IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: D : NEW DELHI

BEFORE SHRI ANUBHAV SHARMA, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

ITA No.1963/Del/2025
Assessment Year: 2022-23

Emerging India Focus Funds, Apex Financial Services (Mauritius) Ltd., 6th Floor, Two Tribeca Central, Trianon, 72261, Mauritius.	Vs	ACIT, Circle Int. Tax 1(2)(2), Delhi.

PAN: AACCE0596N

(Appellant) (Respondent)

Assessee by	:	Shri Ajay Vohra, Sr. Advocate; Shri Krishan Malhotra, Advocate; Shri Gaurav Sachdeva, Advocate; & Ms Aditi Garg, CA
Revenue by	:	Shri Abhishek Sharma, CIT-DR
Date of Hearing	:	08.05.2025
Date of Pronouncement	:	25.06.2025

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the final assessment orders dated 23.01.2025 passed by the Asstt. Commissioner of Income Tax, Circle Int. Tax 1(2)(2), Delhi (hereinafter referred to as the Ld. AO) u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred as ‘the Act’) for assessment year 2022-23.

2. Heard and perused the records. On the basis of submissions and the material on record it comes up that assessee is a foreign company and a tax resident of Mauritius. The assessee is carrying on investment activity in India by way of investments in shares and debentures of Indian companies through recognized stock exchanges in India. The assessee has also obtained registration as Foreign Institutional investor from Securities Exchange Board of India (SEBI) vide Registration No. 20081098. The assessee collects money from participating shareholders (investors) from all over the world and invests the same as per the investment objective of the assessee as defined in the Private Placement Memorandum (PPM) and Supplement of each class of the hand. Each share class of the fund had investment only in SEBI Registered Mutual Funds. The assessee filed return of income for A.Y 2022-23 on 13.10.2022 declaring total income of Rs. 5,460/-. In the AY 2022-23, the assessee earned capital gain income of Rs. 5,93,48,24,274/- on account of sale of equity-oriented mutual funds in India. Such capital gains were claimed as exempt under Article 13(4) of the India-Mauritius DTAA. The case was selected for scrutiny under CASS and Notice u/s 143(2) of IT Act dated 31.05.2023 was issue to the assessee by the AO for the following reasons:-

• Large Foreign Remittance made (Business ITR)

3. In the Draft Assessment Order, the Assessing Officer held that out of the total capital gain of Rs. 593,48,24,274/-, the capital gains of Rs. 385,76,35,779/- were to be covered under Article 13(3A) of the India-Mauritius DTAA and

hence, taxable. In doing so, the AO held that when the assessee sells the equity-oriented Mutual Funds, it becomes the beneficiary of capital gains arising from the alienation of the underlying asset of investment i.e. shares/ equity. Accordingly, the AO held that since the assessee has underlying assets of transactions as Equity, therefore, 65% of the total capital gains i.e. Rs. 385,76,35,779/- is covered under Article 13(3A) of the India Mauritius DTAA as the underlying asset in the transaction is shares and is taxable. The relevant extracts of the order of the AO is reproduced as under:

> *"8. The reply of the assessee was thoroughly perused and not found tenable because of the following reasons-*
>
> *8.1 The assessee has made foreign remittances from India during F.Y2021-2022 against Capital gains income from Mutual Fund Investment which invest primarily in share market. Hence, the assessee is effectively investing in the share market merely by an indirect instrument. It is also a beneficiary of the stock market gains arising from the investment in the equity.*
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> *8.2 The intent of the amendment in India-Mauritius DTAA, with respect to Article 13, was to bring the share/equity investment under the taxation purview of the source country. This is inclusive of all the instruments wherein the share/equity investment is made, as the DTAA does not categorise the instrument used to invest in shares/equity. Hence, when the assessee acquires equity based Mutual Funds, it is effectively acquiring the shares which fall under the purview of Article 13(3) of India- Mauritius DTAA which mandates the taxation of the capital gain arising from the alienation of the shares.*
>
> *8.3 As per the assessee's own submission, wherein it has submitted the documents pertaining to the asset allocation done by the Mutual fund, it clearly reflects that the primary asset of investment is equity/shares only with minimum equity investment is 65% and the maximum equity investment is 100% in some schemes. Hence, the intent of the assessee was to derive benefit from the share market movement in equity asset only, which is evident from the choice of the Mutual Fund it has invested into. Accordingly, the assessee is deriving the benefit from the capital gains*

accrued from the sale of the equity when it sells the equity based mutual funds and books capital gains.

