“AB” Mauritius (the Applicant) filed an application requesting an advance ruling on taxability of capital gains arising on transfer of shares held in ‘AB’ India to its subsidiary company, ‘AB’ Singapore. The Application was admitted by the AAR keeping the question of tax avoidance open.

2. As per the details accompanying the application and subsequent submissions, the facts of the case are stated to be as under:

2.1 The Applicant is a company incorporated in Mauritius in 2003, having its registered office at Mauritius and is a Mauritius tax resident, holding Category 1 Global Business License. It has a Tax Residency Certificate granted by the Mauritius tax authorities.

2.2 The Applicant is a part of “C” Equity Portfolio’ and “C” Affiliates Fund LP (‘C’ Group) , which cumulatively hold 79.62% shares of the
Applicant and the balance 20.38% shares are held by other individual investors. It’s business activities are carried on from Mauritius and managed by its Board of Directors. The sole purpose of its incorporation was to invest in the ‘S’ sector in India and other Asian markets. For acquiring the shares in ‘AB’ India, it had obtained regulatory approvals from FSC in Mauritius and FIPB in India. FIPB in its approval clearly states that the Applicant is 99% shareholder of ‘AB’ India. In the regulatory filings in Mauritius in July 2003, it was specifically stated that the Applicant will initially hold investments in ‘AB’ India.

2.3 It acquired 2,011,482 shares in ‘AB’ India for an amount of USD 380,160 from ‘AB’ Inc. and ‘US’ Inc. USA (Sellers). These were acquired by the Applicant vide Stock Purchase Agreement (SPA) dated 10 November 2003, and since then the Applicant has been holding the shares legally and beneficially, and enjoying all shareholder rights, including dividends. The SPA was executed by Mr. ‘S’, as an authorized signatory, representing the promoter group and being fully authorized by the Board of Directors of the Applicant. The Applicant submitted a letter from the Board of Directors clarifying and evidencing the authority of Mr. ‘S’ to execute the SPA on behalf of the Applicant. These shares were taken over along with a liability which the sellers had payable to the ‘C’ Group as per the loan agreement dated 30 November 2003. This liability was discharged by the Applicant over a period of time, as seen in its financial statements.

2.4 Pursuant to the aforesaid transaction, the Applicant became the owner of the shares of ‘AB’ India and agreed to repay the loan owed by the Sellers to ‘C’ Group, which represents fair and just compensation for the shares acquired. These are recorded in its financial statements for the period ending 30 June 2004, as under:
<table>
<thead>
<tr>
<th>Liability</th>
<th>Amount (USD)</th>
<th>Assets</th>
<th>Amount (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loans from shareholders (for investment)</td>
<td>380,160</td>
<td>Investment in subsidiary</td>
<td>380,160</td>
</tr>
<tr>
<td>Loan from shareholders (for other business purposes)</td>
<td>6,674</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2.5 The Applicant made further investment from time to time as mentioned below:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Number of shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Share purchase on 1 Dec. 2003</td>
<td>2,011,482</td>
</tr>
<tr>
<td>Share purchase on 25 March 2007</td>
<td>636,855</td>
</tr>
<tr>
<td>Buy back of shares on 6 May 2009</td>
<td>(486,090)</td>
</tr>
<tr>
<td>Total shares</td>
<td>2,162,247</td>
</tr>
</tbody>
</table>

It submits that it had made substantial follow-on investments amounting to USD 930,105 in 25 March 2007 in ‘AB’ India and acquired additional equity shares, bringing its final share holding to 2,162,247 shares in ‘AB’ India. It received dividends amounting to USD38,35,584 over a period of time, after payment of dividend distribution tax in India by ‘AB’ India, which was utilized for its business activities, as per the directions and decisions made by its Board of Directors.
2.6 The investment in ‘AB’ India has been shown in the audited financial statements of both the Applicant and ‘AB’ India since the time of investment. The Annual Accounts of ‘AB’ India for the year ended 31 March 2004 give the following note for the change in shareholding:

“In December 2003, ‘AB’ Inc. USA and ‘US’ Inc. USA sold their equity investment in ‘AB’ India to ‘AB’ Mauritius and its holding company ‘C’ Equity Portfolio II L.P. Pursuant to the above, the company has become the ultimate subsidiary of ‘C’ Equity Portfolio II L.P. effective from December 2 2003.”

2.7 The acquisition of shares by the Applicant has been in the knowledge of the various regulatory authorities including FIPB, RBI and the Income-tax authorities in India and Mauritius. Further, during the course of ‘AB’ India’s assessment proceedings for various years, time and again the income tax authorities have requested for details of shareholding pattern of the Applicant.

2.8 ‘AB’ India, in the year 2009-10 had done a buy-back of shares, wherein the Applicant offered 486,090 shares under the buy-back offer and the gains on such buy-back was considered as exempt under the India – Mauritius Tax Treaty. The information of buy back was called by the Income tax authorities, including the tax treatment for the same, and tax exemption to the Applicant as per the India – Mauritius treaty was accepted.

2.9 The Applicant submits that as part of the corporate strategy of the Group, to support its business in the Asia – Pacific region in the medium to long term, and to obtain operational and cost benefits from centralizing
the ownership of investments and operations in Asia – Pacific region, a regional headquarters in Singapore was proposed. Pursuant to filing the application, ‘AB’ Singapore was incorporated on 23 August 2011. The group re-organization has the following objective:

a) ‘AB’ Singapore shall function as a regional headquarters of the Group for the entire Asia-Pacific region covering India, Singapore, Thailand, Vietnam, Philippines and Indonesia; b) Function as a research and development centre for the group in the Biotech Park Singapore to perform research on field and vegetable crops; c) Undertake the business of promoting, marketing and trading in hybrid ‘S’; and d) Acting as an investment holding and management company for the Group in Asia-Pacific region;

2.9.1 Keeping in view the above objectives, the Group and ‘AB’ Singapore have invested substantial amount in Singapore (more than USD 3 million) since its inception, including a state of art biotechnology lab in Singapore and hired specialist scientist to run the lab.

2.9.2 In order to achieve the above objective, the Applicant proposed to transfer the shares held in ‘AB’ India to ‘AB’ Singapore, a subsidiary of the Applicant. For the purpose of ascertaining the availability of the tax exemption under the DTAA the application was made before the Hon’ble AAR for the proposed transfer on 13 September 2011. Ultimately the shares were transferred by the Applicants to its subsidiary in Singapore on 30 March 2012. The shares of other group companies were also transferred to ‘AB’ Singapore in exchange of shares to achieve the objective.
2.10 Thus, prior to the transfer of shares to its subsidiary, the Applicant has held the shares of ‘AB’ India for a period of 9 years, and thereafter, through ‘AB’ Singapore for a further period of 3 years. By virtue of transferring the shares to ‘AB’ Singapore, the Applicant’s objective was not to earn any gains or earn immediate financial gains. The restructuring was solely motivated by business and commercial reasons. Furthermore, post the restructuring, ‘AB’ India continued to carry on its business activities in India.

3. On the above facts, as submitted by the Applicant, the following Questions on which advance ruling is sought, have been framed and which form part of the application:

   I. Whether on the facts and circumstances of the case, the Applicant will be entitled to the benefits of the Agreement between the Government of Mauritius and the Government of the Republic of India for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and capital gains (“the India-Mauritius tax treaty”)?

   II. If the answer to Question 1 is in the affirmative, whether on the facts and circumstances of the case, the gains arising to the Applicant from the proposed sale of shares in ‘AB’ India (“AB’ India”) to a Group Company (“Transferee”) would not be liable to tax in India having regard to the provisions of Article 13 of the India-Mauritius tax treaty?

   III. If answer to Question 2 is in affirmative i.e. holding that the gains arising from the proposed sale of shares by Mauritian company are not chargeable to tax in India, whether there will be any obligation to withhold tax under section 195 of the Income Tax Act, 1961?
IV. If answer to Question 2 is in affirmative i.e. holding that the gains arising from the proposed sale of shares by Mauritian company are not chargeable to tax in India, whether the transfer pricing provisions of section 92 to section 92F of the Act will apply?

V. Whether on the facts and circumstances of the case the Applicant will be liable to tax under the provisions of section 115JB of the Act in relation to income earned from the proposed transaction?

4. Further to the above, the Applicant has summarized its question-wise arguments as under:

4.1 In respect of Question I, that it is a company incorporated and a tax resident of Mauritius, which is evidenced by the certificate of incorporation issued by the Mauritius authorities. Hence, it is entitled to the benefits under the India-Mauritius Double Taxation Avoidance Agreement (DTAA). It holds a valid TRC issued by the Mauritius tax authorities, which serves as sufficient evidence of its residence in Mauritius and entitled to benefits under the DTAA, which has been upheld in the following rulings: UOI v Azadi Bachao Andolan 263 ITR 706, (SC); CIT v. P. V. A. L. Kulandagan Chettiar 267 ITR 654 (SC); Circular 789, dated April 14, 2000, Circular 728 dated October 30, 1995, and Circular 333, F. No. 506/42/81-FTD, dated April 2, 1982.

