Judicial Precedents – International Tax and Transfer Pricing

CA Dinesh Supekar

1

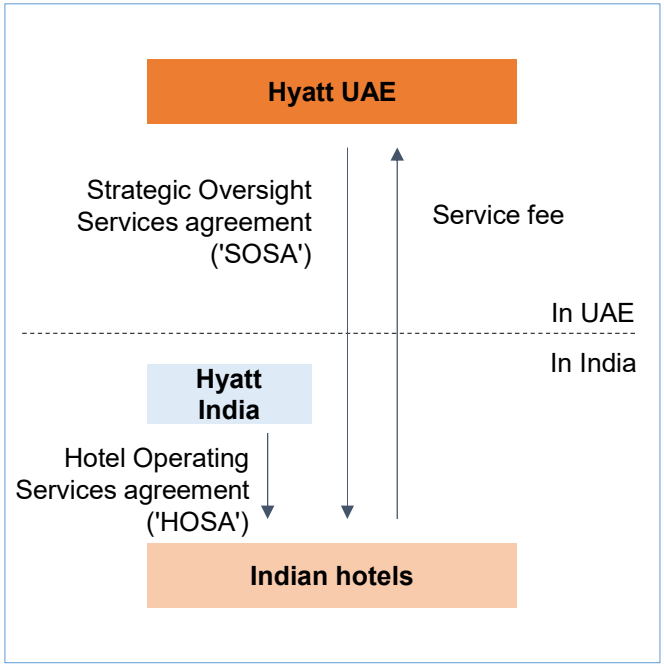
Permanent Establishment

01 Hyatt International – Supreme Court

Name	Date of pronouncement	Forum	Topic
Hyatt International Southwest Asia Ltd	24 July 2025	Supreme Court	Involvement in substantive operational control and implementation functions constitutes a fixed place PE

Facts of the case

- Assessee is a tax resident of UAE under India – UAE DTAA
- Under Strategic Oversight Services Agreements (SOSAs) entered on 04-Sep-2008 with Asian Hotels Limited ('AHL') (one for Delhi hotel and one for Mumbai hotel), Hyatt UAE agreed to provide Strategic planning services
- A separate agreement was entered into for trademark and know-how. Additionally, Hyatt India entered into a Hotel Operating Services Agreement (HOSA) with the hotel owner for day-to-day management.
- During assessment proceedings for AY 2009-10 (and it continued for subsequent AYs until 2017-18), Hyatt UAE submitted that there is no FTS clause in India – UAE DTAA. Further, no PE is constituted and hence, income earned under SOSAs are not taxable in India.
- AO, DRP, ITAT, HC and SC relied on Formula One ruling and held that Hyatt UAE constituted a fixed place PE in India.



01 Hyatt International – Supreme Court

Key clauses of SOSA

- **Period of SOSA** – 20 years + 10 years (extendable)
- **Role of Hyatt UAE** - To formulate and establish the overall strategic plans, policies processes guidelines and parameters for the following:
  - Recruiting, interviewing and assistance in hiring general manager (with approval of AHL)
  - Formulating and establishing overall HR policies
  - Establishing a host of policies – such as purchasing policy, guest admission, use of hotel premises, promotion and marketing, occupancy rates, revenues client structure, sales terms and cash management, receipts and payments, banking operations etc. - Virtual control on entire policies related to the business.
  - Furnishing of sales and marketing services and central reservation services
  - Making available its personnel for reviewing plans and specifications for future alterations and replacement furniture and equipment
- Hyatt to perform its duties from offices outside of India.
- Hyatt has no obligation to depute any personnel, but on a need basis, reserved the rights to do so at its sole discretion for a temporary period.
- **Strategic fees during the operating term** – Hyatt UAE shall be entitled to basic strategic fee is 0.5% of the room rent and 7% of the cumulative gross operating profit for the year.
- **Employees** - 6 employees were deputed to India for different roles – (1) Managing Director, (2) Director Finance, (3) Director HR, (4) Director sales and marketing, (5) Director Revenue management, (6) Internal Audit – They stayed for a total period of 158 days

01 Hyatt International – Supreme Court

Observations of the Supreme Court

- **Hyatt UAE constitutes a Fixed place PE in India under Article 5(1) of India – UAE DTAA as there exists a clear and continuous commercial nexus and control with the hotel's core functions**

Factor 1 – Performance of core operations in India

- Hyatt UAE's rights go well beyond mere consultancy, which shows that it was an active participant in core operational activities of the hotel:
  - Appoint and supervise the General Manager and other key personnel,
  - Implement human resource and procurement policies,
  - Control pricing, branding, and marketing strategies,
  - Manage operational bank accounts,
  - Assign personnel to the hotel without requiring the owner's consent.
- Indian hotel to obtain a non-disturbance agreement from lender, whenever funds are borrowed – This ensured that Hyatt UAE can perform its obligation under SOSA and realize its fee without interference.
- Functions of Hyatt UAE was not auxiliary but core and essential functions clearly establishing day to day operations of the hotel.
- SOSA conferred upon Hyatt UAE a continuing and enforceable right to implement its policies and ensure compliance in all operational aspects of the hotel.

01 Hyatt International – Supreme Court

Observations of the Supreme Court

Factor 2 – Revenue model

- Consideration not a fixed fee but a % of room revenues and other revenues – This clearly reflects an active commercial involvement, linking Hyatt UAE's income to financial and operational performance of hotel.