8.4 Therefore, when the assessee sells the equity oriented Mutual fund, it is a beneficiary of the capital gains arising from the alienation of underlying asset of the investment, i.e, shares/equity.

Given under is the Article 13 of the India- Mauritius DTAA, which clearly inundates that gains arising from alienation of shares acquired on or after 01.04.2017 are taxable in source only.

ARTICLE 13
CAPITAL GAINS

1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.

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 a fixed base, may be taxed in that other State.

3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

[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.
3B. However, the tax rate on the gains referred to in paragraph 3A of this Article and arising, during the period beginning on 1st April, 2017 and ending on 31" March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated;

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

5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States.

8,5 The assesses has the following type of transactions post 2017 i.e. HDFC Balanced Advantage Fund Regular Plan Growth, HDFC Equity Savings Fund Regular Plan Growth, HDFC Flexi Cap Fund Direct Plan Growth Option and HDFC Flexi Cap Fund Regular Plan Growth which are tabulated as under-

Particular	Capital Gains Amount (Rs.)	Minimum Allocation in Equity (% of total Assets)	Capital gain arising out of sale of equity investment (Rs.)
HDFC Balanced Advantage Fund Regular Plan Growth	48.31.10.235	65	31,40,21,653
HDFC Equity Savings Fund Regular Plan Growth	44.46.36.290	65	28,90,13,588
HDFC Flexi Cap Fund Direct Plan Growth Option	4,92,69,29,944	65	320,25,04,464
HDFC Flexi Cap Fund Regular Plan Growth	8,01,47,806	65	5,20,96,074
Total	593,48,24,274		385,76,35,779

8.6 From the above table, the assessee's capital gain from HDFC Mutual fund wherein the investment is made in Equity/shares by the assessee is computed. Given as under is the screenshot of mutual fund asset allocation.

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8.7 Accordingly, as per the submission of the assessee minimum equity investment percentage is taken to calculate the Capital Gain arising out of shares. Accordingly, the capital gains from share investment comes to be Rs. 385,76,35,779/- out of the total capital gains of Rs. 593,48,24,274/- booked by the assessee.

8.8 As the assessee has underlying assets of transactions is Equity, therefore, the proportionate capital gain amounting to Rs. 385,76,35,779/-

is clearly covered under the Article 13(3A) of the India- Mauritius DTAA, as the underlying assets in transaction is shares and is taxable.

8.9 In view of the above discussion, it is evident that the capital gain amount of Rs. 385,76,35,779/- earned by the assessee from transactions in shares is taxable in India as Capital Gain as per Income Tax Act 1961 as per Article 13(A) of DTAA, the same is added back to the income of the assessee. The penalty u/s 270A for underreporting of income is being initiated."

4. Aggrieved with the order of the AO, the assessee filed objections before the Dispute Resolution Panel (DRP). The case set up before DRP was that the capital gains arising on sale of units of equity oriented mutual funds is not covered under Article 13(3A)of the India Mauritius DTAA since the said clause is applicable only on account of alienation of shares and not units of mutual funds. It submitted that the case of the assessee is covered under Article 13(4) of the India Mauritius DTAA and is thereby exempt from tax in India. Further, without prejudice to the main argument, it was also submitted that capital gains of Rs. 310,80,53,009/- pertained to sale of units of mutual funds acquired prior to 01/04/2017 and hence, in respect of such gains, Article 13(3A) cannot be applicable. The relevant extract of the submissions of the assessee which were again reasserted by ld. Sr. Counsel is reproduced as under:-

- *"It is imperative to note that as per Article 13(3A) of lndia-Mauritius DTAA taxability arises in India only on gains from alienation of shares acquired on or after 1 April 2017 of a company which is resident of India. Accordingly, Article 13(3) of India-Mauritius DTAA clearly categorizes the instrument which is taxable in India i.e., shares in a company.*

- *Where the intention um to cover underlying investment of shares in case of equity oriented mutual fund, the same should have been specifically included* *in Article 13(3A) or the Article 13(3A) should have used the term gains on alienation of shares directly or indirectly.*

• *In this connection, Hon'ble Supreme Court in the case of Commissioner of Customs (Import) vs M/s Dilip Kumar and Company & Ors. (2018) 9 SCC 1 held that while interpreting taxation statute, there is no room for searching intendment nor drawing any presumption. Relevant extract of the Hon'ble Supreme Court ruling is reproduced below:*

"Indeed, it is well settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute."

