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In this article, the authors examine a recent ruling by the Indian Tax Tribunal on indirect transfers involving an offshore two-tier structure and its implications for cross-border structuring and treaty entitlement.

Introduction

In a recent ruling in the case of *eBay Singapore Services Private Limited*,[1] the Indian Tax Tribunal (ITAT) delivered a significant decision on the taxability of indirect transfers involving an offshore two-tier structure based in Singapore holding Indian assets. It held that capital gains arising to a Singapore tax resident from such indirect transfers would fall under the residual clause of the India-Singapore tax treaty (Tax Treaty)[2] and not be taxable in India.

This ruling is particularly significant in the evolving landscape of indirect transfer taxation, a domain that continues to test the contours of source-based taxation, treaty interpretation, and antiavoidance safeguards. It addresses the long-standing ambiguity surrounding the interplay between articles 13(4B) and 13(5) of India's tax treaties, which determine the country entitled to tax capital gains arising from indirect transfers. The decision holds even greater importance against the backdrop of India's evolving antiavoidance regime, particularly the application of the principal purpose test under tax treaties and the general antiavoidance rules under Indian domestic tax laws to offshore share transfers.

In this article, we provide an in-depth analysis of the ruling, covering the factual background, the legislative framework on indirect transfers, the key arguments advanced by both parties, and our perspective on the ITAT's reasoning and its wider implications on cross-border structuring and treaty entitlement.

Legal Background

Before 2012, indirect transfers were neither expressly covered nor taxable under Indian domestic income tax laws. The Indian Supreme Court in *Vodafone International Holdings* clarified

[1] *EBay Singapore Services Pvt. Ltd. v. DCIT*, ITA No. 2378/Mum/2022 (Mumbai Trib.) (Sept. 30, 2025).

[2] Agreement Between the Government of the Republic of India and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, at art. 13(5) (Jan. 24, 1994).

that,[3] in the absence of an explicit "look-through" provision, gains arising to a nonresident from the transfer of shares of a foreign company whose underlying assets were situated in India could not be taxed in India.

Following this landmark ruling, the Indian government introduced a retroactive clarification to nullify the ruling under section 9(1)(i) of the Income Tax Act, 1961.[4] The amendment introduced indirect transfer tax provisions, deeming income from the transfer of shares or interests in a foreign entity to be taxable in India if such foreign entity derives "substantial value" from assets located in India. A share or interest in a foreign entity is deemed to derive substantial value from Indian assets if, on the specified date, the value of Indian assets exceeds INR 100 million and such assets represent at least 50 percent of the total value of the foreign entity.[5] However, no subsequent amendments addressing the taxation of such indirect transfers were introduced in any of the Indian income tax treaties.

Pertinently, article 13 (Capital Gains) of the Tax Treaty sets out,[6] *inter alia*, the allocation of taxing rights as follows:

- Article 13(4A): Gains from the sale of shares acquired before April 1, 2017, shall be taxable only in the country of residence of the alienator.
- Article 13(4B): Gains from the sale of shares acquired on or after April 1, 2017, may be taxed in the state in which the company is resident.
- Article 13(5): Gains from the alienation of property not covered by the preceding paragraphs shall be taxable in the country of residence of the alienator.

Importantly, unlike certain other treaties entered into by India (such as those with Cyprus, France, the Netherlands, and Switzerland), the Tax Treaty does not include a separate limb for conferring source-based taxing rights where shares derive their value principally from immovable property situated in India.

Factual Background

The case concerns eBay Singapore Services Private Limited (the Taxpayer), a company incorporated in Singapore. The Taxpayer was a tax resident of Singapore and held a valid tax residency certificate (TRC). As part of its activities in the Asia-Pacific region, the Taxpayer made several investments in Indian entities between 2014 and 2019. In April 2017 it transferred its Indian e-commerce business to Flipkart Singapore Private Limited (Flipkart Singapore) in exchange for shares of Flipkart Singapore. It also acquired an additional minority stake in Flipkart Singapore through a primary subscription.