Factor 3 - Longevity

- Core functions continuously performed for a 20-year period under a revenue-sharing arrangement clearly triggers a fixed place PE.

Other observations

- Relied on Formula One ruling - Stability, Productivity and Dependence affirmed in the instant case.
- Substance over form Applied - Hyatt UAE's argument that daily operations handled by Hyatt India rejected
- Holds that extent of control, strategic decision-making, and influence exercised by Hyatt UAE clearly establish that business was carried on through the hotel premises.
- For Service PE - Continuity of business presence in aggregate is relevant - not the length of stay of each individual employee.

01 Hyatt International – Supreme Court

Key principles emerging from this ruling

No Requirement for Ownership or Lease of Workspace

- A foreign company does not need to own or lease a specific workspace in India to constitute a fixed place PE.
- If employees of the foreign company have a place of work available to them in India for all practical purposes, this may be sufficient to create a PE, regardless of workspace ownership or lease arrangements.

Substance Over Form Principle

- The actual conduct and functions performed are more important than the formal terms of written agreements.
- Example: If an expatriate employee is stationed in India, has a place of work, and works entirely for and under the control of the foreign company, simply having an employment contract with an Indian entity may not protect against PE risk.
- It is crucial that, in practice, the expatriate functions as an employee of the Indian company, not the foreign company, to mitigate PE risk.

Operational and Business Decision-Making from India

- If the foreign company, through its employees, is involved in making significant operational and business decisions for the Indian company from within India, the risk of constituting a fixed place PE increases.
- Regular visits by foreign employees to India to perform significant functions can trigger PE exposure.

01 Hyatt International – Supreme Court

Key principles emerging from this ruling (cont.)

Risk Mitigation Measures

- Establish clear dos and don'ts for foreign employees during India visits; integrate these into the overall India business model.
- Maintain comprehensive documentation - Record details of who has travelled to India, the purpose of the visit, and the work performed while in India.

Case-Specific Analysis

- The determination of a PE is fact-specific; there is no universal guideline on the number of days in India required to constitute a PE.
- The nature of the business and the work performed are critical factors. Example: In the Formula One Supreme Court case, even a few days' presence in India was sufficient to establish a PE.

Implications for Multinational Corporations (MNCs)

- The current legal position is favourable to the Indian Revenue authorities.
- MNCs must assess their specific facts against the principles established by recent rulings.
- Where relevant, it is advisable to implement appropriate risk mitigation strategies to manage potential PE exposure.

Practical instances where the above principles could be applicable – contract manufacturing from India, GCCs, expatriates deputed to India, employees on India payroll performing global roles

02 Mitsui Mining and Smelting Company (Japan) – Delhi ITAT

Name	Date of pronouncement	Forum	Topic
Mitsui Mining and Smelting Company Ltd	31 July 2025	Delhi ITAT	Secondment of Employees to Indian Subsidiary: No PE for Foreign Parent

Facts of the case

- The taxpayer is a Japanese company manufacturing and selling specialised engineered materials, electronic components, and automotive parts.
- The taxpayer has an Indian subsidiary producing catalytic convertors for the automobile industry.
- For FY 2021–22, the taxpayer filed its income tax return in India, offering royalty and fees for technical services to tax.
- During assessment, TO observed that the taxpayer received reimbursements from the Indian subsidiary for remuneration paid to seconded employees.
- Seconded employees received part of their salary in India and part in Japan; the Indian subsidiary reimbursed the Japanese parent for the Japan-paid portion.
- The TO reviewed the secondment agreement and believed the taxpayer's employees exercised control over the Indian subsidiary's premises and sales operations.

02 Mitsui Mining and Smelting Company (Japan) – Delhi ITAT

Taxpayer's Arguments

- Both conditions for a Permanent Establishment (PE)—a fixed place and business carried out from that place—must be met.
- Having subsidiaries and exercising some control is common in global business and does not automatically create a PE.
- The Indian tax department accepted salary payments to seconded employees and did not dispute tax deduction at source, undermining the TO's claim of control by the taxpayer.
- Appointment and release letters showed that seconded employees became employees of the Indian subsidiary, not the taxpayer, upon transfer.

Revenue's Arguments

- The taxpayer's employees exercised complete control over the Indian subsidiary's physical premises and sales operations.
- The taxpayer exercised effective control over the operational structure and premises of the Indian subsidiary.
- Concluded that the Indian subsidiary constituted a PE of the taxpayer in India under Article 5 of the India-Japan DTAA.

02 Mitsui Mining and Smelting Company (Japan) – Delhi ITAT

Ruling of the ITAT

- The central issue was whether the seconded employees were under the control of the taxpayer or the Indian subsidiary.
- The Tribunal examined the secondment agreement, which showed seconded employees were integrated into the Indian subsidiary's business and worked under its supervision and direction.
- Seconded employees acted for the Indian subsidiary, not on behalf of the taxpayer.
- The taxpayer had no rights over the assets or infrastructure of the Indian subsidiary and was not liable for losses from the employees' actions.
- The Tribunal concluded that the taxpayer did not exercise control over the employees or assets of the Indian subsidiary.
- Therefore, the conditions for constituting a PE (fixed place of business) were not satisfied; the TO's order was set aside.

