



RSM India Newsflash: Mumbai ITAT upholds Treaty protection for Singapore entity; upholds Indirect Transfer gains taxable only in Singapore

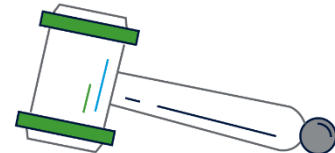
Newsflash

Mumbai ITAT upholds Treaty protection for Singapore entity; upholds Indirect Transfer gains taxable only in Singapore

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1.0 Background

- 1.1 In a recent ruling, the Hon'ble Mumbai Bench of the Income Tax Appellate Tribunal ('Hon'ble ITAT') in the case of **eBay Singapore Services Pte. Ltd.** ('the Appellant') has held that eligibility of the India-Singapore Double Taxation Avoidance Agreement ('DTAA' or 'the treaty') for the Appellant cannot be disregarded, considering various factual evidences furnished by the Appellant in its support and in the absence of any contrary evidence shown by the revenue authorities.



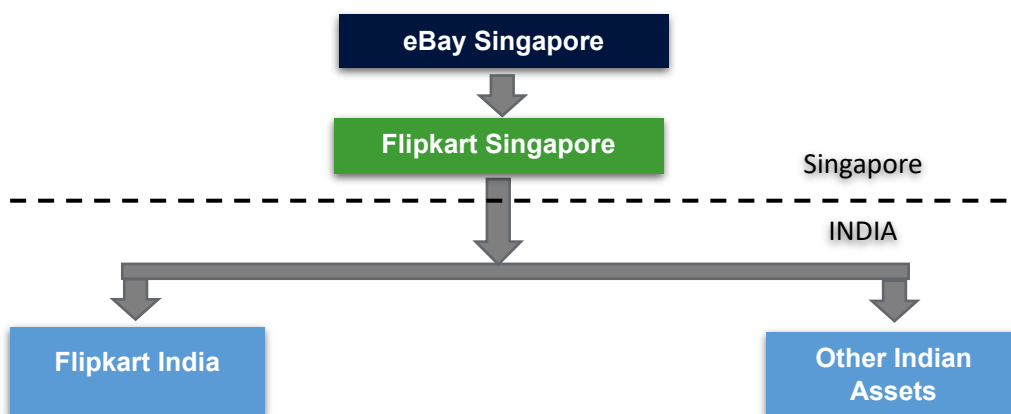
The Hon'ble ITAT further held that capital gains arising from the sale of shares of another Singapore company, which indirectly held Indian assets, are not taxable in India. The Hon'ble ITAT observed that taxing rights over such gains lie exclusively with Singapore under Article 13(5) of the treaty (which is a residuary clause) as other clauses of Article 13 (Capital Gains) do not provide for taxability in case of indirect transfer of assets/ shares in India.

2.0 Facts of the Case

- 2.1 The Appellant is a company incorporated in Singapore in 2003 and has, since its inception, been engaged in providing e-commerce-related services to its group entities. Such services include product management, business development, customer service support, legal, human resources, and finance functions. From AY 2019-2020 onwards ('year under consideration'), the Appellant was also licensed to provide an online platform facilitating export sales from Indian sellers to overseas buyers.

The Appellant held shares in **Flipkart Singapore Pte. Ltd.** ('Flipkart Singapore'), which in turn indirectly held substantial assets in India through its Indian subsidiaries, including **Flipkart India Private Limited** ('Flipkart India').

The structure of the Appellant was as follows:



- 2.2 The Appellant has at all times been a tax resident of Singapore and has duly obtained TRC for the year under consideration.
- 2.3 During the year under consideration, the Appellant sold its shares in Flipkart Singapore for a total sales consideration of Rs. 7,440.79 crores on 17 August 2018, thereby earning capital gains amounting to Rs. 2,257.91 crores. The Appellant filed its return of income on 3 October 2019 declaring 'Nil' income, claiming that the aforesaid capital gains were not taxable in India by virtue of Article 13(5) of the DTAA.
- 2.4 During the course of assessment proceedings, the Ld. AO was of the opinion that the "head and brain" of the Appellant were situated in the United States of America ('USA') and that, in substance, the management and control of the Appellant rested with eBay Inc., USA.
- 2.5 The Ld. AO passed a Draft Assessment Order proposing to deny the benefit of Article 13(5) of the DTAA availed by the Appellant and treat the entire capital gains as taxable in India in accordance with the Act read with India-USA DTAA. The Hon'ble DRP upheld the findings of the Ld. AO and accordingly, the Ld. AO passed the final assessment order determining the total income at Rs. 2,257.91 crores.
- 2.6 Aggrieved by the said final assessment order, the Appellant preferred an appeal before the Hon'ble ITAT.

3.0 Contentions of the Appellant

3.1 Treaty Eligibility under the Singapore-India DTAA

The Appellant relied on a valid TRC issued by the Inland Revenue Authority of Singapore for the year under consideration, which was duly furnished before the Ld. AO.

