



# SATURDAY INTERNATIONAL TAX GYAN !!!

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### SITG No. 230

## India Opportunity Fund I F.C.R

VS

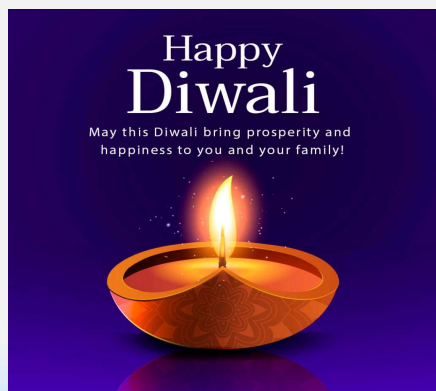
## DCIT-2(2)(1), Mumbai

Indirect transfer of shares of a company holding less than 10% shares in an Indian company is not taxable in India as per India – Spain DTAA.

02.11.2024



Jain Shrimal & Co.



I.T.A. No. 4536/Mum/2023 (Mumbai Tribunal)

## Facts of the Case



- ❖ The assessee (India Opportunity Fund) is a VC Fund Incorporated under the laws of Spain who is holding 100% shares of IMI Investments Two Ltd (Cyprus). Further, IMI holds **9.65%** shares in NXT Singapore and NXT Singapore holds 100% shares of NXT India. The assessee did not have any permanent establishment or any office in India.
- ❖ During the AY 2021-22, the assessee has transferred the shares in Cyprus company and claimed the same as exempt in India under section 90/91 of the Act as well as Article 14 of DTAA between India and Spain and hence, filed the return of income for AY 2021-22 on 15.03.2022 declaring income of Nil.
- ❖ The return was selected for scrutiny and the statutory notices were duly served on the assessee stating that how the assessee is entitled for the benefit as per Article-14 of the India-Spain DTAA. As a result, AO passed the final order pursuant to the directions of the DRP in which the capital gain on the sale of shares was taxable in the hands of the assessee.
- ❖ The assessee is in appeal against the final order of assessment passed by the AO.

## Assessee's Contention



- ❖ As per the capital structure the percentage of holding of the ultimate parent company is **less than 10%** in assessee and therefore, sub-clause (5) of Article-14 of India Spain treaty is not applicable in assessee's case.
- ❖ Immovable property held by the assessee is used for the purpose of business and therefore sub-clause (4) of Article-14 cannot be applicable in assessee's case.
- ❖ The value of immovable property of the Indian company is **less than 50% of the overall assets** of the company and therefore the said property cannot be said to be '**principally**' situated in India.
- ❖ With regard to the rejection of the valuation of immovable property done by JLL, JLL is a reputed property valuer and has adopted scientific method to value the immovable property of the assessee and hence same should not be rejected.

## Revenue's Contention



- ❖ Assessee has not provided any evidence in support of the claim and how the assessee is entitled for the benefit as per Article-14 of the India-Spain DTAA.
- ❖ The **value adopted** by the assessee based on the valuation report for intangibles and immovable properties is **unacceptable as the assessee has inflated the value of intangibles** substantially attributing huge importance to their revenue earning capacity, the same needs to be discarded for the purpose of ascertaining the proportion of immovable properties in the total assets.
- ❖ Book value of the intangible assets is reasonable and basis the same, the value of immovable properties is more than 50% of the total assets. **As a result provisions of Article 14(4) of the India Spain DTAA is attracted and long term capital gains is taxable in India.**

# Legal provisions



## **Article 14 of India- Spain DTAA:**

1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State.
3. Gains from the alienation of ships or aircraft operated in international traffic or of movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