Key takeaways

- Mere secondment of employees to an Indian subsidiary does not create a PE for the foreign parent under Article 5 of the DTAA.
- A PE is not constituted if seconded personnel operate under the full control of the Indian entity and the foreign company retains no authority over employees or subsidiary assets/business.
- The legal distinction between control and operational integration is critical in PE determinations.
- The ruling reinforces the importance of clear secondment agreements and proper documentation to avoid unintended PE exposure.

03 Warner Bros Distributing Inc – Mumbai ITAT

Name	Date of pronouncement	Forum	Topic
Warner Bros Distributing Inc	13 October 2025	Mumbai ITAT	Taxation of film distribution revenues

Facts of the case

- Taxpayer (WBDI) - a US tax resident, distributed films in India through Warner Bros. Pictures (India) Pvt. Ltd. (WBPIPL).
- WBDI entered into an agreement with WBPIPL granting exclusive rights to distribute cinematographic films in India.
- For AY 2020-21, WBDI received INR 53.52 crores from WBPIPL, characterized as "Royalty Income" and claimed as exempt.
- The AO treated the receipts as business income, not royalty, and attributed 65% of the revenue as taxable in India, alleging existence of a Dependent Agent Permanent Establishment (DAPE) in the form of WBPIPL.
- The Dispute Resolution Panel (DRP) upheld the AO's findings, leading to an appeal before the ITAT.

03 Warner Bros Distributing Inc – Mumbai ITAT

Taxpayer's Arguments

- The agreement between WBDI and WBPIPL was on a principal-to-principal basis; WBPIPL was not a dependent agent.
- WBPIPL did not act on behalf of WBDI, did not maintain stock for WBDI, nor secure orders for WBDI.
- All transactions were at arm's length, and WBPIPL was legally and economically independent.
- Even if DAPE existed, no further profit attribution was warranted as transactions were at arm's length (citing Supreme Court in Morgan Stanley).
- Distribution revenues should not be taxed as royalty, as the Act and DTAA specifically exclude such payments.

Revenue's Arguments

- WBPIPL acted as a dependent agent, habitually concluding contracts and securing orders in India on behalf of WBDI.
- WBDI controlled and supervised WBPIPL's activities, indicating a DAPE existed under Article 5(4) of the India-USA DTAA.
- The income from film distribution was business income accruing in India, not royalty.
- Alternatively, the revenue could be taxed as royalty under section 9(1)(vi) of the Act and the DTAA

03 Warner Bros Distributing Inc – Mumbai ITAT

Ruling of the ITAT

DAPE Issue

- The agreement granted WBPIPL exclusive distribution rights in India, and WBPIPL entered into further agreements with third parties on a P2P basis. The Tribunal emphasized that not just the agreement, but also the actual conduct of the parties must be examined to determine if WBPIPL was acting 'on behalf of' WBDI.

Attribution of Profits

- Held that since the transaction between WBDI and WBPIPL was consistently found to be at arm's length in prior and subsequent years by TPO, no further attribution of profits was warranted (following Supreme Court in Morgan Stanley).
- Directed deletion of the addition of INR 34.78 crores.

Royalty Characterization

- Reiterated that distribution revenues from films are not taxable as royalty under the Act or the DTAA, following its own earlier rulings and the specific exclusion in section 9(1)(vi).

04 Pride Foramer S.A. – Supreme Court

Name	Date of pronouncement	Forum	Topic
Pride Foramer S.A.	17 October 2025	Supreme Court	Business Continuity and Tax Deductions for Non-Resident Companies

Facts of the case

- Pride Foramer S.A., a non-resident company incorporated in France, engaged in oil drilling activities.
- Awarded a 10-year drilling contract by ONGC in offshore Mumbai from 1983 to 1993.
- No drilling contract in India between 1993 and October 1998; a new contract was formalized in January 1999.
- During the interim period (Assessment Years 1996-97, 1997-98, 1999-2000), the company continued to maintain its business infrastructure, corresponded with potential clients, and participated in bidding processes for new contracts.
- Incurred various expenditures (administrative charges, audit fees, etc.) aimed at continuing business activities and realizing tax refunds.
- Filed returns showing 'NIL' income except for interest on income tax refunds, and claimed business expenditure deductions and set-off of unabsorbed depreciation from earlier years.

Key issues before the Court -

(1) Whether the company could be said to be "carrying on business" in India during the period of inactivity for the purposes of claiming business expenditure under section 37 and carry forward of unabsorbed depreciation.

(2) Whether a non-resident company is required to have a PE in India to be considered as "carrying on business" under the Act.

04 Pride Foramer S.A. – Supreme Court

Taxpayer's Arguments

- The company had not ceased business in India; the period without contracts was a temporary lull, not a cessation.
- Continued efforts to secure business in India, evidenced by ongoing correspondence and bidding activity.
- Claimed that business expenditures and unabsorbed depreciation should be allowed as deductions, as the business was ongoing in substance.
- Asserted that the absence of a permanent establishment in India did not equate to cessation of business activities.

Revenue's Arguments

- Argued that the company was not carrying on any business in India during the relevant assessment years.
- Disallowed business expenditure deductions and carry forward of unabsorbed depreciation, as there was no active contract or permanent establishment in India.
- Maintained that the taxpayer's activities did not amount to carrying on business in India for tax purposes

Ruling of the Supreme Court

- Held that a **mere lull or temporary discontinuance** in business does not amount to cessation of business.
- Recognized that continuous efforts, such as correspondence and bidding, demonstrated the **intention to carry on business**.
- Clarified that a non-resident company is **not required to have a permanent establishment** or office in India to be considered as carrying on business for Indian tax purposes.
- Set aside the High Court's restrictive interpretation and revived the ITAT's orders, allowing the taxpayer's claims for business expenditure and unabsorbed depreciation.
- Directed the Assessing Officer to pass fresh assessment orders in line with the ITAT's findings.