In August 2018 a Singapore-based entity owned by Walmart Inc. acquired a 70 percent controlling stake in Flipkart Singapore from its existing shareholders. As a result of this transaction, the Taxpayer divested its entire holding in Flipkart Singapore, resulting in short-term capital gains. The Taxpayer claimed that such gains were exempt from tax in India under article 13(5) of the Tax Treaty.

The Indian tax authorities, however, rejected the Taxpayer's claim of treaty exemption, observing that the effective control and management of the Taxpayer was with eBay Inc., a U.S.-based entity.

Arguments Before the ITAT

The Taxpayer presented the following key submissions before the ITAT:

1. **Genuine tax residency and treaty eligibility:** The Taxpayer functioned as a regional holding and investment company for eBay Inc. in the Asia-Pacific region and has made multiple investments in Indian entities. Being incorporated and managed in Singapore, it held TRCs for calendar years 2018 and 2019 (in other words, for the entire period during which the shares of Flipkart Singapore were sold), which were not disputed by the tax authorities.

[3] *Vodafone International Holdings B.V. v. Union of India*, 341 ITR 1 (SC) (2012).

[4] Income Tax Act, 1961, at Ch. II, section 9(1)(i).

[5] *Id*. at Ch. II, section 9(1)(i), explanation 5.

[6] India-Singapore Income Tax Treaty, *supra* note 2, at art. 13.

Relying on the Supreme Court in *Vodafone International Holdings* and *Azadi Bachao Andolan*;[7] Circular No. 789, dated April 13, 2000;[8] and the press release, dated March 1, 2013,[9] issued by the Central Board of Direct Taxes (the top tax administration body in India), the Taxpayer contended that a TRC issued by the Singapore tax authorities constitutes conclusive evidence of residence and beneficial ownership for claiming treaty benefits. Accordingly, the Taxpayer, as a tax resident of Singapore, is entitled to the beneficial provisions of the Tax Treaty.

2. **Taxability under residuary clause article 13(5), and inapplicability of article 13(4B):** Article 13(4B) applies only when a Singapore resident alienates shares of an Indian company, which was not the case here, as both the Taxpayer and Flipkart Singapore were residents of Singapore. Furthermore, the phrase "may be taxed in that State" in article 13(4B) refers to the country of residence of the company whose shares are alienated, which is Singapore, not India, in this case.

   Capital gains arising from the sale of shares of Flipkart Singapore, a Singapore tax resident, fall under article 13(5) of the Tax Treaty, the residuary clause that grants exclusive taxing rights to the country of residence for gains not covered under paragraphs 1, 2, 3, 4A, or 4B.

   Absent any express clause conferring source-based taxation rights, the treaty must be read as is, without importing any domestic law fictions (such as the indirect transfer tax provisions). The Taxpayer relied on *Sanofi Pasteur Holdings SA*,[10] where the Andhra Pradesh High Court held that gains from the transfer of foreign shares holding Indian assets were not taxable in India under the relevant treaty.

3. **Commercial substance and management control:** To rebut the tax authority's allegation that the Taxpayer's control and management were in the United States, the Taxpayer submitted detailed evidence demonstrating that its management and control were exercised in Singapore:
   - Two of the three directors were Singapore residents, while the third director was based in Hong Kong. Between 2015 and 2018, no director held any position in eBay Inc.
   - All board meetings were held in Singapore, and eBay Inc. had no nominees or common directors on the Taxpayer's board.
   - Key investment and divestment decisions, including the acquisition and sale of shares of Flipkart Singapore, were made and approved by the board of directors in Singapore, as evidenced by the board resolutions filed.
   - The group treasury team merely acted in an executional capacity under the authority of the board; decision-making powers remained with the directors based in Singapore.

