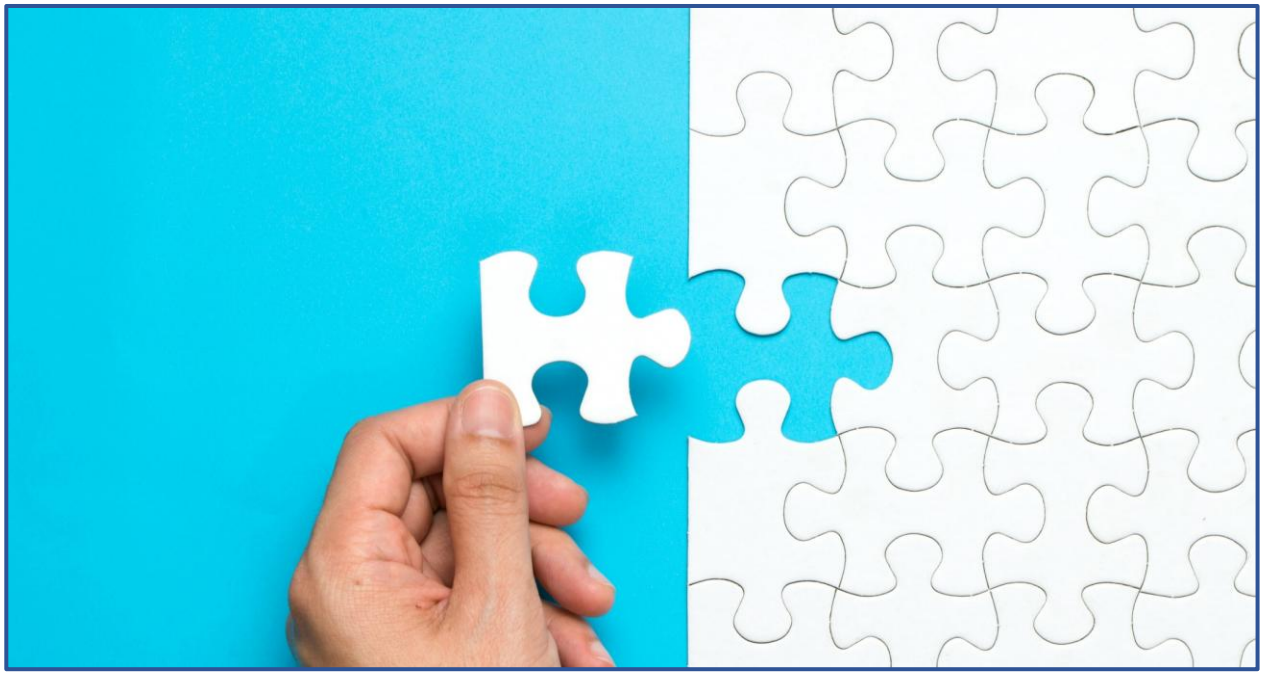
JMP Advisors

*For private circulation only*

# NEWS ALERT

15 September 2025



## Tax treaty entitlement reaffirmed for Mauritius-based entity; POEM in India ruled out sans evidence of control and management being in India

In a comprehensive ruling on the issue of tax residency of a Mauritius based entity, the Delhi Tribunal held that the taxpayer is non-resident in India on account of its control and management not being situated wholly in India in the year under consideration. The Tribunal also upheld the validity of the Tax Residency Certificate issued by the Mauritian tax authorities and underscored its conclusive nature as proof of residency. As a result, relief under the Capital Gains article of the India – Mauritius DTAA was allowed to the taxpayer for shares acquired prior to 1 April 2017.