• *Similar principles have been held by Hon'ble Supreme Court in the case of State of W.B. v. Kesoram Industries Ltd. and Ors. (2004) 10 SCC 201.*

• *Further, where the intention of the legislature urns to cover underlying assets directly or indirectly, the same has been expressly mentioned in relevant Articles. For eg. Article 13(3) of lndia-UAE DTAA provides for taxability in India on 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 India.*

• *A language similar to Article 13(3) of India-UAE DTAA can be found in various other DTAA entered into by India for eg. Article 13(4) of India- Sweden DTAA, Article 14(4) of India-Spain DTAA, Article 14(4) of India- France DTAA etc.*

• *Similarly, there are also other treaties such as India-USA DTAA, India-UK DTAA, which expressly provides that all types of transfers are taxable in India including transfer of mutual fund units. Accordingly, where the intention was to tax gains on units of mutual fund, the same has been expressly provided in certain tax treaties.*

• *Further, the Assessee submits that redemption of units of mutual fund cannot be considered as sale of shares of a company and hence, shall not be covered by Article 13(3)/ Article 13(3B) of India-Mauritius DTAA.*

• *The Income-tax Act itself recognizes shares of a company and units of a mutual fund differently - for example: section 2(42 A), section 111A, section 112, section 112 A, etc.*

• *Further, under the Securities Contract (Regulation) Act, 1956, shares and mutual fund units are identified as separate securities.*

• *The aforesaid view is also supported by Cochin Tribunal in the case of DCIT(IT) vs. K.E. Faizal [2019] 178 ITD 383 and Mumbai Tribunal in the case of ITO(IT) vs. Satish Beharilal Raheja [2013] 37 taxmann.com 296, wherein it has been held that mutual fund units (including equity oriented mutual funds) could not be considered as shares of companies and hence, gains arising on mutual fund units shall not be liable to tax in India under the relevant DTAA.*

• *Accordingly, since gain on redemption of mutual fund units shall be covered by Article 13(4) of India-Mauritius DTAA, the same shall not be liable to tax in India.*

Without prejudice of the above submissions
For units acquired prior to 1 April 2017

• *Article 13(3) of India-Mauritius DTAA provides for taxation in India of gains from alienation of Indian company shares acquired on or after 1 April 2017.*

• *Accordingly, any gains derived from alienation of shares acquired prior to 1 April 2017 shall not be taxable in India,*

• *The learned AO has appreciated this in para 8.4 of the draft assessment order wherein it has been mentioned that Article 13 clearly enunciates that gains arising from alienation of shares acquired on or after 1 April 2017 are taxable in source only.*

• *In the instant case, the Assessee is eligible to claim India-Mauritius DTAA and certain mutual fund units redeemed during AY 2022-23 were acquired by the Assessee prior to 1 April 2017.*

During AY 2022-23, the Assessee derived long-term capital gains of IN310,80,53,009 on units acquired prior to 1 April 2017. The same is summarized below:

Mutual Fund	*Period of acquisition*	*Long Term Capital Gain (in INR)*
HDFC Flexi Cap Fund Regular Plan Growth	*13 May 2015 to 22 May 2015*	*8,01,47,806*
HDFC Flexi Cap Fund Regular Plan Growth Option	*05 February 2015 to 22 February 2017*	*302,79,05,203*
Total Capital Gains on mutual fund units acquired prior to 1 April 2017		*310,80,53,009*

- *During the course of assessment proceedings, the Assessee duly submitted mutual fund Statements showing details of purchase and sale of mutual fund units vide submission dated*

- *11 November 2023 which clearly reflected that certain units redeemed during AY 2022-23 were purchased prior to 1 April 2017. The relevant submission along with the annexures was attached as Exhibit 2 in the detailed submissions (refer page 142 to 445 of the paper book).*

- *The Assessee was always of the view that the gains from mutual fund units were not taxable in India under Article 13(4) of India-Mauritius DTAA.*

- *However, since the learned AO has considered such capital gains to be taxable in India, the Assessee would like to submit that gains derived from sale of units acquired prior to 1 April 2017 should not be taxable in India*

- *Accordingly, in the instant case, without prejudice to the submission that*
capital gains on redemption of mutual fund units is not taxable in India as per Article 13(4) of India-Mauritius DTAA, the Assessee submits that long-term capital gains of INR 310,80,53,009 derived on units acquired prior to 1 April 2017 shall not be liable to tax in India under India-Mauritius DTAA and hence 65% of the aforesaid amount i.e. INR 202,02,34,456 should not be considered for additions.