4.2 In respect of Question II, it is stated that being eligible to avail benefits under the DTAA, by virtue of Article 13(4) of the DTAA read with section 90(2) of the Act, capital gains earned by the Applicant from transfer of shares of ‘AB’ India would not be liable to tax in India, in view of the following: UOI v Azadi Bachao Andolan, 263 ITR 706 (SC); Serco
BPO Private Limited vs AAR, CWP No.11037 of 2014; Dow Agri Sciences Agricultural Products Ltd, AAR No. 1123 of 2011; JSH Mauritius Ltd, AAR No.995 of 2010, which has been subsequently upheld by the Hon’ble Bombay High Court, Writ Petition No.3070 of 2016; Mahindra Investment Company (Mauritius) Ltd, AAR No. 991 of 2010; Shinsei Investment Limited, AAR No. 1017 of 2010; and CBDT circular No. 682, dated March 30, 1994.

4.3 In respect of Question III, the Applicant contends that since the gains on transfer of shares is not taxable in India, the consideration received by the Applicant would not be subject to any withholding tax as per section 195 of the Act. It relies on the decision of Supreme Court in case of GE India Technology Centre (P) Ltd vs CIT, 327 ITR 456(2010), and Transmission Corporation of AP Ltd and Another vs CIT, 239 ITR 587(1999); recent rulings of the Hon’ble AAR in case of JSH Mauritius Ltd, Dow Agri and Shinsei.

4.4 In respect of Question IV, that sale of shares by the Applicant would not give rise to any tax incidence in India and hence the transfer pricing provisions contained in section 92 to section 92F of the Act would not apply to the proposed transaction. The Applicant relies on the decision of the Bombay High Court in Vodafone India Services Private Ltd., 368 ITR 1, Shell India Markets Private Ltd., Hon’ble AAR ruling in case of Hershey, AAR No. 1470 of 2013, and Dow Agri.

4.5 In respect of Question V, with regard to application of section 115JB of the Act on the subject transaction, the Applicant contends that the provisions of the said section shall not be applicable as per the retrospective amendment to section 115JB by Finance Act, 2016, and relies on the Supreme Court ruling in cases of Castleton Investments
Limited, Dow Agriand Shinsei (supra) and the press release issued by Government dated 24 September 2015.

5. The Revenue, represented by Sri G C Srivastava, Special Counsel, has submitted detailed reports in the context of the details filed with the Application, as also in response to its subsequent contentions and defence, as filed and argued during the course of these proceedings. The same are, as under:

5.1 It is submitted by Revenue that in this case the preliminary question is whether the applicant is entitled to the benefits of the India-Mauritius tax treaty, and it needs to be ascertained whether the applicant had made any investment in India and whether the capital gains on the transaction arose to it in terms of the DTAA, that is whether the applicant owns the shares on which the gains arose.

5.2 Revenue states that the shares of the Indian company came to be held in the name of the Mauritian applicant through the Stock Purchase Agreement of November 2003. The ‘C’ Group, i.e., ‘C’ Equity Partners II, LLP and ‘C’ Affiliates Fund, US, together acquired from ‘AB’ Inc. USA, and ‘US’ Inc. USA, a total of only 20,318 shares in the Indian company, being 1% of the shareholding, while it has forgone its total debt of USD 362,995 plus USD 21,005, i.e. USD 3,84,000, as a consideration for the same. On the other hand, the Applicant has acquired 2,011,482 shares in the Indian company, being 99% of the shareholding, without paying any amount whatsoever, as consideration. Thus, the shares were transferred by the two US entities to ‘C’ Equity partners and ‘C’ Affiliates, also US entities, against the cancellation of the entire loan payable by the two US entities. It was thus a transaction between two sets of US entities.
5.3 Revenue has submitted that the Applicant had no role in the above transaction. Its name was only interposed in the agreement. Neither the preamble nor any clause in the Share Purchase Agreement makes any reference to the role of the applicant as a buyer. The US entities transferred the shares in consideration of the loans being cancelled by ‘C’ Equity and ‘C’ Affiliates. It is mentioned in the agreement that the shares were transferred to the entities which paid the consideration by way of cancellation of the liabilities, i.e. ‘C’ Equity and ‘C’ Affiliates.

5.4 It is further submitted that the agreement was signed by Mr. ‘S’ in November 2003, on behalf of the applicant in the capacity of its Chairman. However, it is seen that he was taken on the Board of the Applicant only on 23 August 2005. As on the date of the agreement he was only Managing Director and principal investor in ‘C’ Affiliates Fund of companies for the entire loan, and not the Chairman of the applicant company.

5.5 Revenue states that Mr. ‘S’ had absolutely no authority to sign on behalf of the applicant company. In 2016 the applicant submitted a letter declaring Mr. ‘S’ was authorized to sign. No minutes of the meetings of the Board of the applicant company have any indication that he was acting then as a representative of the applicant company.

5.6 It is submitted that there is no indication in the agreement that the Applicant either paid any consideration to the selling US entities or it took over the loans advanced by ‘C’ Entities of the US. There was also no mention of any consideration flowing from the Applicant to the ‘C’ Group in the Share Purchase Agreement or in the application before the Hon’ble AAR.
5.7 There is also no material to show that the Mauritian applicant at any stage took any decision to invest in the Indian company or to purchase the shares from the US entities, or that it was involved in the process of such decision-making.

5.8 It is not Revenue’s contention that the applicant is not a resident of Mauritius and therefore not entitled to treaty benefits. Its contention is that before granting such treaty benefits to a Mauritian company, it has to be ascertained that this company was in substance holding the investment on its own account.

5.9 Revenue further contends that the minutes of the meeting of the Board of Directors of the applicant held on 22 December 2004, show that evenone year after the acquisition of shares of the Indian company, the Board of Directors of the Applicant was not even aware of the investment held in its name.

5.10 Referring to above Clause 4 of the minutes, with reference to the acquisition of Equity shares in ‘AB’ India, it is stated that “.....Mr. ‘S’ informed the Board that following the re-organization of the group, of which the Company formed part, that the company has on 10 November 2003, acquired 2,011,482 equity shares in ‘AB’ India, as also about the Stock Purchase Agreement, giving details of the acquisition. As per Clause 4.2, the Board took note of the business activities of ‘AB’ India which included...... .Per Clause 4.3, following a question raised by the Chairman on the profitability of ‘AB’ India, Mr. ‘S’ advised.......and per Clause 4.4, it was resolved to ratify the acquisition by the company of 2,011,482 equity shares of ‘AB’ India and execution of the aforesaid Stock Purchase Agreement by Mr. ‘S’... . It was agreed that any future investments in ‘AB’ India would be considered and approved by a Board
meeting duly convened for that purpose. Clause 4.5 shows that the Chairman enquired on the financing of the aforesaid acquisition of 2,011,482 equity shares. Mr. ‘S’ advised the Board that ‘AB’ Inc. originally owed………………further stated that on the closing date of the above-mentioned acquisition, the principal amounts of USD 362,995 and USD 21,005 had been cancelled by ‘C’ Equity Partners II, LP and ‘C’ Affiliates Fund respectively, in exchange for the 2,031,800 equity shares that ‘AB’ Inc., directly and indirectly holds in ‘AB’ India. Pursuant to the aforesaid Stock Purchase Agreement, out of the aforesaid 2,031,800 equity shares acquired in ‘AB’ India, 2,03,142 equity shares were acquired for and on behalf of the company and 20,318 equity shares were acquired on behalf of ‘C’ Equity Portfolio LP, a group company……. “

5.11 Thus, the applicant company had no knowledge of any such acquisition of the shares standing in the name of their company, prior to this date, and this fact exposes the falsity of the declaration in the agreement that Mr. ‘S’ had at all signed on behalf of or under the authority of the applicant company. A copy of the Stock Purchase Agreement was tabled, for the first time, for the Board’s perusal, at this meeting.

5.11.1 These minutes, recorded by the company, show that the applicant’s assertion that it took over the liabilities of US entities or that it invested in the Indian company on their own account was false. These minutes also show that it was agreed that any future investment in the Indian company would be considered and approved by a Board meeting. The minutes also record that the amount of investment has already been shown as a loan advance to the applicants by the parent company and the applicant company was advised to give a similar treatment of the
amount in the books of accounts. The Board of Directors ratified the acquisition and the advancement of loan to the applicant. The minutes also state that the shares were acquired as a result of the re-organization of the group. In these circumstances, the shares could not be said to be held by the applicant company for or on its own account.

5.12 It is reiterated that Mr. ‘S’ was appointed as a Director of the applicant on 23 August 2005 long after the signing of the agreement. As on the date of the Stock Purchase Agreement, he had no authority to bind the applicant in any agreement. He was actually the MD of the ‘C’ Group since 1995 and was so at the time of signing of the Stock Purchase Agreement.

