



The Swinging GAAR Pendulum: Between Overreach & Restraint

Setting the Context

The opening months of 2026 have unfolded like a closely watched pendulum in India's anti-avoidance landscape. Within a short span, a series of unfolding developments have brought into focus an expansive judicial articulation of General Anti Avoidance Rules (GAAR) followed by a near-simultaneous legislative response that invites careful reflection. The proximity of these developments is as telling as their substance, pointing towards an evolving dialogue between interpretation and intent, and perhaps even a subtle interplay shaped by broader geopolitical and economic considerations.

A decisive moment arrived on 15 January 2026, when a dispute that had originated in 2018 as a routine withholding tax application under section 197 of the Income-tax Act, 1961 culminated in a judgment of the Hon'ble Supreme Court of India in the case of 'AAR vs. Tiger Global International Holdings' [TS-38-SC-2026]. What initially appeared to be a narrow controversy concerning withholding obligations on a share transfer transaction gradually transformed into a far broader judicial engagement with the interplay between GAAR, treaty benefits, and grandfathered protections. This transformation is particularly noteworthy given that GAAR itself had not been formally invoked by the Revenue authorities through the statutory process prescribed under Chapter X-A, thereby raising important questions about the scope and manner of its application.

That moment, therefore, deserves reflection not merely for what it decided, but for what it revealed about the evolving contours of anti-avoidance jurisprudence in India. It raised a foundational question for tax policy and legal interpretation alike: how far can an anti-avoidance principle extend through interpretative reasoning before it begins to unsettle the very policy commitments upon which the legal framework was consciously built?

Grandfathering: From Temporal Certainty to Interpretative Characterisation

What stands out in the Tiger Global judgment is the discernible shift, away from a straightforward time-based framework of grandfathering towards a more interpretative exercise grounded in characterisation. Traditionally, grandfathering provisions are anchored in a clear and objective temporal test. The enquiry they contemplate is straightforward and binary in nature: whether the investment in question was made prior to the prescribed cut-off date.

However, in Tiger Global, this foundational enquiry was supplemented, and in practical effect displaced, by a deeper examination of the nature, structure, and perceived intent of the transaction itself. Before the Court, the learned Additional Solicitor General, in paragraphs 7.6 to 7.9, advanced a carefully structured argument that Rule 10U embodies a conscious and deliberate distinction between an "investment" and an "arrangement". It was specifically emphasised that Rule 10U(1)(d) employs the expression "investment", whereas Rule 10U(2) uses the expression "arrangement", thereby signalling that the Legislature, in its wisdom, had intentionally adopted two distinct terminologies to convey different legal consequences and to enable differentiated treatment under the law.



On this basis, it was contended that while genuine investments made prior to 1 April 2017 may be entitled to grandfathering protection, arrangements yielding tax benefits after that date would nonetheless remain subject to GAAR, irrespective of when the underlying investment was made.

This line of reasoning found resonance in the judicial analysis. In paragraph 12.30, the Hon'ble Supreme Court observed that arrangements are not automatically grandfathered and that GAAR may apply where tax benefits arise post 2017, even if linked to earlier investments. Further, in paragraph 46, the Court noted that the expression "without prejudice to" in Rule 10U(2) operates to dilute the protection under Rule 10U(1)(d), thereby permitting GAAR to extend to arrangements irrespective of the timing of the investment.

This interpretative shift, from chronology to characterisation, was not merely a matter of analytical preference. It represented a movement from an objective, bright-line test to a more subjective and interpretative inquiry, thereby introducing a degree of uncertainty into what was intended to be a clear, predictable, and investor-assuring safeguard.

When Overstretched GAAR meets Geopolitical Realities

The questions thrown up by the Tiger Global judgment, especially those relating to the perceived dilution of settled grandfathering assurances, did not arise in isolation. They emerged at a time when the global economic and geopolitical environment itself has been undergoing significant and rapid shifts. Heightened geopolitical tensions, ongoing regional conflicts, realignments in global trade relationships, and increasing volatility in capital markets have collectively contributed to an environment where the movement of capital is far more sensitive than before to considerations of certainty, stability, and policy credibility.

