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Newsflash

Delhi ITAT Holds Gain on Transfer of US Entity Not Taxable in India under India-Ireland DTAA

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1.0 Background

1.1 In a recent ruling, the Hon'ble Delhi Bench of the Income Tax Appellate Tribunal ("Hon'ble ITAT" or "Tribunal") in the case of ***FireEye Ireland Limited***[1] ('the Appellant') has held that the capital gain arising from the transfer of ownership in a US entity, which in turn held an Indian company, could not be treated as an indirect transfer of the shares of the Indian company for the purposes of Article 13(5)[2] of the India-Ireland Double Taxation Avoidance Agreement ("DTAA" or "the treaty") which permits a Contracting State to tax gains from the alienation of shares in a company resident in that State, subject to Article 13(4). In the given case, since the transferred entity was a US entity and not a resident of India, the capital gain fell within the residuary Article 13(6)[3] and is not taxable in India.



1.2 The Hon'ble ITAT further held that the eligibility of India-Ireland DTAA for the Appellant cannot be disregarded, solely on the basis of an alleged treaty abuse, in the absence of any material demonstrating that the transaction was undertaken for obtaining an undue treaty benefit.

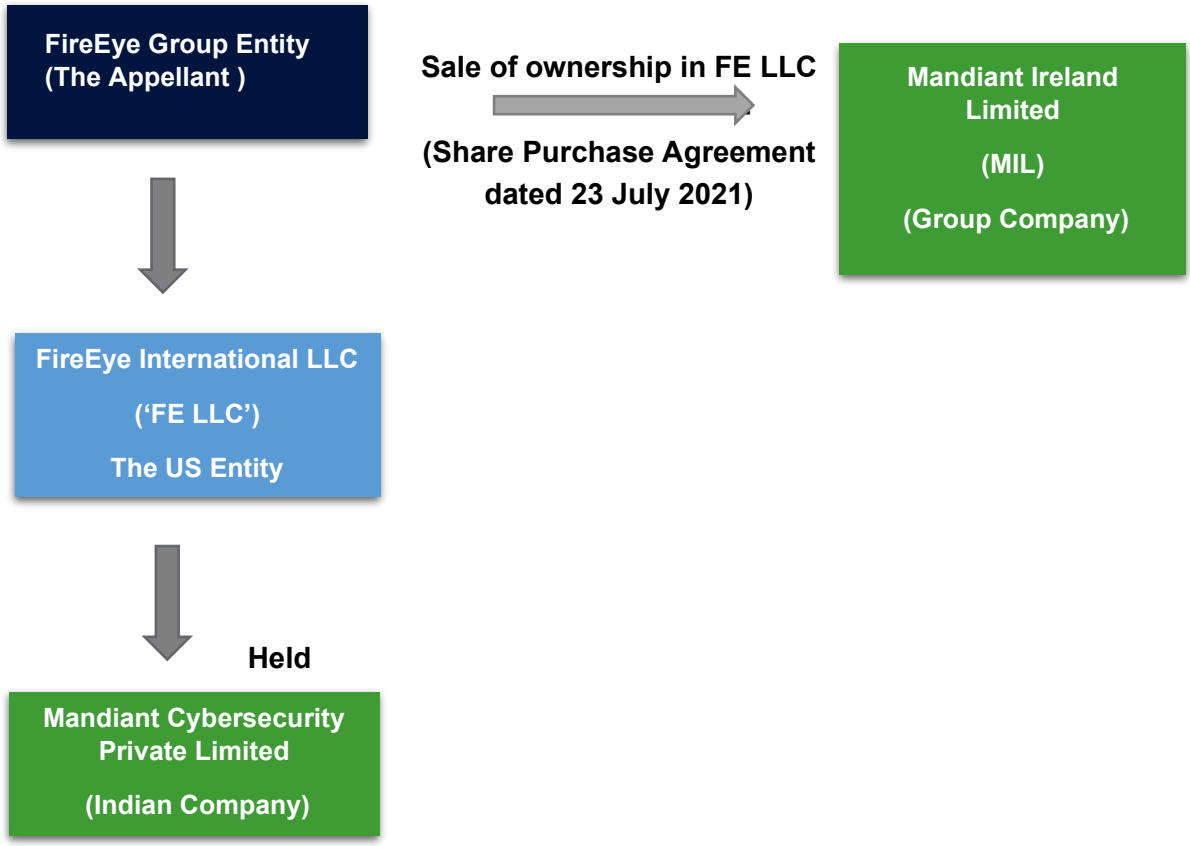
2.0 Facts of the Case

2.1 The Appellant is a company incorporated in Ireland and a tax resident of Ireland under the India–Ireland DTAA. The Appellant is a part of the FireEye Group, which markets its offerings to customers across non-American regions, including India. In India, the Appellant provided cybersecurity solutions comprising standard software along with incidental updates and support, consulting services, and the sale of accessories and appliances.

[1] *IT(IT)A No. 1431/DEL/2025, AY 2022-23, order dated 30 September 2026*
[2] *Article 13(5) of India-Ireland DTAA: 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*
[3] *Article 13(6) of India-Ireland DTAA: 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.*

2.2 During FY 2021-22, the Appellant as part of an internal restructuring of the FireEye Group transferred its ownership interest in 17 group entities to Mandiant Ireland Limited ("MIL"), another group company, pursuant to a Share Purchase Agreement dated 23 July 2021. Among the entities transferred was FireEye International LLC, a US entity ("FE LLC"), which, in turn, held Mandiant Cybersecurity Private Limited ("MCPL" or "Indian company").

2.3 The structure of the transaction undertaken by the Appellant is as under:



2.4 The Appellant, a company incorporated and fiscally resident in Ireland, had furnished a valid TRC for the year under consideration and was eligible to claim benefits under the India-Ireland DTAA. The Appellant stated that it had neither a physical presence nor a permanent establishment (PE) in India.

2.5 The Appellant reported capital gain arising from the transfer of its ownership in FE LLC ***as not taxable in India, relying on Article 13(6) of the India-Ireland DTAA***. The Appellant claimed that the transfer was exempt under domestic laws of Ireland by virtue of exemption available for intra-group transfers.

2.6 During the assessment proceedings, the Learned Assessing Officer ("Ld. AO") characterized the transaction as an indirect transfer of shares of MCPL on the basis that FE LLC derived substantial value from assets located in India. Accordingly, the Ld. AO invoked Explanation 5 to Section 9(1)(i)[4] of the Income-tax Act, 1961 ("the Act") and Article 13(5) of the India-Ireland DTAA to hold that the capital gains arising from the transaction were taxable in India. The Ld. AO further placed reliance on Article 6 of the Multilateral Instrument ("MLI"), alleging that the transaction resulted in double non-taxation and constituted an abuse of treaty benefits.

2.7 Following the same, the Ld. AO issued a draft assessment order proposing to tax the capital gains under Article 13(5) of the India-Ireland DTAA read with Explanation 5 to Section 9(1)(i) of the Act. The Hon'ble Dispute Resolution Panel ("DRP") upheld the findings of the Ld. AO. Consequently, the Ld. AO passed the final assessment order determining taxable capital gains of approximately Rs. 497.73 crore.

2.8 Aggrieved by the final assessment order and the directions issued by the Hon'ble DRP, the Appellant preferred an appeal before the Hon'ble ITAT.

3.0 Contentions of the Appellant



3.1 Indirect transfer deeming fiction under Explanation 5 to Section 9(1)(i)[5] cannot be imported into the DTAA

The Appellant argued that the deeming fiction under Explanation 5 to Section 9(1)(i) of the Act, which seeks to tax indirect transfers of Indian assets, cannot be extended to the provisions of the applicable DTAA in the absence of a corresponding provision under Article 13(5) of the treaty. The Appellant contended that a domestic law amendment cannot, by itself, expand or modify the taxing rights allocated under a tax treaty.

In this regard, the Appellant placed reliance on the decision of the **Hon'ble Delhi High Court in DIT v. New Skies Satellite BV** [6] wherein the Court held that a unilateral legislative amendment to domestic law cannot alter the taxing rights agreed between two sovereign states. Mere amendment to the section 9(1)(vi) cannot result in a change unless such amendment is brought in the agreement as well.

