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Taxing Intellectual Property Assets on a Cross-Border Transaction: Application of *Mobilia Sequuntur Personam* and the Case of the India-Mauritius Tax Treaty

M.P. Ram Mohan[*]

Aditya Gupta[**]

Abstract

Intellectual Property (IP) assets enjoy a unique advantage in tax planning. Owing to their intangible nature and lack of physical substance, IP assets can be methodically parked to transfer income between tax jurisdictions. In 2016, the Delhi High Court was presented with a dispute in which IP assets registered in India were transferred between an Australian and an English company through their subsidiary holdings in Mauritius. The question before the court was which tax jurisdiction, India, Australia or Mauritius, would be entitled to tax the capital gains arising from the transaction. The court held that if a foreign corporation owns an IP asset, regardless of its registration and use in India, it would be taxed by the jurisdiction of the owner's residence. Coming to its conclusion, the Indian court found a legislative vacuum in the Indian Income Tax Act, 1961, and relied on the doctrine of mobilia sequuntur personam to fill the lacuna. This article examines the relevance of the doctrine in line with precedential guidelines and the international treaty framework. The article reveals that, either inadvertently or by design, the Indo-Mauritian Double Taxation Avoidance Agreement (DTAA) creates an instance of double tax exemption of Mauritian-owned, Indian-registered IP assets.

Introduction

Intellectual property (IP) transactions impose a unique burden on tax regimes. Owing to their intangible nature and lack of physical substance, these assets can be methodically parked to reduce tax liability and create stateless income.[1] Companies can create subsidiaries and IP holding companies in low-tax jurisdictions and transfer ownership of IP assets to these subsidiaries. The IP holding companies then license the IP assets back to the parent companies and other

[*] Associate Professor, Strategy Area, Indian Institute of Management Ahmedabad.
[**] Research Associate, Indian Institute of Management Ahmedabad.

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[1] Andrew Fischer, "A Comprehensive Approach to Stateless Income" (2014) 83 *The George Washington Law Review* 1028, 1038–1041.

subsidiaries.[2] Employing such a corporate structure allows parking of income in low tax jurisdictions, which parent companies can then access through "loans" or "dividend payments".[3] One interesting example of this approach is Microsoft, the IP assets of which are held by an Irish subsidiary.[4] Without putting any employees on the payroll, the subsidiary reported a profit equivalent to three-quarters of Ireland's gross domestic product (GDP), specifically, US$314.7 billion in 2020.[5]

For corporations, IP rights play an essential role in tax planning and profit shifting. Despite an exponential increase in the share of total income contributed by intangibles, the "problem of deciding the jurisdictions to which such income is assignable has proved to be intractable".[6] Studies attribute up to 72 per cent of profit shifting to the pricing of IP in intra-firm transactions and to the shifting of IP rights to strategic low-tax or no-tax jurisdictions.[7] With such a significant amount of profit shifting attributable to IP transactions, it is only legitimate to assume that there is a fundamental design flaw in the tax law governing IP transactions.

This article discusses a dispute which involved a transaction between an Australian and an English company along with their many subsidiary holdings incorporated in India and Mauritius. The judicial controversy has been explored as a case study to illustrate how the Indian judiciary addressed the issue of tax base erosion through strategic planning of IP assets. The study has wider implications for both the interpretation of the doctrine of *mobilia sequuntur personam* and investing in India in the context of the Indo-Mauritian Double Taxation Avoidance Agreement (DTAA).

In 2006, a composite sale agreement was effectuated between Dismin India Ltd, Foster's Group Ltd and SABMiller. By virtue of the sale agreement, a Mauritian step-down level subsidiary, FBG Mauritius Ltd, was transferred to SABMiller. The Mauritian subsidiary held 100 per cent equity in an Indian company, Foster's India Pvt Ltd. Therefore, by virtue of the sale, Dismin India Ltd sold their step-down level subsidiary, that is, Foster's India Ltd, to SABMiller.

[2] See Fischer, "A Comprehensive Approach to Stateless Income" (2014) 83 *The George Washington Law Review* 1028, 1040, 1041; Matthias Dischinger and Nadine Riedel, "Corporate Taxes and the Location of Intangible Assets within Multinational Firms" (2011) 95 *Journal of Public Economics* 691.

[3] Fischer, "A Comprehensive Approach to Stateless Income" (2014) 83 *The George Washington Law Review* 1028, 1038–1041; Xuan-Thao Nguyen, "Promoting Corporate Irresponsibility? Delaware as the Intellectual Property Holding State" (2020) 46 *Journal of Corporate Law* 717, 719–720.

[4] Josh White, "This Week in Tax: Microsoft Faces Questions over Tax Strategy" (2021) *International Tax Review*; Jeffrey A. Maine and Xuan-Thao Nguyen, *The Intellectual Property Holding Company: Tax Use and Abuse from Victoria's Secret to Apple* (Cambridge: CUP, 2017), pp.193–203.

[5] Rupert Neate, "Microsoft's Irish Subsidiary Posted £220bn Profit in Single Year" *Guardian*, 3 June 2021. For a detailed indictment of Microsoft's business model see: *Statement of Senator Carl Levin, before U.S. Senate Permanent Subcommittee on Investigations on Offshore Profit Shifting and the U.S. Tax Code* (20 September 2012), *https://www.hsgac.senate.gov/imo/media/doc/OPENING%20-%20LEVIN-Carl%20(September%2020%202012)1.pdf* [Accessed 1 February 2023].

[6] Stanley I. Langbein, "United States Policy and the Taxation of International Intangible Income" (2019) 50 U. Miami Inter-Am. L. Rev. 1, 3.

[7] Wolfram F. Richter, "Taxing Intellectual Property in the Global Economy: A Plea for Regulated and Internationally Coordinated Profit Splitting" (CESifo, 2017), 6564, *https://ideas.repec.org/p/ces/ceswps/_6564.html* [Accessed 1 February 2023]; citing Jost H. Heckemeyer and Michael Overesch, "Multinationals' Profit Response to Tax Differentials: Effect Size and Shifting Channels" (ZEW-Leibniz Centre for European Economic Research, 2013), 13–045, *https://ideas.repec.org/p/zbw/zewdip/13045.html* [Accessed 1 February 2023].

Apart from the sale of the subsidiary, the two parties also transferred the rights to 16 trademarks which were owned by CUB Pty Ltd. Four of the 16 trademarks were registered in India and were licensed to Foster's India Ltd through a Brand Licensing Agreement (Figure 1). The question before the court was which country, that is, India, Australia or Mauritius, was entitled to tax the sale of trademarks which were registered in India.[8]

In 2016, the Delhi High Court determined that the Indian tax administration's ability to tax the transaction would be determined by the location or situs of the IP asset.[9] However, the court did not find any legislative direction for determining the situs of an IP asset. In light of the legislative vacuum, the court relied on a common law doctrine and held that that the transaction was only taxable in the country of residence of the IP owner.[10] This meant that the transaction would be taxed only in the jurisdiction in which the IP asset owner resided.

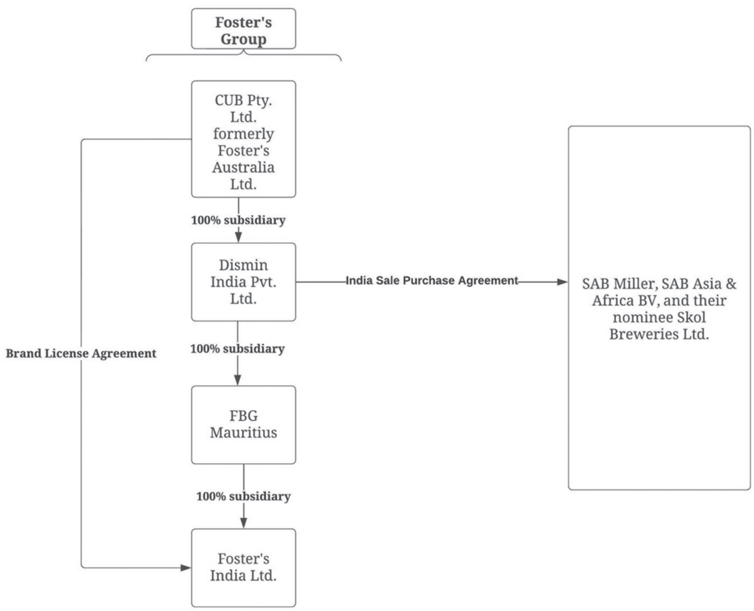

Figure 1: transaction in the case of CUB Pty Ltd v Union of India

The reliance of the court in *CUB Pty Ltd (formerly known as Foster's Australia Ltd) v Union of India* (*CUB Pty Ltd*)[11] on owner's residence to determine the situs of an IP asset could create a fertile ground for tax planning and avoidance. To avoid the payment of capital gains tax,

[8] Also see Aseem Chawla, Pranshu Goel and Shubhangi Arora, "The Principle of Mobilia Sequuntur Personam and the Situs of Intangible Property: The Brew of Foster's High Court Case" (2017) 22(6) *Asia-Pacific Tax Bulletin*.
[9] *CUB Pty Ltd (formerly known as Foster's Australia Ltd) v Union of India* (*CUB Pty Ltd*) 2017 SCC OnLine Del 4070.
[10] *CUB Pty Ltd* 2017 SCC OnLine Del 4070.
[11] *CUB Pty Ltd* 2017 SCC OnLine Del 4070.

multi-national corporations can transfer the ownership of their IP assets to jurisdictions such as Mauritius where no tax is levied on capital gains.[12]

This article aims to examine how the sale of IP assets is taxed in a cross-border transaction. The complexity of taxing multinational enterprises (MNEs) and a possible loophole regarding IP taxation has also been recognised in international treaty jurisprudence.[13] The authors attempt to identify any vulnerabilities within India's tax partnerships that may allow a double tax evasion in the case of cross-border sales of IP assets registered and used in India. The scope of the article is limited to the transfer of capital assets and does not extend to the accrual of income through the use or exploitation of IP assets. In doing so, the authors examine the state of the Indian taxation regime along with the guidance provided by the UN and OECD model treaties on how to delineate the proposed treatment of IP assets in a cross-border taxation dispute. By analysing these treaties in conjunction with the mandate provided by the Indian Income Tax Act, 1961 (Act of 1961), and the DTAA between India and Mauritius an interesting situation of double tax exemption is revealed.