2

PPT under MLI

05 Sky High Leasing – Mumbai ITAT

Name	Date of pronouncement	Forum	Topic
Sky High Appeal XLIII Leasing Company Ltd.	13 August 2025	Mumbai ITAT	MLI PPT Not Enforceable Without Specific Notification – India–Ireland DTAA

Facts of the case

- Taxpayer is a Irish company (tax resident of Ireland, with valid TRCs) - part of a global aircraft leasing group and lease aircraft to airlines in India, China, and Korea.
- No employees or office in Ireland; Day-to-day operational and remarketing services outsourced to international service providers
- Ultimate parent located outside Ireland (in Cayman Islands)
- In FY 2021–22, entered into three dry operating lease agreements with an Indian airline (A Co.).
- Aircraft owned by taxpayer, registered in its name with Indian DGCA.
- Taxpayer filed nil income return, claiming:
  - Lease rentals not 'royalty' under Article 12(3)(a) of DTAA.
  - No PE in India; business profits taxable only in Ireland (Article 7).
  - Income exempt under Article 8(1) as derived from operation of aircraft in international traffic.
- TO denied DTAA benefits, **invoked PPT under MLI**, treated **rentals as 'royalty' and/or 'interest'**, and alleged **existence of a PE** in India.
- DRP upheld TO's view, citing **lack of substance in Irish** SPV and **control over aircraft in India**.

05 Sky High Leasing – Mumbai ITAT

Issue 1: Legality of MLI

Taxpayer's argument

- India-Ireland tax treaty was notified in the Official Gazette on 11 January 2002
- MLI was notified through Notification 57/2019 dated 9 August 2019 – India-Ireland tax treaty is a "Covered Tax Agreement"
- The consequences of MLI on the India-Ireland tax treaty are yet to be notified in line with section 90 of the Act
- Reliance placed on the SC ruling of Nestle SA

Revenue's argument

- MLI is a multilateral treaty which modifies bilateral treaties based on reciprocal notification by treaty partners – Does not work as a protocol which directly amends text of a treaty, rather to be read alongside the treaty
- MLI notification of August 2019 is sufficient to "import" Article 6 and 7 of MLI in the India-Ireland tax treaty
- Separate notification under section 90 not needed
- Synthesized text is not a legal document and therefore there is no need to notify the same

05 Sky High Leasing – Mumbai ITAT

Issue 1: Legality of MLI

Ruling of the ITAT

- While the MLI notification was issued, those **positions remained contingent upon the principle of reciprocity** and depended on the stance of the other contracting states – thus the MLI notification alone is not sufficient
- Without a notification there is a risk that Indian courts/ **authorities may apply MLI in a form that was not intended**
- Revenue's own admission that **MLI "modifies" tax treaties** necessitates issuance of a notification under section 90(1) incorporating those modifications in tax treaties in line with the ruling of Nestlé SA
- MLI cannot be invoked to curtail/ restrict the tax treaty benefits unless such notification is issued
- Absent such notification, the **bare text of MLI or Synthesised text has no legal sanctity** to apply MLI/ PPT provisions
- Ruling in **Nestlé SA to be followed strictly** as it deals with substantive safeguard that treaty modifications cannot be enforced until the procedure as per section 90 is satisfied

Article 7(1) of MLI *: Notwithstanding any provisions of the Agreement, a* ***benefit*** *under the Agreement* ***shall not be granted*** *in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that* ***obtaining that benefit was one of the principal purposes*** *of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Agreement.*

05 Sky High Leasing – Mumbai ITAT

Issue 2: Applicability of PPT

Taxpayer's argument

- Ireland chosen due to **commercial considerations** of aircraft lasing industry:
  - Global hub for aircraft leasing since 1977; 19 out of 20 of world's largest lessors based in Ireland
  - Strategically located, known for its regulations and safety standards, membership of OECD and EU
  - Directors, bankers, company secretary Irish; management outsourced to experienced Irish servicer, which is an industry norm
- Ultimate parent outside Ireland irrelevant and not in line with OECD guidance on PPT; relief given in case of an entity with Irish parent

Revenue's argument

- Assessee lacks economic substance and operates as a **shell entity for ultimate parent** located outside India
- Transaction structured **solely to access treaty benefit** while ultimate patent based in Cayman Islands / Hong Kong
- Ireland appears to be chosen solely for **tax advantages** under tax treaty
- **Ultimate income will be siphoned outside Ireland** to tax-free jurisdictions

05 Sky High Leasing – Mumbai ITAT

Issue 2: Applicability of PPT

Ruling of the ITAT

- **TRC will be presumed to be valid ground for allowing treaty benefits** even after MLI, unless it is a case of treaty shopping or fraud
- Referring to the OECD examples, ITAT held that **PPT cannot be triggered merely because during decision making existence of favorable treaty was considered**
- True inquiry is whether the **benefit obtained is divorced from genuine commercial considerations** (substance)
- **Business was in fact being conducted from Ireland** as the directors, servicers, bankers, lawyers, etc. were all based in Ireland
- Existence of **robust ecosystem** and wide treaty network is a sound commercial reason for choosing Ireland as the base - Cross border footprint also indicates Ireland was not selected just for India
- Treaty benefits cannot be denied merely because the ultimate parent is located in a third country - DRP's allegation that ultimate income will be shifted outside Ireland found to be without basis
- Granting **benefit in line with the object and purpose of the India-Ireland tax treaty**