For units acquired on or after 1 April 2017
- *Capital gains derived on redemption of mutual fund units acquired on or after 1 April 2017 is INR 282,67,71,265*

• As per section 2(42A) of the Act, units of equity oriented mutual fund shall be long-term in nature inhere the units are held for more than 12 months.

• In the instant case, units acquired post 1 April 2017 were acquired during the period 24 April 2017 to 16 October 2018. Accordingly, at the time of redemption of units during AY 2022-23, the mutual fund units were long¬term in nature and gains derived from such mutual fund units shall be taxable as long-term capital gains.

• Accordingly, without prejudice to the submission that capital gains on redemption of mutual fund units is not taxable in India as per Article 13(4) of India-Mauritius DTAA, 65% of the capital gains on redemption of mutual fund units acquired on or after 1 April 2017 i.e. INR 183,74,01,322 (65% of INR 282,67,71,265) shall be considered long-term in nature and taxable at 10% plus applicable surcharge and cess as per section 112A of the Act subject to the cost step-up under section 55(2)(ac) of the Act."

5. The DRP decided the issue against the assessee and even differed with the view of AO to tax only 65% of the capital gains but held that whole of the capital gain from Mutual funds disinvestment are taxable and benefit of grandfathering clauses was though given to assessee. The findings of DRP are reproduced below;

"4.2 DRP DISCUSSIONS AND DIRECTIONS:

(i) The sole issue for consideration before the Panel is whether the capital gains arising on sale of equity-oriented mutual funds are covered under Article 13(3A) or Article 13(4) of the India-Mauritius DTAA.
(ii) In this regard, it is imperative to first examine the provisions of Article 13 of the India-Mauritius DTAA which reads as under:

ARTICLE 13
CAPITAL GAINS

1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.

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 a fixed base, may be taxed in that other State.

3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

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

3B. However, the tax rate on the gains referred to in paragraph 3A of this Article and arising during the period beginning on 1st April, 2017 and ending on 31st March, 2019 shall not exceed 50% of the tax rate applicable on such gains in the State of residence of the company whose shares are being alienated;

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.

5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States.

(iv) On perusal of the above provisions of Article 13 of the of the India-Mauritius DTAA, the Panel observes that the Article 13(3A) and 13(4) deal with the following aspects:

- *Gains from alienation of shares acquired on or after 01.04.2017 in an Indian company - Taxable in India;*

- *Gains from the alienation of any property other than that referred to in paragraphs 1,2,3 and 3A (i.e. excluding shares) in India - Taxable in Mauritius*

(v) Thus, the issue in the present case is that whether the units of equity-oriented Mutual Funds are to be considered as 'shares' to fall under Article 13(3A) of the India- Mauritius DTAA (AO's stance) or will the same

fall under the residuary clause i.e. Article 13(4) of the India-Mauritius DTAA (as contended by the assessee).

(vi) In this regard, the findings of Panel are discussed as under:

- *In case of equity oriented mutual funds, a major composition of the funds is invested in the equity shares of the domestic companies and hence, the units of such mutual funds partake in the characteristics of shares. Hence, such units of equity oriented mutual funds are akin to shares. In this regard, reference may be drawn to Explanation to Section 10(38) of the Act which defines "equity- oriented fund".*

- *The Explanation to section 10(38) provides that where the funds are invested by way of equity shares in domestic companies to the extent of more than sixty-five per cent of the total proceeds of such fund; and which has been set up under a scheme of a Mutual Fund specified under clause (23D), such funds are to be treated as equity oriented mutual funds. Thus, since the composition of equity-oriented mutual funds is mainly into the equity market, therefore, its units are akin to shares and are to be treated as shares.*