5.13 Revenue submits that another important factor to decide the genuineness or otherwise of holding of investment is the consideration flows between the contracting parties. In the present case the ‘C’ Group has foregone its receivables from ‘AB’ Inc. USA, for acquiring the shares of the Indian company in the name of the applicant. But the real question is whether the applicant has paid any consideration to ‘AB’ Inc. or the ‘C’ Group for acquiring the shares. There is no mention of any consideration being payable by the applicant in the Stock Purchase Agreement or in the application filed by the applicant. The entire consideration has been paid by the ‘C’ Group and hence the applicant was not a legitimate owner of the shares.

5.14 It is stated that in April 2016 the applicant has filed a Loan Agreement dated 30 November 2003 before the Hon’ble AAR as per which the ‘C’ Group and the Directors had given a loan in the aggregate of USD 380,160 to the applicant. The Applicant has contended that taking up this fresh loan was the consideration payable by the applicant.
This appears to be highly suspicious, because the Stock Purchase Agreement contained reference to all the considerations but has no reference to this loan agreement, it does not mention anywhere that the loan relates to the subject transaction, the agreement was submitted much after the absence of consideration was questioned in these proceedings, and most importantly the minutes of the meeting of 22 December 2004 show that enquiry regarding financing of the shares was being made by the Directors, and Mr. ‘S’ only informed them about the cancellation of the loan and advised its ratification and accounting for in its books. It was then that the loan was ratified by the Board of Directors. If the loan was genuinely taken, there would be no cause or occasion for such ratification.

5.15 Thus it is obvious that it was the ‘C’ Group which had actually invested in the Indian company and provided consideration for such acquisition by surrendering their rights in the outstanding loans to the other two US entities which originally held the shares. The applicants only lent their names to these investments at a later time through a ratification and did not hold the investment on their own behalf but for and on behalf of the ‘C’ Group entities, as mere name lenders.

5.16 As regards, the submission of the business plan before the regulatory authorities in Mauritius, Revenue submits that the said letter is dated 7 July 2003 and was filed long before the incorporation of the applicant company and was therefore, obviously not signed or addressed by the applicant company. It only affirms that the company proposed to be incorporated would invest in India. It does not and cannot establish that such investment was really made by the Applicant.
5.17 As regards the application before FIPB in India, the same was made by the Indian company as seen in the approval letter. It is not a case before FIPB that the applicant company declared their intentions to invest in the Indian company. On 22 October 2003 when the application before FIPB was made, the share purchase agreement was not even entered into and there is nothing to indicate that the applicant would be investing in India for an on its own behalf or to the applicant company was aware of any such investment being made in the name.

5.18 Regarding the annual accounts, Revenue states that it will only reflect the apparent and not the real state of affairs. The annual accounts for the period closing in June 2004 were audited and filed in May 2005 nearly a year after the close, and long after the investment was ratified by the applicant in December 2004.

5.19 It is stated by Revenue that in view of the above stated position the transaction was prima facie for the avoidance of tax payable in India and since the investment was made by the US entities and the consideration having flowed from them, and the applicant too being only a name lenders, the capital gains would arise in the hands of the real investors and not the name lenders, because of which the Indo US DTAA would apply and not the Indo Mauritius treaty.

5.20 Revenue has referred to the case of Azadi Bachao Andolan, 263 ITR706, wherein the Hon’ble Supreme Court held that, a colourable device, as in the instant case, is impermissible tax avoidance. It is stated that seen in the background of the Vodafone case, 341 ITR 1, it would fall under the exception as the apex court held that the subsidiary which acts as a puppet in the hands of its parent has to be disregarded, as in
the instant case the applicant was merely a puppet and agreed to show the investment of the parent in its own name as a mere name lender.

5.21 Revenue has argued at length the importance of the subsidiary acting as a separate and independent entity, on which treaty law is based. It has referred extensively to the case of Vodafone International, to highlight that when the parent takes all decisions and actions for the subsidiary, the latter is reduced to a puppet and becomes ineligible for the benefits of the treaty with that state.

5.22 Revenue states that this is different from a case where the Mauritian company made the investment on its own, irrespective of the sources from which the funds were raised. In the present case the investment was made by the US entity, the consideration directly flowed from the US company and the applicant merely lent its name.

5.23 Revenue has cited the case of Aditya Birla Nuvo, 342 ITR 308 where the Hon’ble Bombay High Court held that there was no document on record to suggest that AT &T, Mauritius had agreed to subscribe/purchase the shares of JVC. Hence the payments made by AT&T, Mauritius could not be said to be payments for subscribing/purchasing the shares of the JVC in the name of AT&T, Mauritius. Mention has also been made of the cases of Ardex Investments Mauritius Ltd, (AAR 866 of 2010), Castleton investment Ltd AAR 999 of 2010, Dow Agri Sciences, AAR 1123 of 2011, as referred to by the applicant, to say that in all these decisions Revenue’s only argument for tax avoidance was the involvement of a Mauritian entity and unlike the present case, no peculiarity in the conduct of the group was demonstrated.
5.24 Revenue has cited the OECD, and para 22 of its commentary, to make a case for substance over form, and to say that States do not have to grant the benefits of a double taxation Convention with arrangements that constitute an abuse of the provisions of the Convention..... The UN has also subscribed to this view in its commentary at para 21 of Article 1.

5.25 It is pointed out that the passing of an adjustment entry in the books cannot be taken to reflect the actual transaction, particularly when the conduct of the parties and other evidence point to a different reality. A mere accounting entry without the actual flow of money must be made subservient to the actual transaction.

5.26 It is submitted that the form and the manner in which the actual transaction takes place is of paramount importance. The look at versus the look through test propounded by the Hon'ble Supreme Court in the case of Vodafone holds importance here. In this regard it is submitted that it is not the case of the revenue that ownership of the Indian shares cannot be of the applicant because the relevant documents do not exist. The point being highlighted is that what those arguments represent. In the instant case, if the Board of the applicant had convened a meeting before the purchase, decided to invest in India and had contributed the funds for making such an acquisition, Revenue could not have made a case against it. This would be so because in such a case the twin elements of intention to invest and contribution of consideration would both be attributable to the applicant. Tax treaties also envisage a subsidiary as an independent legal entity, different from its parent, even though controlled by it. The difference is between having the power and having a persuasive position.
5.27 Revenue has taken an alternative plea and contended that the transaction is squarely covered by the provisions of section 93 of the Act.

5.27.1 It is submitted that the applicability of sec 93 depends on four conditions, namely that there must be a transfer of assets, as a result of this transfer, either alone or in conjunction with associated operations, any income becomes payable to a non-resident; any person by means of such transfer acquires a right by virtue of which he has the power to enjoy the income of the non-resident person; and if the income had been the income of the said first mentioned person, it should have been chargeable to income tax. It is stated that in the present case all these four conditions were met. Hence the income arising to the Mauritian entity should be deemed to be the income of the US entity, the ‘C’ Group.

5.27.2 It is submitted that treaty provisions override the domestic law to the extent that there exists a conflict between the two. Such conflict is usually seen in the context of distribution of income sources between the countries. However in the case of treaty abuse, there does not exist any conflict between the domestic law and the treaty, and therefore the question of treaty override does not arise. It was further submitted that the correct import of the expression ‘any person’ has to be derived from the definition of the word in section 2 (31) of the act. It cannot be limited to a resident person.

6. In its written submissions and during the course of these proceedings, the Applicant, represented by Mr. Rajan Vora, CA submits that Revenue’s interpretation of the facts that Applicant is a name lender and benami is completely misplaced and inaccurate.
6.1 The Applicant submits that it is the legal and beneficial owner of the shares held in ‘AB’ India. The below given sequence of events would show that not only the Applicant was involved in the acquisition of the shares but the decision to acquire was also that of the Applicant:

<table>
<thead>
<tr>
<th>Date</th>
<th>Sequence of events</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 July and 10 July 2003</td>
<td>Submission of business plan and application to FSC are mandatory for incorporating a company in Mauritius. The application to the FSC and submission of business plan which clearly brings out the fact that the Applicant is being incorporated to invest in ‘S’ sector in India and other Asian countries and the initial investment would be made in ‘AB’ India.</td>
</tr>
<tr>
<td>10 August 2003</td>
<td>Incorporation of the Applicant</td>
</tr>
<tr>
<td>12 August 2003</td>
<td>Grant of Global Business License by the FSC pursuant to furnishing of the application and business plan</td>
</tr>
<tr>
<td>15 August 2003</td>
<td>Date of first Board of Directors meeting wherein the Board of Directors took on record the Global Business License granted by the FSC after considering the business plan, which specifically stated that the Applicant is being incorporated to hold shares in ‘AB’ India, along with other investments in ‘S’ sector.</td>
</tr>
<tr>
<td>22 October 2003</td>
<td>Date of FIPB approval, which clearly states that the Applicant will be the shareholder of ‘AB’ India.</td>
</tr>
<tr>
<td>November 2003</td>
<td>Post obtaining approvals from the regulatory authorities in India and Mauritius, SPA dated 10 November 2003 was entered to acquire the shares and the consideration for such acquisition was discharged by taking over a loan/ liability by loan agreement 30 November 2003 which the seller owed to the ‘C’ Group.</td>
</tr>
<tr>
<td>December 2003</td>
<td>The Applicant and ‘AB’ India records the acquisition of shares in its books of accounts. Shares were transferred in the name of the Applicant on 1 December 2003.</td>
</tr>
<tr>
<td>31 March 2004</td>
<td>The financial statements of ‘AB’ India for the period ending 31 March 2004 show the Applicant as the shareholder.</td>
</tr>
<tr>
<td>22 December 2004</td>
<td>The Board of Directors record the acquisition of shares and the loan taken over in detail. Further, it is important to note that the said Board</td>
</tr>
<tr>
<td>Date</td>
<td>Sequence of events</td>
</tr>
<tr>
<td>------</td>
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<tr>
<td></td>
<td>of Directors meeting minutes also reflect that the shares have been acquired for and on behalf of the Applicant.</td>
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6.2 The contention of the Revenue that the Board of Directors of the Applicant were not aware of the investment being made by the Applicant until the board meeting on 22 December 2004 is also not correct as the Board of Directors in their meeting on 15 August 2003 considered the GBL license granted by the FSC pursuant to the application and business plan submitted, which clearly mentions the intent to invest in ‘AB’ India. Relevant extracts of the board meeting minutes of 15 August 2003 are reproduced below

“The Chairman also reported that the Company has applied and was granted a Category 1 Global Business License by the Financial Services Commission on the 12th day of August 2003 which bears the reference ZX/04/000743.

The relevant extracts of the business plan are reproduced below:

‘AB’ Mauritius will be an Investment holding company for investments in ‘S’ sector in India and other Asian Markets. The company will initially hold investments in ‘AB’ India.

The beneficial owners of the proposed company are ‘C’ Equity Portfolio II, L.P., Mr. ‘BN’ and ‘C’ Affiliates Fund L.P.

6.3 The Applicant also states that the Revenue has misinterpreted the language of the application made to FSC and business plan to suggest that the investments are being held by the Applicant in the name of ‘C’ Group. In essence the actual meaning of the said statement is to incorporate a wholly owned subsidiary to act as an investment holding company for the Group, which is an accepted way of making investments
followed by several corporate. Support has been taken from the following cases:

In Vodafone International BV, 368 ITR 1(SC), it was held that:

“Setting up of a WOS Mauritius subsidiary/SPV by principal/genuine substantial long-term FDI in India from/through Mauritius, pursuant to the DTAA and circular no. 789 can never be considered to be set up for tax evasion.”

In Sanofi Pasteur Holding SA, W.P. 14212 of 2010, 3339 and 3358 of 2012 (AP) it was held that “creating wholly owned subsidiaries or joint ventures either for domestic or overseas investment is a well-established business/commercial organizational protocol; and investment is of itself a legitimate, established and globally well recognized business/commercial avocation.”

6.4 Regarding Revenue’s contention that no consideration has flowed from the Applicant to the sellers, it is stated that the shares in ‘AB’ India were acquired by the Applicant from the Sellers and the consideration for such acquisition was discharged by the Applicant by taking over the loan/liability which they owed to ‘C’ Group. Thereby, resulting in the Applicant acquiring an asset along with a liability. The Applicant submits that for a transaction to be genuine and the real owner being the recipient of shares, there is no requirement that there shall be actual flow of cash, as in barter system. Further, there is no specific provision in the Act which prohibits consideration other than cash. In the present context, the Applicant submits this is a similar situation, wherein the loan liability which was receivable by ‘C’ Group was now transferred from the Sellers to the Applicant, which was eventually paid by the Applicant through banking channels.
6.5 The Applicant submits that Revenue’s reliance on the cash flow statement which shows no inflow and outflow of funds for acquisition of shares and that the acquisition has been made by virtue of adjustment entry is misplaced and inaccurate. The acquisition of shares was done along with taking over a liability of the seller, which is the due consideration for such a transaction and the said transactions were effected through accounting entries (journal entries reflecting taking over of the loan/liability) and not by way of adjustment entries as envisaged by the Revenue.

6.6 As per the Applicant when the whole sequence of events is seen, including the conduct of the Applicant company in the subsequent years of investment, the fresh investments made, dividends received etc., it will be clearly seen that the intention of the Applicant was always to invest in ‘AB’ India. Considering the fact that shares have been transferred in the name of the Applicant and the same being recognized by the Indian company in December 2003, and since then it was known to income tax authorities and various other government authorities, the acceptance of the tax treatment at the time of acquisition and buy back, clearly reflect that the Applicant was the rightful owner of the shares since the beginning.

6.7 The Applicant states that the understanding of the parties with respect to the transaction is important and it is left open to the parties involved to document in the manner they commercially see fit. In the current context, the Applicant, the sellers and the ‘C’ Group agreed and decided to enter into two separate agreements – one for acquisition of the shares and second for availing a loan, but in essence the same were linked by virtue of the understanding between the parties. Further, the Applicant highlights the fact that the loan agreement specifically mentions
that the loan is being given for the purpose of an investment of fixed amount.

6.8 It is further submitted that the six additional individuals who are reflected as party to the loan agreement are also the shareholders of the Applicant and hold approximately 20% share in the Company. These individuals have become party to the loan agreement on the basis of an arrangement between the ‘C’ Group and the individuals, as they were also the investors in ‘C’ Group, and for taking over certain portion of loan that Sellers owed to ‘C’ Group.

6.9 Further, the allegation of the Revenue that the shares have been acquired by ‘C’ Group is also not correct, as the loan which was receivable from the Sellers was now receivable from the Applicant, which was the consideration payable to the Sellers for acquisition for the shares in ‘AB’ India. This fact is clearly brought out in the loan agreement and the annual account of the applicant company, which has been accepted by the statutory auditors, government and tax authorities in Mauritius and India.

6.10 With regard to the SPA being executed by Mr. ‘S’, who was neither the Chairman or Director of the Applicant, the Applicant relies on the Board of Directors meeting minutes of 22 December 2004, to say that it clearly brings out the fact that the shares have been acquired for and on behalf of the Applicant by Mr. ‘S’, who was authorized by the Applicant to act on its behalf. Further, the Applicant submitted a letter from the Board of Directors certifying that Mr. ‘S’ was authorized to act on behalf of the Applicant. Relevant extracts of the Board of Directors meeting minutes of 22 December 2004 and the letter issued by the Board of Directors is as under:
Board of Directors meeting minutes dated 22 December 2004:

“Pursuant to the Stock Purchase Agreement, out of the aforesaid 2,031,800 equity shares acquired in 'AB' India, 2,031,482 equity shares were acquired for and on behalf of the Company…….”

It was therefore resolved to ratify the loan received for the purpose of the investment made and to ratify the execution of any documents related to the aforesaid loan by any of the ‘C' Directors or Mr. ‘S', for and on behalf of the Company”

The letter for Board of Directors authorizing Mr. ‘S’ reads as under:

“This letter is to certify that Mr. ‘S’ was authorized by the Company to act on its behalf to execute the Share Purchase Agreement to buy the shares of the ‘AB' India from 'AB' Inc., USA and ‘US' Inc. USA in 2003.”

6.11 Revenue’s contention that Mr. ‘S’ signed the Stock Purchase Agreement on behalf of the promoter group but not on behalf of the Applicant is stated to be not correct, as the Stock Purchase Agreement and the Board minutes of 22 December 2004, read along with the sequence of events clearly show that Mr. ‘S’ has executed the Stock Purchase Agreement for and on behalf of the Applicant, which he was duly authorized to execute under the authority given by the Applicant.

6.12 In addition to the above, the Applicant submits that it has made further investment amounting to USD930,000 in ‘AB’ India and has over the years received dividends amounting to USD 3,835,584. The Applicant has utilized the dividend received for its business activities as per the direction and decisions made by the Board of Directors of the Applicant.
In support of its contentions, the Applicant submits that Hon'ble Supreme Court ruling in case of Vodafone International BV (341 ITR 1), held that:

Every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/ Courts should keep in mind the following factors: the concept of participation in investment; the duration of time during which the holding structure exits; the period of business operations in India; the generation of taxable Revenues in India; the timing of the exit; the continuity of business on such exit.

95 ……… No presumption can be drawn that the Union of India or the Tax Department is unaware that the quantum of both FDI and FII do not originate from Mauritius but from other global investors situate outside Mauritius…..

96….. on a subsequent sale/ transfer/disinvestment of shares by the Mauritius company, after a reasonable time, the sale proceeds would be received by the Mauritius company as the registered holder/ owner of such shares, such benefits could be sent back to the foreign principal/ 100 per cent shareholder of Mauritius company either by way of a declaration of special dividend by the Mauritius company and/or by way of repayment of loans received by the Mauritius company from the foreign principal/ shareholder for the purpose of making the investment..