Part 1 of the article examines how the Indian income tax regime taxes foreign income. Part 2 deliberates on the Delhi High Court's decision and aims to delineate its mandate. Part 3 studies the development of the doctrine of *mobilia sequuntur personam* and examines its relevance in line with Indian judicial decisions. Part 4 analyses the guidance provided by the UN and OECD model tax law treaties to determine the ideal treatment of income generated through royalties and sale of IP assets. Part 5 deals with the overriding effect of DTAAs on domestic tax law and examines the case of the Indo-Mauritian DTAA.

(1) Taxability of foreign income

Tax systems are a creation of national law and are an integral element of a country's legislative sovereignty.[14] However, the extent of a state's ability to tax income arising outside its jurisdiction has been the subject of consistent inquiry. Although this debate is beyond the scope of the present inquiry, a brief assessment of the jurisprudence guiding legislative competence is detailed below.

Predominantly there are two schools of thought which guide this debate. Some scholars believe that public international law does not place any limitations on a country's tax jurisdiction.[15]

[12] Leyla Ates, Moran Harari and Markus Meinzer, "Negative Spillovers in International Corporate Taxation and the European Union" in Irma Johanna Mosquera Valderrama, Dries Lesage and Wouter Lips (eds), *Taxation, International Cooperation and the 2030 Sustainable Development Agenda* (Springer International Publishing, 2021), Pt 10.3.3.

[13] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* (Paris: OECD Publishing, 2022), *https://doi.org/10.1787/0e655865-en* [Accessed 2 February 2023], Ch.VI, deals with the pricing of intangibles and extends to over 212 paragraphs and 73 pages, including an annex where 29 examples illustrate the application of the OECD guidance; Daniel Shaviro, "Mobile Intellectual Property and the Shift in International Tax Policy from Determining the Source of Income to Taxing Location-Specific Rents: Part One" (2020) *Singapore Journal of Legal Studies* 681, 682, 683; Brian J. Arnold, *International Tax Primer*, 3rd edn (Kluwer Law International, 2016), Pt 6.5.5 and 15.

[14] Edwin van der Bruggen, "State Responsibility under Customary International Law in Matters of Taxation and Tax Competition" (2001) 29 *Intertax* 115.

[15] van der Bruggen, "State Responsibility under Customary International Law in Matters of Taxation and Tax Competition" (2001) 29 *Intertax* 115; See Reuven S. Avi-Yonah, "Does Customary International Tax Law Exist?" in Yariv Brauner (ed.), *Research Handbook on International Taxation* (Edward Elgar Publishing, 2020); Elliott Ash and Omri Marian, "The Making of International Tax Law: Empirical Evidence from Tax Treaties Text" (2020) 24 *Florida Tax Review* 151.

Others argue that the existence of a nexus or genuine link[16] is an essential part of customary international law.[17] It constitutes a fundamental limitation of a country's jurisdiction to tax any foreign income. The Act of 1961 follows the latter approach and accepts the standards of sufficient territorial connection or nexus.[18] This section examines how the Act of 1961 taxes foreign income, specifically income that arises from capital transactions involving the sale of IP assets.

The liability to pay any tax pursuant to the Act of 1961 originates from section 4 of that Act. The provision levies tax on the assessee's total income for the previous year[19] as per the tax rate determined in the assessment year.[20] The meaning and constituents of such total income are provided by section 5 of the Act of 1961. The provision establishes a nexus with the taxability of income either through residence[21] or source.[22] For section 5's mandate to be applicable, section 6 determines the scope of residence-based taxation[23] while section 9 impugns tax liability on the basis of source.[24] While Indian residents are taxed on their worldwide income, non-residents are charged on income that has its source in India.[25]

(a) Section 9 of the Income Tax Act, 1961

Section 9 expands the tax jurisdiction of the Act of 1961, and includes foreign income within the scope of taxability. While the income covered by section 9 does not accrue or arise in India, it is brought within the ambit of the Indian tax administration through deeming fictions.[26] Section 9 does not alter the nature of the income accruing to an assessee, it merely shifts the locale of

[16] Nexus refers to a sufficient connection with a state to be subject to that state's tax jurisdiction. Joseph J. Cordes, Robert D. Ebel and Jane G. Gravelle, *The Encyclopedia of Taxation & Tax Policy*, 2nd edn (Urban Institute Press, 2005).

[17] Stjepan Gadzo, *Nexus Requirements for Taxation of Non-Residents' Business Income: A Normative Evaluation in the Context of the Global Economy* (IBFD, 2018), Vol.41. The status of the nexus requirement as a norm of customary international law is confirmed in this book, as both necessary criteria, i.e. state practice and opinio juris are deemed to be satisfied.

[18] Khagesh Gautam, "Taxing Offshore Transactions in India and the Territoriality Clause — A Case for Substantial Constitutional Limitations on Indian Parliament's Power to Retrospectively Amend the Income Tax Act" (2014) 40 *International Tax Journal* 17, 26–27.

[19] Income Tax Act, 1961 s.3.

[20] Income Tax Act, 1961 s.2(9).

[21] Shreya Rao, "Nexus Matters: India's Right to Tax" (2008) 49 *Tax Notes International* 75, 75.

[22] Rao, "Nexus Matters: India's Right to Tax" (2008) 49 *Tax Notes International* 75, 75.

[23] Arvind P. Datar, R. Sandeep Bagmar and M.V. Swaroop, *Kanga & Palkhivala's The Law and Practice of Income Tax: with a concise commentary on equalisation levy*, 11th edn (Lexis Nexis, 2020), pp.309–322. Some source-based taxation rules, such as taxation on the basis of "place of effective management" can also be found in s.6. See Nigam Nuggehalli, *International Taxation: The Indian Perspective* (Springer India, 2020), "Overview of Indian Legislation Regarding International Taxation".

[24] Nuggehalli, *International Taxation: The Indian Perspective* (2020), "Overview of Indian Legislation Regarding International Taxation", pp.7, 8; Prateek Andharia, "Section 9 of the Income Tax Act, 1961: Defaced and Defiled?" (2013) 25 *National Law School of India Review* 119, 121–122. Department of Revenue (Central Boards of Direct Taxes), Explanatory Notes to the provisions of the Finance Act, 2010, F.No.142/1/2011-SO(TPL) (issued on 6 April 2011).

[25] Rao, "Nexus Matters: India's Right to Tax" (2008) 9 *Tax Notes International* 75, 76.

[26] Datar, Bagmar and Swaroop, *Kanga & Palkhivala's The Law and Practice of Income Tax: with a concise commentary on equalisation levy*, 11th edn (2020), pp.332, 333; Geoffrey T. Loomer, "The Vodafone Essar Dispute: Inadequate Tax Principles Create Difficult Choices for India" (2009) 21 *National Law School of India Review* 89, 101; the scope of the Income Tax Act, 1961 ss.5 and 9 has to be harmoniously constructed. *Re Mustaq Ahmed* [2008] 307 ITR 401 (AAR).

where the income is accrued.[27] Within its extent, the provision legislates deeming fictions for five heads of income: property, source of income, asset, business connection and the transfer of capital asset.[28] For the purposes of this article, the last head, the transfer of a capital asset, is important.[29]

Scholars speculate that the reason for including section 9 in the Act of 1961 is to "redress situations where taxpayers would try to shift income out of India".[30] The income covered by section 9 becomes taxable in India in the hands of all persons irrespective of their domicile, citizenship or place of residence.[31] Given its wide import and applicability to non-resident foreign corporations, section 9 has withstood multiple constitutional challenges.[32] The Supreme Court of India has held that to furnish a basis for the imposition of tax further to section 9, a sufficient territorial nexus must be established.[33]

Section 9(1)(i) of the Act of 1961 provides that a non-resident shall be liable to pay tax for an income which arises from the transfer of a capital asset situate in India. Irrespective of where a transfer takes place, a transaction would continue to attract section 9(1)(i) provided the capital asset was situated in India.[34] The Supreme Court in *Vodafone International Holdings BV v Union of India* (*Vodafone*) interpreted three essentials for applying this provision: (1) existence of a capital asset, (2) transfer thereof, and (3) situation of such capital asset in India.[35] If the Supreme Court's mandate is examined in terms of the capital gains generated from an IP assignment, the transaction would easily fulfil the first two essentials.