The team at JMP Advisors is pleased to bring to you a gist of the decision in the case of Essar Communications Limited vs ACIT

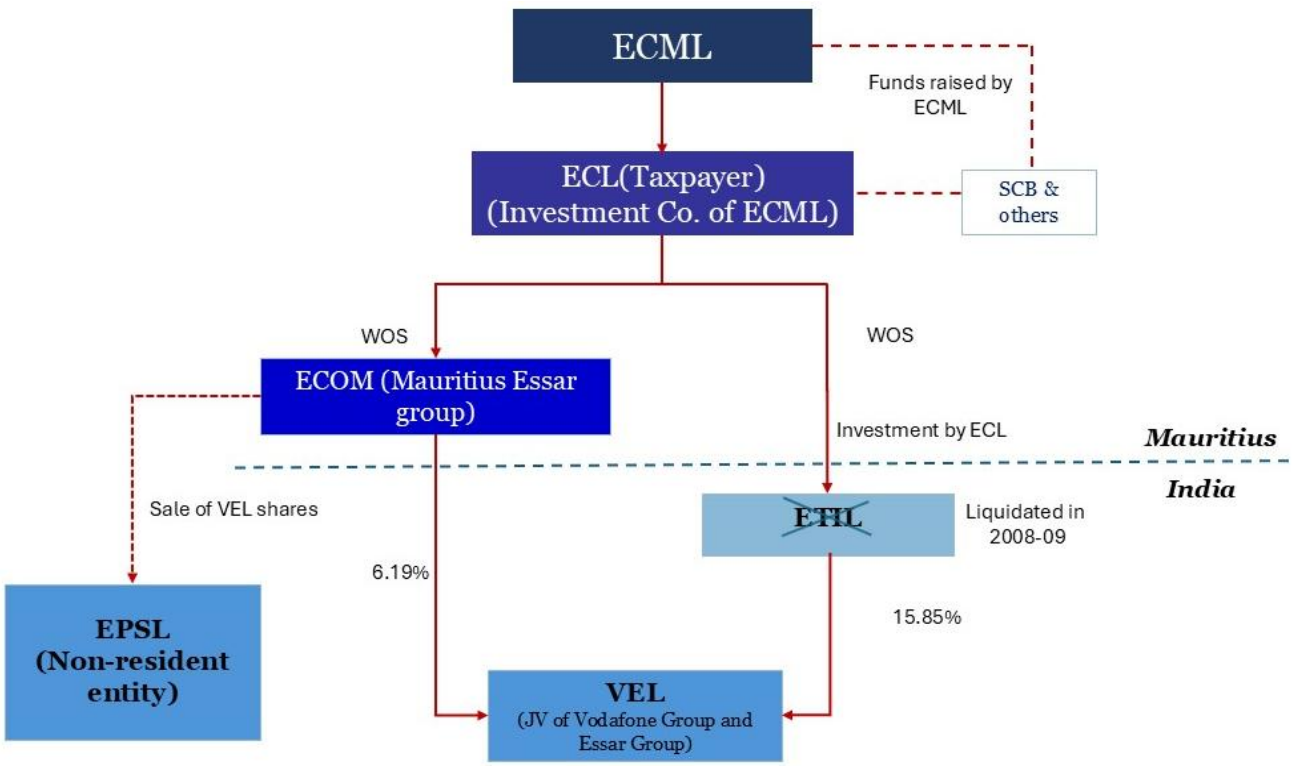
## *Facts of the Case*

### Nature of business

Essar Communications Limited ('the taxpayer') is a company incorporated in Mauritius on 13 October 2005. It is a part of the Essar Group which has a presence in Mauritius since 1992. The principal activity of the taxpayer is to make and hold investments in the telecom sector in India. Since its inception, the taxpayer has consistently held a valid Tax Residency Certificate ('TRC') issued by the Mauritius Revenue Authority ('MRA') and a Category 1 Global Business License ('GBL') issued by the Financial Services Commission, Mauritius.