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

6.14 The Applicant also places reliance on the judgement of the Hon’ble AAR in case of E*Trade Mauritius Ltd., AAR 826 of 2009, wherein the Hon’ble AAR held as follows:

“10… In this fact situation, ex facie, it is difficult to assume that the capital gain has not arisen in the hands of the applicant, more so when according to the binding pronouncement of the Supreme Court, the motive of tax avoidance is not relevant so long as the act is done within the framework of law, the treaty shopping through conduit companies is not against law and the lifting of corporate veil is not permissible to deny the benefits of a tax treaty……By virtue of the Circular 789 issued by the CBDT (which has been upheld by the Supreme Court), the tax residency certificate issued by the Mauritius authorities is at least a presumptive evidence of beneficial ownership of the shares and the gains arising therefrom, even if it does not given rise to a conclusive presumption.

6.15 The Applicant further places reliance on the Hon’ble AAR ruling in the case of Ardex Investments Mauritius Ltd., AAR866 of 2010, wherein, on beneficial ownership of shares held in an Indian company, the AAR held as following in context of India – Mauritius DTAA

“6. It is true that the funds for acquisition of shares in the Indian company was provided by the principal, a company incorporated in the United Kingdom. The shares in the Indian company were first acquired in the year 2000. Subsequently further shares were acquired in the years 2001, 2002 & 2009. These shares are sought to be transferred by the applicant company to another subsidiary of the group, incorporated in Germany. It is not clear how far the theory of beneficial ownership could be invoked to come to a conclusion that the holder of the shares in the Indian company in this case would be the company in UK. The first shares were purchased almost 10 years before the application and the shareholding was steadily increased. This is not an arrangement come to all of a sudden. May be, the formation of this subsidiary in
Mauritius was with an eye on the India-Mauritius Treaty. At worst it might be an attempt to take an advantage of a Treaty. But, that by itself cannot be viewed or characterized as objectionable treaty-shopping………………. The decision in AzadiBachaoAndolan has even gone to the extent of holding that treaty-shopping itself is not taboo.

But in a case of this nature, where the shares were held for a considerable length of time, before they are sought to be sold by way of a regular commercial transaction, it may not be possible to go into an enquiry on who made the original investment for the acquisition of the shares and the consequences arising there from. As we have stated, the contention of the Revenue is that it would be the treaty between the India and the UK that would apply and not the treaty between India and Mauritius in view of the beneficial ownership of the shares vesting in the company in the UK. At worst it could be said to be the case of the treaty shopping. Even then, in the light of the decision of the Supreme Court in AzadiBachaoAndolan, no further enquiry on the question is warranted or justified. We may also notice that this is not a case of so called gift or transfer without consideration of shares that is contemplated, but a sale at market rate”

6.16 The Applicant submits that on similar facts and on the subject of treaty shopping, the Hon’ble AAR in case of JSH Mauritius (supra) has held as following:

“14. The above mentioned judgment will be a complete answer to the objections raised by the Revenue about the treaty shopping as also about the arguments under so called unethical aspect. We are therefore, completely convinced that in case of applicant the DTAC between Govt. of India and Govt. of Mauritius would be applicable and would govern the parties.

………..

16. We have examined the rulings and we find in all the rulings a heavy reliance is placed on the aforementioned ruling of the Supreme Court in AzadiBachaoAndolan. We are in complete agreement with the above rulings.

17. ……….We are quite convinced that the applicant is not a “fly by night” or “shell
company”. We therefore, answer the first question in favor of the assessee and against the Revenue."

The Applicant further draws attention to the Bombay High Court ruling in case of JSH Mauritius Ltd., W.P. 3070 of 2016, wherein the Bombay High Court while upholding the decision of the Hon’ble AAR has held that:

“In the present matter, it would be relevant to note that the shares were purchased by the Respondent in the year 1996 and were held for long period of 13 years and were sold in the year 2009. This goes to suggest the bona fide of the applicant. The said shares were again invested in another company of the same group in India and the same are being held by the Respondent. Considering this aspect, it has been observed by the AAR that the Respondent is not a Fly By Night or a Shell Company…….”

6.16.1 The Applicant submits that in case of JSH Mauritius Ltd, the facts were similar to that of the Applicant, and the AAR and the Bombay High Court has held that Mauritius company would be eligible for the benefits of the India – Mauritius DTAA and mere routing of investments through Mauritius shall not make it tax avoidance. Additionally, the Applicant submits in JSH Mauritius (supra), the FIPB approval for making investment in India was taken on a company based out of Bermuda, however the investment was made from Mauritius after a request for change in the name of investor was made. The Hon’ble AAR even under such factual matrix has held that investment through Mauritius is not for avoidance of tax and the benefits available under the India – Mauritius DTAA shall be available.
6.16.2 Further, the Applicant submits that the Hon’ble AAR in case of Dow Agri Sciences (supra) under similar facts as that of the Applicant has upheld the availability of the India – Mauritius DTAA.

6.17 As regards Revenue’s allegation that the Applicant is a name lender or benami of ‘C’ Group, it is submitted that this understanding is misplaced. As per the Companies Act, the name of the shareholder that appears in the shareholders registers is the lawful owner of the shares. In case the shares are held on behalf of someone – nominee shareholder, then the nominee shareholder is required to report the beneficial ownership of the shares to the company. In the present context, the Applicant submits that it was the registered and beneficial owner of the shares as per the shareholders register as early as in December 2003. The Applicant places reliance on the Hon’ble Supreme Court ruling in case of Howrah Trading Co Ltd v CIT, 36 ITR 215 (1959).

6.18 Regarding the allegation that the decision making of the Applicant is in the hands of the ‘C’ Group and the Applicant merely acts like a puppet, it is submitted that the Applicant, through its Board of Directors takes all its decisions for its day to day operations, strategic decisions, etc., as evidenced from its board minutes, whereby the Board of Directors of the Applicant meet in Mauritius to take all the decisions of the Company. In fact, the acquisition of shares of ‘AB’ India was done by the Applicant after due consideration by its Board of Directors, who had full knowledge about the incorporation of the Applicant and its business objective.

6.19 In addition to the above, the Applicant submits that it satisfies all the conditions laid down by the Supreme Court in case of Jaya Dayal Poddar, 1974 AIR 171, which is being relied upon by the Revenue and
states that it is the beneficial owner of the shares. Further, the ruling of Aditya Birla Nuvo Ltd [2011] 12 taxmann.com 141 (Bom) is not applicable, as the shares are registered in its own name. Further, it is submitted that the AAR in case of Shinsei Investment I Ltd (AAR 1017 of 2010) has also examined the Aditya Birla Nuvo Ltd (supra) facts in case of an investment through Mauritius and has held:

“7 …….that shares have been subscribed by the applicant in its own name and the bank statements filed show that the applicant has paid for such subscription of shares. In these circumstances the applicant cannot be termed as a ‘permitted transferee’ as was the case in Aditya Birla Nuvo. The facts in Aditya Birla Nuvo were entirely different where AT&T had paid for and subscribed to the shares of JV Company in India and obtained the shares in the name of AT&T Mauritius as a permitted transferee. ……. Once it is established that the applicant has made investment on its own and Shinsei Bank Ltd was party to SPA only in its capacity as sponsor and in order to comply with mutual fund regulations, there is no bar on application of Article 13(4) of the India-Mauritius DTAA in this case…….”

6.20 The Applicant submits that the customary principle of “pactasuntservanda” should be applied and the India – Mauritius DTAA shall be applied in good faith and also refers to the ruling of the Hon’ble Punjab and Haryana High Court in case of Serco BPO (supra) which has held that “……..30……This is a convention/treaty entered into between two sovereign states. A refusal to accept the validity of a certificate issued by the contracting states would be contrary to the convention and constitute an erosion of the faith and trust reposed by the contracting states in each other…….”

6.21 The Applicant also relies on the CBDT circular 789 dated April 14, 2000 which states as following:“It is hereby clarified that wherever a certificate of residence is issued by the Mauritian authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAC accordingly.”
Considering the above submission and factual matrix in the case of the Applicant, it is submitted that the allegation of the Revenue that Applicant is name lender/ benami of ‘C’ Group is untenable and needs to be dismissed.

6.22 Regarding the allegation that the incorporation of the Applicant was an afterthought and interposed by ‘C’ Affiliates Fund to take advantage of India-Mauritius DTAA, and that the transaction is a brazen and colourable device for the avoidance of tax in India, it is submitted that the Applicant has always over the last 12 years exercised its rights of the shareholder of ‘AB’ India and that can be illustratively evidenced from the Board minutes held in the subsequent period from 2005 till 2011. Extracts of meetings of 23 August 2001, 8 October 2007, 12 July 2011 have been cited to highlight that regular meetings of the Board were held from time to time, indicating that the Board was working independently, with regard to subsequent investments, increase in business and capacity, capital expenditure, disposal of shares of ‘AB’ India, establishment of regional headquarters, and authorizations given to Directors to negotiate on behalf of the company etc.