First, an IP asset qualifies as a capital asset. Section 2(14) of the Act of 1961 defines the term "capital assets" as including property of any kind.[36] The second essential requires the transfer of the capital asset. The Act of 1961 defines transfer as including sale, exchange and relinquishment.[37] "Sale" has been defined to mean a voluntary transaction between two persons by which the buyer

[27] Datar, Bagmar and Swaroop, *Kanga & Palkhivala's The Law and Practice of Income Tax: with a concise commentary on equalisation levy*, 11th edn (2020), pp.332, 333; Loomer, "The Vodafone Essar Dispute: Inadequate Tax Principles Create Difficult Choices for India" (2009) 21 *National Law School of India Review* 89, 100.

[28] Andharia, "Section 9 of the Income Tax Act, 1961: Defaced and Defiled?" (2013) 25 *National Law School of India Review* 119, 121–122, 124.

[29] Sale of IP assets cannot be taxed as income from business connection. In *Commissioner of Income-Tax v Qantas Airways Ltd* 2002 SCC OnLine Del 484 the Delhi High Court clarified that the business connection clause can be used only in reference to trading activities, and not in reference to capital gains arising from sale of assets.

[30] Nuggehalli, *International Taxation: The Indian Perspective* (2020), "Overview of Indian Legislation Regarding International Taxation", p.7.

[31] K.B. Bhatnagar, *K.B. Bhatnagar's Direct Taxes Digest (1922–2011)*, 9th edn (Lexis Nexis, 2011), 6740; Loomer, "The Vodafone Essar Dispute: Inadequate Tax Principles Create Difficult Choices for India" (2009) 21 *National Law School of India Review* 89, 100.

[32] Andharia, "Section 9 of the Income Tax Act, 1961: Defaced and Defiled?" (2013) 25 *National Law School of India Review* 119, 121–122.

[33] *CIT v Eli Lilly & Co (India) (P) Ltd* (2009) 15 SCC 1.

[34] *In re Triniti Corp*, 2007 SCC OnLine AAR-IT 8; *Commissioner of Income-Tax v Qantas Airways Ltd*, 2002 SCC OnLine Del 484.

[35] *Vodafone International Holding BV v UOI* (*Vodafone*) (2012) 6 SCC 613 (Supreme Court of India).

[36] Income Tax Act, 1961 s.2(47) is drafted as a carve-out provision and does not exclude IP assets, Datar, Bagmar and Swaroop, *Kanga & Palkhivala's The Law and Practice of Income Tax: with a concise commentary on equalisation levy*, 11th edn (2020), pp.83–89.

[37] Income Tax Act, 1961 s.2(47).

acquires the seller's property.[38] An assignment which means a transfer of a whole of a particular estate,[39] would qualify as a transfer within the requirement of the Act of 1961.

Therefore, of the three essentials spelled out by the Supreme Court for taxing the sale of IP assets between non-residents, an IP assignment fulfils the requirements of the first two. While legislative guidance is provided for the meaning of "capital assets" and "transfer", no guidance has been provided to determine the *situs* of an IP asset[40] thereby creating a legislative vacuum.

The Delhi High Court dealt with this legislative vacuum in 2016. The dispute involved a cross border sale of trade marks. Relying on a common law doctrine to fill the legislative vacuum, the court determined which of the concerned jurisdictions could assume the right to tax.

(2) *CUB Pty Ltd (formerly known as Foster's Australia Ltd) v Union of India*

In 2016, the Delhi High Court delivered a decision which dealt with the taxability of an intellectual property assignment. In *CUB Pty Ltd*,[41] the primary question related to the taxability of the sale of trademarks registered and used in India. The transaction was entered into between the subsidiary of an Australian company, Foster's Australia, and an English company, SABMiller.

The petitioner, formerly known as Foster's Australia Ltd, was involved in a complex web of corporate holdings and subsidiaries, as detailed in the Introduction to this article. The transaction between the two parties was executed in 2016, through a composite sale agreement referred to as the "India Sale Purchase Agreement" (ISPA). The sellers were the Foster's Group Ltd and Dismin India Ltd. The two companies transferred the ownership of their Mauritian subsidiary, Foster's Mauritius Ltd, to SABMiller. Since the Indian subsidiary was entirely owned by Foster's Mauritius Ltd, the sale of the latter also resulted in the sale of the former. Along with the sale of the subsidiaries, the transaction also included a sale of 16 trademarks owned by the petitioner, that is, Foster's Australia Ltd.

The ISPA also provided for the termination of a Brand Licensing Agreement (BLA) whereby the petitioner had licensed four Indian registered trademarks to its Indian subsidiary. The crux of the dispute between the Income Tax Department of India (the Department) and the petitioner was the taxability of trademarks initially licensed by the BLA. The Department sought to tax the four marks as the licensed marks derived substantial value from their use in India.

After the execution of the ISPA and the Deed of Assignment, the petitioner approached the Authority for Advance Ruling (AAR).[42] The question referred to the AAR was whether the assignment of trademarks through the ISPA was taxable within the Act of 1961.[43] Relying on

[38] *Calcutta Electric Supply Corp Ltd v CIT* AIR 1951 Cal 151; Datar, Bagmar and Swaroop, *Kanga & Palkhivala's The Law and Practice of Income Tax: with a concise commentary on equalisation levy*, 11th edn (2020), p.166.
[39] J.J.S. Wharton, *Wharton's Law Lexicon* (Arkose Press, 2015).
[40] There are some fictions legislated in reference to shares; See Income Tax Act, 1961, Explanation 5, s.9(1).
[41] *CUB Pty Ltd* 2017 SCC OnLine Del 4070.
[42] Vinita Krishnan and Shabnam Shaikh, "Delhi High Court Clarifies Where IP Rights Are 'Situated' for Taxation Purposes" (2017) 12 *Journal of Intellectual Property Law & Practice* 92: "AAR is a quasi-judicial body providing the facility of ascertaining the income-tax liability of a taxpayer". The AAR has been replaced by the Board for Advance Ruling by the Finance Act, 2021.
[43] *Foster's Australia Ltd v Commissioner concerned Commissioner of Income Tax*, AR MANU 0033 (2008).

the test laid down in the *Vodafone* judgment, the AAR ruled that the trademarks were situated in India and therefore their sale was taxable in India.[44]

The petitioner challenged the AAR's order under the jurisdiction of the Delhi High Court.[45] The petitioner claimed that since the trademarks were owned by an Australian company, their situs would follow that of their owner thereby situating the trademarks in Australia. The Department, on the other hand, claimed that since the trademarks had been put to continuous use in India, they had assumed a tangible presence in India.[46]

Writing for the court, Justice Ahmed admitted that "the issue of situs of intangible asset, such as the intellectual property rights in trademarks, brands, logos etc., is indeed a tricky one".[47] The court noted that, while the Act of 1961 provides a deeming fiction for determining the situs of shares owned by a foreign company,[48] there is no comparable advice for intellectual property assets.[49] Adopting a negative inference approach, the court opined that the doctrine of *mobilia sequuntur personam* would operate to fill the legislative gap.[50] The doctrine provides that "the closest approximation of the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset".[51] Adopting the doctrine to accommodate the legislative uncertainty, the court ruled that the situs of the assigned trademarks would be Australia thereby placing them beyond the taxability of the Act of 1961.[52]

The negative inference approach and the lack of discussion concerning the state of international and precedential guidelines on the issue exposed Justice Ahmed's judgment to criticism.[53] For instance, in 1957, the Central Board of Direct Taxes issued a clarificatory circular which clearly stated that: "Patents, trade marks and designs are located in India if they are registered in India."[54] The circular was issued in reference to section 6 of the Wealth Tax Act, 1957, which provides that the value of assets located outside India shall not be included when compounding the net

