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Tax Flash News



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Indirect transfer gains not taxable under India-Ireland tax treaty; domestic deeming fiction cannot be imported into treaty

Executive summary

In the case of *FireEye Ireland Limited*,[1] the Delhi Bench of the Income-tax Appellate Tribunal ('the Tribunal') examined whether capital gains arising to an Irish entity from transfer of a US entity holding shares of an Indian subsidiary were taxable in India under the India-Ireland tax treaty ('the Treaty').

The Tribunal held that the capital gains arising from transfer of shares in a US entity could not be taxed in India under the Treaty. The domestic deeming fiction relating to indirect transfers cannot be read into the Treaty and that the Treaty allocates taxation rights to India only where shares of an Indian resident company are alienated. Since the shares of a US company were transferred, the capital gains fell within the residuary clause of the Treaty which allocates taxation rights to the alienator's country (i.e. Ireland, in the instant case).

The Tribunal also rejected the Revenue's reliance on the Multilateral Instrument ('MLI') in the absence of any evidence of the Treaty abuse, particularly where the transaction formed part of a broader group restructuring.

[1] *FireEye Ireland Limited* v. *ACIT* (IT(IT)A 1431/Del/2025)

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Facts of the case[2]

The taxpayer was an Irish tax resident company.

As part of an internal group restructuring, the taxpayer transferred its ownership in various entities to another Irish group company. One of the transferred entities was a US entity ('USCo'), which in turn held shares in an Indian company, ('ICo').

The taxpayer claimed that the resulting capital gains were not taxable in India in view of Article 13(6) of the Treaty. However, the Revenue treated such capital gains as taxable under Article 13(5) of the Treaty.

Relevant provisions

Section 9(1) of the Income-tax Act, 1961 ('the 1961 Act') provides that income accruing or arising through the transfer of a capital asset situated in India will be taxable in India.

Explanation 5 to section 9(1) clarifies that a capital asset being shares of a foreign company will be deemed to be situated in India, if such shares derive, directly or indirectly, their value substantially from the assets located in India.

Article 13 of the Treaty allocates taxing rights over gains arising from alienation of different categories of property.

Article 13(5) applies to gains from alienation of shares[3] in a company resident in a Contracting State and grants taxation rights to that State.

Article 13(6) is the residuary clause which applies to property not covered by the preceding paragraphs of Article 13 of the Treaty[4] and grants taxation rights to the Contracting State of which the alienator is a resident (i.e. Ireland in the instant case).

Article 3 of the Treaty defines certain terms for the purposes of the Treaty. Article 3(2) provides that where a term is not defined in the Treaty, it will have the meaning assigned to it under the domestic tax law of the Contracting State applying the Treaty, unless the context requires otherwise.

[2] The issue relating to taxation of software income has not been covered in this note.

[3] Other than shares of a company the property of which consists directly or indirectly principally of immovable property

[4] Other than the property referred to in paragraphs 1 to 5 of Article 13

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Revenue's contentions

Transfer of ownership in USCo resulted in an indirect transfer of shares of ICo. Since USCo derived substantial value from ICo in India, the transaction was taxable in India.

While considering the taxpayer's claim for the Treaty relief, the Revenue invoked Article 6 of the MLI,[5] and contended that section 90 of the 1961 Act[6] is for avoidance of double taxation and not for creating opportunities for double non-taxation.

Tribunal's decision

Capital gains not taxable in India under the Treaty

As per Article 13(5), the capital gains are taxable in India only if the shares of an Indian tax resident company are alienated. In the present case, the taxpayer transferred shares in USCo (which was not an Indian tax resident) and therefore capital gains were not taxable under Article 13(5).

Relied on decision in case of *Sofina SA*[7] wherein the Mumbai Bench of the Tribunal, in the context of the India-Belgium tax treaty, held that unlike Article 13(4),[8] Article 13(5) does not employ the words 'directly or indirectly' and thus, does not permit a 'see through' approach.

Consequently, the transaction fell within the residual clause (i.e., Article 13(6)), under which capital gains were taxable only in the state of residence of the alienator (i.e. Ireland).

Domestic deeming fiction cannot override the Treaty

The tax treaty terms must ordinarily be interpreted according to their context, object and purpose, and definitions under the 1961 Act can be imported only if there is ambiguity in use of the term in the context of the tax treaty.

Recourse to Article 3(2) of the Treaty by the Revenue for importing the inclusive definition of the term "transfer" under the 1961 Act[9] for interpreting the word "alienation" under the Treaty was not sustainable. There was no genuine ambiguity in the term "alienation" used in the Treaty, which had to be interpreted in its ordinary sense as an enforceable contractual transaction based on some valuable consideration determined in such contract itself.

In view of the above, the Revenue could not rely on domestic-law concepts or other aids of interpretation to

[5] Article 6 of the MLI provides that tax treaties are intended to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax avoidance or treaty abuse.

[6] Section 90 deals with the Central Government entering into tax treaties

[7] *Sofina S.A.* v. *ACIT* [2020] 116 taxmann.com 706 (Mumbai Tribunal)

[8] Article 13(4) of the India-Belgium treaty deals with the transfer of shares of company the property of which consists directly or indirectly principally of immovable property

[9] Section 2(47)

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expand the scope of Article 13(5) by contending that the indirect transfer of underlying Indian assets was covered therein.

The deeming fiction in the 1961 Act relating to indirect transfer, being a unilateral domestic law amendment, cannot be read into the Treaty provisions.[10]

MLI cannot be invoked without evidence of Treaty abuse

The Revenue had not established any treaty abuse through a specific enquiry or evidence. The taxpayer was an Irish entity with substantial business operations and employees, and the restructuring involved transfer of ownership in seventeen entities as part of a broader global reorganisation. Accordingly, invocation of Article 6 of the MLI merely on the basis that indirect transfer of Indian assets resulted in double non-taxation was not justified.



Our comments

This ruling reiterates that domestic indirect-transfer provisions cannot automatically be read into tax treaties in the absence of corresponding tax treaty language. It also emphasises that invocation of the MLI anti-abuse provisions requires evidence of treaty abuse and cannot rest merely on the tax outcome of a transaction.

[10] *CIT* v. *Telstra Singapore Pte. Ltd.* [2024] 165 taxmann.com 85 (Delhi)

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