05 Sky High Leasing – Mumbai ITAT

Issue 3: Permanent Establishment

Taxpayer's argument

- All core **commercial decisions taken from Ireland**; no employee, crew or technical person provided by Assessee
- **Lessee had operational control of lessee during lease**
- Lessee responsible for maintenance and compliance with various Regulatory requirements
- Li**mited right to inspect** the aircraft once a year cannot be equated with disposal, merely a protective right

Revenue's argument

- **Continuous presence** of a high-value, income earning **asset in India for commercial exploitation** is a tangible presence
- Assessee in the **business of leasing** and in this context **place of business is the "aircraft" itself**, in India and used for business
- **Right to inspect and repossess** go beyond mere ownership, demonstrate satisfaction of disposal test

05 Sky High Leasing – Mumbai ITAT

Issue 3: Permanent Establishment

Ruling of the ITAT

- Disposal test not satisfied and therefore the aircraft cannot be considered as a PE of Assessee
  - As per operational guidelines aircraft **always remains under control of airline**
  - Assessee's business, i.e., grant of lease rights, executed outside India
  - **Aircraft never placed at the control of Assessee** while it remains in India to conduct its business

3

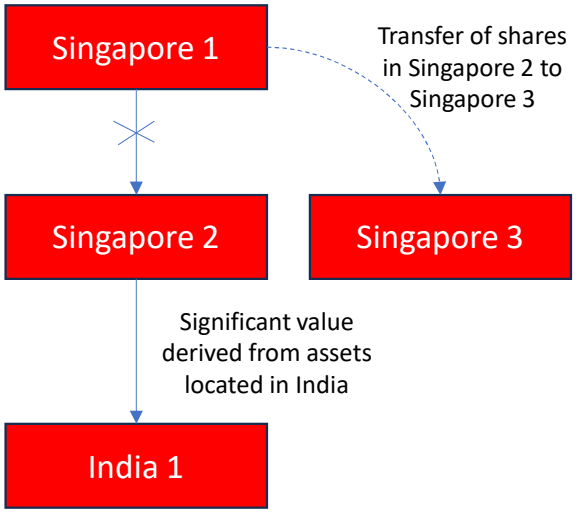
Capital Gains

06 eBay Singapore – Mumbai ITAT

Name	Date of pronouncement	Forum	Topic
eBay Singapore Services	30 September 2025	Mumbai ITAT	Taxability of STCG on sale of shares of a Singapore Entity as per India-Singapore DTAA

Facts of the case

- Taxpayer is a tax resident of Singapore and a holding company for investments in the Asia-Pacific region
- The taxpayer sold shares in a Singapore entity to another Singapore entity, resulting in a STCG in India (indirect transfer of Indian shares)
- TRC obtained from Singapore
- TO argued that the taxpayer's 'head and brain' (effective management and control) was in US.
- The TO contended that the transaction was taxable in India under domestic law and the India-US DTAA, denying the exemption under Article 13(5) of the India-Singapore DTAA.



06 eBay Singapore – Mumbai ITAT

Revenue's Arguments

- TRC is not conclusive proof for DTAA benefits eligibility.
- Taxpayer's management and control were in the US, as it was a wholly owned step-down subsidiary of a US entity, which was the ultimate beneficiary of the sale proceeds.
- Asserted that the India-US DTAA should apply, making the gains taxable in India.
- Contended that Article 13(1) to 13(5) of the India-Singapore DTAA should not apply, as the ultimate beneficiary was the US entity, not the Singapore taxpayer.

Taxpayer's Arguments

- The valid TRC is conclusive proof of Singapore tax residency, entitling the taxpayer to DTAA benefits.
- Majority of the board of directors were Singapore residents. All board meetings were held in Singapore. No US entity nominees or common directors on the board. The investment and subsequent sale were approved by the Singapore board of directors.
- Satisfied the LOB condition under Article 24A of the DTAA by incurring annual expenditure exceeding SGD 200,000 in Singapore.
- Article 13(5) of the India-Singapore DTAA exempts India from taxing capital gains on the sale of shares of a Singapore entity to another Singapore entity, granting exclusive taxing rights to Singapore.
- The India-Singapore DTAA lacks a 'look-through' clause, unlike the India-Cyprus DTAA.

06 eBay Singapore – Mumbai ITAT

Ruling of the ITAT

- TRC issued by Singapore authorities as conclusive evidence of the taxpayer's residency and entitlement to India-Singapore DTAA benefits.
- Taxpayer's substantial evidence shows that its control and management were with directors in Singapore, not in the US.
- Held that unless the TO can prove the transaction is a layered or colourable device to evade tax, the TRC cannot be disregarded.
- Capital gains from indirect transfer of shares - Not taxable in India under Article 13(5) of the India-Singapore DTAA.
- Concluded that the denial of exemption under Article 13(5) by the Tax Officer was not supported by law or facts in this case.