4. **Compliance with the limitation of benefits clause:** The Taxpayer further argued that it satisfied the limitation of benefits clause under article 24A of the Tax Treaty, having incurred annual operating expenditure exceeding $200,000 in Singapore. It is a fully functional entity with a substantive board of directors, senior management personnel, and active business operations that generate revenue and incur expenses. It cannot be characterized as a shell or conduit company, and treaty benefits cannot be denied.

The Indian tax authorities sought to deny the Taxpayer's claim basis the following key arguments:

1. **Control and management not in Singapore:** The tax authorities contended that eBay Inc., a U.S.-based company, was the ultimate beneficiary of the transaction and exercised control and management

[7] *Union of India v. Azadi Bachao Andolan*, 263 ITR 706 (SC) (2003).

[8] Central Board of Direct Taxes, "Circular No. 789" (Apr. 13, 2000).

[9] Central Board of Direct Taxes, "Finance Ministry's Clarification on Tax Residency Certificate (TRC)" (Mar. 1, 2013).

[10] *Sanofi Pasteur Holdings SA v. Department of Revenue*, 354 ITR 316 (AP) (2013).

over the Taxpayer. Accordingly, the Taxpayer was not a genuine resident of Singapore, and the Tax Treaty was inapplicable. The Taxpayer should instead be governed by the India-U.S. tax treaty,[11] as its "head and brain" were effectively located in the United States.

2. **Applicability of article 23:** Article 13 of the Tax Treaty applies only to capital gains arising from the alienation of shares of a company that is a tax resident of India. As Flipkart Singapore is a tax resident of Singapore, article 13 was inapplicable, and the transaction fell within the scope of article 23 (income not expressly mentioned) of the Tax Treaty, under which such gains are taxable in accordance with the Indian domestic income tax laws.
3. **Indirect transfer and article 13(4B):** Without prejudice to the applicability of article 23, the tax authorities contended that article 13(4A) applies to gains from the sale of shares acquired before April 1, 2017, and uses the phrase "shall be taxable only in that State," thereby granting exclusive taxing rights to the country of residence and consequently it was not relevant in the present case. In contrast, article 13(4B), which applies to gains from shares acquired on or after April 1, 2017, states that such gains "may be taxed in that State" (i.e., the jurisdiction in which the company whose shares are being alienated is treated as a tax resident for tax purposes, which in this case is Singapore). The tax authorities contended that the omission of the phrase "shall be taxable only" indicates that India is not expressly precluded from taxing such gains, including those arising from indirect transfers of Indian assets. Further, article 13(5), being a residuary clause, was argued to be inapplicable, as the subject property — shares of a Singapore company — falls within the category of assets described under articles 13(4A) and 13(4B).
4. **Lack of commercial substance:** There was no formal communication protocol between the Taxpayer and the global treasury team, and the treasury team executed transactions independently without prior authorization or direction from the Taxpayer, indicating that the Taxpayer and its parent company did not operate as distinct and autonomous entities.
5. **TRC cannot be taken as conclusive proof:** The tax authorities contended that a TRC cannot be taken as conclusive proof of eligibility for treaty benefits and that the tax authorities are not precluded from denying treaty benefits if it is found that the structure or arrangement is for the purpose of avoiding taxes.

Judgment

The ITAT ruled in favor of the Taxpayer and allowed the capital gains exemption under article 13(5) of the Tax Treaty. The ITAT's findings, reasoning, and key conclusions are summarized below:

1. **Control and management in Singapore:** The ITAT observed that the Taxpayer had furnished extensive documentary evidence to demonstrate that control and management were exercised by its board of directors based in Singapore. The Taxpayer also submitted that there were no nominees of eBay Inc. on its board, nor had eBay Inc. seconded any director to the taxpayer.

   The ITAT noted that, in the absence of contrary evidence, the tax authority's contention — that the taxpayer was controlled from the United States and that eBay Inc. was the ultimate beneficiary — was based merely on assumptions. Accordingly, this line of argument could not be sustained.
2. **Applicability of 13(4B) and 13(5):** Article 13(4B) applies only where the seller and the target company are residents of two different countries. In the present case, the

[11] Convention Between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income (Sept. 12, 1989).