### Structure of investment

- Initial investment: Essar Telecom Investments Limited ('ETIL'), the wholly owned Indian subsidiary of the taxpayer held 6,56,34,887 equity shares in VEL, which constituted 15.85% of VEL's ordinary share capital. The taxpayer infused USD 400.61 million into ETIL in various tranches during January and February 2007
- Source of funding : The funding for the taxpayer's investment in ETIL was largely by way of infusion of funds into the taxpayer by its holding company, Essar Communications (Mauritius)




[1] ITA No.339/DEL/2022

Limited ('ECML/Holding Company'). ECML had in turn borrowed these funds from time to time from the Standard Chartered Bank ('SCB'), UK and a consortium of banks led by SCB, UK. The shares held by the taxpayer in VEL were pledged as a security for the borrowings by ECML.

- Requirement to pledge securities: A crucial turning point was the lender banks' demand for greater enforceability over the security of VEL shares by way of a direct pledge. An application for direct pledge of VEL shares was made by ETIL to the Reserve Bank of India ('RBI') which was rejected.

- Restructuring: In view of the above, it was decided to liquidate ETIL with a view to migrate the VEL shares directly to the taxpayer, thereby enabling a direct pledge of the shares with the lenders. This liquidation and transfer occurred during FY 2008-09. After ETIL's liquidation in July 2008, the VEL shares were distributed to the taxpayer, making the taxpayer the direct owner of these shares. The taxpayer then filed a fresh application for pledge of VEL shares with the RBI, which was approved on 14 November 2008.

**Sale of shares**

As per an Offshore Underwritten Put Option arrangement between Vodafone and Essar Group, ECML had acquired a put option to sell shares of VEL or procure sale of VEL shares by the taxpayer. Accordingly, ECML exercised the put option and on 1 July 2011, the taxpayer sold all the shares held in VEL to Euro Pacific Securities Limited ('EPSL'), a non-resident company nominated by Vodafone International Holdings B.V. Appropriate taxes were deducted on the sale consideration paid to the taxpayer.

**Issues**

The taxpayer took a position that the capital gains on the sale of VEL shares were not taxable in India by virtue of Article 13(4) of the India-Mauritius DTAA ('the DTAA'). Accordingly, it filed its return of income in India for FY 2011-12 with a claim for a refund of the TDS on this transaction.

The fundamental question here was whether the capital gains on the sale of VEL shares were subject to tax in India. Further, the question was whether the taxpayer was entitled to the benefits of capital gains tax exemption as stipulated under Article 13(4) of the DTAA.

**Tax scrutiny proceedings**

Pursuant to scrutiny, the Tax Officer denied the benefit under Article 13(4) of the DTAA by treating the taxpayer as a resident of India under section 6(3) of the Income-tax Act, 1961 ('the Act'), on the basis that the control and management of the taxpayer's affairs was wholly situated

in India. The Tax Officer further held that the taxpayer lacked commercial substance and was a sham entity incorporated solely to avail the benefits of the DTAA.

According to the Tax Officer, the Indian Promoter Group, particularly the Ruia family, exercised effective control over the company's affairs, with board meetings in Mauritius being mere formalities lacking substantive decision-making. The Tax Officer emphasized that the taxpayer's board acted under instructions from Indian Promoter Group executives in India. Therefore, the taxpayer was treated as an Indian resident for tax purposes. Allegations of round-tripping and misuse of offshore structures were also raised, asserting that sale proceeds ultimately benefited the Indian Promoter Group and not the taxpayer directly. The taxpayer's appeal to the First-Appellate Authority against the Tax Officer's order was rejected.

**Key observations of the Delhi Tribunal**

On further appeal by the taxpayer, the Delhi Income Tax Appellate Tribunal ('Tribunal') in its ruling provided several key insights on the issue as under:

Residential status: The Tribunal observed that as on the relevant FY, for a foreign company to be regarded as an Indian resident under Section 6(3)(ii) of the Act, its control and management must be "wholly" situated in India. If any part of the control and management is outside India, the company would not be considered Resident in India as per sec. 6(3) of the Act. In this connection, the Tribunal noted that the taxpayer was controlled and managed by its board of directors with all decisions concerning its affairs taken in meetings held at its registered office in Mauritius. The Tribunal further observed that the taxpayer had nine directors, with a majority being Mauritius residents or non-resident Indians and during FY 2011-12, the board meetings were consistently conducted in Mauritius. The Tribunal emphatically rejected the Tax Officer's argument that the taxpayer's control and management were "wholly" in India.