## Legal provisions



### **Article 14 of India- Spain DTAA:**

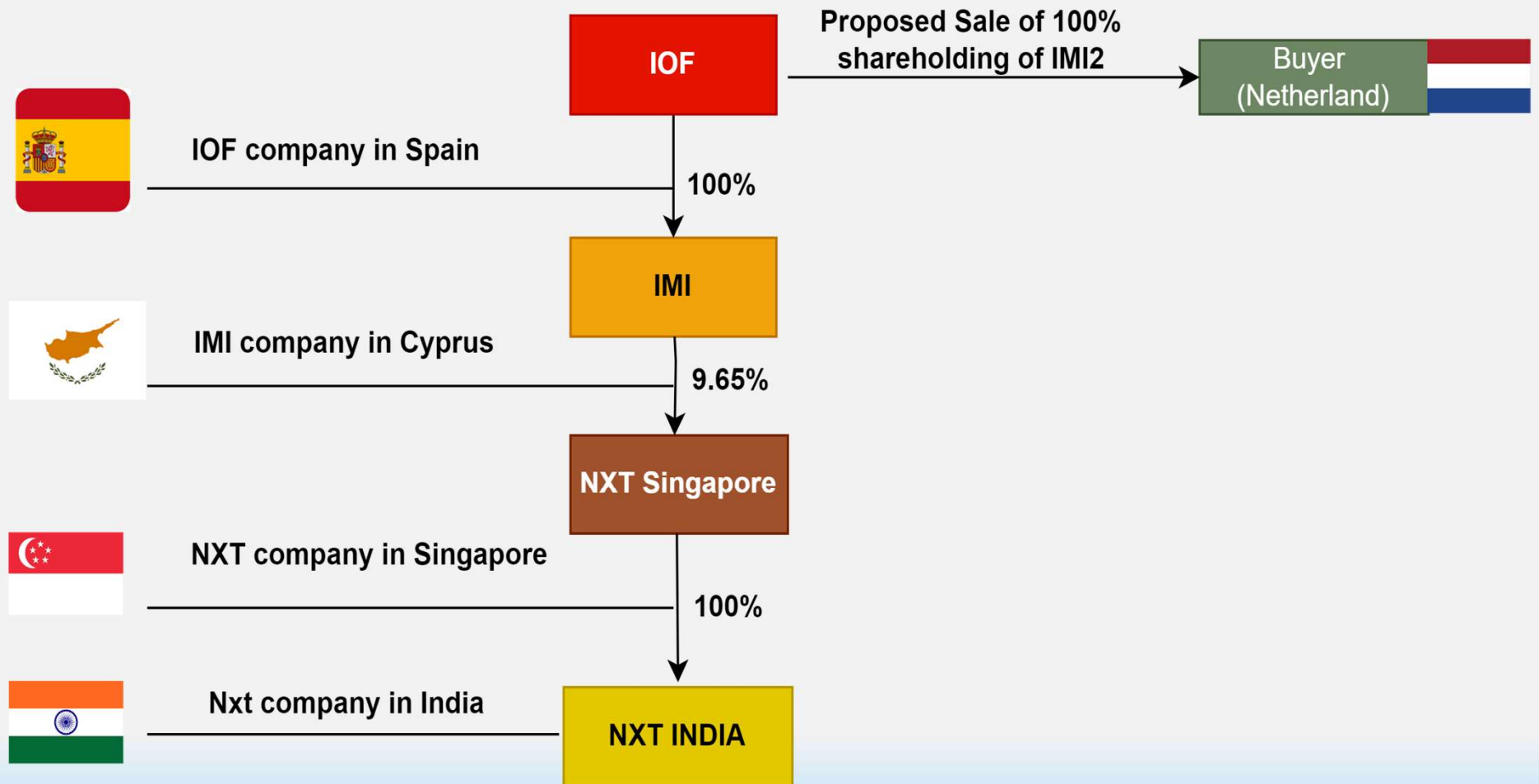
4. Gains from the alienation of shares of the capital stock of a company the property of which consists, directly or indirectly, principally of immovable property situated in a Contracting State may be taxed in that State.
5. Gains for the alienation of shares of the capital stock of a company forming part of a participation of at least 10 per cent in a company which is a resident of a Contracting State may be taxed in that Contracting State.
6. Gains from the alienation of any property other than that mentioned in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident.

# Ruling



- ❖ The Hon'ble ITAT held that it is an undisputed fact that assessee is holding only 9.65% of the shares indirectly in IMI Investments Two Ltd and therefore applying the ratio of the decision in the case of JCIT Vs. Merrill Lynch Capital Market Espana SA SV(ITA No.6108/Mum/2018 dated 11.10.2019), it cannot be said that such holding is towards any controlling interest.
- ❖ It is also relevant to mention here that as per UN Model Convention commentary, the provisions of Article 14(4) come into effect to prevent the case of indirect transfer of ownership of immovable property by transfer of shares owning these properties.
- ❖ Therefore, Article-14(4) of the DTAA between India and Spain cannot be applied in assessee's case. Hence, the capital gain arising out of transfer of shares of the IMI Investments Two Ltd. cannot be taxed in India.
- ❖ In the result, the appeal of the assessee is allowed.

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## Our Comments



- ❖ If a company is only incorporated to hold immovable properties in another company and the shares are indirectly transferred by the ultimate holding company it will result as taxable in the country where such immovable property is situated as the shares are deriving it's major value from such immovable property.
- ❖ Further, since resident country is Spain and source country is India, India Spain treaty has been discussed.
- ❖ Further, in the current case valuation of intangible assets have also played an important role and if the valuation of such intangible asset was not accepted then such capital gain on shares would have been taxable in India. Also, the word principally has not been defined in the DTAA.



<b>Section/Article</b>	Article 14 of India-Spain DTAA
<b>DTAA/Country</b>	India Spain
<b>Court</b>	Mumbai ITAT
<b>Date of decision</b>	27.08.2024

**Note:** Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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