

TAX SPHERE

Index-based derivatives ≠ shares: STCG exempt under Article 13(4) of India-Mauritius DTAA

The ITAT in the case of **EM Delta One**[1] has ruled that Short-term Capital Gains ("**STCG**") arising in the hands of Mauritius-based Foreign Portfolio Investor ("**FPI**") from trading in index-based derivatives are not taxable in India.

The assessee, incorporated in Mauritius and registered as FPI with SEBI, earned STCG from trading in index-based derivatives and claimed exemption under Article 13(4) of the DTAA. The assessing officer sought to tax the same under Article 13(3A) of the DTAA, which subjects gains from alienation of shares in an Indian resident company to taxation in India, on the basis that since the value of a derivative is derived from the underlying share, gains from alienation of derivatives should be treated similarly to gains from alienation of the underlying shares itself.

Observing that derivatives and shares are distinct asset classes, as recognized under the Securities Contracts (Regulation) Act, 1956 as well as the Income-tax Act, 1961, the ITAT emphasized that merely because

[1] IT(IT)A No. 84/Del/2025



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the derivatives derive value from underlying equity or indices, derivatives should not be equated with shares and such economic linkage does not alter their legal character.

The ITAT relied on the decision of coordinate bench of the Tribunal in the case of Estee India Fund[2] to hold that gains from trading in derivatives is fundamentally different from trading in shares and are not taxable in India under Article 13(4) of the India-Mauritius DTAA, as they are taxable only in the Contracting State of which the alienator is a resident.

This ruling provides important clarity for foreign investors resident of countries, DTAA with which have similar clauses regarding capital gains taxation as contained in Article 13 of the India-Mauritius DTAA, reaffirming that derivative transactions cannot be recharacterized as share transactions for treaty purposes solely because derivatives derive value from underlying shares/ indices.

List of such countries includes Singapore, Malaysia, Oman, Qatar, Saudi Arabia, Kuwait, United Arab Emirates etc.

It is, however, important to take note that not all DTAA's have such clauses governing capital gains taxation. The DTAA with UK, USA, Canada, for instance, allocates taxing rights to both source and residence

[2] [2026] 184 taxmann.com 416, order dated 12.03.2026

countries in an omnibus manner without distinguishing between gains from different class of securities.

The ITAT decision is aligned with the view taken earlier in the context of taxation of gains arising from sale of mutual fund units by investors resident in Mauritius, holding that shares have different connotations than units of mutual funds, notwithstanding that said units derive value from the underlying shares. (*Refer Emerging India Focus Funds, Apex Financial Services (Mauritius) Ltd*) [3]

[3] [2025] 175 taxmann.com 1013 (Del Trib)

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OUR OFFICES

DELHI

1st, 9th & 11th Floor,
Mohan Dev Building,
13, Tolstoy Marg,
New Delhi - 110001, India,

TEL: +91 11 42492525,
delhi@vaishlaw.com

MUMBAI

106, Peninsula Centre,
Dr. S. S. Rao Road, Parel,
Mumbai - 400012, India,

TEL: +91 22 42134101,
mumbai@vaishlaw.com

BENGALURU

Bhive Premium
Ramanashree (MG Road) No. 2/1,
Brunton Road, Off MG Road
Opposite Old Passport Office
Bengaluru - 560001, India

TEL: +91 80409 03588/ 89
bangalore@vaishlaw.com



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