



## Global Business Tax Alert

### Sharp Insights

**The Bangalore Tribunal in the case of Fidelity Business Services India Pvt. Ltd<sup>1</sup>. has held that claim for capital gains exemption by the Mauritius holding company towards buy back of shares needs to be substantiated by evidence that buy back price is not artificially inflated.**

**Issue no:** GBTA/33/2017

**In this issue:**

[Background / Facts](#)  
[Revenue's key contentions](#)  
[Taxpayer's key contentions](#)  
[Ruling of the Tribunal](#)  
[Conclusion](#)  
[Do you know about Dbriefs?](#)  
[Contacts](#)

<sup>1</sup> M/s Fidelity Business Services India Pvt. Ltd. vs. ACIT I.T. (T.P) A. No. 416/ Bang/ 2016

## Background / Facts

- Fidelity Business Services India Pvt. Ltd. ('the taxpayer'), an Indian company bought back 2,933 shares (face value INR 10) from its ultimate Mauritius holding company holding 99.99% shares, of INR 2,85,108 per share.
- The assessing officer ('AO') was of the view that the payment made by the taxpayer towards such buy back is deemed dividend under the <sup>2</sup> Income tax Act 1961 ('Act') and accordingly, subject to <sup>3</sup>Dividend Distribution Tax ('DDT') for the assessment year 2011-12.
- AO computed the dividend being the difference between the face value of shares and the amount paid by the taxpayer towards the buy back price to the holding company.

---

<sup>2</sup>Section 2(22)(d) of the Act

<sup>3</sup>Under Section 115-O of the Act

## Revenue's key contentions

- The taxpayer has adopted a colourable device to make the payment out of the reserves and surplus to its holding company in the garb of buy back of shares at a very exorbitant high price without payment of taxes.
- The transaction should be subject to DDT liability under the Act.

## Taxpayer's key contentions

- <sup>4</sup>Prior to June 1, 2013, buy back of shares is subject to capital gains tax in the hands of the shareholder under Section 46A of the Act. Since such capital gain is not taxable as per <sup>5</sup>India-Mauritius tax treaty, <sup>6</sup>AO cannot reclassify the said transaction of buy back of shares into transaction of dividend distribution with a view to tax it in India.
- <sup>7</sup>Central Board of Direct Taxes ('CBDT') has clarified that any consideration received on buy back of shares between the periods April 1, 2000 to May 31, 2013 would be taxed as capital gains. Since, capital gains are exempt from tax as per India Mauritius tax treaty, subject transaction is not taxable in India.
- Separately, section 2(22) which deals with provisions of deemed dividend specifically excludes buy back of shares in the definition of dividend. Hence, such transaction cannot be taxed as deemed dividend.

---

<sup>4</sup>Finance Act 2013 has inserted Section 115QA under the Act w.e.f. June 1, 2013 whereby the buy back of shares by the unlisted companies will attract distribution tax @ 20% (plus applicable surcharge and cess) in the hands of the company.

<sup>5</sup>Refer Article 13(4) of the Double Taxation Avoidance Agreement entered into between Indian and Mauritius.

<sup>6</sup>Relied upon a decision rendered by the Mumbai bench of Tribunal in the case of 'Goldman Sachs India Pvt. Ltd. vs. ITO' (International Taxation) 70 Taxmann.com 46

<sup>7</sup>Circular no. 3/16 dated February 26, 2016

## Ruling of the Tribunal

- Tribunal took note of the fact that the subject transaction cannot be taxed as capital gain due to specific exemption provided under the India- Mauritius tax treaty.
- It was held that if the buy back price paid to the holding company is unrealistic and highly inflated, then to that extent, the subject transaction can be said to be given a colour of payment towards buy back.
- The tribunal remanded back the case to AO to examine the Fair market value ('FMV') of the share vis-à-vis the buy back price as the tribunal found that the AO and the DRP had not recorded an express finding on the FMV of the shares.

## Conclusion

The tribunal has upheld the legal position that transaction of buy back of shares from a Mauritius company prior to 01.06.2013 is exempt from tax provided assessee brings on record robust documentation to substantiate the transaction value.

## Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the [Dbriefs](#) page



Download the report



## Contacts

### Ahmedabad

19<sup>th</sup> Floor, Shapath - V  
SG Highway,  
Ahmedabad – 380 015.  
Tel: + 91 (079) 6682 7300  
Fax: + 91 (079) 6682 7400

### Coimbatore

Shanmugha Manram  
41, Race Course,  
Coimbatore  
Tamil Nadu - 641018  
Tel: + 91 (0422) 439 2801  
Fax: +91 (0422) 222 3615

### Kolkata

Bengal Intelligent Park Building  
Alpha, 1st floor, Block EP and GP  
Sector V, Salt Lake Electronics  
Complex,  
Kolkata - 700 091.  
Tel : + 91 (033) 6612 1000  
Fax : + 91 (033) 6612 1001

### Bangalore

Deloitte Centre, Anchorage II,  
100/2, Richmond Road,  
Bangalore 560 025.  
Tel: +91 (080) 6627 6000  
Fax: +91 (080) 6627 6010

### Delhi/Gurgaon

Building 10,  
Tower B, 7th Floor,  
DLF Cyber City,  
Gurgaon 122 002  
Tel : +91 (0124) 679 2000  
Fax : + 91 (0124) 679 2012

### Mumbai

Indiabulls Finance Centre,  
Tower 3, 28th Floor,  
Elphinstone Mill Compound,  
Senapati Bapat Marg, Elphinstone  
(W),  
Mumbai – 400013  
Tel: + 91 (022) 6185 4000  
Fax: + 91 (022) 6185 4101

### Chennai

No.52, Venkatanarayana Road,  
7th Floor, ASV N Ramana Tower,  
T-Nagar,  
Chennai 600 017.  
Tel: +91 (044) 6688 5000  
Fax: +91 (044) 6688 5050

### Hyderabad

1-8-384 and 385, 3rd Floor,  
Gowra Grand S.P.Road,  
Begumpet,  
Secunderabad – 500 003.  
Tel: +91 (040) 6603 2600  
Fax: +91 (040) 6603 2714

### Pune

106, B-Wing, 7<sup>th</sup> Floor,  
ICC Trade Tower,  
Senapati Bapat Road,  
Pune – 411 016.  
Tel: + 91 (020) 6624 4600  
Fax: +91 (020) 6624 4605



Deloitte makes an impact that matters

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material and the information contained herein prepared by Deloitte Touche Tohmatsu India LLP (DTTI LLP) is intended to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). This material contains information sourced from third party sites (external sites). DTTI LLP is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such external sites. None of DTTI LLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this material, rendering professional advice or services. This information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this material.

©2017 Deloitte Touche Tohmatsu India LLP. Member of Deloitte Touche Tohmatsu Limited