In support of its treaty eligibility, the Appellant placed reliance on ***CBDT Circular No. 789 dated 13 April 2000***, the judgment of the Hon'ble **Supreme Court** in ***Vodafone International Holdings B.V. v. Union of India [(2012) 341 ITR 1 (SC)]*** and the ***Press Release dated 1 March 2013***, contending that a valid TRC is conclusive evidence of residence and beneficial ownership for treaty purposes. Further reliance was placed on ***Azadi Bachao Andolan [(2003) 263 ITR 706 (SC)]*** and ***P.V.A.L. Kulandagan Chettiar [(2004) 267 ITR 654 (SC)]***, affirming that a taxpayer may apply provisions of the Act or the DTAA, whichever is more beneficial.

3.2 Rebuttal to the allegation of USA-based Control

The Appellant submitted that two of the three Directors of the Appellant were Singapore residents and the third was based in Hong Kong. None of the Directors held any post in eBay Inc., USA during the year under consideration. It was clarified, based on documentary evidence submitted before the Hon'ble DRP, that Ld. AO's observation regarding one Director (Mr. Jae Hyun Lee) being associated with eBay Inc., USA was factually incorrect. A remand report dated 8 December 2021 also confirmed this fact, though the Hon'ble DRP failed to duly consider the same.

It was further submitted that all board meetings of the Appellant were held in Singapore and that key investment and divestment decisions, including the acquisition and subsequent sale of Flipkart Singapore shares, were taken by the Board of Directors of eBay Singapore through resolutions passed in Singapore. The global Treasury team merely executed the transactions under the authority of the Board and held no independent decision-making powers.

3.3 Applicability of Article 13(5) of the DTAA

The Appellant submitted that Article 13(5) of DTAA is a residuary provision that allocates taxing rights over gains from alienation of property, not covered under paragraphs (1), (2), (3), (4A) or (4B), exclusively to the State of residence of the transferor entity. Since the shares of Flipkart Singapore do not fall within any of the earlier paragraphs, gains arising therefrom are governed by Article 13(5) and are therefore not taxable in India.

Reliance was placed on the judgment of the **Hon'ble Andhra Pradesh High Court** in **Sanofi Pasteur Holdings SA v. Department of Revenue** [(2013) 354 ITR 316 (AP)], wherein it was held that indirect transfers effected through alienation of shares of a foreign company are not taxable in India under the applicable tax treaty.

4.0 **Contentions of the Revenue**

4.1 Challenge to the Conclusiveness of TRC

The Revenue contended that the Tax Residency Certificate (TRC) produced by the Appellant cannot be treated as conclusive evidence for granting treaty relief and does not preclude the tax authorities from denying treaty benefits where the structure or arrangement is found to be for the purpose of avoiding taxes. In this regard, reliance was placed on the **Hon'ble Supreme Court's decision in Vodafone International Holdings B.V. (supra)** and the **Hon'ble Bombay High Court's decision in Aditya Birla Nuvo Ltd. v. DDIT** [(2012) 342 ITR 308 (Bom)], to support the application of judicial anti-avoidance rules.



4.2 Allegation of USA-Based Control and Layered Transaction

The revenue primarily contended that the DTAA shall not apply in the present case, as the ultimate control and management of the Appellant rested with **eBay Inc., USA**. It was also alleged that the transaction was a layered transaction, wherein **eBay Singapore** functioned merely as an intermediary entity and that the ultimate beneficiary of the sale proceeds of the Flipkart Singapore shares was **eBay Inc., USA**.

Referring to the findings in the assessment order, the Revenue submitted that the treasury operations of the Appellant were effectively managed from the USA, and that there existed no formal communication mechanism between **eBay Singapore** and its global treasury team. It was alleged that the treasury team operated independently of the Singapore Board, indicating that the real control and management were situated outside Singapore.

4.3 Inapplicability of Article 13 of the DTAA

The Revenue further argued that Article 13 of the DTAA was not applicable in the present case, as the transaction involved the sale of shares of a Singapore-resident company (Flipkart Singapore). According to the Revenue, Article 13 is intended to allocate taxing rights only where the property alienated is situated in India, or the shares transferred are of an Indian company, and not where both the transferor and transferee are non-residents.

The Revenue argued that the residuary clause under Article 13(5) of the DTAA applies only where the property alienated is not otherwise covered under other clauses of Article 13. Since shares are specifically dealt with under Articles 13(4A)–(4C), Article 13(5) was contended to be inapplicable to the present case.

4.4 Application of Domestic Law in Absence of Express Treaty Prohibition

The Revenue also contended that even as per Article 23 (“Income Not Expressly Mentioned”) and Article 25 (“Avoidance of Double Taxation”) of the DTAA, income not expressly dealt with in other Articles may be taxed in accordance with the domestic law of each contracting state. Since the DTAA does not contain any “express prohibition” against India taxing gains on shares of a Singapore company deriving value from Indian assets, the domestic deeming fiction under the Act applies. In this regard, the revenue cited the observations of the **Hon’ble Supreme Court** in **Maru Ram & Ors. v. Union of India** [AIR 1980 SC 2147].

