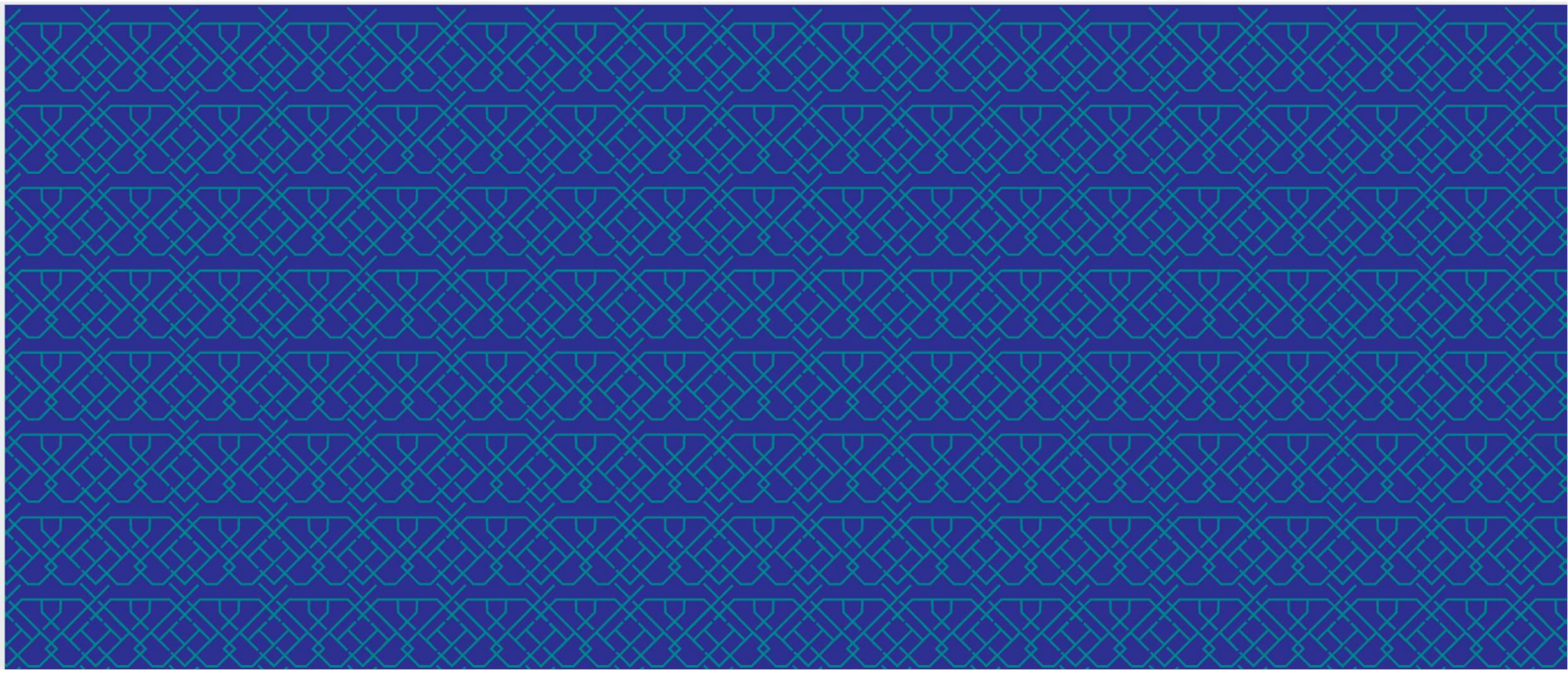
INSIGHTS

Direct Tax

March 2026 Edition



BANSI S. MEHTA & CO.

ITAT Delhi | Share buy-back within corporate group qualifies as 'reorganization' eligible for benefit under India-Netherlands DTAA[1]

As per Article 13(5) of India-Netherlands Double Tax Avoidance Agreement ('DTAA'/ Treaty), capital gains are generally taxed in the seller's country of residence i.e. his home country. However, if a seller owning ≥10% shares of a company resident in another country, sells such shares to a buyer who is a resident of that country, capital gains is taxable in the home country of buyer.

