well as in the case of

Vodafone International Holding B.V. v. Union of India (supra), as noted above, squarely apply to the case of Petitioner and there cannot be any two views about it.

78. Having observed that the Advance Ruling Authority has failed to consider Circular 682 of 1994, 789 of 2000, the Press release with respect to the TRC, the decision in the case of *Union of India vs. Azadi Bachao Andolan (supra)*, the decision in the case of *Vodafone Intl. Holding B.V. v. Union of India (supra)*, the applicability of the LOB clause as well as the Press Releases dated 1st March 2013 and 29th August 2016 which clearly grandfathers investments made before 1st April 2017 by stating that such investments will not be subject to capital gains taxation in India and the investment as well as the sale in the instant case being prior to 1st April 2017, in our view, the matter needs to be remanded back to the Authority.

79. We, accordingly, quash and set aside the Ruling dated 10th February, 2020 passed by the Respondent no.1 Authority for

Advance Ruling, and remand the matter back to the Authority for reconsideration of Petitioner's application in the light of the above discussion, which the Authority shall consider and decide within a period of eight weeks from today after giving an opportunity of hearing to Petitioner and the Revenue Authorities.

80. Petition stands disposed in the above terms. No costs.

(ABHAY AHUJA, J.)

(DHIRAJ SINGH THAKUR J.)