4.5 Reliance on the Tiger Global Ruling

The revenue placed heavy reliance on the decision of the **Authority for Advance Rulings (AAR)** in **Tiger Global International II Holdings, Mauritius** [(2020) 429 ITR 288 (AAR)] and the subsequent judgment of the **Hon’ble Delhi High Court** in the same matter [(2025) 170 Taxmann.com 706 (Del)], wherein the AAR had observed that the object of the India-Mauritius DTAA was to grant exemption only for transfer of shares in Indian companies, and not for transfer of shares in foreign companies holding Indian subsidiaries. The **Hon’ble Supreme Court**, having stayed the operation of the Delhi High Court’s judgment, was also cited to support the interpretation that India retains the right to tax capital gains arising from indirect transfers of Indian assets.

5.0 Decision of the Hon’ble Mumbai ITAT

5.1 No evidence of management and control from the USA

The Hon’ble ITAT found that the Appellant had placed comprehensive documentary evidence showing that its Board of Directors, comprising residents of Singapore and Hong Kong, exercised effective management and control over its affairs. The Board resolutions evidencing key investment and divestment decisions were produced and not disputed by the Revenue. There were no nominees or secondees of eBay Inc., USA, on the Appellant’s Board, nor any evidence showing that the US parent dictated the Appellant’s decision-making.



The revenue had not produced any evidence to the contrary. Accordingly, it was held that the revenue’s assertion of US-based control lacked factual basis and that the Appellant’s control and management were situated in Singapore.

5.2 Article 13 of the India–Singapore DTAA – Clause-by-Clause Analysis

The Hon’ble ITAT examined the applicability of Article 13 of the DTAA and observed that the transaction did not fall within the scope of paragraphs (1) to (4C) of the Article. Hence, it was held that the transaction falls under the residual provision of Article 13(5), which governs gains from alienation of property not covered by the preceding paragraphs. In terms of Article 13(5), such gains are taxable only in the State of residence of the alienator. Accordingly, the Hon’ble ITAT concluded that, in the present case, the taxing rights over the impugned capital gains vest exclusively with Singapore.

5.3 Reliance on “Tiger Global” Ruling Not Applicable

The Hon’ble ITAT noted that the revenue’s reliance on the ruling of **AAR v. Tiger Global International II Holdings** was misplaced. It was observed that while the Hon’ble Supreme Court has admitted the Revenue’s SLP against the **Delhi High Court’s** decision in **Tiger Global** [(2024) 165 Taxmann.com 850 (Del)], there has been no final adjudication. Unless a layered or colourable transaction is demonstrated on facts, the preliminary observations in **Tiger Global** cannot be automatically invoked.

5.4 DTAA overrides domestic deeming provisions

The Hon’ble ITAT reiterated that while Section 9(1)(i) of the Act, read with Explanation 5, may deem indirect transfers of Indian assets to be taxable in India, such deeming provisions cannot override DTAA allocations under Section 90(2) of the Act. Reliance was placed on the judicial principles established by the Hon’ble Supreme Court in:

- *Vodafone International Holdings B.V. v. UOI* [(2012) 341 ITR 1 (SC)];
- *Sanofi Pasteur Holdings SA v. Department of Revenue* [(2013) 354 ITR 316 (AP)]; and
- *Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT* [(2021) 125 Taxmann.com 42 (SC)],

wherein it was consistently held that DTAA provisions prevail over domestic tax fictions, if they are more beneficial.

5.5 Absence of “Look-Through” Clause in the DTAA

The Hon’ble ITAT noted that India-Singapore DTAA does not contain any “look-through” clause enabling source-based taxation of gains from shares deriving value from Indian assets (unlike certain DTAAAs which specifically include such provisions for shares deriving value from immovable property). In the absence of such a clause, it was held that the residuary Article 13(5) applies, allocating exclusive taxing rights to Singapore.

6.0 **Our Comments**

- 6.1 The ruling reinforces the long-standing judicial principle that treaty provisions prevail over domestic deeming fictions if they are more beneficial, such as the indirect transfer tax provisions of the Act. It highlights that India’s taxing rights must flow from the express language of the applicable DTAA and cannot be expanded through unilateral domestic amendments.
- 6.2 The Hon’ble ITAT has placed its thrust on TRC and various factual evidence furnished by the Appellant to substantiate its residency and held that the same cannot be doubted in the absence of any contrary evidence on record.
- 6.3 Importantly, the Hon’ble ITAT’s interpretation of Article 13(5) of the DTAA provides clarity that, in the absence of a specific “*look-through*” clause, gains arising from offshore transfers of shares cannot be brought within India’s tax net merely because the underlying assets are located in India. This finding offers significant comfort to multinational investors using Singapore as a regional holding jurisdiction. This will also apply to investors in other jurisdictions where similar beneficial provisions exist in the treaty.

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This Newsflash summarizes a recent ruling by the Mumbai ITAT, which held that gains arising from the indirect transfer of Indian assets are not taxable in India under the India-Singapore DTAA. It may be noted that nothing contained in this Newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain thereof and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this Newsflash.

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