As an exception to this rule, if such transfer of shares is on account of corporate organization, reorganization, amalgamation, division or similar transaction within a group having ≥10% common ownership (i.e. either the buyer or seller owns at least 10% of the other), capital gains are taxed only in the seller's country of residence.

In a recent ruling, the Delhi Tribunal held that buy back of shares within same corporate group qualifies for corporate reorganization and hence capital gains is taxable only in the country of residence of the transferor.

Juxtaposing the facts of the case in context of Article 13(5) of the Treaty

The taxpayer (Huntsman BV) is company resident of Netherlands, holding 99.98% of shares of its Indian subsidiary (HIPL). The Indian subsidiary bought back equity shares (representing 24% of its capital) from the taxpayer.

The taxpayer initially offered capital gain tax in India. During assessment, the Transfer Pricing Officer ('TPO') proposed an upward adjustment.

Before the Dispute Resolution Panel ('DRP'), the taxpayer raised an additional ground claiming: (a) the buy-back was tax-neutral under Sec. 47(iv) of the Act; and (b) under Article 13(5) of the India-Netherlands DTAA, the capital gain was not taxable in India. The DRP rejected both claims.

On appeal before the Tribunal, the Accountant Member allowed the appeal on the ground of Article 13(5), while the Judicial Member dismissed it. The matter was accordingly referred to a Third Member.

Third Member's Ruling

The Third Member held an intra-group buy-back by an Indian subsidiary from its Dutch parent as 'corporate reorganization' under Article 13(5), thereby shifting taxing rights over the capital gains to the transferor's country of residence i.e. Netherlands.

Key observations made by Third Member summarised below:

- **Buy-back qualifies as Corporate Reorganization under the Treaty**

  The sole controversy was whether the buy-back would be classified under the exception 'corporate reorganization' under Article 13(5) of the Treaty.

  The Third Member held that, while the buy-back resulted in reduction of taxpayer's financial interest in HIIPL and change in the financial structure of HIIPL, the taxpayer continued to own HIIPL. This combination of changed financial form with continuity of

[1] Huntsman Investment (Netherlands) BV v. A.D.I.T [ITA NO. 764/DEL/2014 (A.Y.2009-10)]

ownership is fundamental to corporate reorganization.

- **Support from professional guidance**

  The Third Member drew support from P. Ramanatha Aiyar's Major Law Lexicon (defining 'reorganization' as a substantial change in capital structure), ICAI guidance on Capital and Financial Restructuring (which includes buy-back of shares), and ICSI guidance (recognizing buy-back as part of corporate restructuring) to conclude that buy back qualifies as corporate reorganization.

Our Comments

Interestingly in arriving at this decision, reference is also made to Protocol to DTAA between Netherlands and Nigeria where the words corporate organization, reorganization, …. etc. were explained as under:

"It is understood that the terms corporate organization, reorganization, amalgamation, division or similar transaction refer to a transfer of shares within a group of associated enterprises. In that case, shares will be evaluated for transferee at the book value of the transferor."

The ruling adopts a purposive and broader interpretation of the word 'reorganization' under the Treaty. Further, it will be interesting to see the outcome of this decision in light of Sec. 159(7) of the Income-tax Act 2025.

Bom HC | Public charitable trust deemed irrevocable unless Trust deed expressly provides for revocation [2]

In a writ petition filed by the taxpayer along with other charitable trusts registered under Maharashtra Public Trusts Act, 1950 (MPT Act), the Bombay Court has held that absence of irrevocability clause in trust deed is not a ground for rejecting registration/renewal under Sec. 12AB of the Act.

The taxpayers had applied for renewal of registration under Sec. 12AB which was rejected by CIT (Exemptions) on two grounds –

i. The trust deeds lacked an explicit irrevocability/dissolution clause

ii. Online Form 10AB seeking information as to 'whether trust deed contains irrevocable clause' was filed with the answer - Yes' without an explicit 'irrevocable clause' in the trust deed.

The taxpayers contended that:

- Under the MPT Act, trust assets never revert to settlor upon revocation and are transferred to the Public Trusts Administration Fund. Thus, a trust is irrevocable by default unless a specific power of revocation is expressly reserved in the trust deed.