In such a landscape, jurisdictions are no longer competing merely on tax efficiency or market potential. They are increasingly being evaluated on the strength of their legal assurances, the predictability of their tax regimes, and the consistency with which those assurances are honoured over time. For a country like India, which continues to position itself as a reliable and attractive destination for long-term foreign investment, the manner in which past commitments, particularly those relating to treaty protection and grandfathering, are interpreted and applied assumes critical importance.

Viewed from this perspective, the interpretative shift noted in Tiger Global, from an objective time-based test to a more subjective characterisation exercise, carried implications that extended beyond the confines of the case itself. It had the potential to influence broader perceptions of policy continuity, investor confidence, and the credibility of commitments made under earlier regimes.

The Mauritius Compact: A Deliberate Policy Commitment, Not an Accidental Outcome

The India-Mauritius Double Taxation Avoidance Agreement must be understood not as a passive treaty arrangement, but as a carefully crafted economic policy instrument, consciously designed and consistently sustained over decades to facilitate and channel foreign capital into



India at a time when such inflows were essential for economic development and integration with global markets.

When the treaty was renegotiated, the Government did not merely amend its provisions; it consciously preserved investor confidence by introducing a clear and unequivocal grandfathering clause up to 1 April 2017. This protection was not hedged with conditions or confined to a narrow class of investors. It extended uniformly to all investments made prior to the cut-off date, whether by entities that were native residents of Mauritius or by global investors who had legitimately structured their investments through Mauritius in accordance with the legal and treaty framework prevailing at the time.

This was, in substance, a policy compact between the State and investors. It recognised that capital does not flow merely in response to tax efficiency, but in response to certainty, predictability, and the assurance that rules governing past investments will not be revisited through subsequent reinterpretation.

CBDT Steps In: Amendments on the Eve of the New Tax Framework

On the eve of the implementation of the New Income Tax Act, 2025, the Central Board of Direct Taxes (CBDT) introduced amendments to Rule 10U of the Income-tax Rules, 1962 and the corresponding Rule 128 of the Income-tax Rules, 2026.

The timing of these amendments is noteworthy and, perhaps, indicative of a broader policy sensitivity. Coming at a juncture when the contours of GAAR and grandfathering were being intensely debated, the changes appear to serve not merely as a technical clarification, but as a considered realignment aimed at reinforcing certainty, restoring coherence, and reaffirming confidence in the tax framework.

Decoding the Amendments: Precision, Clarity and Intent

The amendments introduced by the CBDT are both nuanced in drafting and substantive in impact.

At one level, they bring about an important clarification in the language of Rule 10U(1)(d). The provision now more clearly conveys that the grandfathering protection is linked to investments made prior to 1 April 2017, thereby removing any ambiguity that could arise between the timing of the investment and the timing of its eventual transfer. This clarification reinforces the legislative intent that the benefit of grandfathering attaches to the act of investment itself, and not merely to the transaction of transfer.

At another, more significant level, the amended Rule 10U(2) removes the phrase “without prejudice to” and introduces an explicit exception, providing that GAAR shall apply to arrangements irrespective of their timing, except in respect of income arising from the transfer of investments made prior to 1 April 2017.

This change operates at multiple levels. The removal of the phrase eliminates the misplaced interpretative basis for treating Rule 10U(2) as having an overriding or diluting effect on Rule



10U(1)(d), in the Tiger Global judgement. More importantly, the insertion of a specific carve-out ensures that any profits or gains arising on grandfathered investments made prior to 1.4.2017 are clearly and unequivocally placed outside the ambit of GAAR, irrespective of how the surrounding transaction may be characterised.

A parallel amendment in Rule 128 of the Income-tax Rules, 2026 ensures continuity and consistency in this position under the new legislative framework of the Income Tax Act, 2025.

Recalibrating the Earlier Interpretative Position

When viewed against the backdrop of the arguments advanced before the Court and the observations recorded in the judgment, these amendments assume deeper significance.

The earlier emphasis on a rigid and determinative distinction between “investment” and “arrangement” appears to stand moderated in light of the amended language. The explicit inclusion of the expression “investments” within Rule 10U(2) itself, by way of a carve-out, suggests that the Legislature did not intend for this distinction to operate as a decisive factor capable of overriding grandfathering protection.