Taxpayer and *Flipkart Singapore* were tax residents of Singapore. Therefore, article 13(4B) was held to not be applicable.

Article 13(5), being the residuary clause, governs gains arising from the alienation of any property not covered under the preceding paragraphs. Consequently, taxing rights over such gains lie exclusively with Singapore, the country of residence of the alienator.

3. **Treaty override:** While Indian domestic income tax laws[12] deem indirect transfers of Indian assets taxable in India, treaty provisions override Indian domestic income tax laws. Relying on judicial precedents, including *Vodafone International Holdings*, *Sanofi Pasteur Holdings*, and *Engineering Analysis Centre of Excellence*,[13] the ITAT reaffirmed that domestic-deeming fictions cannot extend to override treaty allocations.

   The ITAT also noted that, unlike the India-Mauritius[14] and India-Cyprus treaties[15] — amended to incorporate "look-through" provisions for shares deriving substantial value from Indian immovable property — the Tax Treaty does not contain such language. Accordingly, in the absence of a "look-through" clause in the Tax Treaty, article 13(5) operates as a shield against taxation of such indirect transfers in India.

Key Takeaways

Singapore and Mauritius have long been favored destinations for setting up a holding company to take shares of Indian entities. It becomes critical to carefully examine the implications of India's indirect transfer provisions on investor exits at the holding company level as opposed to direct transfer of Indian entities.

In today's era of heightened antiavoidance oversight, investors can no longer afford to sail too close to the wind. It is important to note that the provisions of GAAR were not analyzed in the present case, and the interplay of these provisions on indirect transfers would be critical to review going forward. The commercial rationale for adopting an indirect investment and a transfer route, rather than a direct investment and transfer route, must be transparent and substantiated.

In the context of indirect transfers and the availability of treaty relief, this ruling provides much-needed clarity on the interplay between articles 13(4B) and 13(5) of the Tax Treaty. It reinforces the settled position (as held in *Sofina S.A.*[16] and *Sanofi Pasteur Holding SA*[17]) that, absent a specific 'look-through' provision (such as the immovable property clause), gains from indirect transfers are governed by the residuary clause under the capital gains article of the applicable tax treaty.

Eligibility for tax treaty relief has long been a point of contention with the Indian tax authorities, and presently, the authorities are closely scrutinizing such claims. In its ruling, the ITAT underscored the importance of rigorous documentation to evidence control and management in the country of residence. It reflects a clear shift in approach — tax authorities are peeling back the layers of the corporate onion and reading between them to assess the true substance behind offshore structures. Taxpayers must therefore substantiate their holding structures with an unassailable paper trail, capturing evidence of management and decision-making, articulating the commercial rationale for multi-tier structures, and demonstrating genuine substance in offshore jurisdictions to withstand the increasing scrutiny of treaty provisions.

Looking ahead, this ruling could serve as an important cornerstone for how India navigates the delicate balance between source-based taxation and treaty protection in a post-GAAR world. As India continues to refine its international tax framework in line with global antiavoidance norms, consistency and predictability in the interpretation of treaty provisions will be key to preserving investor confidence. For multinational groups, this

[12] Income Tax Act, 1961, *supra* note 4.

[13] *Engineering Analysis Centre of Excellence (P.) Ltd. v. Commissioner of Income Tax*, 125 taxmann.com 42 (SC) (2021).

[14] India-Mauritius Income Tax Treaty (Aug. 24, 1982).

[15] India-Cyprus Income Tax Treaty (Nov. 18, 2016).

[16] *Sofina S.A. v. ACIT (IT)*, 79 ITR 489 (Mumbai Trib.) (2020).

[17] *Sanofi Pasteur Holding SA*, 354 ITR 316 (AP) (2013).

underscores the need to move beyond form-driven structuring toward substance-backed governance models that can withstand not only technical scrutiny but also the smell test of commercial authenticity. ■