Key takeaways

- TRC is generally sufficient for DTAA benefits unless tax avoidance is proven
- Indirect transfers not taxable in India under India-Singapore DTAA provisions
- Importance of proper documentation and compliance

07 Emerging India Focus Funds (Mauritius) – Delhi ITAT

Name	Date of pronouncement	Forum	Topic
Emerging India Focus Funds, Apex Financial Services (Mauritius) Ltd	25 June 2025	Delhi ITAT	Taxability of Sale of Equity-Oriented Mutual Funds under India–Mauritius DTAA

Facts of the case

- Taxpayer: Foreign Institutional Investor (FII), registered with SEBI, tax resident of Mauritius.
- Taxpayer earned capital gains from sale of equity-oriented mutual funds (EOMF) acquired after 1 April 2017 in India.
- Claimed exemption on such capital gains under Article 13(4) of the India–Mauritius DTAA.
- Tax Officer's View: Gains taxable in India under Article 13(3A) of the DTAA, treating EOMF sale as 'alienation of shares'.

Relevant extracts of Article 13 of India-Mauritius DTAA

*3A. Gains from the alienation of **shares** acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.*

*4. Gains from the alienation of **any property other than** that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident.*

07 Emerging India Focus Funds (Mauritius) – Delhi ITAT

Revenue's Arguments

- EOMFs are akin to shares as 65%–100% of their funds are invested in equity shares.
- Taxpayer derives benefit from underlying equity assets; thus, gains should be taxed as gains from shares.
- Applied 'Doctrine of Purposive Construction'— intent of legislature is to treat EOMF units as equivalent to equity shares.

Taxpayer's Arguments

- Sale of EOMF units is not covered under Article 13(3A) (which applies to shares, not mutual fund units).
- If intention was to cover underlying shares in EOMF, DTAA would have specifically included it (as seen in other DTAAs).
- Redemption of EOMF units is not equivalent to sale of company shares.

Ruling of the ITAT

- DTAA interpretation - If terms are clear, strict interpretation applies; no need for purposive construction.
- Indian law - Shares and mutual funds are distinct securities with different rights, regulations, and tax treatment.
- EOMF units are not 'shares' under Indian law or the DTAA.
- Gains from sale of EOMF units are not covered under Article 13(3A) of the India–Mauritius DTAA.
- Such gains fall under the residual clause i.e., Article 13(4) and are exempt from Indian tax for Mauritius residents.

08 Fullerton Financial Holdings Singapore – Mumbai ITAT

Name	Date of pronouncement	Forum	Topic
Fullerton Financial Holdings Pte. Ltd	28 October 2025	Mumbai ITAT	LTCG Exemption under India-Singapore DTAA – Substance over Form

Facts of the case

- Singapore-based taxpayer, incorporated in 2003, wholly owned by a Singapore investment company, ultimately owned by the Government of Singapore.
- Invested in an Indian company in FY 2008–09; sold entire stake in the relevant year, earning LTCG).
- Claimed LTCG exemption in India under Article 13(4A) of the India-Singapore DTAA (shares acquired before 1 April 2017).
- TO denied exemption, alleging the taxpayer was a shell/conduit company and failed the LoB clause under Article 24A.
- TO argued taxpayer did not meet the SGD 200,000 operational expenditure threshold and lacked commercial substance.

Relevant extract of Article 24A of India-Singapore DTAA

*2. A **shell or conduit company** that claims it is a resident of a Contracting State shall not be entitled to the benefits of paragraph 4A or paragraph 4C of Article 13 of this Agreement. A shell or conduit company is any legal entity falling within the definition of resident with negligible or nil business operations or with no real and continuous business activities carried out in that Contracting State.*

*3. A resident of a Contracting State is deemed to be a shell or conduit company if its **annual expenditure** on operations in that Contracting State is **less than S$ 200,000 in Singapore** or Indian Rs. 5,000,000 in India, as the case may be:*

08 Fullerton Financial Holdings Singapore – Mumbai ITAT

Taxpayer's Arguments

- Not a shell or conduit company; incorporated before Article 24A was introduced.
- Investment was a long-term, strategic holding, not a short-term scheme for treaty shopping.
- Ultimate owner (Government of Singapore) is itself eligible for DTAA benefits; no treaty shopping possible.
- Demonstrated genuine business presence in Singapore (Tax Residency Certificate, Board credentials, audited financials, board minutes, bank details).
- Operational expenses paid to group entity are legitimate business practice; satisfied SGD200,000 threshold (supported by IRAS and auditor certificates).

Revenue's Arguments

- Taxpayer is a shell/conduit company, established for treaty shopping, lacking real commercial substance.
- No employees, business infrastructure, or independent economic activity in Singapore.
- Rejected IRAS and auditor certificates as insufficient proof of business substance.
- Management service fees and other expenses viewed as artificial cross-charges, not genuine operational costs.
- Test for treaty abuse should be applied at the time of transaction, not incorporation.

08 Fullerton Financial Holdings Singapore – Mumbai ITAT

Ruling of the ITAT

- Taxpayer satisfied the PPT under Articles 24A(1) and (2) of the DTAA.
- Not a conduit; recognized as an active investment and operating platform for the Singapore sovereign group.
- Demonstrated commercial substance and independent economic presence in Singapore.
- Governance and strategic management by experienced Board in Singapore; investment was long-term and aligned with business objectives.
- Ultimate beneficial owner is the Government of Singapore, which enjoys sovereign immunity.
- Concluded taxpayer was not a shell company; transaction not primarily for tax avoidance.
- Allowed DTAA benefits; capital gains not taxable in India.