[44] *Foster's Australia Ltd v Commissioner concerned Commissioner of Income Tax*, AR MANU 0033 (2008) at [14].
[45] The position has since been amended by the Finance Act, 2021 which added s.245W to the Income Tax Act, 1961. The provision provides for an appeal to the High Court against the order passed or ruling pronounced by the Board for Advance ruling or the Assessing Officer; see Central Board of Direct Tax, Income-tax (Sixteenth Amendment) Rules, 2022, F. N. 57/2022. F. No. 370142/31/2021-TPL (Part III) (issued on 31 May 2022, India).
[46] A very similar argument was adopted by the AAR; see *Foster's Australia Ltd v Commissioner concerned Commissioner of Income Tax*, AR MANU 0033 (2008); Chawla, Goel and Arora, "The Principle of Mobilia Sequuntur Personam and the Situs of Intangible Property: The Brew of Foster's High Court Case" (2017) 22(6) *Asia-Pacific Tax Bulletin*.
[47] *CUB Pty Ltd* 2017 SCC OnLine Del 4070 at [19].
[48] Income Tax Act, 1961 Explanation 5, s.9(1)(i); for details see Anil Talreja, "Changing Tax Reforms in India — What Next?" (2013) 24 *National Law School of India Review* 75, 87.
[49] *CUB Pty Ltd* 2017 SCC OnLine Del 4070 at [19]–[20].
[50] Chawla, Goel and Arora, "The Principle of Mobilia Sequuntur Personam and the Situs of Intangible Property: The Brew of Foster's High Court Case" (2017) 22(6) *Asia-Pacific Tax Bulletin*.
[51] *CUB Pty Ltd* 2017 SCC OnLine Del 4070 at [20.2].
[52] Krishnan and Shaikh, "Delhi High Court Clarifies Where IP Rights Are 'Situated' for Taxation Purposes"(2017) 12 *Journal of Intellectual Property Law & Practice* 92, 93–94.
[53] Chawla, Goel and Arora, "The Principle of Mobilia Sequuntur Personam and the Situs of Intangible Property: The Brew of Foster's High Court Case" (2017) 22(6) *Asia-Pacific Tax Bulletin*; Ritvik M. Kulkarni, "Searching for Situs: Delhi High Court Holds IP Transfer by Foreign Based Entity Not Taxable in India" (10 August 2016) *SpicyIP*, *https://spicyip.com/2016/08/searching-for-situs-delhi-high-court-holds-ip-transfer-by-foreign-based-entity-not-taxable-in-india.html* [Accessed 1 February 2023].
[54] Central Board of Direct Taxes, Location of Assets, No. 392 [F. No. 321/78/75-WT] (Issued on 8 August 1957).

wealth of certain persons.[55] While this clarificatory circular was not issued in reference to the Act of 1961 and was not legally binding on the court, its absence from the decision-making process aroused criticism.[56]

Despite this criticism, however, the Delhi High Court's adoption of the *mobilia sequuntur personam* doctrine has been favourably cited by many High Courts. In the next section the authors examine some of these ratifying judgments to determine the scope and interpretation of the common law doctrine.

(3) The relevance and import of *mobilia sequuntur personam*

The doctrine of *mobilia sequuntur personam* creates a legal fiction that the situs of intangible property follows the domicile of its owner.[57] The lineage of the doctrine can be traced back to Roman times when an owner's personal assets were carried from place to place at his will.[58] The practice was very common, and the cases presented before the courts followed a trend where a person's personal property followed that person's domicile.[59] After a consistent line of decisions in which the situs of movable property coincided with the domicile of the owner, a fiction assumed judicial preference.[60] The doctrine was developed to serve administrative convenience and was not a result of a particular public policy decision.[61]

However, it soon came to be argued that the state in which the property was situated and enjoyed the protection of the law, should be entitled to tax that property.[62] Therefore, the doctrine of *mobilia sequuntur personam* gave way to the rule of *lex situs*, according to which personal tangible property was taxed where it was located, irrespective of the owner's domicile.[63] The rule was applied by the US Supreme Court in 1885 in the case of *Brown v Houston*,[64] where the sale of coal was taxed based on its physical location rather than the domicile of the owner. Another instance of the application of the *lex situs* principle can be found in *Pittsburg & Southern Coal Co v Bates* dating back to 1895.[65]

[55] See *CWT v OMM Kinnison* (1986) 4 SCC 297.

[56] Krishnan and Shaikh, "Delhi High Court Clarifies Where IP Rights Are 'Situated' for Taxation Purposes" (2017) 12 *Journal of Intellectual Property Law & Practice* 92.

[57] Elsabe Schoeman and Christa Roodt, *Private International Law in South Africa* (Wolters Kluwer Law International, 2014), para.151.

[58] L.S.T., "Taxation. Property Tax. The Doctrine of Mobilia Sequuntur Personam" (1930) 16 *Virginia Law Review* 521.

[59] *Pullman's Palace Car Co v Pennsylvania* 141 US. 18 (1891).

[60] L.S.T., "Taxation. Property Tax. The Doctrine of Mobilia Sequuntur Personam" (1930) 16 *Virginia Law Review* 521, 522; *Kireeva v Bedzhamov* [2021] EWHC 2281 (Ch) (England and Wales High Court).

[61] Stephen Moore, "A Reformed Intangible Personal Property Tax: A Cure for Inequity" (2005) 24 *Journal of State Taxation* 25, 31.

[62] L.S.T., "Taxation. Property Tax. The Doctrine of Mobilia Sequuntur Personam" (1930) 16 *Virginia Law Review* 521.

[63] Schoeman and Roodt, *Private International Law in South Africa* (2014), p.149; *Brown v Houston* 114 U.S. 622 (1885) (US Supreme Court); *Pittsburg & Southern Coal Co v Bates* 156 U.S. 577 (1895); Joseph S. Ferrell and Michael R. Smith, "State Jurisdiction to Tax Tangible Personal Property" (1978) 56 *North Carolina Law Review* 807, 822–824.

[64] *Brown v Houston* 114 U.S. 622 (1885); Ferrell and Smith, "State Jurisdiction to Tax Tangible Personal Property" (1978) 56 *North Carolina Law Review* 807, 822–824.

[65] Similar treatment in *Pittsburg & Southern Coal Co v Bates* 156 U.S. 577 (1895); Ferrell and Smith, "State Jurisdiction to Tax Tangible Personal Property" (1978) 56 *North Carolina Law Review* 807, 822–824.

While *lex situs* began to be applied to determine the situs of tangible property, the fiction of *mobilia sequuntur personam* continued to apply in the case of intangible property.[66] Unlike tangible property, intangible property represents a mere advantage protected by legal theory and substantive law. The advantage exists only in reference to its owner and cannot have an independent existence.[67] Therefore, shifting its situs away from the owner may not be judicially coherent.[68]

(a) Application of mobilia sequuntur personam in India

While the doctrine has been criticised as being archaic and as fostering an outmoded understanding of contemporary markets,[69] its origin as a doctrine of convenience[70] has been wielded fairly well by multiple Indian courts for the purposes of determining the situs of IP assets.

In 1974, the Karnataka High Court relied on the doctrine of *mobilia sequuntur personam* to determine a claim of taxability of IP assets within the Estate Duty Act, 1953 (Act of 1953). The Act provides that movable property situated outside the country at the time of the deceased's death shall not be included in his estate unless he was domiciled in India at the time of his death.[71] Adjudicating whether or not the property in the UK was taxable under the Act of 1953, the court noted: "For tax purposes movable property is governed, no matter where situated, by the law of the domicile of the owner."[72] The court further noted that the legislature's intent to tax movable property based on the domicile of the deceased before his death is a clear enunciation of the principle of *mobilia sequuntur personam*.[73]

In another instance, the Bombay High Court dealt with the issue of situs in a sales tax dispute between two states in India. The case involved the grant of IP franchise agreements between parties. The fast-food chain, Subway, entered into a franchise agreement in Delhi in favour of its franchisees in Mumbai. The question before the court was which of the two states was entitled to collect sales tax. The court noted, obiter,[74] that the legislature does not specify situs in the case of intangible property. The court explicitly held that

> "in this legislative vacuum, the internationally accepted principle of mobilia sequuntur personam would apply, i.e., the situs of the owner of an intangible asset would be the closest

[66] Maurice H. Merrill, "Jurisdiction to Tax-Another Word" (1935) 44 *Yale Law Journal* 582, 587–590.
[67] Merrill, "Jurisdiction to Tax-Another Word" (1935) 44 *Yale Law Journal* 582, 588.
[68] However, there are some types of intangible property which assume a situs independent of their owner. This, however, appears to be a measure or expedient policy and not legal theory.
[69] Moore, "A Reformed Intangible Personal Property Tax: A Cure for Inequity" (2005) 24 *Journal of State Taxation* 25, 31.
[70] See Langbein, "United States Policy and the Taxation of International Intangible Income" (2019) 50 U. Miami Inter-Am. L. Rev. 1.
[71] The Estate Duty Act, 1953 s.21(1)(b)(i). For details see *Dhananjay Waghray v Respondent: Controller of Estate Duty, Hyd* [1998] 234 ITR 276 (AP).
[72] *Controller of Estate-Duty, Bangalore v John D'Souza* [1974] 95 ITR 460.
[73] *Controller of Estate-Duty, Bangalore v John D'Souza* [1974] 95 ITR 460.
[74] On an allied issue in the case, the court decided that the franchise agreement was liable for service tax, not sales tax. Thus, rendering the question of jurisdiction and situs moot; *Mahyco Monsanto Biotech (India) Pvt Ltd v Union of India* 2016 SCC OnLine Bom 5274.