To support its view on the "control and management" test, the Tribunal relied on the Supreme Court ('SC') judgment in case of Nandlal Gandalal[2], wherein the Hon'ble SC held that the control and management of a company are situated at the place where meetings are held by the board of directors. Thus, the Tribunal held that the taxpayer is not a resident of India since its control and management was not situated wholly in India and on the contrary, its control and management was situated wholly in Mauritius.

The Tribunal also observed that the Tax Officer failed to provide any material or evidence to substantiate its claim that the control and management were wholly in India or that the Indian Promoter Group made decisions beyond their capacity. It clarified that making a decision is different from executing a decision, which can be

[2] (1960) 40 ITR 1(SC)

delegated to personnel. The Tribunal struck down the Tax Officer's claim that the Indian Promoter Group was controlling and managing the affairs of the taxpayer and that too from India, when several family members of the Indian Promoter Group are non-residents for Indian tax perspective.

Therefore, the Tribunal held that the control and management of the taxpayer is with the board of directors in Mauritius and the allegation made by the Tax Officer is baseless and contrary to evidence on record.

Further, the Tribunal held the taxpayer is eligible for the benefits of Article 13(4) of the DTAA. It took note that the taxpayer was incorporated in Mauritius and engaged in investment activities, held a valid TRC issued by the MRA and did not have a Permanent Establishment ('PE') in India. The Tribunal also acknowledged the long-standing presence in Mauritius since 1992, with significant investments routed through Mauritius-based sector holding companies, further supporting the commercial rationale and disproving the notion of a transient setup for tax avoidance.

Role of TRC**:** The Tribunal underscored the conclusive nature of the TRC as proof of residency. It stated that the MRA's TRC explicitly affirm that taxpayer's control and management were in Mauritius. This fact, combined with CBDT Circular No. 789 (dated 13 April 2000) and Circular No. 682 (dated 30 March 1994), constitutes sufficient evidence for accepting the taxpayer's residential status and beneficial ownership for DTAA application. The Tribunal held that the Tax Officer's attempt to question the TRC was contrary to the Government of India's repeated assurances and judicial pronouncements. It also noted that the Supreme Court in Azadi Bachao Andolan[3] and Vodafone International Holdings B.V[4]. had upheld the validity of Circular 789 and the role of TRCs, even if not explicitly for direct share transfers.

Rejection of "Round-Tripping" Allegations: The Tribunal dismissed the Tax Officer's claims of "round-tripping," since there was no material brought on record in evidence of the claim of round-tripping of money or any other illegal activities.

Commercial substance and colourable device: The Tribunal explicitly ruled that the taxpayer did not adopt any colourable device for avoidance of tax since all the transactions undertaken by it were for commercial reasons.

The Tribunal held that the absence of Limitation of Benefit ('LOB') clause makes the scope of the DTAA positive from the perspective of a special purpose vehicle created specifically to route investments into India. It further noted that the LOB clause was inserted in the DTAA only with effect from 1 April 2017 and therefore does not apply to FY 2011-12. Further, even if the principle of the LOB clause were applied, the taxpayer met the threshold of minimum expenditure in Mauritius.

[3] (2003) 263 ITR 706 (SC)
[4] (2012) 341 ITR 1 (SC)

The Tribunal observed that all the transactions have been undertaken for commercial and business reasons and business exigencies in order to address the lenders concerns, the contention of the Tax Officer regarding invocation of Judicial Anti-Avoidance Rule is unsustainable and contrary to settled principles of law.

