



Tax alert: Indirect transfer not taxable under India-Ireland tax treaty

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The Delhi Bench of the Income-tax Appellate Tribunal (ITAT) has held that where shares of an Indian company were indirectly transferred by the Irish taxpayer, in terms of the deeming fiction under Explanation 5 to section 9(1)(i) of the Income-tax Act, 1961, it was not taxable under Article 13(6) of the India-Ireland tax treaty.

In a nutshell



A tax treaty is an agreement and not a taxing statute. The principles adopted in the interpretation of statutory legislation are not applicable to treaties. Hence, the meaning of the term 'transfer' could be imported from section 2(47) of the ITA only if there was some ambiguity in use of term in context to the relevant clauses of the tax treaty.

The objective of such exercise and recourse to Article 3(2) of the tax treaty, cannot be to expand the scope of transaction described by words 'alienation', to hold that the transaction between the taxpayer and another non-resident taxpayer resulting in an indirect transfer of assets located in India was covered by the tax treaty.



No case of treaty abuse was established by any specific enquiry or allegation and specially on basis of possible interpretation of a term, to the benefit of Revenue, the provisions of Article 6(1) of the MLI to the preamble of the India-Ireland tax treaty, should not have been relied.

The provisions of the MLI were invoked on an incorrect basis that the taxpayer structured the transfer of shares of I Co indirectly outside India which has led to double non-taxation and consequently, the taxpayer abused the tax treaty. Such assertion needed some evidence which was not there.

Background:

- The taxpayer¹ a company incorporated in Ireland, was a tax resident of Ireland under India-Ireland tax treaty. The taxpayer offered cybersecurity solutions in the form of standard software (along with incidental updates and support), consulting services and sale of accessories and appliances to customers in India. Taxpayer claimed that it had no physical presence in India and no Permanent establishment (PE) in India.
- During Financial Year (FY) 2021-22, corresponding to Assessment Year (AY) 2022-23, the taxpayer as a part of an internal restructuring within its Group, sold its ownership in various entities to another group company in Ireland (A Co), vide Share Purchase Agreement (SPA).

Amongst the various entities transferred, one of the entities was a US entity (U Co), which in turn held shares of an Indian Company (I Co). The taxpayer, while filing its return of income duly disclosed the capital gains arising from transfer of ownership in U Co as not taxable in India under Article 13(6) of the India-Ireland tax treaty [relating to taxation of capital gains].

- During the course of audit proceedings, the Assessing Officer (AO), *inter-alia*, treated the capital gains from transfer of ownership in U Co as taxable under Article 13(5) of the India-Ireland tax treaty, as it has resulted in indirect transfer of shares of I Co.

The AO invoked Article 6 of the Multilateral Instrument (MLI) [relating to Purpose of a Covered Tax Agreement] and did not accept the plea that the taxpayer was not liable to be taxed in India on any capital gains by virtue of Article 13(6) of the India-Ireland tax treaty.

- Aggrieved, the taxpayer filed objections with the Dispute Resolution Panel and subsequently, an appeal with the Delhi Bench of the Income-tax Appellate Tribunal (ITAT) against the final AO's order.

The Revenue's key contention before the ITAT were as follows:

- The transaction entailed transfer of ownership of U Co shares which resulted in indirect transfer of shares of I Co.
- The aforesaid transaction was taxable under Explanation 5 to section 9(1)(i) of the ITA [Section 9(1) of the Income-tax Act 2025] as U Co derived substantial value from I Co in India, subject to the relief under the provisions of the tax treaty as per section 90 of the ITA.
- Further, section 90 of the ITA was for avoidance of double taxation and not for creating opportunities for double non-taxation (*it may be pertinent to note that as per the submissions of the taxpayer with the AO, the alienation of shares / ownership of U Co by the taxpayer was not taxable as per the domestic laws of Ireland by virtue of exemption available for intra-group transfers*).

Relevant provisions of Income-tax Act 1961 (ITA)

Section 2

“(47) “transfer”, in relation to a capital asset, includes,—
(i) the sale, exchange or relinquishment of the asset

Section 9

“(1) The following incomes shall be deemed to accrue or arise in India :—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India.

....

Explanation 5- For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be

¹ Fireeye Ireland Ltd. v ACIT (International Tax), New Delhi (2026) IT(IT)A 1431/DEL/2025 [Delhi-Trib.]

and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.....”

Relevant provisions of India-Ireland tax treaty

Article 3 General Definitions

“(2) As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.”

Article 13 Capital Gains

“.....