> approximation of the situs of his intangible asset. This is the principle widely used, unless there is a local legislation to the contrary; there is not."[75]

In the case of *Lal Products v Intelligence Officer*, the Kerala High Court dealt with the inter-state taxability of the sale of patents and trademarks. The appellant was headquartered in Kerala and executed a sale agreement in Gujarat for transferring IP assets. The question related to which of the two states would be entitled to levy a sales tax on the transaction. Writing for the court, Justice Chandran noted that "the situs of a sale can only be fixed by the appropriate legislature by creating a legal fiction".[76] Since no such legal fiction was available before the court, Justice Chandran relied on the Delhi High Court's decision in *CUB Pty Ltd* to determine the dispute.[77] The judgment noted that

> "the situs of the owner of an intangible asset, would be the closest approximation of the situs of an intangible asset. On the above reasoning, it has to be held that the exercise of the right to a trademark or a patent right; which has been obtained by the assessee, who had their principal places of business in the State of Kerala, is exercised from the principal place of business."[78]

Therefore, adopting the doctrine of *mobilia sequuntur personam*, the court decreed the taxing right to exist in favour of the State of Kerala.[79]

An analysis of the judicial authorities referred to above supports the argument that the doctrine of *mobilia sequuntur personam* is based on a firm footing in Indian tax law. The next section examines international model treaties to delineate the ideal taxation system for IP assets in cross-border disputes. Prima facie, it is clarified that these model treaties aim only to create templates for double taxation avoidance agreements, and so it is up to the states involved to agree on a workable arrangement.[80]

(4) International frameworks and guidance

The primary purpose of tax treaties is the reduction of instances of *double taxation*. The international tax system functions on the Single Tax Principle which posits that if multiple jurisdictions simultaneously tax income and investment, it would deter trade and investment.[81] Tax treaties also aim to prevent tax evasion and avoid double tax exemption. While double taxation imposes an inappropriate barrier to international commerce, the tolerance of fiscal evasion and avoidance (section 5 of this article details the distinction) "offers an inappropriate

[75] *Mahyco Monsanto Biotech (India) Pvt Ltd v Union of India* 2016 SCC OnLine Bom 5274 at [77].
[76] *Lal Products v Intelligence Officer* 2018 SCC OnLine Ker 5304 at [6].
[77] *CUB Pty Ltd* 2017 SCC OnLine Del 4070.
[78] *Lal Products v Intelligence Officer* 2018 SCC OnLine Ker 5304 at [22].
[79] *Lal Products v Intelligence Officer* 2018 SCC OnLine Ker 5304.
[80] Oddleif Torvik, *Transfer Pricing and Intangibles: US and OECD Arm's length Distribution of Operation Profits from IP Value Chains* (IBFD Doctoral Series 45, 2018), pp.53–56.
[81] Thomas M. Brinker and W. Richard Sherman, "Comparing the U.S., OECD, and U.N. Model Tax Conventions" (2003) 57 *Journal of Financial Service Professionals* 68.

incentive for such commerce".[82] Hence, the fundamental principle of tax treaties is that "income is taxed once and only once".[83]

The model income tax treaties maintain mere standards and do not enact any rules for implementation.[84] These treaties serve as a baseline negotiating position in establishing bilateral income tax treaties.[85] Most bilateral treaties follow the template of the Organisation for Economic Co-operation and Development's *Model Tax Convention on Income and on Capital* (OECD Model) or the United Nations' *Model Double Taxation Convention between Developed and Developing Countries* (UN Model).[86]

The OECD published its version of an ideal tax treaty in 1963.[87] Since then, the Model has been updated multiple times, the latest one being in 2017.[88] The OECD Model has influenced many bilateral tax treaties and has laid the foundation for other model tax conventions as well.[89]

Similar to the OECD, the UN published its version of the ideal tax treaty in 1980, with the latest revision coming in 2021.[90] While the UN Model is very similar to the OECD Model, it favours the jurisdiction of the source country's taxation rights.[91]

This section examines how income from sale and exploitation of IP assets is taxed within the remit of the model tax treaties. While neither of these models provides any specific guidance concerning capital gains arising from the transfer of IP assets,[92] the authors determine the ideal treatment inferentially in this article.

(a) Taxation of royalties

Prima facie, consideration of taxation of royalties in cross-border transactions is beyond the scope of this article. Nevertheless, a basic understanding of the treatment of royalties is necessary to differentiate between royalty payments arising from the transfer of a right to use and capital gains arising from the sale or alienation of the subject of intellectual property assets.

[82] Lorenzo Riccardi and Giorgio Riccardi, *China-Europe Tax Treaties* (Springer Nature Singapore, 2022), "Objectives of Tax Treaties", p.9.
[83] Riccardi and Riccardi, *China-Europe Tax Treaties* (2022), "Objectives of Tax Treaties", p.9.
[84] Ajay Kumar, "Making International Tax Law: Analysing Tax Jurisprudence in India" in Srinivas Burra and R. Rajesh Babu (eds), *Locating India in the Contemporary International Legal Order* (Springer India, 2018), pp.71–77.
[85] Brinker and Sherman, "Comparing the U.S., OECD, and U.N. Model Tax Conventions" (2003) 57 *Journal of Financial Service Professionals* 68, 69; Ajay Prasad and Rohit Bhat, "Domestic and International Tax Treatment of Royalties and Fees for Technical Services" (2010) 22 Nat'l L. Sch. India Rev. 173, 183, 184.
[86] Riccardi and Riccardi, *China-Europe Tax Treaties* (2022), "Historical Background to International Treaties"; Michael Lang, *Introduction to the Law of Double Taxation Conventions* (IBFD, Linde International, 2010), p.27.
[87] For a more detailed historical account see John F. Avery Jones, "Understanding the OECD Model Tax Convention: The Lesson of History" (2009) 10 Fla. Tax Rev. 1.
[88] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (Paris: OECD Publishing, 2017), *https://doi.org/10.1787/mtc_cond-2017-en* [Accessed 6 February 2023]; Michael Lang, *Introduction to the Law of Double Taxation Conventions*, 3rd edn (IBFD, Linde International, 2021), pp.5–9.
[89] Lang, *Introduction to the Law of Double Taxation Conventions* (2021), 2.3–2.5.
[90] UN *Model Double Taxation Convention between Developed and Developing Countries* (United Nations, 2021). Lang, *Introduction to the Law of Double Taxation Conventions* (2021), p.5.
[91] UN *Model Double Taxation Convention between Developed and Developing Countries* (UN, 2018). For an example see Lang, *Introduction to the Law of Double Taxation Conventions* (2021), p.6.
[92] Patricia A. Brown, "Transfers of Intangibles under Tax Treaties (Although All the Fun Stuff Is in the Transfer Pricing Guidelines)" in Guglielmo Maisto (ed.), *Taxation of Intellectual Property under Domestic Law, EU Law and Tax Treaties* (IBFD, 2018).

Article 12 of both models provides for taxation of royalties.[93] However, the treatment advocated in each of the model treaties differs substantially one from the other.[94] While the OECD Model provides the residence jurisdiction with the exclusive right to tax a transaction, the UN Model supports a shared competence, where both source and residence-based taxations are allowed.[95]

The OECD Model provides for exclusive taxation of royalties in the state where the beneficial owner[96] resides.[97] There is only one exception to this mandate: where outbound royalties from a source state are effectively connected to a permanent establishment, a right to source taxation is allowed in the Contracting State in which the permanent establishment is located.[98] Comparatively, the UN Model provides a non-exclusive taxing right in favour of the beneficial owner's residence state.[99] Therefore, the UN Model opens up the possibility of source taxation of royalties[100] and includes an exception for permanent establishment similar to that included in the OECD Model.[101]

While important, article 12 of each of the model frameworks deals only with taxation of royalty payments.[102] The very definition of royalties included in the model treaties refers to "payments…received as a consideration for the use of, or the right to use" intellectual property rights.[103] While the distinction between alienation and royalty payments is not always clear, there are some important contractual obligations which differentiate between the two types of transaction. These obligations are (1) retention of the right to use the IP by the licensor, (2) right to approve any sub-licensing or subsequent sale of the subject IP asset by the licensor,[104] (3) inclusion of an exclusivity clause, if the right itself is not subject to any such clause, and (4) payment in the form of a lump-sum or up-front payment rather than continuing royalty payments.[105] Hence, while article 12 plays an important role in determining the taxation of intellectual property

[93] Matthias Valta, "Taxation of Intellectual Property (IP) in Domestic Tax Law" in Maisto (ed.), *Taxation of Intellectual Property under Domestic Law, EU Law and Tax Treaties* (2018), Pt 1.2.2.
[94] For incorporation and interpretation of art.12 in India's DTAAs, see D.P. Sengupta, "India" in Claus Staringer, et al. (eds), *The Impact of the OECD and UN Model Conventions on Bilateral Tax Treaties* (Cambridge: CUP, 2012), Pt 18.4.3.
[95] Philip Baker, "The Meaning of 'Beneficial Ownership' as Applied to Dividends Under the OECD Model Tax Convention" in Fernando Souza de Man (ed.), *Taxation of Services in Treaties Between Developed and Developing Countries: A Proposal for New Guidelines* (IBFD, 2017), Pt 5.2 Royalties.
[96] For definition of "beneficial owner" see *Golden Bella Holdings Ltd v Deputy Commissioner of Income Tax* (2020) 206 TTJ (Mum) 618 (ITAT Mumbai).
[97] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Model 2017) (OECD Publishing, 2019), *https://doi.org/10.1787/g2g972ee-en* [Accessed 1 February 2023], art.12(1).
[98] OECD Model 2017 art.12(3).
[99] UN *Model Double Taxation Convention between Developed and Developing Countries* (UN, 2017) (UN Model 2017) art.12(1).
[100] UN Model 2017 art.12(2).
[101] UN Model 2017 art.12(4).
[102] Brown, "Transfers of Intangibles under Tax Treaties (Although All the Fun Stuff Is in the Transfer Pricing Guidelines)" in Maisto (ed.), *Taxation of intellectual property under domestic law, EU law and tax treaties* (2018), p.162.
[103] UN Model 2017 art.12(3); OECD Model 2017 art.12(2).
[104] Carlo Garbarino, *Judicial Interpretation of Tax Treaties* (Edward Elgar Publishing, 2016), "Royalties (Art. 12)".
[105] Brown, "Transfers of Intangibles under Tax Treaties (Although All the Fun Stuff Is in the Transfer Pricing Guidelines)" in Maisto (ed.), *Taxation of intellectual property under domestic law, EU law and tax treaties* (2018), pp.168–170.

income, the provision is concerned with income arising from royalty payments and not capital gains, rendering it beyond the scope of this article.