The Tribunal extensively applied the principles from the SC judgment in the case of Vodafone (supra) wherein it was held that the approach to be adopted is to 'look at' and not 'look through' an arrangement/transaction to determine whether a colourable device exists. Thus, the Tribunal concluded there was no question of a colourable device since the taxpayer is a genuine Mauritian corporation holding a valid TRC and was formed for genuine investment business. The Tribunal found that taxpayer's transaction satisfied all the parameters of "investment to participate" laid down in Vodafone (supra):

- Time duration test: The taxpayer held investments in ETIL/VEL for over four years prior to the sale.
- Business operations in India test: VEL, the investee company, had PAN-India presence, substantial turnover, profits and paid significant taxes in India.
- Generation of taxable revenues in India test: The SC recognised the extent of operations carried on by VEL and the taxes paid by it in its decision in the case of Vodafone to VEL.
- Timing of exit: The sale was driven by economic necessity and for loan repayment by ECML. The taxpayer found a favourable valuation opportunity, making it a purely commercial decision by the taxpayer's board.
- Continuity of business: VEL's business continued uninterrupted after the exit.

Therefore, the Tribunal held that the taxpayer is eligible for the benefits of exemption from capital gains tax as provided under Article 13(4) of the DTAA. Accordingly, the capital gains that have arisen to it on the sale of shares of VEL are not liable to tax in India.

***JMP Insights –*** The judgement serves as a significant affirmation of the treaty protection under the India–Mauritius DTAA, particularly in the context of pre-2017 investments. The Tribunal underscored the importance of maintaining robust documentation and evidence to demonstrate commercial substance and overseas control. It reinforces the judicial stance that genuine commercial rationale and demonstrable foreign control and management are critical in defending DTAA benefits against anti-avoidance challenges. Crucially, the Tribunal reinforced that a valid TRC issued by the Mauritian authorities is conclusive proof of tax residency and beneficial ownership, unless there is evidence to show that the treaty is abused for the fraudulent purpose of tax evasion.

Should you wish to discuss any of the above issues in detail or understand the applicability to your specific situation, please feel free to reach out to us on coe@jmpadvisors.in.

**JMP Advisors Private Limited**
12, Jolly Maker Chambers II, Nariman Point, Mumbai 400 021, India
E: info@jmpadvisors.in, W: www.jmpadvisors.com
Follow us on

**Recognised consistently as a leading tax and transfer pricing firm in India, *inter alia,* by ITR in the 2025 Directory!**

**About JMP Advisors**

JMP Advisors is a leading professional services firm that offers advisory, tax and regulatory services. The vision of JMP Advisors is to be 'The Most Admired Professional Services Firm in India'. It aims to be the best as measured by the quality of its people and service to clients. The firm has a merit based culture and operates to the highest standards of professionalism, ethics, and integrity. Jairaj (Jai) Purandare, the Founder Chairman has over four decades of experience in tax and business advisory matters and is an authority on tax and regulation in India. Jai was Regional Managing Partner, Chairman - Tax and Country Leader - Markets & Industries of PricewaterhouseCoopers India. Earlier, Jai was Chairman of Ernst & Young India and Country Head of the Tax & Business Advisory practice of Andersen India.

JMP Advisors offers advice in international taxation, domestic taxation, transfer pricing, mergers and acquisitions, Goods and Services Tax (GST), business laws and exchange control regulations and foreign investment consulting. We specialize in fiscal strategy, policy foresight and advocacy matters and are trusted advisors to high net worth families. Our team at JMP Advisors takes pride in being the best at what matters most to clients - technical expertise, innovative solutions, consistent, high quality service, reliability and ease of doing business.

JMP Advisors has been consistently recognized as a leading Tax firm in India, *inter alia,* in the International Tax Review (Euromoney) World Tax Directory for all successive years since incorporation, including the 2025 Directory.