- *Secondly, various provisions of the Income Tax Act providing exemption/ tax treatment of equity shares also provide the same exemptions in respect of equity-oriented Mutual Funds, some of such provisions are stated as under:*

a. Section 10(38) of the Act exempts income arising from the transfer of equity shares in a company. Such section also exempts the income arising from the transfer of unit of an equity-oriented fund also. So, logically it can be deduced that units of equity oriented funds are akin to shares.

b. Section 112A of the IT Act exempts long term capital gains arising from the transfer of equity shares of a company. Such a section also exempts capital gains arising from a unit of an equity-oriented fund. This treatment of capital gain to both equity shares and units of equity oriented funds logically establish that units of equity funds are analogous/have semblance with the equity shares.

- *Thus, the intent of Income Tax Law is very clear to treat the units of equity- oriented mutual funds as equity shares and therefore, all the exemptions as available for equity shares have been extended to the units of equity- oriented mutual funds also.*

- *The Panel seeks to examine the above semblance of units of equity oriented mutual funds and units of equity shares under the "'Doctrine of Purposive Construction' which provides that the transaction must be* *considered in the sense in which the legislature intended it to be done. It is based on the idea that words of a law should be interpreted in a way that best aligns with the law's purpose and the subject matter. The object has to be kept in mind for purposive construction a construction which would defeat the very object of the legislature should be avoided.*

- *Among the various rules or interpretation, the one which clicks highest priority to the object of the legislation and advances such interpretation of statute which helps in the fulfillment of the object of such statute, is the 'Rule of Purposive' interpretation of statute. In the celebrated case of Workmen of Dimakuchi Tea Estate vs. Management of Dimakuchi Tea Estate (1958) AIR 353, the Hon'ble Supreme court held that the words of a statute, whenever there is a doubt about its meaning have to be understood in the sense in which they best harmonious with the subject of enactment and the object which the legislature has in its view. It was stated that 'the meaning of the statute is not found in a strict grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used and the object to be attained'.*

(Source:https://blog.ipleaders.in/understanding-the-rule-of-purposive-interpretation-of-statutes/)

- *Hence, it is apparent that the intent of the legislature was always to treat units of equity oriented mutual funds equivalent to equity shares since it carries inherent characteristics of equity shares.*

(vii) Therefore, in view of the above discussion, the Panel finds that the AO was correct in holding that the units of equity oriented mutual funds are in t he nature of equity shares and therefore, the provisions of Article 13(3A) of the India Mauritius DTAA are applicable to the facts of the assessee as against the benefit of Article 13(4) of the India Mauritius DTAA incorrectly claimed by the assessee. Hence, the Panel does not find any infirmity in the order of the AO and confirms the observation of the AO in the DAO that since the underlying asset of transaction is equity therefore the capital gains arising on account of sale of equity oriented mutual funds is covered under Article 13(3A) of the India Mauritius DTAA. The AO is accordingly directed to tax the entire capital gain of Rs. 5,93,48,24,274/-

(viii) However, the Panel also finds that the AO was not correct in holding that only 65% (i.e. minimum equity investment percentage) is taken to calculate the Capital Gain arising out of shares. The AO thus, only taxed capital gains of Rs. 385,76,35,779/- out of the total capital gains of Rs. 593,48,24,274/- earned by the assessee from equity oriented mutual funds. In this regard, the Panel observes that once the AO has held that the units of the equity oriented mutual funds were to be

treated as shares, the AO was not correct in calculating the proportionate capital gains at 65%. Once units of equity oriented mutual funds were held to be shares, the entire capital gains of Rs. 593,48,24,274/- was liable to be taxed as per Article 13(3A) of the India Mauritius DTAA.

(ix) Further, the assessee in its submissions has also submitted before the Panel that out of the total capital gains of Rs. 593,48,24,274/-, capital gains aggregating to Rs. 310,80,53,009/- were arising on account of sale of mutual funds acquired prior to 01/04/2017 and thus, the same was not liable to be taxed as per Article 13(3A) of the India Mauritius DTAA. In this regards, the Panel considers it appropriate to direct the AO to verify the claim of the assessee and in case, the same is found to be correct, the benefit of exemption under Article 13(4) of the India-Mauritius DTAA may be provided to that extent. The AO however in verifying the above information should confine herself on the material available on record and is precluded from making any enquiries from the assessee as mandated in section 144C(8) of the IT Act. Accordingly, objections raised in ground number 1 are disposed off."