(5) Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that Contracting State.

(6) Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident.”

Decision of the ITAT:

Relevance of ‘transfer’ definition under the ITA for interpreting the term ‘alienation’ under India-Ireland tax treaty

- The tax authorities relied on the concept of 'transfer' under section 2(47) of the ITA [Section 2(109) of the Income-tax Act 2025] for interpretation of the word 'alienation' as used in Article 13(5) of the India-Ireland tax treaty, to hold that the transaction between the taxpayer and A Co was taxable in India. The assertion that the word 'alienation' is a synonym of the word 'transfer' as defined in the ITA, has no legal basis.
- While interpreting the terms or words in context, to the tax treaty in context, the ordinary meaning in the light of its object and purpose need to be given. The ordinary meaning is not the technical legal meaning, but the meaning that words carry in context used.
- A tax treaty is an agreement and not a taxing statute. The principles adopted in the interpretation of statutory legislation are not applicable to treaties. Hence, the meaning of the term 'transfer' could be imported from section 2(47) of the ITA only if there was some ambiguity in use of term in context to the relevant clauses of the tax treaty. The objective of such exercise and recourse to Article 3(2) of the tax treaty, cannot be to expand the scope of transaction described by words ‘alienation’, to hold that the transaction between the taxpayer and A Co resulting in an indirect transfer of assets located in India was covered by the tax treaty.
- Article 13(5) is in regard to alienation of shares for a company which is resident of contracting state, and the same may be taxed in that contracting state. In the present case, the taxpayer transferred ownership in U Co which was not an Indian entity and not a resident of India. Thus, Article 13(5) was not applicable.
- Article 13(6) provides alienation of any property other than that referred to in paragraphs 1 to 5 and provides that the income shall be taxable only in the contracting state of which the alienator is a resident. Here the taxpayer transferred ownership in U Co. As per Article 13(6) such alienation does not trigger any income-tax liability in India.
- Thus, interpretation of the word ‘alienation’ did not arise so as to give opportunity to the tax authority in India to take recourse to any internal or external aid of interpretation and to rely on a part of the definition of transfer in section 2(47) of the ITA to claim that as the underlying assets to the shares transferred are involved, Article 13(5) shall become applicable.
- The ordinary meaning of the term 'alienation' needs to be adopted for the subject of transfer of ownership in U Co, and not the meaning as per the term ‘transfer’ under section 2(47) the ITA. Here, the expression

‘transfer’ was in section 2(47) of the ITA describing various kinds of transactions by way of a ‘inclusive definition’, and to expand the scope of word ‘alienation’ in the tax treaty was not sustainable in law.

- Article 3(2) of the tax treaty was erroneously considered, to invoke clauses of section 2(47), without ambiguity, where alienation was merely referred to enforceable contractual transaction based on some valuable consideration determined in such contract itself.
- The High Court (HC) in an earlier ruling² expounded on the scope of Article 3(2) of the India-Singapore tax treaty and opined that unilateral amendments cannot be accorded an overriding effect over the provisions of the tax treaty. Article 3(2) was confined to resolving ambiguities in treaties and cannot be pressed into service to override or alter the substantive taxing rights allocated under the treaty by introducing element of uncertainty. A see-through or look-through approach cannot be adopted in a transaction falling under a specific head and no such construction can be imported from domestic law.
- Another earlier ruling of Mumbai ITAT³ was in context to Article 13(5) of the India-Belgium tax treaty. It said that the Article applies only where the shares transferred are of a company resident in a Contracting State (India or Belgium); since the shares transferred were of a Singapore company, Article 13(5) was inapplicable and the gains fell within the residuary Article 13(6), taxable only in Belgium.

The ITAT held that unlike Article 13(4), Article 13(5) does not employ the words "directly or indirectly" and hence does not permit a "see through" approach; the transfer of shares of the foreign holding company cannot be regarded as a transfer of shares of its Indian subsidiary; the ITAT further held that the deeming fiction in explanation 5 to section 9(1)(i), being a unilateral amendment to domestic law, cannot be read into the tax treaty; amendments to the ITA, whether retrospective or prospective, do not modify or subject treaty provisions to the ITA.