(b) Taxation of capital gains

Article 13 of each of the two model treaties explicitly deals with capital gains taxation. While there are some important differences between the provisions in the two model treaties, the provisions are identical in relation to the alienation of IP assets. Article 13 of each of the two model treaties includes a residuary rule, and exceptions are carved out for specific kinds of properties. The residuary rule, which applies to any property, provides for exclusive taxation by the resident state.[106] The exceptions to the statutory rule include gains from alienation of immovable property,[107] movable property forming part of the business property of a permanent establishment located in the other Contracting State,[108] alienation of ships, aircrafts or boats[109] and gains from the alienation of shares in real estate companies.[110] Given that there are no specific exceptions provided for IP assets, it can be inferred that the alienation of IP assets would be governed by the residuary rule.[111]

The approach of the two model treaties can create unique situations of double tax exemptions. If the source country does not tax because of the treaty and the residence country does not tax because of domestic laws, neither country would impose any liability for tax on the assignment of an IP asset.[112] IP owners can strategically decide the residence of their IP asset and exploit this loophole. One such case of double tax exemption is the case of the Indo-Mauritian DTAA,[113] which is discussed under (5)(b) in the next section.

The next section deals with how DTAAs are interpreted within Indian law and examines the DTAA between India and Mauritius in terms of the taxation of intellectual property assignments between the two jurisdictions.

[106] OECD Model 2017 art.13(5), UN Model 2017 art.13(6); Ekkehart Reimert, "Article 13: Capital Gains" in Alexander Rust and Ekkehart Reimert, *Klaus Vogel on Double Taxation Conventions* (Wolters Kluwer Law International, 2022), Vol.1; Garbarino, *Judicial Interpretation of Tax Treaties* (2016), "Income from Immovable Property, Capital Gains and Capital (Artt. 6, 13 and 22)", paras 5.54–5.74.
[107] OECD Model 2017 art.13(1); Garbarino, *Judicial Interpretation of Tax Treaties* (2016), "Income from Immovable Property, Capital Gains and Capital (Artt. 6, 13 and 22)", paras 5.47–5.51.
[108] OECD Model 2017 art.13(2); Garbarino, *Judicial Interpretation of Tax Treaties* (2016), "Income from Immovable Property, Capital Gains and Capital (Artt. 6, 13 and 22)", paras 5.47–5.52.
[109] OECD Model 2017 art.13(3); Garbarino, *Judicial Interpretation of Tax Treaties* (2016), "Income from Immovable Property, Capital Gains and Capital (Artt. 6, 13 and 22)", paras 5.47–5.51, 5.53.
[110] OECD Model 2017 art.13(4); Garbarino, *Judicial Interpretation of Tax Treaties* (2016), "Income from Immovable Property, Capital Gains and Capital (Artt. 6, 13 and 22)", paras 5.47–5.51, 5.54.
[111] Brown, "Transfers of Intangibles under Tax Treaties (Although All the Fun Stuff Is in the Transfer Pricing Guidelines)" in Maisto (ed.), *Taxation of intellectual property under domestic law, EU law and tax treaties* (2018), p.162.
[112] Garbarino, *Judicial Interpretation of Tax Treaties* (2016), "Income from Immovable Property, Capital Gains and Capital (Artt. 6, 13 and 22)", p.252.
[113] Shreya Mathur, Aakriti Singhanchi and Arpita Sharma, "India Singapore and Mauritius: Tax Treaty Shopping and FDI Flows" (2015) 5 *Asian Journal of Research in Banking and Finance* 277.

(5) Tax evasion/avoidance debate and the Indo-Mauritian DTAA

This section examines the interpretation and the role of DTAAs in tax planning[114] within India's tax jurisprudence. The authors are particularly interested in India's DTAA with Mauritius for two reasons: (1) Mauritius is the biggest tax haven[115] in terms of its investments into India,[116] and (2) it is one of the countries which contribute the highest inward foreign direct investment (FDI) to India.[117]

The debate concerning the distinction between tax evasion and avoidance has persisted in judicial[118] and academic enquiry for decades.[119] While avoidance refers to the exploitation of ambiguities and loopholes to reduce tax liability, evasion is a deliberate misrepresentation of facts to reduce tax liability.[120] Some scholars maintain that avoidance is legally permissible and that it is only evasion that is illegal,[121] but others tend to disagree.[122] The Mauritius Vice Prime Minister and the Minister of Finance and Economic Development, implicitly alluded to this debate in 2013:

> "There is always a debate on what is the definition of tax fraud, of tax evasion, of tax avoidance, and on the other hand what is legitimate tax planning. Legitimate tax planning is part of what businesses across the world do. All MNCs do tax planning, whether they are from the US, Europe, China or from India. So, nobody wants to tolerate tax evasion, tax fraud or even aggressive tax planning. And you know that means coming under the scrutiny of the G20, the G8 and of OECD."[123]

Writing for the Supreme Court, after analysing Indian and English jurisprudence, Justice Radhakrishnan sided with the legality of tax planning and avoidance:

> "The revenue cannot tax a subject without a statute to support and in the course, we also acknowledge that every taxpayer is entitled to arrange his affairs so that his taxes shall be

[114] See Prashant Bhushan, "Legitimising Tax Avoidance" (2012) 47 *Economic and Political Weekly* 37; Nigam Nuggehalli, *International Taxation: The Indian Perspective* (2020), pp.23–27.
[115] Eva Stal and Alvaro Cuervo-Cazurra, "The Investment Development Path and FDI From Developing Countries: The Role of Pro-Market Reforms and Institutional Voids" (2011) 12 *Latin American Business Review* 209, 215, 216.
[116] K.V. Mukundhan, Sreevas Sahasranamam and James J. Cordeiro, "Corporate Investments in Tax Havens: Evidence from India" (2019) 18 *Asian Business & Management* 360, 374.
[117] Press Trust of India, "US Pips Mauritius as 2nd Largest Source of FDI in India in 2020-21: DPIIT" (28 May 2021) *Business Standard India*, *https://www.business-standard.com/article/economy-policy/us-pips-mauritius-as-2nd-largest-source-of-fdi-in-india-in-2020-21-dpiit-121052801580_1.html* [Accessed 1 February 2023].
[118] For an interesting survey of judicial attitudes in India see Khagesh Gautam, "Tax Avoidance Jurisprudence in India: Questioning the Traditional Narrative" (2019) 5 *NLS Business Law Review* 1.
[119] For example, see Walter J. Blum, "Knetsch v. United States: A Pronouncement on Tax Avoidance" [1961] *The Supreme Court Review* 135; Vito Tanzi and Parthasarathi Shome, "A Primer on Tax Evasion" (1993) 40 *Macmillan Journals on behalf of the International Monetary Fund* 807.
[120] Lynne Oats and Emer Mulligan, *Principles of International Taxation*, 7th edn (Bloomsbury Professional, 2019), pp.14, 15; Anil Kumar Jain, "Tax Avoidance and Tax Evasion: The Indian Case" (1987) 21 *Modern Asian Studies* 233.
[121] Montgomery B. Angell, "Tax Evasion and Tax Avoidance" (1938) 38 *Columbia Law Review* 80; James T. Carter, "Tax Saving versus Tax Evasion" (1934) 20 *Virginia Law Review* 307.
[122] See Pankhuri Agarwal and Mathews P. George, "Use of the Corporate Vehicle for Tax Planning: The Vodafone Case and Direct Taxes Code — NUJS Law Review" (2010) 3 *NUJS Law Review* 201.
[123] Paranjoy Guja Thakurta and Shinzani Jain, *Thin Dividing Line: India, Mauritius and Global Illicit Financial Flows* (Penguin Random House India, 2017), p.57.

> as low as possible and that he is not bound to choose that pattern which will replenish the treasury."[124]

A very important element of tax planning is the role of DTAAs.[125] The following sections examine how DTAAs intersect with domestic tax law and empower MNEs to reduce their tax liability.