In effect, the amendments re-anchor the analysis in the objective timing of the investment rather than its subsequent characterisation, thereby restoring the primacy of certainty over interpretative subjectivity.

Investment versus Arrangement: A Distinction in Search of a Boundary

The distinction between “investment” and “arrangement” also warrants deeper scrutiny.

In commercial reality, investments do not exist in isolation. They are structured, routed, and executed through arrangements that reflect business considerations, regulatory requirements, and economic objectives. To attempt a clear separation between the two is to impose a distinction that may not always correspond with practical reality.

This raises a critical question. On what objective basis can an investment be segregated from an arrangement for the purpose of denying grandfathering protection?

If the answer depends on subjective interpretation, the distinction becomes fluid and unpredictable. If it is to be grounded in objective criteria, the only stable reference point remains the date on which the investment was made.

The amended rules, by anchoring the exclusion from GAAR to this temporal criterion, appear to acknowledge this difficulty and to prefer certainty over interpretative flexibility.

Conclusion: Grandfathered Commitment Cannot Be Rewritten at Exit

The trajectory from Tiger Global to the present amendments reflects an evolving dialogue between interpretation and clarification, between judicial reasoning and legislative response, set against a backdrop of increasing geopolitical and economic uncertainty. If the judgment expanded the interpretative horizon of GAAR, the subsequent amendments appear to restore a measure of equilibrium by reaffirming the centrality of certainty, coherence, and policy fidelity.



In a global environment marked by shifting alliances, regional conflicts, and heightened competition for capital, the importance of maintaining investor confidence through credible and consistent policy commitments has assumed even greater significance. While it was publicly conveyed at the time of the Tiger Global judgment by the CBDT leadership that past investments would not be disturbed, such assurances, in a rapidly evolving global landscape, may not by themselves suffice to instil the level of confidence that investors seek. What appears to have been required, therefore, was a more tangible and legally embedded reaffirmation of that commitment.

The recent amendments to Rule 10U and Rule 128 may thus be viewed as a measured and timely response to these broader realities. By explicitly restoring the protection for pre-2017 investments and clarifying their position vis-à-vis GAAR, the amendments reinforce the credibility of earlier commitments in a manner that is both visible and legally grounded. In doing so, they align the operation of anti-avoidance rules with the larger objective of maintaining India's attractiveness as a stable, predictable, and investor-friendly jurisdiction, particularly at a time when global capital is increasingly sensitive to policy consistency and legal certainty.

To bring this conceptual nuance into a more relatable frame, one may draw a parallel from everyday life. Consider a newly launched technology or innovation expo, say an AI Convergence Symposium, which initially charges an entry fee but struggles to attract sufficient participation. In order to increase footfall and engagement, the organisers announce that entry to the event will be free. Relying on this assurance, a large number of participants, innovators, and visitors choose to attend the event.

However, at the time of exit, the organisers introduce an "exit fee", justifying it on the ground that only the entry fee was waived and that the exit was a distinct and separately chargeable event. While such a distinction may be crafted to sustain a technical argument, it would clearly run contrary to the underlying expectation created at the time of entry. The immediate result may be a one-time recovery, but the longer-term consequence would almost certainly be a loss of credibility and a reluctance among participants to engage in future editions of the event.

Similarly, when investments were made prior to 1 April 2017 under a regime that expressly promised grandfathering protection, revisiting that assurance at the stage of exit by introducing a distinction between an "investment" and an "arrangement" risk creating a disconnect between the promise at entry and its application at exit. The amended Rule 10U framework, by restoring the linkage between the two, appears to realign the legal position with the underlying principle that commitments made at the time of investment should not be revisited through subsequent interpretative refinements.

Because, in the final analysis, a tax system earns trust not by the ingenuity with which it can reinterpret settled promises, but by the discipline with which it chooses to honour them. Certainty, once extended and relied upon, is not merely a matter of legal form, but of institutional credibility. And in an increasingly competitive and uncertain global landscape, it



is this credibility, more than anything else, that determines whether capital chooses to enter, or quietly stays away.