Key takeaways

- Tax authorities cannot mechanically invoke the LoB clause to deny DTAA benefits.
- Must establish that the company's affairs are primarily for tax avoidance or that it is a shell/conduit.
- Satisfaction of PPT is fact-specific and must consider the taxpayer's overall conduct and economic reality.
- Reinforces the importance of commercial substance and genuine business presence for treaty benefits.

4

Taxability of Software license

09 Saxo Bank A/S – Delhi ITAT

Name	Date of pronouncement	Forum	Topic
Saxo Bank A/S	14 April 2024	Delhi ITAT	Taxability of Software License Reimbursements

Facts of the case

- Taxpayer: Foreign company registered in Denmark, operating in the fintech sector.
- No business operations carried out by the taxpayer in India during the relevant assessment year.
- Taxpayer procured various shrink-wrapped software user licenses from third-party vendors under a global agreement for use by all group entities.
- Indian Associated Enterprise (AE) reimbursed the taxpayer for its share of the software license costs, with tax deducted at source under section 195 of the Income-tax Act, 1961.
- The software licenses were used by group entities for business operations.

09 Saxo Bank A/S – Delhi ITAT

Taxpayer's Arguments

- Software was procured solely for business operations of the group, not for maintaining any IT infrastructure.
- The taxpayer only cross-charged the cost of software to group entities; did not provide or maintain IT infrastructure.
- Demonstrated that most software was installed directly on end-user devices (laptops/desktops) or accessed via third-party managed cloud services.
- No servers or IT infrastructure were maintained by the taxpayer.
- Relied on the Supreme Court's decision in Engineering Analysis, arguing that in the absence of transfer of copyright, the cross-charge is not taxable as royalty.

Revenue's Arguments

- Argued that the taxpayer procured software licences for the entire group and maintained IT infrastructure.
- Claimed that the payment received was for making available IT infrastructure on an actual usage basis.
- Sought to treat the receipts as "equipment royalty" under the India-Denmark Double Taxation Avoidance Agreement.

09 Saxo Bank A/S – Delhi ITAT

Ruling of the ITAT

- Observed that neither the taxpayer nor its Indian AE had rights to sub-license, transfer, reverse engineer, modify, or reproduce the software.
- Held that the license did not confer any proprietary interest or copyright to the licensee.
- Concluded that the payment was not for use or right to use any copyright, and thus, not taxable as royalty.
- Stated that mere deduction of tax at source does not make the receipt taxable as royalty.
- Followed the Supreme Court's Engineering Analysis decision, ruling the cross-charge of software licence fees as non-taxable in India.

Key takeaways

- Reaffirms Supreme Court's position: software licence fees are not taxable as royalty in the absence of copyright transfer.
- Mere licensing or sub-licensing of software does not attract royalty taxation unless copyright rights are transferred.
- Revenue's attempt to tax as "equipment royalty" was rejected due to lack of taxpayer-maintained IT infrastructure.

10 Munich RE Automation Solutions – Delhi ITAT

Name	Date of pronouncement	Forum	Topic
Munich RE Automation Solutions Ltd	4 September 2025	Delhi ITAT	Standard Software License Fees Not Taxable as Royalty under India–Ireland DTAA

Facts of the case

- Taxpayer: Irish company engaged in developing software solutions for the insurance sector.
- Provided standard software and related services (support and maintenance) to an Indian customer.
- Taxpayer treated receipts as non-taxable in its return of income and claimed a refund of tax deducted at source (TDS) by the Indian customer.
- Tax Officer (TO) treated the receipts as 'royalty' under section 9(1)(vi) of the Income-tax Act, 1961 and Article 12(3) of the India-Ireland DTAA.
- TO relied on the Master Procurement Agreement (MSA) and Statement of Works (SOWs) to argue the software was tailor-made and IPR would vest with the Indian customer.

10 Munich RE Automation Solutions – Delhi ITAT

Taxpayer's Arguments

- Software provided was standard, not tailor-made for the Indian customer.
- Transaction was a license to use the software, not a transfer of any copyright or intellectual property rights (IPR).
- MSA and SOWs clearly stated all IPR remained with the taxpayer.
- Relied on Supreme Court decision in Engineering Analysis Centre of Excellence (P.) Ltd., which held that payments for standard software do not constitute royalty.

Revenue's Arguments

- Receipts should be treated as 'royalty' under both domestic law and the DTAA.
- Interpreted the MSA and SOWs to suggest the software was tailor-made and IPR would be transferred to the Indian customer.
- Asserted that providing access to software applications and related implementation services constituted royalty.

Ruling of the ITAT

- Examined the MSA and SOWs, confirming the software was standard and not tailor-made.
- MPA defined 'licensed software' as standard software, patches, maintenance releases, or new versions.
- Clause 6 of the MSA confirmed all IPR, including updates and documentation, remained with the taxpayer unless specifically developed for the Indian customer (not applicable here).
- No deliverables or works made for hire were provided to the Indian customer.
- Concluded the transaction was a direct purchase of software by an end user from a foreign supplier (as per SC's Engineering Analysis case).
- Held that payments were not covered within the definition of 'royalty' under Article 12(3) of the DTAA

5

Miscellaneous topics

11 Foods and Inns Limited – Mumbai ITAT

Name	Date of pronouncement	Forum	Topic
Foods and Inns Limited	30 September 2025	Mumbai ITAT	Taxability of Overseas Commission and Warehousing Charges

Facts of the case

- Taxpayer - An Indian company, engaged in manufacturing and exporting fruit pulps, concentrates, and processed vegetables.
- For AY 2017-18, the company paid:
  - ₹25 lakhs as commission to non-resident agents in the UK, Australia, Netherlands, France, UAE, Hong Kong, and Germany.
  - ₹3.19 crores as warehousing charges in Europe for storage of goods before delivery to foreign buyers.
- The non-resident agents had no business operations or permanent establishment (PE) in India; their role was limited to canvassing orders and facilitating export transactions abroad.
- Payments were made in foreign currency outside India.
- Warehousing services were limited to storage; no technical, consultancy, or managerial services were provided.