[4,5] *Explanation 5 to Section 9(1)(i) —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 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*

[6] *[2016] 382 ITR 114 (Delhi - HC)*

3.2 Applicability of definition of "Transfer" under section 2(47) of the Act

The Appellant contended that Article 3(2) of the DTAA can be invoked only where the meaning of a term used in the treaty is unclear or requires recourse to domestic law. Merely because the term "alienation" is synonymous to the expression "transfer" under domestic law, the definition of "transfer" contained in Section 2(47) of the Act cannot automatically be imported into the DTAA.

In support of its contention, the Assessee relied upon the decision of the **Andhra Pradesh High Court in case of Sanofi Pasteur Holding SA v. Department of Revenue**[7], wherein the Court held that where the relevant terms used in the DTAA are clear and unambiguous, there is no warrant for invoking Article 3(2) to import the meaning assigned under domestic law. The Court further observed that where the DTAA clearly and exclusively allocates the right to tax capital gains to other Contracting State, the treaty provisions would prevail, and the transaction cannot be brought within the ambit of Section 2(47).

3.3 Applicability of Article 13(6) to the transfer of ownership interest in FE LLC

The Appellant submitted that Article 13(5) is not applicable to the impugned transaction, since the transaction involves transfer of ownership interest in FE LLC i.e. an US entity and therefore, does not constitute alienation of shares falling within the scope of Article 13(5). Accordingly, the transaction is governed by the residuary provisions of Article 13(6), which apply to gains arising from the alienation of any property other than the property referred to in paragraphs 1 to 5 of Article 13. Such gains are taxable only in the Contracting State of which the alienator is a resident.

In this regard, reliance is placed on **Sofina S.A. v. ACIT (International Taxation)**[8] wherein it was held that, since the transaction under consideration was covered by the residuary provisions of Article 13(6) of the India-Belgium tax treaty, the gains arising therefrom were taxable only in Belgium, being the Contracting State of which the alienator was a resident.

4.0 Contentions of the Revenue

4.1 Taxability as indirect transfer under explanation 5 to Section 9(1)(i) read with Article 13(5)

The Revenue contended that although the Assessee transferred its interest in FE LLC, a US entity, the transaction effectively resulted in an indirect transfer of MCPL, an Indian company, since FE LLC derived substantial value from MCPL. Accordingly, by virtue of Explanation 5 to

[7] *[2013] 30 taxmann.com 222 (Andhra Pradesh – HC)*
[8] *[2020] 116 taxmann.com 706 (Mum.-Trib.)*

Section 9(1)(i) of the Act, the interest in FE LLC was deemed to be situated in India and the resultant capital gains were taxable in India.

Consequently, the Revenue sought to bring the transaction within the ambit of Article 13(5) of the India-Ireland DTAA, instead of the residuary provision under Article 13(6).

4.2 Meaning of "transfer" under section 2(47) relevant for interpreting "alienation" under the DTAA

The Revenue sought to interpret the expression "alienation" under Article 13(5) of the India-Ireland DTAA with reference to the meaning of "transfer[9]" under Section 2(47) of the Act. On this basis, the Revenue contended that the expression "alienation" under Article 13(5) should be interpreted broadly so as to encompass the indirect transfer of the Indian company arising from the internal restructuring.

4.3 Applicability of section 90(1)(b)[10] of the Act and Article 6(1) of Multilateral Instrument

The Revenue relied upon Section 90(1)(b) of the Act to contend that one of the objects of entering into a DTAA is the avoidance of double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance. Further, the Revenue relied upon Article 6(1) of the Multilateral Instrument (MLI), which modifies the preamble of the India-Ireland DTAA to clarify that the treaty is not intended to create opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty-shopping arrangements.

Since the gains arising from the transaction were claimed to be not taxable in India under the DTAA and also exempt in Ireland on account of the intra-group nature of the transfer, the Revenue contended that the Assessee had structured the transfer of shares of Indian company indirectly outside India which has led to double non-taxation. Accordingly, the Revenue alleged that the arrangement resulted in an abuse of the India-Ireland DTAA.