- The online application Form No. 10AB, prescribed for registration/renewal of trusts is so designed that without declaring 'Yes' for presence of irrevocability clause, the Form cannot be filed.

- Ministry of Finance has confirmed to Parliament that a dissolution clause is 'neither necessary nor legal' in Maharashtra.

[2] Chamber of Tax Consultants & Others v. CIT (Exemptions) Writ Petition (L) No. 7587 of 2026 (Bom HC)

Bombay High Court ruling

Key observations made by the High Court summarised below:

- As per Sec. 12AB of the Act, the Commissioner should be satisfied about –
  (i) objects of the trust,
  (ii) genuineness of activities, and
  (iii) compliance with other material laws
  It contains no condition that the deed must have an explicit irrevocability clause.

- The Revenue's contention is based on the premise that Sec. 11 of the Act is "subject to sections 60 to 63" and, hence, a specific clause as to irrevocability is a must for grant of registration.

- The Revenue has overlooked the fact that the statute requires grant of exemption under Sec. 11 to be subject to Sec. 60 to 63 and does not provide for such requirement in registration/renewal under Sec. 12AB of the Act. Nonetheless , Sec. 63 of the Act creates a legal fiction that a transfer is revocable only if the instrument contains a positive provision for re-transfer or empowers the transferor to re-assume control. Silence in the deed implies irrevocability, not revocability.

- Under the MPT Act, even if a trust is revocable and is revoked, assets are never returned to the settlor but are absorbed into the Public Trusts Administration Fund. This aligns with the spirit of Sec. 63.

- The Ministry of Finance's own position confirms that a dissolution clause is 'neither necessary nor legal' in Maharashtra; the Commissioner, being subordinate to that Ministry, cannot take a contrary stand.

- Forcing applicants to answer 'Yes' to a question they cannot truthfully answer, and then treating that answer as a 'specified violation', is contrary to all legal principles and manifestly arbitrary.

The High Court allowed the writ petition and gave directions as under:

- The Revenue shall refrain from rejecting applications for registration/renewal under Sec. 12AB solely on the ground of absence of an explicit irrevocability and/or dissolution clause in the Trust Deed.

- Form 10A/10AB utility to be amended allowing applicants to correctly declare their position regarding the irrevocability clause without being compelled to make incorrect declaration. Accordingly, Row 6 of Form 10AB to be reworded as 'Is the trust/institution revocable?'

- All similarly situated rejection orders to be reconsidered.

Our Comments

This is a welcome judgment for charitable trusts, holding such trusts as deemed to be 'irrevocable' by operation of law unless the instrument of trust expressly provides a power of revocation.

The Court also observed that even if the trust deed provides for any revocability clause, due to operation of sections 22(3A) and 22(3B) of the MPT Act, such trusts which are registered under the MPT Act, would be irrevocable insofar as the Income-tax Act is concerned. However, this issue was left open to be decided for a case with such facts.

Delhi ITAT | Gains on stock derivatives not taxable as capital gains under Article 13(3A) of India-Mauritius DTAA [3]

Under Article 13(3A) of India-Mauritius DTAA (Treaty), capital gains arising on sale of shares which are acquired post April 01, 2017 are taxable in the source country of such shares.

Article 13(4) is a residual clause, which taxes capital gains in the seller's country of residence where the asset transferred is other than asset covered by Article 13 (3A) i.e. **shares**, *inter alia,* assets covered by Article 13(1),13(2),13(3) of the Treaty.

In a recent ruling, the Delhi Tribunal laid down the fundamental distinction between 'shares' and 'derivatives' to hold that stock derivatives are not shares and hence covered Article 13(4) of the Treaty which allocates taxing rights to seller's country of residence.

The taxpayer, a resident of Mauritius, is a quant multi-strategy market-neutral fund registered with SEBI as a Category II Foreign Portfolio Investor.

During the year, the taxpayer traded in Futures and Options (F&O) across two segments: (i) currency derivatives, and (ii) stock derivatives and claimed gains on both segments as not taxable in India under Article 13(4) of the Treaty.