(a) The overriding effect of DTAAs

Double taxation results from an overlap of the source and residence rules of taxation.[126] When a company accrues income in multiple jurisdictions, the home country might tax this income based on the residence rule, while the country where the income is accrued can rely on the source rule to determine its tax liability.[127] Such a situation, where two countries attempt to tax the same income, is referred to as juridical double taxation.[128] To overcome this issue, countries enter into "bilateral agreements between pairs of countries in which the two countries set out how they will eliminate double taxation on their residents with respect to income or gains derived in the other country".[129] These agreements are referred to as DTAAs, and their principal role is to limit the taxing power of a jurisdiction or to divide the taxes between different jurisdictions.[130] These limits are decided by means of a bargain between the contracting countries.[131]

To avoid instances of double taxation and to promote bilateral trade and investment, section 90 of the 1961 Act empowers the Central Government to enter into DTAAs. The government can enter into a DTAA with a view to promoting mutual economic relations, trade and investment and for the avoidance of double taxation of income.[132]

DTAAs function as an "alternate rather than an exception to a domestic tax system".[133] While different countries have different procedures to resolve any possible inconsistencies between DTAAs and domestic tax law, the Indian tax regime has enacted a special procedure under section 90 of the 1961 Act.[134] In case of an inconsistency between the DTAA and the domestic law, the law of the DTAA overrides the mandate of the domestic law.[135] Explaining this inconsistency, the Calcutta High Court held:

> "The correct legal position is that where a specific provision is made in the Double Taxation Avoidance Agreement, that provision will prevail over the general provision contained in

[124] *Vodafone* (2012) 6 SCC 613 (Supreme Court of India) at 733; see Gautam, "Tax Avoidance Jurisprudence in India: Questioning the Traditional Narrative" (2019) 5 *NLS Business Law Review* 1.
[125] See Agarwal and George, "Use of the Corporate Vehicle for Tax Planning: The Vodafone Case and Direct Taxes Code — NUJS Law Review" (2010) 3 *NUJS Law Review* 201, 212–213.
[126] Oats and Mulligan, *Principles of International Taxation*, 7th edn (2019), pp.95–96.
[127] Oats and Mulligan, *Principles of International Taxation*, 7th edn (2019), pp.95–96.
[128] Oats and Mulligan, *Principles of International Taxation*, 7th edn (2019), p.96.
[129] Oats and Mulligan, *Principles of International Taxation*, 7th edn (2019), p.96.
[130] Klaus Vogel, "Double Tax Treaties and Their Interpretation" (1986) 4 *International Tax and Business Law* 1, 8.
[131] Kumar, "Making International Tax Law: Analysing Tax Jurisprudence in India" in Burra and Babu (eds), *Locating India in the Contemporary International Legal Order* (2018), pp.71–77.
[132] *Toyota Kirloskar Motor (P) Ltd v Union of India* 2019 SCC OnLine Kar 3488.
[133] Nuggehalli, *International Taxation: The Indian Perspective* (2020), "Overview of Indian Legislation Regarding International Taxation", p.9.
[134] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1.
[135] Income Tax Act, 1961 s.90(2).

the Income Tax Act, 1961….Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provisions of the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law i.e., the Income Tax Act, that will govern the taxation of income."[136]

Thus, where the terms and provisions of a DTAA are more advantageous to an assessee, the DTAA shall prevail.[137] Given these characteristics, DTAAs present an opportunity for tax planning and avoidance.[138] The next section examines how the Indo-Mauritian DTAA has become a fertile ground for tax planning.

(b) The case of the Indo-Mauritian DTAA

India and Mauritius share a long history of social, ethnic, cultural and military ties dating back to the 1730s.[139] Mauritius was India's third highest contributor of equity inflow in the financial year 2021–22, contributing 15.98 per cent of India's global FDI inflows.[140] For 2022, the projected FDI from Mauritius is over US$9.4 billion, an increase from US$5.6 million in 2021[141] and up from US$3.6 billion in 2014.[142] Between April 2000 and September 2016, Mauritius was the largest contributor of India's inward FDI: US$95,909 million, 33.24 per cent of total inflows in India.[143]

One of the most significant reasons[144] for such generous inflows from Mauritius is the DTAA that was signed between the two countries in 1982. The DTAA follows the OECD Model Treaty framework. Article 13(4) of the Indo-Mauritian DTAA, similar to article 13(4) of the OECD

[136] *Commissioner Of Income-Tax v Davy Ashmore India Ltd* 1991 190 ITR 626 Cal.

[137] *Toyota Kirloskar Motor (P) Ltd v Union of India* 2019 SCC OnLine Kar 3488; *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1; also see *Shiva Kant Jha v Union of India*, 2009 SCC OnLine Del 3643; *CIT v PVAL Kulandagan Chettiar* (2004) 6 SCC 235.

[138] The legislature can overrule the mandate of s.90. Income Tax Act, 1961 s.94A, allows the Central Government to designate any country or area as a *notified jurisdictional area*. Such a notification results in adverse tax consequences; *T Rajkumar v UoI* MANU/TN/0524/2016; Ajay Kr Sharma, "How to Axe a Double Taxation Avoidance Agreement: Analysing Section 94A of the Indian Income Tax Act" (2016) 44 *Intertax* 838.

[139] For more details see Thakurta and Jain, *Thin Dividing Line: India, Mauritius and Global Illicit Financial Flows* (2017), Ch.3.

[140] Press Trust of India, "Manufacturing Sector Gets $21 Billion Foreign Direct Investment in FY22" (28 July 2022) *Outlook India*, *https://www.outlookindia.com/business/manufacturing-sector-gets-21-billion-foreign-direct-investment-in-fy22-news-212533* [Accessed 1 February 2023].

[141] Reserve Bank of India, *Annual Report 2021–22* (Reserve Bank of India, 2022), *https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR2021226AD1119FF6674A13865C988DF70B4E1A.PDF* [Accessed 1 February 2023], p.295.

[142] Reserve Bank of India, *Annual Report 2021–22* (Reserve Bank of India, 2022), *https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR2021226AD1119FF6674A13865C988DF70B4E1A.PDF* [Accessed 1 February 2023], p.224.

[143] Department for Promotion of Industry and Internal Trade, *Fact Sheet on Foreign Direct Investment From April 2000 to March 2016* (Ministry of Commerce and Industry, Government of India, 2016), *https://dpiit.gov.in/sites/default/files/FDI_FactSheet_JanuaryFebruaryMarch2016.pdf* [Accessed 1 February 2023].

[144] For other probable reasons see Zisha Rizvi and Rekha Panchal, "Inward Foreign Direct Investment in India" (2016) 3 *Court Uncourt* 24; also see Thakurta and Jain, *Thin Dividing Line: India, Mauritius and Global Illicit Financial Flows* (2017), Ch.3.

Model, confers the right to tax capital gains only on the resident jurisdiction[145] which creates an interesting situation because the domestic tax law of Mauritius does not tax capital gains.[146] Commenting on the Indo-Mauritian DTAA, the Comptroller and Auditor General of India pointed out that the treaty had "…led to the establishment of conduit companies in Mauritius through which investors of third countries routed their investment".[147]

Scholars have sometimes referred to the Indo-Mauritian DTAA as a "No Taxation Agreement".[148] Given the advantages offered by the treaty, Mauritius becomes an obvious choice for companies to invest in India to save substantial taxes on capital gains.[149] While the Indian Government attempted to renegotiate certain important terms of the treaty in 1995–96[150] and again in 2008,[151] the treaty could not be amended owing to push-back from the Mauritian Government.

The resultant "treaty shopping"[152] and the routing of capital investments in India through Mauritius have been the subject of considerable political and judicial disagreement. In 2002, the Delhi High Court ruled to nullify the protection afforded by the treaty.[153] On appeal, the Supreme Court opined that:

> "Developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide them. The loss of revenues could be insignificant compared to the other non-tax benefits from the treaty…This Court cannot adjudge the legality of treaty shopping merely because one section of thought considers it improper."[154]

Overruling the Delhi High Court's decision, the Supreme Court indicated its favour of treaty shopping and tax avoidance mechanisms.[155]

[145] Central Board of Direct Taxes, Clarification regarding agreement for avoidance of double taxation with Mauritius, Circular No.682 (Issued on 30 March 1994).

[146] Urmila Barnymandhub Bodell, "Mauritius Offers Access to India" (1996) 7 *International Tax Review* 47; Thakurta and Jain, *Thin Dividing Line: India, Mauritius and Global Illicit Financial Flows* (2017), Ch.3; Ashrita Prasad Kotha, "The Mauritius Route: The Indian Response" (2017) 62 *St Louis University Law Journal* 203, 205–207.

[147] Karan Gulati and Shubho Roy, "Measuring Tax Treaties: Why India Gets Investment from Mauritius" (Springer, 2021), p.8; Joint Committee on Stock Market Scan and Matters Relating Thereto, *Report of the Joint Committee on Stock Market Scam and Matters Relating Thereto, Volume 1* (Lok Sabha Secretariat, 2002) C.B. No.462 179–182.

[148] Thakurta and Jain, *Thin Dividing Line: India, Mauritius and Global Illicit Financial Flows* (2017).

[149] Nirav Shah, "Why Invest in India through Mauritius" (2003) 14 Int'l Tax Rev. 20.

[150] Gulati and Roy, "Measuring Tax Treaties: Why India Gets Investment from Mauritius" (2021); Joint Committee on Stock Market Scan and Matters Relating Thereto, *Report of the Joint Committee on Stock Market Scam and Matters Relating Thereto, Volume 1* (Lok Sabha Secretariat, 2002) C.B. No.462 179–182.

[151] Kotha, "The Mauritius Route: The Indian Response" (2017) 62 *St Louis University Law Journal* 203, 208.