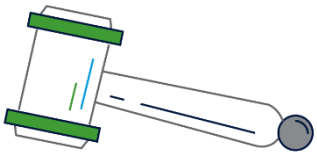
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[9] *The definition of "transfer" under Section 2(47) is wide in scope. The Explanation thereto provides that the term "transfer" includes, and shall be deemed to have always included, the disposal of or parting with an asset or any interest therein, or creation of any interest in an asset, directly or indirectly, including where such transfer flows from the transfer of shares of a company incorporated outside India.*

[10] *Section 90(1)(b) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory),*

5.0 Decision of the Hon'ble Delhi ITAT

5.1 Indirect transfer deeming fiction under Explanation 5 to Section 9(1)(i) cannot be imported into the DTAA



The Hon'ble ITAT observed that Explanation 5 to Section 9(1)(i) of the Act is a deeming provision confined to the Act and cannot be read into the India-Ireland DTAA in the absence of a corresponding provision in the treaty. A unilateral amendment to domestic law, whether retrospective or prospective, cannot modify or expand the taxing rights provided under the DTAA.

Accordingly, the ITAT concluded that the gains arising from the transfer of the Appellant's ownership interest in FE LLC to MIL, which resulted in an indirect transfer of shares of MCPL only by virtue of the deeming fiction contained in Explanation 5 to Section 9(1)(i), could not be subjected to tax in India under the India-Ireland DTAA. The Tribunal held that the taxability of such gains was governed by Article 13(6) of the DTAA.

In arriving at its conclusion, the ITAT relied on the principle laid down in ***Sanofi Pasteur (supra)*** observing that a transfer of ownership interests in a foreign holding company cannot be treated as a transfer of shares of its underlying Indian subsidiary by importing the deeming fiction under Explanation 5 to Section 9(1)(i) into the DTAA. Consequently, the Tribunal held that the gains arising from the impugned transaction were not taxable in India under the treaty.

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

The Hon'ble ITAT examined the applicability of Article 13 of the India-Ireland DTAA. The relevant provisions and the observations of the Hon'ble ITAT are summarized below:

Article No.	Provision of the Article	Observation of the Hon'ble ITAT
Article 13(1)	Provides that gains derived by resident of contracting state from the alienation of immovable property referred in Article 6 and situated in the other contracting state which may be taxed in that other state.	The impugned transaction does not involve the transfer/alienation of such immovable property.
Article 13(2)	Deals with gains arising from the alienation of movable property forming part of business property of a permanent establishment	Article 13(2) is not applicable as the impugned transaction does not relate to the alienation of any movable property forming part of

	maintained by enterprise in other contracting state.	business property of a permanent establishment.
Article 13(3)	Provides for gains derived by an enterprise of a contracting state for the alienation of specific assets like ships or aircrafts operated in international traffic or movable property pertaining to the operation of such ships or aircraft.	Article 13(3) is not applicable to the impugned transaction as the Appellant has transferred ownership in FE LLC by transfer of shares and does not involve the alienation of any ship or aircraft.
Article 13(4)	Provides for gains from alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State.	This clause is not applicable to the present case as there is no alienation of shares/interest of partnership or trust.
Article 13(5)	Provides that gains arising from the alienation of shares, other than those covered under Article 13(4), in a company that is a resident of a Contracting State may be taxed in that Contracting State.	• Relying on the decision in **Sofina S.A. (supra),** the Tribunal concluded that Article 13(5) applies only where the shares being transferred are those of a company that is a resident of a Contracting State. • Further, unlike Article 13(4), Article 13(5) does not employ the words "directly or indirectly." Therefore, the scope of Article 13(5) cannot be expanded by adopting a "look-through" or "see-through" approach so as to tax the transfer merely on the basis of any underlying Indian assets or interests. • In the present case, the Appellant transferred its ownership interest in FE LLC, which is neither an Indian entity nor a resident of India. Accordingly, Article 13(5) is not applicable to the impugned transaction.