6.23 The Applicant states that the transaction has to be looked at holistically in view of the decision of the Hon’ble Supreme Court in case of Vodafone International BV which lays down various factors which must be kept in mind in taking a holistic view. In addition to the above, Courts/ AAR have held time and again that setting up of Mauritius subsidiary/ SPV by principal/ genuine substantial long term FDI in India from/ through Mauritius, pursuant to the DTAA and Circular 789 can never be considered to be set-up for tax evasion.
6.24 The Applicant submits that the reason for opting to select Mauritius as a base for investment holding company is very well documented in the business plan submitted to the FSC in Mauritius.

6.25 It is stated that the transaction on which ruling of the Hon'ble AAR is sought is for a transfer of shares of ‘AB’ India to a subsidiary of the Applicant, ‘AB’ Singapore. The Applicant submits that at the time being referred to by Revenue there was no exit by the Applicant from the investment in ‘AB’ India but a group restructuring to achieve the overall business objective of the Group. It is furthermore submitted that the allegation of the Revenue that the whole transaction in 2003 has been structured in order to take the benefit for the aforesaid transaction is misplaced, as it is not reasonable to assume or predict the future 9 years from the date of making the investment. Its incorporation was not an afterthought and an interposed entity by ‘C’ Group to take advantage of India-Mauritius DTAA by the ‘C’ Group. On the basis of decided cases, it is submitted that the Revenue’s allegation of the transaction being a colourable device for the avoidance of Income tax in India after a period of 9 years is untenable.

6.26 Regarding Revenues alternative plea in invoking section 93, the Applicant submits this is an anti-abuse provision and takes its color from the erstwhile section 44D of the Income-tax Act, 1922. It refers to the Law Commission Report of September 26, 1958 which says that the provisions of section 44D of the Income tax Act, 1922 were intended to be applied in the hands of the residents, and that the reference to first mentioned person appearing even in the Income tax Act, 1922 was intended to effectively refer to persons who are residents in India. To support the above inference, the Applicant relies on the Hon’ble Supreme
Court ruling in case of M.C.T.M. Chidambaram Chettair&Ors v. CIT (60 ITR 28), to say that this provision was applicable only to residents.

6.26.1 In view of the above, the Applicant submits that the objective behind introducing section 93 is to tax income arising out of transaction which residents may undertake to externalize the assets, while continuing to enjoy the rights over such income or assets. In its case there is no externalizing of asset in the form of capital/loan nor the Applicant or ‘C’ Group are residents of India. Hence, the provisions of section 93 of the Act are not applicable to the subject transaction in Applicant’s case. Otherwise also, Sec 93(3), exempts bonafide transactions.

6.26.2 Without prejudice to the above, it is submitted that the provisions of India – Mauritius DTAA cannot be overridden by the provisions of the Act. The provision of section 90(2) of the Act is very clear that the provisions of the DTAA shall prevail over the provisions of the Act (including section 93), to the extent such provisions are beneficial for the assessee. Further, neither section 90 nor section 93 of the Act provide for a DTAA override vis-à-vis section 93 of the Act. Additionally, if the Parliament in its wisdom chooses to provide for an override of DTAA provisions by the domestic tax laws, it would make such a provision or enable such a recourse in the domestic tax law itself, example of which is the General Anti Avoidance Rules (GAAR), which specifically provides for DTAA override. Mauritius DTAA does not have a limitation of benefits clause and in the presence of the CBDT Circular 789 of 2000, the argument that the investment made through SPV in Mauritiusis for avoidance of tax is factually and legally incorrect and untenable.
6.26.3 In this connection the Applicant has placed reliance on the Hon’ble Supreme Court ruling in case of UOI v Azadi Bachao Andolan, CIT v. P. V. A. L. Kulanadagan Chettiar and CBDT Circular 333 [F. No. 506/42/81-FTD], dated April 2, 1982.

6.27 Furthermore, regarding the argument of the Revenue that the DTAA provisions override domestic tax laws only when there exists a conflict between the two, it is submitted that the provisions of the Act are very clear to state that once a taxpayer is entitled to DTAA benefit, they shall be eligible for the same or the provisions of the DTAA, whichever are more beneficial.

6.28 In conclusion, the Applicant prays that once in its oral and written submission, Revenue have acknowledged that the Applicant is tax resident of Mauritius and by virtue of TRC and Circular 789 entitled to benefits under the DTAA and is not a fly by night company, the Applicant is eligible for the benefits under the DTAA, and it is the Applicant to choose to be governed by either the DTAA or domestic tax provisions, whichever are more beneficial.

7. We have considered the questions posed to us by the applicant, the details, documents and Financial Statements submitted, and the objections raised by the Revenue, as also the response of the Applicant company, as set out in the preceding paragraphs.

7.1 It is seen from the discussions and arguments above, that it is not in dispute that the Applicant is a tax resident of Mauritius and would ordinarily be covered under the India – Mauritius DTAA, and also that it was not a fly by night operator. This narrows down the issues to the investment made by the Applicant in “AB” India in 2003, and the surrounding decision-making process, on which Revenue has raised
objections to say that the Applicant had only lent its name and was a benami of the ‘C’ Group. We consider these aspects important, for the reason that any separate legal entity that puts up a claim for any benefit, under any law or Treaty, must first establish that it is acting on its own behalf, and even more importantly, that the asset sought to be alienated and which results in some gain, actually belongs to it.

7.2 The applicant company was incorporated and set up in 2003, and held a Tax Residency Certificate, issued in Mauritius, showing the date of incorporation as 11 August 2003, and which was valid (after a renewal) till August 2014, i.e. till after the investment in question was shifted from ‘AB’ India to ‘AB’ Singapore. It was incorporated with the purpose of investing in the ‘S’ sector in India and other Asian markets. This intent was mentioned in the application before the FSC, made on 10th July 2003, read with the approval and the appended Global Business Plan, also mentioning that the company would initially hold investments in ‘AB’ India. Hence, the incorporation of the Applicant and the stated objects do not come into question, as it is the Holding company which takes these decisions of setting up a subsidiary and chooses its objectives. It is at this point, i.e. the point of incorporation, begins its journey as a separate legal entity, when its decisions and ownership of assets and liabilities can be taken into account, and must be visibly demonstrable.

7.3 In explaining how it was acting independently after being incorporated, the Applicant has, apart from the TRC and the FSC approval, laid great stress on the minutes of its Board of Directors meeting of 15 August 2003. However, these minutes of 15 August 2003 show discussions on the approvals granted, which were applied for and taken by the parent company or through ‘AB’ India in which Mr. ‘S’, was a Director. It is not as though in this meeting, independent decisions were
taken regarding where and in which sector the investments were to be made, leave alone the quantum and the source thereof. It is seen that FSC approved the Global Business Plan on 22 July 2003, i.e. prior to its incorporation, and the above information was nothing but part of the application made on 10 July 2003 for the FSC approval. Hence, in this meeting, the Board of Directors merely reiterated what the Holding company had decided. Similarly, the FIPB approval at best only shows the intent of the holding company and not any decision taken by the Applicant regarding the proposed investment and its source.

7.4 The SPA was an agreement between the Applicant and the ‘C’ Group on one side as buyers, the two US companies, ‘AB’ Inc. USA and ‘US’ Inc. USA, as sellers, and ‘AB’ India in which the shares were held. Even this agreement was signed by the MD of the ‘C’ Group, and not by any of the Directors of the Applicant, although it was shown as a party to this agreement as a buyer. This is clearly illustrative of the fact that the Applicant had no role whatsoever in taking the decision with regard to acquisition of the shares in ‘AB’ India from the US sellers. The Applicant’s assertion that the agreement was the result of an understanding between all the parties is unacceptable. There could be scope for reading more than what is written or some understanding if there was some document or minutes or clause in the agreement that required or was capable of different interpretation. But in the absence of any such material which indicates the role of the applicant, there is no scope for reading any such understanding. There was no mention in this agreement as to how the Applicant was going to fund this acquisition, which makes it clear that it was not a party to the decision comprised in the SPA.
7.5 The Applicant has stated that Mr. ‘S’ was authorized by the company. This letter of authorization has been produced for the first time in 2016 and is clearly meant to plug the gap in the very obvious lacuna, namely that it was Mr. ‘S’, MD of the Holding company, and not any Director of the Applicant who signed this very important decision and document, ie. the SPA. There are no decisions or discussions in the Board to show that he was authorized. It has to be understood that the Applicant is an Investment holding company. In a dynamic global scenario these decisions on investment are made after great deliberations in the Board of Directors before putting their signature and seal on an agreement for acquisition of shares. Further, such agreements would have full details of the consideration to be paid by each of the buyers, and in whose names shares are to be transferred. Ironically, while as many as 2,011,482 shares, valued at USD 380,160, were transferred to the Applicant, there was not a single clause informing or indicating its liability incurred for such an acquisition. This makes it clear that the Applicant’s name was only superimposed in the Agreement as part of some arrangement, of which the Applicant was not aware at all.