The Assessing Officer (AO) accepted that gains from currency derivatives are covered by Article 13(4) and hence not taxable in India. However, he held that stock derivatives are akin to shares since their value is derived from underlying shares and hence the capital gains are taxable in source country i.e. in India under Article 13(3A) of the Treaty. The Dispute Resolution Panel (DRP) upheld this view, leading to the present appeal.

Tribunal's Ruling

The Tribunal distinguished derivatives from its underlying assets which could be shares or any other asset. It laid distinction on key parameters like meaning under governing statutes, trade without ownership to hold that gain from trading in derivatives, cannot be treated as gain from trading in shares even though the underlying asset may be shares.

Since, Article 13(3A) of India-Mauritius DTAA only refers to gain from alienation of **'shares'** and not **'derivatives'**, the provisions of Article 13(3A) would not get attracted and the gain from trading of derivates would be covered Article 13(4), taxable in the country of residence of the transferor i.e. Mauritius.

Key observations are summarised below:

- A plain reading of Article 13(3A) covers only 'alienation of **shares**'. Article 13(4) sweeps in all other property including derivatives taxable exclusively in the state of residence.

- The Tribunal relied on the decision of Vanguard Funds Public Limited Company[4] wherein in the context of India-Ireland DTAA it was held that 'shares' are distinct from 'rights entitlement' which are rights granted on account of existing shareholding and allotted only on subscription. Further, in Vanguard Funds (supra), reference was drawn to the clarification issued by Economic Affairs Secretary communicating Indian Government's stand that under the newly introduced Article 13(3A) of the India-Mauritius Treaty, India had gained a source based taxation right only for shares (equity) and residence-based taxation will continue

[3] Estee India Fund v. ACIT [ITA No. 1955/Del/2025] (Delhi HC)

[4] Vanguard Funds Public Limited Company v. ACIT [173 taxmann.com 321] (Mum Trib)

to apply for non-equity securities like derivatives, compulsory convertible debentures (CCDs) and optionally convertible debentures (OCDs). It was also observed that Sec. 2(84) of Companies Act defines shares as a share in share capital, whereas derivatives fall under 'securities' under Securities Contracts (Regulations) Act, 1956 (SCRA) separately.

- The Tribunal further relied on Mumbai Tribunal's decision of 3 Sigma Global Fund[5] wherein salient features of derivatives as distinct from shares were discussed.

Our Comments

Similar line of decision[6] also exists in the context of mutual funds wherein it is held that mutual fund units are different from shares and therefore gain on their sale/redemption would fall under the residual clause of the India-Singapore DTAA.

For any queries, you may reach us at knowledge@bansimehta.com

[5] 3 Sigma Global Fund v. ACIT, International [2025] 176 taxmann.com 708 (Mum Trib)

[6] Anushka Sanjay Shah v. ITO [2025] 173 taxmann.com 570 (Mum Trib)

Website

www.bansimehta.com

Mumbai

11/13, Botawala Building, 2nd Floor
Horniman Circle, Fort, Mumbai 400 001
+91 22 2266 1255, +91 22 2266 0275
bsmco.bbo@bansimehta.com

Surat

Tower A, Wing-B/604, Swastik Universal
Opp. Central Mall, Near Vesu,
New Magdalla, Surat 395 007
+91 261 4614460, +91 99875 23838
bsmco.srt@bansimehta.com

Mumbai

Merchant Chamber, 3rd & 4th Floor
41, New Marine Lines, Mumbai 400 020
+91 22 2200 4002, +91 22 2201 4922
bsmco.mco@bansimehta.com

Chennai

No. 28, Anugraha, Ground Floor
Murray's Gate Road, Alwarpet
Chennai, Tamil Nadu 600 018
+91 44 2499 1671, +91 44 2466 1179
bsmchennai@bansimehta.com

Delhi

417, World Trade Centre, 4th Floor, Babar
Road, Connaught Place,
New Delhi 110 001
+91 11 4152 2771
bsmdelhi@bansimehta.com

Hyderabad

Door No: 6-3-655/1, Flat No. 302, Second Floor,
Meera Mansion, Civil Supplies Lane,
Somajiguda, Hyderabad 500082
+91 701330 40599, + 91 8464026050
bsmhyd@bansimehta.com