Article 13(6)	Provides that gains arising from the alienation of any property other than property covered under Articles 13(1) to 13(5) shall be taxable only in the Contracting State of which the alienator is a resident.	Since the transfer of the ownership interest in FE LLC does not fall within Articles 13(1) to 13(5), the transaction is governed by Article 13(6). Consequently, the resulting gains are taxable only in the Contracting State in which the Company, being the alienator, is resident and do not give rise to an income-tax liability in India under the relevant treaty provisions.

5.3 Meaning of "transfer" under Section 2(47) cannot be imported to expand "alienation" under the DTAA

The Hon'ble ITAT rejected the Revenue's contention that "alienation" under Article 13(5) should be interpreted as synonymous with "transfer" as defined under Section 2(47) of the Act, holding that such an interpretation had no legal basis.

The ITAT observed that a tax treaty is an agreement and not a taxing statute. Accordingly, treaty terms must ordinarily be interpreted according to their ordinary meaning in their context and in light of the object and purpose of the treaty. The meaning of the term "transfer" could be imported from section 2(47) of the Act only if there is a genuine ambiguity in the treaty terminology.



The ITAT relied upon the **Hon'ble Delhi High Court ruling in CIT (International Taxation) v. Telstra Singapore Pte. Ltd.**[11] to reiterate that Article 3(2) is intended to resolve genuine ambiguities in treaty terminology and cannot be used to override or alter the substantive allocation of taxing rights under a DTAA through unilateral domestic-law amendments.

5.4 No treaty abuse established; Section 90(1)(b) and Article 6(1) of the MLI incorrectly invoked

[11] *[2024] 165 taxmann.com 85 (Delhi)*

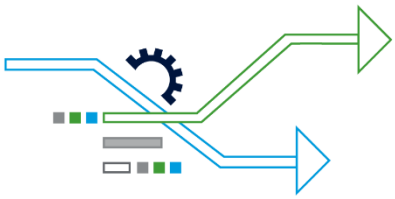
The Hon'ble ITAT held that the tax authorities had incorrectly interpreted Section 90(1)(b) to conclude that the capital gains were taxable in India merely because the transaction could otherwise result in double non-taxation.

The Tribunal further rejected the Revenue's reliance on Article 6(1) of the MLI stating that the Revenue's assertion that the transaction had been structured as an indirect transfer of shares of the Indian company merely to achieve double non-taxation required supporting evidence, which was absent.

Further, **considering the Appellant's substantial business operations and employee base, as well as the fact that the restructuring involved the transfer of interests in 17 entities, the Tribunal held that it would be too narrow to regard the global restructuring as having been undertaken merely to indirectly transfer MCPL**. Accordingly, the Tribunal rejected the Revenue's reliance on Article 6(1) of the MLI on the facts of the case. The Tribunal also held that receipts from software and related support were not taxable as royalty or fees for technical services, following its decisions in the Appellant's own cases for the two preceding years.

6.0 Our Comments

6.1 The ruling reiterates that India's taxing rights in a cross-border transaction must be determined having regard to the language of the applicable tax treaty. In the present case, the Tribunal held that the deeming fiction under Explanation 5 to section 9(1)(i) of the Income-tax Act, 1961 could not be read into Article 13(5) of the India–Ireland DTAA to extend its scope to the transfer of an interest in a US entity.



6.2 On the facts of the case, the Tribunal held that the gains fell within the residual provision of Article 13(6), which allocates taxing rights exclusively to the State of residence of the transferor. The application of this reasoning to other transactions would depend on the terms of the relevant treaty and the nature of the asset transferred. In particular, the separate rule under Article 13(4), as modified by the MLI, would need to be considered where the value of the shares or comparable interests is derived principally from immovable property.

6.3 On treaty abuse, the Tribunal found that the possibility of double non-taxation, by itself, was insufficient to substantiate the Revenue's allegation. Its conclusion took into account the Appellant's business operations and the wider scope of the group restructuring. The ruling highlights the relevance of the commercial background and supporting evidence when assessing treaty entitlement in a restructuring.

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This newsflash discusses the Delhi ITAT ruling in the case of FireEye Ireland Limited, clarifying the taxability of indirect share transfers under the India-Ireland 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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