6. Assessee has raised following grounds:-

"Present appeal is being preferred under section 253 of the Income-tax Act, 1961 ('the Act') against the final order dated 23 January 2025 passed by the Assistant Commissioner of Income Tax, Circle 1 (2)(2), Delhi ('Ld. AO') under section 143(3) of the Income-tax Act, 1961 ('the Act') as per the directions issued by the Dispute Resolution Panel ('DRP') under section 144C(13) of the Act on following grounds:

1. On the facts and in the circumstances of the case and in law, the Ld. AO and the DRP erred in considering the capital gains on sale of mutual fund units as taxable in India and making an addition of INR 297,13,00,571 in the final assessment order passed under section 143(3) read with section 144C(13) of the Act.

2. On the facts and in the circumstances of the case and in law, Ld. AO erred in levying interest under section 234B of the Act amounting to INR 11,03,18,474.

The Appellant craves leave to add, amend, alter or withdraw any of the above grounds of appeal at or before the time of hearing of the appeal, so as to enable the Hon'ble Income Tax Appellate Tribunal to decide this appeal according to law."

7. The ld. Sr. Counsel has reasserted the averments as mentioned above while the ld. DR relies the findings of the ld. tax authorities below. On giving thoughtful consideration to the material on record and submissions, we are of the considered view that the Dispute Resolution Panel by relying the doctrine of purposive construction has drawn semblance of units of equity oriented mutual fund with equity shares itself and to conclude that intent of legislature was always to treat units of equity oriented mutual fund to equity shares since it carries inherent characteristics of equity shares. However, losing sight of the fact that interpretation involved was of provisions of a DTAA. It is settled law that DTAA should be given an interpretation in which the reasonable meaning of words and phrases is preferred. Principles or rules of interpretation of a tax treaty would be relevant only where terms or words used in treaties are ambiguous, vague or are such that different meanings are possible. If words are clear or unambiguous then there is no need to resort to different rules for interpretation. As far as purposive interpretation, approach is concerned, the treaty is to be interpreted so as to facilitate the attainment of the aims and objectives of the treaty. In case of **Union of India v. Azadi Bachao Andolani, (2003) 263 ITR 706**, the Hon'ble Supreme Court of India observed that *"the principles adopted for interpretation of treaties are not the same as those in interpretation of statutory legislation. The interpretation of provisions of an international treaty, including one for double taxation relief, is that the treaties are entered into at a political level and have several considerations as their*

bases." The Hon'ble Apex Court also agreed to the argument put forth by the Appellant that *"the preamble to the Indo-Mauritius DTAC recites that it is for the 'encouragement of mutual trade and investment and this aspect of the matter cannot be lost sight of while interpreting the treaty*".

8. In regard to the issue before us the relevant background is that earlier, pursuant to Article 13(4) of DTAA, only the resident jurisdiction taxes capital gains from alienation of shares. In respect of the foreign investment coming into India from Mauritius, any capital gains on the alienation of shares was taxable only in Mauritius. The domestic tax law of Mauritius exempted capital gains from the sale of shares. Hence, gains from the alienation of shares held by Mauritius entities in Indian companies were not taxed in either India or Mauritius. This led to the migration of a number of entities to Mauritius and the emergence of the so-called Mauritius Route. The Mauritius Route sparked the ire of the Indian revenue officers, as the entities availing the benefits of Article 13(4) were not beneficially owned from Mauritius. In response, came the Protocol, which was signed between India and Mauritius on May 10, 2016. It amended a few articles of the Treaty, including Article 13.

9. As for the issue under hand, the analysis here only examines the amendments relating to capital gains taxation arising from alienation of shares. The Treaty has been amended to incorporate and bring in place Article 13(3A) and (3B). The effect being that the right to tax capital gains from alienation of

shares acquired on or after April 1, 2017 is vested with the source jurisdiction. Capital gains on shares acquired on or after April 1, 2017 and derived between then and March 31, 2019 may avail the benefit of a concessional rate 50% of the tax rate prevalent in the source state on the fulfillment of conditions stipulated in a limitation of benefit clause set out in Article 27A ("LOB"). Article 13(4) still leaves taxing rights of any property, other than that mentioned in paragraphs 1, 2, 3, and 3A, with the residence state.