11 Foods and Inns Limited – Mumbai ITAT

Taxpayer's Arguments

- The commission paid to foreign agents constitutes business income accruing outside India, taxable in India only if there is a business connection or PE in India, which was absent.
- Warehousing charges are commercial payments for storage abroad, not fees for technical services (FTS).
- Cited earlier years' Tribunal decisions in their favor, where similar payments were held not taxable in India.

Revenue's Arguments

- Argued that services, though rendered abroad, were "utilised" in India, making the income deemed to accrue or arise in India under Section 9(1) of the Income Tax Act.
- Claimed that commission and warehousing charges had elements of consultancy, technical, or managerial services, thus qualifying as FTS.
- Asserted that the taxpayer was required to deduct tax at source, and failure to do so warranted disallowance under Section 40(a)(ia).

Ruling of the ITAT

- The obligation for TDS arises only if the payment is chargeable to tax in India.
- Commission paid to foreign agents is business income, taxable in India only if there is a business connection or PE in India.
- Activities of foreign agents (canvassing orders) do not amount to rendering managerial, technical, or consultancy services; thus, not FTS.
- Warehousing charges are for storage services, not technical or consultancy services, and do not qualify as FTS.
- Both payments are business income accruing outside India, not chargeable to tax in India; hence, no TDS obligation.
- Relied on the Supreme Court's ruling in GE India Technology Centre (P.) Ltd.

12 Prakash Raman – Chennai ITAT

Name	Date of pronouncement	Forum	Topic
Prakash Raman	22 September 2025	Chennai ITAT	Taxability of Salary for Indian Employees on Foreign Assignment

Facts of the case

- The assessee, Prakash Raman, was an employee on the rolls of an Indian company.
- For Assessment Year 2019-20, he was sent to the United States on a work assignment.
- During this period, he rendered services in the US but continued to receive his salary in India from the Indian employer.
- The Indian company was reimbursed for the salary costs by the foreign (US) company.
- The assessee claimed to be a tax resident of the USA for the relevant period and furnished a US Tax Residency Certificate (TRC) as additional evidence before the Tribunal.

12 Prakash Raman – Chennai ITAT

Taxpayer's Arguments

- Salary income earned as a tax resident of the USA for services rendered in the USA should be taxable only in the USA, not in India.
- As a non-resident for the relevant year, only salary for services rendered in India should be taxable in India.
- Relief under Article 16(1) of the India-USA DTAA should be granted, exempting the salary from Indian taxation.
- The denial of DTAA benefits by lower authorities was erroneous, especially after submission of the US TRC.

Revenue's Arguments

- The Indian company maintained the employer-employee relationship and issued Form 16, deducting TDS on the salary paid in India.
- Salary received in India from the Indian employer is taxable in India under section 5(2)(a) of the Income-tax Act.
- The benefit of Article 16 of the India-USA DTAA cannot be granted in the absence of a valid US TRC.
- The assessee was attached to the Indian company for performance reviews and social security, reinforcing the Indian tax nexus.

Ruling of the ITAT

- Salary cannot be taxed in India solely because it was received in India; taxability depends on where the services were rendered.
- If services are rendered outside India, salary accrues outside India and is not taxable in India, even if received in India.
- The Tribunal admitted the US TRC as additional evidence and directed the AO to verify its genuineness.
- If the TRC is found valid, relief under section 90 and Article 16(1) of the India-USA DTAA must be granted, exempting the salary from Indian tax.

6

Takeaways from recent judgements

Key takeaways from recent judgements

1

Permanent Establishment

- PE exposure - If the foreign enterprise has **substantive control over the business operations in India**, with actual operational presence — not merely formal rights or temporary access
- The **onus is on the tax authorities** to establish the existence of a PE by demonstrating actual business activities and control in India; mere outsourcing or presence of a subsidiary does not create a PE

2

Taxability of Transactions – Whether a Colourable Device to Evade Tax

- Consistently apply the **doctrine of substance over form**, focusing on the real intention, economic substance, and actual conduct of the parties
- The place of effective management (POEM), board decision-making, and operational control are determinative for tax residence and eligibility for treaty benefits
- Courts have disregarded arrangements **lacking commercial substance** or where the real business activity is not aligned with the legal form

3

Emphasis on Documentation

- Repeatedly stressed that maintaining comprehensive, contemporaneous documentation is essential to substantiate residence, beneficial ownership, and commercial substance

Key takeaways from recent judgements

4

Arms length price of management service fees

- Cannot be arbitrarily determined as Nil by the TPO
- Following one of the prescribed methods is essential

5

Recharacterization in a transfer pricing situation

- Recharacterization of a transaction is possible only in a tax avoidance kind of a situation and cannot be done in a routine manner for genuine transactions

Thank you