7.6 The above picture that the Applicant was a mere spectator gets confirmed from the minutes of the Board of Directors meeting of 22 December 2004, that is a full year later. In this meeting, as brought out by Revenue, for the first time Mr. ‘S’ informed and the Directors took note of the happenings with regard to investment; enquiries were made about the financing arrangement; they were informed about the reorganization in the group and about the acquisition in the shares of ‘AB’ India; advice was taken and decisions about the investment made in ‘AB’ India were directed to be ratified. Even at this time Mr. ‘S’ was not a Director in the Applicant company. Thus, even till the time the
investment had been made the Board had no information at all on its own, and was so informed about it by the Holding company, through its MD. In fact, in this meeting the Board was also directed to *incorporate the above transactions* in its accounts. It was only now that the Board stated that the transactions were done for and on behalf of the Applicant. Clearly the Board of Directors was neither managing nor controlling its crucial investment decisions, for which it was stated to be set up.

7.6.1 Detailed narration of the activities post 2003 are of no avail as we are concerned with the happenings of 2003, when the Applicant is stated to have acquired the shares, as that is the relevant period for determining its independent status as also its ownership of shares as it is with reference to those shares that the issue of gains arises now on their transfer to ‘AB’ Singapore. And in this crucial period it was only acting as a puppet in the hands of the holding company.

7.7 Regarding the Applicant’s claim of ownership of the asset, the shares in ‘AB’ India, which subsequently led to the capital gains, it is seen that the ‘C’ Group (‘C’ Equity Partners II, LLP and ‘C’ Affiliates Fund, US) together acquired from ‘AB’ Inc. USA, and ‘US’ Inc. USA, a total of only 20,318 shares in the Indian company, being 1% of the shareholding, while it has forgone its total debt of USD 362,995 and USD 21,005, respectively, i.e. USD 384,000, as a consideration for the same. Very surprisingly, on the other hand, the applicant has been shown to have acquired 2,011,482 shares in the Indian company, i.e. 99% of the shareholding, without paying any amount whatsoever, as consideration. Since the consideration was paid by these ‘C’ Group companies (by cancellation of debt), totaling USD 384,000, in full, for the shares acquired in ‘AB’ India, they alone became the owners of the shares. The agreement itself says that the shares were transferred in the name of the
companies which paid the consideration, i.e. the ‘C’ Group. Having paid no consideration, as per the SPA, the Applicant could not be treated as the owner. It could only be benami or a name lender for the ‘C’ Group. Regarding the Applicant’s submission that it was the registered and beneficial owner of the shares as per the shareholders register as early as in December 2003, we have to say that when the SPA speaks of no consideration paid or payable by the Applicant, the question of its acquiring any shares in ‘AB’ India did not arise, except only on paper or by interposing its name.

7.8 Since the ownership of shares in ‘AB’ India could not be accepted unless a consideration of equal amount was paid by it, the Applicant has produced before us in 2016, a Loan Agreement, dated 30 November 2003. As per this the ‘C’ Group and its Directors gave it a loan of USD 380,160, and it is claimed that this taking up of a liability was a consideration, equivalent to the value of shares acquired by it. If this had been the case, the SPA would have been the right place for it to be mentioned, where all other liabilities are referred to. The SPA has no mention of this loan. Also, the Loan Agreement has no mention of the shares allotted to the Applicant or the consideration. While the SPA was signed by Mr. ‘S’, without any authority, the Loan Agreement was signed by a Director, both around the same time. There is no indication in either document that one relates to the transaction mentioned in the other, or that the debt owed by the sellers to the ‘C’ Group stood transferred to the Applicant.

7.9 The above issue has been explained by the Applicant as being an understanding between the parties concerned, to have two separate agreements. It is difficult to accept this position. In a major transaction of taking over of the shares of an Indian company by ‘C’ Equity and ‘C’
Affiliates and paying for the same by cancellation of the sellers’ debt, and at the same time showing the acquisition of shares in the hands of the Applicant by creating a liability, all on the basis of an understanding and without any composite document, looks very peculiar and improbable. The US sellers had no clue how the Applicant would pay for the shares transferred to it, and also the Applicant, a party to the Loan Agreement not knowing the purpose of the loan. These transactions between three sets of companies in three different countries cannot be said to have been guided by oral arrangements, as argued by the Applicant.

7.9.1 Besides, the Loan Agreement also has an Annexure where the names of six other individuals are given, which indicates that this Agreement and the SPA are dealing with completely unconnected issues. The explanation offered by the Applicant that these individuals on the basis of an agreement with the ‘C’ Group had agreed to share in the loan, being shareholders of about 20%, appears not to reconcile with the Balance Sheet, giving an indication that the SPA and the Loan Agreement were two different arrangements and not complementary to each other. This arrangement is also stated to be an oral one between these six persons and the ‘C’ Group, and there is no evidence to this effect.

7.10 Coming now to the Financial Statements relied upon by the Applicant, and to claim that these were submitted to the Income tax and other authorities. Two things have to be said here – first, that financial statements in respect of the first year in which the shares were acquired were due in June 2004 but were actually filed much later in 2005. Also, these showed transactions as per the directions of Mr. ‘S’, who in the November 2004 meeting had advised incorporation of the loans and
acquisition of shares in the books of accounts. Secondly, even if properly reconciled, they only represented what was intended by the parent company and not the real picture.

7.11 A look at the financial statement for the period ending June 2004 shows that the Balance Sheet, in the Current Liabilities carries a Loan of USD 386,834. Further, the Cash Flow statement with the Balance Sheet shows an accretion as “Proceeds from shareholders’ loan”, amounting to USD 386,834. This amount is different from the loan stated to have been taken from the ‘C’ Group, i.e. USD 380,160 as per the Loan Agreement, as a liability and consideration. Further, as per the Applicant it is admitted that the shares were acquired by way of a barter system, and only book entries were passed, and the liability of the ‘C’ Group was taken over as a consideration with no cash exchanged. It is intriguing as to how then there is a cash inflow appearing in the Cash Flow statement as part of the Financial Statements. This only establishes that these were only entries incorporated in the books, and that the loan reflected therein had no connection with the sellers’ debt, stated to have been taken over by the Applicant. During the course of these proceedings, when this lacuna was pointed out to the Applicant, Sri Rajan Vora stated that these were only book entries. The only consideration paid for these shares was by the ‘C’ Entities when they acquired these shares in ‘AB’ India by cancelling the debt of the sellers, as per the SPA, and hence it can be reasonably concluded that the investment was made by the ‘C’ Group and not the Applicant.

7.12 The above discussions lead to us to a situation that neither was the Applicant acting on its own behalf in taking decisions like an independent company with a separate legal status in a foreign territory, regarding the investment in ‘AB’ India, though it was an Investment
Holding company itself; and also that the manner and accounting followed in acquiring those shares only go to show that they were taken on its books on hindsight, at the directions of the Holding company. Only this can explain the various lacunae noticed, and as discussed above. It had only lent its name and was a benami of the ‘C’ Group.

7.13 Interpreting the various cases cited by both Revenue and the Applicant in the light of the above factual matrix we find that the decision of the Hon’ble Supreme Court in Azadi Bachao Andolan, 263 ITR 706, holds good. In merely superimposing the name of the Applicant on a transaction done by the ‘C’ Group, would render the transaction to be seen as a colourable device and an impermissible tax avoidance. The manner in which the name of the Applicant was brought in by stating that it had acquired the shares by taking over the debt owed by the US sellers to the ‘C’ Group’, the case clearly falls in the category of an exception being a mere name lender, as referred to in the case of Vodafone (341 ITR 1). Neither were the decisions for such take over taken by the Applicant, in fact it was completely unaware, nor did any consideration actually flow from it in any form, and was yet ratified and incorporated in the books at the directions of the MD of the ‘C’ Group. In so doing it had not acted on its own, and only lent its name.

7.13.1 Though not a permitted transferee as in the case of Aditya Birla Nuvo (342 ITR 308), simply interposing its name for the purpose of making an investment of shares belonging to the ‘C’ Group’, and deriving tax benefit from the same is not permissible. Reference to the OECD and UN commentaries also indicate that in such cases, it is not necessary for us to allow the benefit of a Tax Treaty to the Applicant on such transactions. Similarly, it is seen that in the case of E*Trade, it is assumed that the transaction has been done in a lawful manner, whereas
in the instant case, the Applicant was not even a signatory to the SPA by which the shares were handed over to it, without any consideration. In Ardex, the shares were acquired by the Company out of the funds made available by the parent. This is acceptable. But in the instant case, only the name of the Applicant was interposed whereas it was the parent, the ‘C’ Group which owned the shares by virtue of the SPA and by cancelling the debt. In JSH Mauritius also the funds for investment in India were routed through this company, which again was acceptable but was clearly different from the facts of the instant case mentioned above, when only entries were made and the actual consideration was not routed through the Applicant.