- Hence, the present transaction wherein the shares of I Co were indirectly transferred, in terms of the deeming fiction under Explanation 5 to section 9(1)(i) of the ITA [Section 9(1) of the Income-tax Act 2025], through the sale of ownership in U Co by the taxpayer to A Co was not taxable under Article 13(6) of the India-Ireland tax treaty.
- The tax authorities incorrectly interpreted section 90(1)(b) of the ITA [Section 159(3)(b) of the Income-tax Act 2025] to hold that capital gains arising to the taxpayer were taxable in India. The taxpayer was a tax resident of Ireland and the deeming provision in Explanation 5 to section 9 of the ITA was confined to the ITA and did not apply to the tax treaty. The gains from the transfer of ownership in U Co to A Co was thus not taxable in India under Article 13(5) of the India-Ireland tax treaty.
- No case of treaty abuse was established by any specify enquiry or allegation and specially on basis of possible interpretation of a term, to the benefit of Revenue, the provisions of Article 6(1) of the Multilateral Instrument (MLI) to the preamble of the India-Ireland tax treaty, should not have been relied.
- The provisions of the MLI were invoked on an incorrect basis that the taxpayer structured the transfer of shares of an I Co indirectly outside India which led to double non-taxation and consequently, the taxpayer abused the tax treaty.

Such assertion needed some evidence which was not there. On the contrary the taxpayer was an entity established in 2013 with substantial business operations and employees, and at the same time held investments in various entities. The SPA was a document vide which the taxpayer had transferred its ownership in seventeen entities to A Co. There was substance in contention that it was too narrow a view to allege that the Group underwent global re-structuring and the taxpayer alienated the shares of various entities only to ‘transfer’ the shares of I Co.

² CIT (International Taxation) vs. Telstra Singapore Pte. Ltd. [2024] 165 taxmann.com 85 (Delhi-HC)

³ Sofina S.A. vs. ACIT (International Taxation) [2020] 116 taxmann.com 706 (Mumbai - Trib.)

Comments:

Taxability of indirect transfers under the relevant tax treaty, has been a subject of litigation. While the Indian domestic tax law has specifically introduced provisions to tax indirect transfer of assets, one needs to examine its implications under the relevant tax treaty provisions.

The ITAT ruling has discussed questions regarding the extent to which domestic deeming fictions (such as indirect transfer) can overlap the operation of tax treaty provisions governing capital gains, the availability of a "look-through" or "see-through" approach for characterising offshore transfers.

The ITAT, in this ruling, held that the present transaction wherein the shares of I Co were indirectly transferred, in terms of the deeming fiction under Explanation 5 to section 9(1)(i) of the ITA [Section 9(1) of the Income-tax Act 2025], through the sale of ownership in U Co by the taxpayer to A Co was not taxable under Article 13(6) of the India-Ireland tax treaty. The same was on the following basis:

- A tax treaty is an agreement and not a taxing statute. The principles adopted in the interpretation of statutory legislation are not applicable to treaties. Hence, the meaning of the term 'transfer' could be imported from section 2(47) of the ITA only if there was some ambiguity in use of term in context to the relevant clauses of the tax treaty. The objective of such exercise and recourse to Article 3(2) of the tax treaty, cannot be to expand the scope of transaction described by words 'alienation', to hold that the transaction between the taxpayer and another non-resident taxpayer resulting in an indirect transfer of assets located in India was covered by the tax treaty.
- No case of treaty abuse is established by any specify enquiry or allegation and specially on basis of possible interpretation of a term, to the benefit of Revenue, the provisions of Article 6(1) of the MLI to the preamble of the India-Ireland tax treaty, should not have been relied. The provisions of the MLI were invoked on an incorrect basis that the taxpayer structured the transfer of shares of I Co indirectly outside India which has led to double non-taxation and consequently, the taxpayer abused the tax treaty. Such assertion needed some evidence which was not there.

Further, it is important to note that the recent Supreme Court (SC) ruling⁴ in case of Tiger Global International has reinforced that the Indian indirect transfer provisions under section 9(1)(i) and tax treaty protections must be examined alongside the General Anti-Avoidance Rule (GAAR).

The SC, amongst others, upheld that GAAR can be invoked notwithstanding the availability of treaty benefits, including under the India-Mauritius tax treaty. Even where an indirect transfer may otherwise escape Indian taxation under a treaty, the tax authorities may deny such treaty protection if the structure lacks commercial substance or is principally designed to obtain a tax benefit, thereby allowing GAAR to override the treaty claim.

Please also refer to our tax alert released on the above SC ruling:

<https://www.deloitte.com/content/dam/assets-zone1/in/en/docs/services/tax/2026/in-tax-gbt-sc-holds-aar-application-related-to-transaction.pdf>

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

⁴ AAR (Income-tax) vs. Tiger Global International II Holdings [2026] 182 taxmann.com 375 (SC)



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