[152] See Maarten van't Riet and Arjan Lejour, "Profitable Detours: Network Analysis of Tax Treaty Shopping" (2015) 108 *Proceedings. Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association* 1; Kumar, "Making International Tax Law: Analysing Tax Jurisprudence in India" in Burra and Babu (eds), *Locating India in the Contemporary International Legal Order* (2018), pp.140–141.

[153] *Shiva Kant Jha v Union of India*, 2009 SCC OnLine Del 3643. See K.R. Girish, "Delhi High Court Blocks Mauritius Tax Relief" (2002) 13 *International Tax Review* 35.

[154] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1 At [135].

[155] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1 at [135]. Kumar, "Making International Tax Law: Analysing Tax Jurisprudence in India" in Burra and Babu (eds), *Locating India in the Contemporary International Legal Order* (2018), pp.71–77, 144, 145. After the latter, the courts in India are now free to support any action that enables the inflow of investments, including treaty shopping through tax havens.

After the Supreme Court's decision in 2004, the AAR noted that the Indo-Mauritian treaty created a situation of double non-taxation.[156] In 2012, the Supreme Court reaffirmed the validity of the *Mauritius Route* in *Vodafone*.[157] The reiteration of the tax planning/avoidance mechanisms by the Supreme Court points to the non-tax factors that play out in treaty negotiations.[158]

(c) Amendment to India-Mauritius DTAA and the status of IP assets

After an intense backlash following the decision in *Vodafone*,[159] article 13 of the Indo-Mauritian DTAA was amended in May 2016. The amended provision only applies to share capital and equity transactions.[160] All other property not specifically excluded from the scope of the residuary provision continues to be taxed exclusively by the residence state.[161] In effect, the amendments vest the right to tax capital gains from alienation of shares acquired on or after 1 April 2017, in the source jurisdiction.[162]

However, this position is limited to shares and equity transactions. Since article 13(4) of the Indo-Mauritian DTAA remains unamended, the right to tax capital gains from other assets, such as the sale of IP assets, would continue to be vested in the resident state.[163] Therefore, in the case of a Mauritius-based IP holding company, any sale of Indian registered IP assets would be delegated to Mauritius and enjoy double non-taxation as a result of the application of the DTAA.

The OECD in its Commentary on the Model Tax Treaty remained wary of this issue. The Commentary suggests that negotiating countries can include a "subject to" clause in their DTAA to avoid double exemption.[164] A subject to clause would mean that the DTAA shall only apply in respect of taxation of the capital gains if the resident jurisdiction taxes said capital gains. If the resident jurisdiction does not tax a capital gains transaction, the subject to clause would assume effect and the right to tax the income would not shift to the resident jurisdiction[165] thereby avoiding any instance of double tax exemption.

(6) Taxing cross border intellectual property assignments: discussion

The foregoing study of taxation of cross-border IP assignments reveals some important findings in relation to both India's domestic tax law and its international dimension. First, the decision of the Delhi High Court in *CUB Pty Ltd* and its subsequent approval in multiple judicial opinions reveals a glaring gap regarding the situs of IP assets within the Act of 1961. The lack of legislative

[156] *E*Trade Mauritius Ltd v DIT* 2010 SCC OnLine AAR-IT 20.
[157] *Vodafone* (2012) 6 SCC 613 (Supreme Court of India); Kumar, "Making International Tax Law: Analysing Tax Jurisprudence in India" in Burra and Babu (eds), *Locating India in the Contemporary International Legal Order* (2018).
[158] Kotha, "The Mauritius Route: The Indian Response" (2017) 62 *St Louis University Law Journal* 203, 213.
[159] Bhushan, "Legitimising Tax Avoidance" (2012) 47 *Economic and Political Weekly* 37.
[160] See Rajesh H. Gandhi, et al., "Changes to India-Mauritius Tax Treaty Affect Investors" (2016) 34 *Journal of Taxation of Investments* 101.
[161] Kotha, "The Mauritius Route: The Indian Response" (2017) 62 *St Louis University Law Journal* 203, 212–214.
[162] Indo-Mauritian DTAA art.13(3A); art.13(3B) read with art.27A.
[163] Kotha, "The Mauritius Route: The Indian Response" (2017) 62 *St Louis University Law Journal* 203, 214.
[164] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD Publishing, 2019), *https://doi.org/10.1787/g2g972ee-en* [Accessed 1 February 2023], C(13)-1-C(13)-17.
[165] Reimert, "Article 13: Capital Gains" in Alexander Rust and Ekkehart Reimert, *Klaus Vogel on Double Taxation Conventions* (2022), Vol.1, p.1445.

guidance or guidance from the Supreme Court, coupled with the continued reliance on an arguably antiquated common law doctrine can lead to inconsistent and potentially undesirable results. The legislature might wish to review the position in law that has been created by judicial interpretation and consider either approving or denouncing the approach taken to promote uniformity and clarity.

Secondly, while the Indo-Mauritian DTAA is consistent with the OECD's Model Treaty, it creates a potential for double non-taxation. The 2016 amendments to the DTAA have dealt with an important aspect of the issue, however several other aspects remain unresolved. This article highlights that the situation concerning the taxation of capital gains arising from the sale of Indian IP assets owned in Mauritius remains unresolved.

Given the judicial decisions and the mandate of the legislature, it can be concluded that the issue of *double non-taxation* remains unresolved in relation to the Indo-Mauritian DTAA. However, there is disagreement as to how the Indian tax administration should deal with this problem.[166] Some scholars suggest that:

> "Emerging economies such as India cannot afford to lose tax revenue from tax evasion as these could be used to help address the myriad social and environmental problems at this stage of its (India's) development."[167]

This argument is buttressed by the aggressive approach taken by India's tax administration in expanding its tax base.[168] The amendment of the DTAA with Mauritius and Cyprus,[169] the enforcement of General Anti-Avoidance Rules,[170] the use of tax information exchange agreements to uncover potential revenue concealed in tax havens,[171] aid the arguments in favour of tapping the revenue lost to double tax exemptions.

Alternatively, others argue and even the Indian judiciary tends to agree that treaty shopping can sustain a continued inflow of FDI in India and is a necessary evil.[172] Therefore, it is possible

[166] Thakurta and Jain, *Thin Dividing Line: India, Mauritius and Global Illicit Financial Flows* (2017): "While certain experts consider the arrangement to have helped in the development of both countries, others have been fiercely and persistently critical of this covert arragement, believing that there is a clandestine nexus of lawmakers, and law keepers and lawbreakers working for the advancement of vested interests of a powerful view."

[167] Mukundhan, Sahasranamam and Cordeiro, "Corporate Investments in Tax Havens: Evidence from India" (2019) 18 *Asian Business & Management* 360, 366; also see Justin Robertson, "India's Offshore Pivot: The Implications of a Tougher Approach towards Mauritius" (2019) 25 *Contemporary Politics* 236.

[168] Robertson, "India's Offshore Pivot: The Implications of a Tougher Approach towards Mauritius" (2019) 25 *Contemporary Politics* 236, 250, 251.

[169] Press Trust of India, "India-Cyprus DTAA from April, Mauritius to Remain Preferred Route" (16 December 2016) *Business Standard India*, *https://www.business-standard.com/article/economy-policy/india-cyprus-dtaa-from-april-mauritius-to-remain-preferred-route-116121600336_1.html* [Accessed 1 February 2023].

[170] Nuggehalli, *International Taxation: The Indian Perspective* (2020), "Overview of Indian Legislation Regarding International Taxation", Ch.2; Jay Shah, Vishal Gada and Zeel Jambuwala, "Inbound Investment into India: Assessing the Impact of GAAR and the MLI" (19 May 2021) *International Tax Review*, *https://www.internationaltaxreview.com/article/2a6a8rd5b6b1ymm5je0ao/inbound-investment-into-india-assessing-the-impact-of-gaar-and-the-mli* [Accessed 1 February 2023].

[171] Vrishti Beniwal, "India to Blacklist Tax Havens Not Sharing Info" (27 June 2013) *Business Standard India*, *https://www.business-standard.com/article/economy-policy/india-to-blacklist-tax-havens-not-sharing-info-113062600802_1.html* [Accessed 1 February 2023].

[172] *Union of India v Azadi Bachao Andolan* (2004) 10 SCC 1; for an analysis of the case see Eduardo A. Baistrocchi, "The Use and Interpretation of Tax Treaties in the Emerging World: Theory and Implications" [2008] B.T.R. 352.

that there are significant non-tax incentives involved in allowing treaty shopping and taking an overly formalistic view of the subject may not be possible.[173]

Hence, owing to the significant divergence of opinion regarding treaty shopping and the resultant double non-taxation, it is difficult to argue in favour of further amendments to the Indo-Mauritian DTAA. The issue of tax exemption is based in public policy and any decision relating to this issue should not be taken formalistically. Therefore, as a public policy taxation measure, it is imperative that further research is undertaken to examine how the issue of cross-border IP assignment should be regulated in the Indo-Mauritian and other DTAAs.

[173] Reuven Avi-Yonah and Christiana Panayi, "Rethinking Treaty-Shopping: Lessons for the European Union" (2010) Law & Economics Working Papers 8–11, *https://repository.law.umich.edu/law_econ_current/art7* [Accessed 1 February 2023].