7.13.2 As regards Circular 789 issued by the CBDT, it is agreed that the tax residency certificate issued by the Mauritius authorities is at least a presumptive evidence of beneficial ownership of the shares and the gains arising therefrom, even if it does not given rise to a conclusive presumption. In the instant case the applicant was incorporated in Mauritius for investing in the ‘S’ sector and in India. Hence, when the TRC was obtained declaring the above intent, it was fairly granted the same. So the presumption would be right that it was set up as an investment holding company. However, it is the subsequent conduct of the company that casts a shadow on whether it could be said to be the beneficial owner of the shares acquired through the SPA, which was neither signed by it nor mentions any consideration paid or payable by it.

7.13.3 As regards the case of Vodafone International BV, 341 ITR 1, which says that every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner, the problem is with the very first of the suggested criterion, namely the concept of participation in investment, since in the instant case the
investment came from the US companies in 1995, and only through a reorganization in 2003, the ‘C’ Group acquired the shares for a consideration but simultaneously through a paper / oral agreement / arrangement the name of the Applicant was interposed. We would accept the arguments that it could not be denied the benefit of the India Mauritius treaty even if it was set up for that very purpose, or that the funds for investment came from the parent in some other country, or even that the income arising from the investment reached the parent in some form, and so on. But here the applicant had merely lent its name under instructions from the parent company, to shares acquired and paid for by the parent. For this very reason the cases of JSH Mauritius and Dow Agri Sciences, referred to by the Applicant become inapplicable on facts, since, as held by the Hon’ble Supreme Court in the case of Jaya Dayal Poddar, the Applicant could not be considered to be the beneficial owner of the shares in ‘AB’ India, but only a benami.

7.14 In distinguishing the above cases, we do not wish to appear regressive or against promoting healthy and fair investment and business. Therefore, at this point it has to be said that it would be inconceivable that the ‘C’ Group, being the Holding Company, would not be involved in any manner in setting up the subsidiary company, decide its objectives, the target markets, taking various approval etc. Yet, a line has to be drawn somewhere. Often this line is very thin. But allowing such arrangements, as in the instant case, would amount to opening the floodgates for parent companies to seek acceptance to their conduct of designing tax avoidance arrangements and putting the stamp of the subsidiary on the same, without the latter even being a party to it, simply lending their names, let alone being a contributor for seeking Treaty benefits. We cannot be seen as promoting such arrangements.
7.14.1 It has to be understood that the existence of a separate and independent status of a subsidiary in another territory is the core basis and foundation of the application of treaty law across the globe. Tax treaties throughout the world function on the premise that the subsidiary is an independent legal entity, different from its parent, even though controlled by it. The circulars and judgments of the Hon’ble Supreme Court relied on by the applicant also stress on this independence and require the Revenue to acknowledge it as well. However, in a case where the parent acts on behalf of its subsidiary and takes all its decisions, corporate veil between the company’s subsidiary and its parent stands torn, not at the instance of the revenue, but by the conduct of the group itself. In the instant case where the companies are acting together as a group having ‘C’ Group’s Director sign agreements on behalf of another, without formally being on the Board and moving consideration to the convenience of the whole group, it can hardly be said that they are separate entities in substance.

7.14.2 As far as the accounts are concerned, the passing of an entry in the books cannot be taken to reflect the actual transaction, especially when seen in the context of the negligible role of the Applicant in the entire episode. We agree with the Revenue that a mere accounting entry without the actual flow of money or other consideration must be made subservient to the actual transaction. In this case where the parent had signed the collusive agreements of the subsidiary on its behalf and paid the consideration for the same, the subsidiary could not be considered as an owner of the shares transferred to it, even though entries have been made in the books.

7.15 In view of the above position, we are unable to rule that the shares were genuinely acquired by the Applicant, that it became the beneficial

45

‘AB’ Mauritius
AAR/1128/2011
owner of those shares, and that the capital gains derived on the transfer of those shares to ‘AB’ Singapore was income in its hands. On the above facts, since the ‘C’ Group, comprising of two US companies had acquired the shares in ‘AB’ India from two other US companies, the gain having arisen in India in the hands of the ‘C’ Group of the US, was taxable in India as per the India-US DTAA.

8. We have considered the Revenue’s reference to the provisions of section 93 of the Act and the Applicant’s response to the same. This provision is akin to the provision contained in section 44D of Income tax Act 1922. As clarified by the Law Commission Report of September 26, 1958 this was intended to be applied in the hands of the residents, and that the reference to first mentioned person appearing even in the Income tax Act, 1922 was intended to effectively refer to persons who are residents in India. Hon’ble Supreme Court’s decision in the case of M.C.T.M. Chidambaram Chettair&Ors v. CIT, 60 ITR 28, referred to by the Applicant, holds good, wherein it was held that:

“The object of s. 44D of the Act, as disclosed by the provisions thereof, was to prevent residents of India from evading the payment of income-tax by transferring their assets to non-residents while enjoying the income by adopting devious methods....”

8.1 The provision in section 93 being similar in intent and purpose as section 44D, would therefore not be applicable in this situation where the transaction under consideration is between a Mauritian company, the Applicant; and the ‘C’ Group, the Holding US companies. Also, in our view, the supremacy of the Treaty entered into between two sovereign states would prevail, unless some provision has been inserted with the specific objective to check non-genuine international transactions, such as the GAAR provisions. It cannot be deduced or inferred.
9. Now let us come to the other questions referred to us for a Ruling.

9.1 Regarding question no. III on the applicability of section 195, (refer para 4.3) i.e. whether tax has to be withheld on the gains arising from the sale of shares, since in the instant case we have held that the income would be chargeable to tax in India, there would be a liability to withhold tax as required by this section. The cases cited by the Applicant are not applicable.

9.2 In respect of Question IV, against the Applicant’s contention (refer para 4.4) that transfer pricing provisions would not apply, the Revenue submits that Chapter X of the Act does not contain any such requirement of taxability of income. As per section 92, any income arising from an international transaction has to be computed having regard to arm’s-length price, if there is an international transaction between two or more ‘associated enterprises’. Hence this transaction of sale of shares in the Indian company should be subjected to and benchmarked as per the transfer pricing provisions contained in Chapter X of the Act. Reference has been made to our Ruling in the case of Castleton Investments Limited (AAR 999 of 2010).

9.2.1 We have considered the matter. In a detailed finding on the issue, in the case of Castleton Investments Limited (AAR 999 of 2010), it was ruled by this Authority that:

“the applicability of section 92 does not depend on the chargeability under the Act. Literally in this case, the capital gains are chargeable to tax under the Act. They escape only in view of paragraph 4 of Article 13 of the DTAC and the ratio of the decision in AzadiBachaoAndolan on the applicability of the DTAC even when there is actually no double taxation".
9.2.2 In coming to this conclusion the earlier Rulings of this Authority in M/s. Praxair Pacific Limited [326 ITR 276], in Vanenburg Group BV [289 ITR 464], and Dana Corporation (AAR 788 of 2008) were considered and not followed. We are in agreement with the view taken in the case of Castleton. As against the position in section 195 of the Act, there is no such requirement in section 92 that the transaction should result in income chargeable to tax under the Act. Hence, the transaction in the instant case of sale of shares in the Indian Company will have to be benchmarked as per the transfer pricing provisions contained in Chapter X of the Act.

9.3 In respect of Question V, with regard to application of section 115JB of the Act on the subject transaction, the Applicant as well Revenue agree that the provisions of the said section shall not be applicable to foreign companies, as per the retrospective amendment to section 115JB by Finance Act, 2016, and the clarification issued by the CBDT dated 24 September 2015. This being so, we have no reason to disagree.

10. In conclusion, the questions referred to us for our Ruling are answered as under:

10.1 Questions I and II: No. In the above factual matrix, the Applicant, “AB” Mauritius, would not be entitled to the benefits of the Agreement between the Government of Mauritius and the Government of the Republic of India for the avoidance of double taxation and prevention of fiscal evasion, with respect to taxes on income from capital gains.

10.2 Question number III: Yes, since the income arising from the sale of shares is held to be taxable in India, in view of the applicability of the
India-US DTAA, there will be an obligation to withhold tax under section 195 of the Income tax Act 1961.

10.3 Question IV: Yes, the transfer pricing provisions contained in section 92 to 92F of the Act would apply to the proposed transaction.

10.4 Question V: No, the provisions of section 115JB shall not be applicable.

The Ruling is accordingly given and pronounced on this day of 8th November, 2017.

Sd/-
(Ashutosh Chandra)
Member (Revenue)

Sd/-
(R.S. Shukla)
In-charge Chairman