10. Relevant to interpret the purport of this protocol is the Press Information Bureau, Government of India, Ministry of Finance release dated 10-May-2016 on India and Mauritius Protocol for amendment of the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains which says that major impact of the Protocol is to tackle the long pending issues of treaty abuse and round tripping of funds attributed to the India-Mauritius treaty, curb revenue loss, prevent double non-taxation, streamline the flow of investment and stimulate the flow of exchange of information between India and Mauritius. It will improve transparency in tax matters and will help curb tax evasion and tax avoidance. At the same time, existing investments, i.e. investments made before 1.4.2017 have been grand-fathered and will not be subject to capital gains taxation in India.

11. Analyzing the Protocol and the LOB, we can see that the Protocol confines itself to 'shares' and "Shares" is not defined in the Treaty. Article 10(4) defines dividends as income from shares or other rights, and juxtaposes it from debt-claims, participating in profits, and other corporate rights subject to same tax treatment as shares. Hence, the Protocol does not disturb the allocation of taxing rights in respect of other fiscal instruments like debentures, hybrid instruments such as compulsory convertible debentures, futures and options contracts, alienation of interests in limited liability partnerships, and participatory notes.

12. As the context does not otherwise suggests, the meaning attributed to 'shares' in the DTAA would thus depend on the Indian domestic law, as a whole and not just the Income Tax Act 1961. A 'share 'is the interest of a member in a company. Section 2(84) of the Companies Act, 2013 defines *"share" means a share in the share capital of a company and includes stock.* It represents the interest of a shareholder in the company, measured for the purposes of liability and dividend. It attaches various rights and liabilities directly connected to the ownership and principles like concept of lifting of corporate veil can be invoked to see if there is any actual distinction between the holder of shares and the company itself, independently.

13. The issue thus narrows down further to question if for the purpose of DTAA, investment in equity oriented mutual funds should be considered to be

investment in shares and consequently giving rise to *'gains from the alienation of shares"* for the purpose of Article 13(3A) of DTAA. This can be very well be negated by taking in consideration the definition of *"securities"* under Securities Contracts (Regulation) Act, 1956 where vide section 2(h) the said Regulation defines *"securities" include— (i) shares, scrips stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or 6 [or a pooled investment vehicle or other body corporate];* Further relevant is Section 2(da), of these Regulation, which defines, *"pooled investment vehicle" means a fund established in India in the form of a trust or otherwise,* ***such as mutual fund****, alternative investment fund, collective investment scheme or a business trust as defined in sub-section (13A) of section 2 of the Income-tax Act, 1961 (43 of 1961) and registered with the Securities and Exchange Board of India, or such other fund, which raises or collects monies from investors and invests such funds in accordance with such regulations as may be made by the Securities and Exchange Board of India in this behalf;"*

14. Then all the aspect with regard to issuance of shares, their types, rights and liabilities of share holders as contributory, right to dividend, transferability of shares and attendant rights are dealt extensively by the Companies Act of 2013. A mutual fund on the other hand in India are established in the form of a Trust under Indian Trust Act, 1882, in accordance with SEBI (Mutual Funds)

Regulations, 1996. A mutual fund is a collective investment vehicle that collects & pools money from a number of investors and invests the same in equities, bonds, government securities, money market instruments. The money collected in mutual fund scheme is invested by professional fund managers in stocks and bonds etc. in line with a scheme's investment objective. The income / gains generated from this collective investment scheme are distributed proportionately amongst the investors, after deducting applicable expenses and levies, by calculating a scheme's "Net Asset Value" or NAV. In return, mutual fund charges a small fee. In short, mutual fund is a collective pool of money contributed by several investors and managed by a professional Fund Manager. Section 30 of the Securities and Exchange Board of India Act, 1992, provides that the Board, with the previous approval of Central Government, can make regulations relating to regulation of mutual fund in area like Formation, Documents, Code of advertisement, Assurance on returns , Minimum corpus and Valuation of investment.

15. In Mutual Fund schemes, dividends are distributed when the fund has booked profits on the sale of securities in its portfolio. Mutual Fund dividend and stock dividends are two different things. While stock dividends represent the profits earned by a company, mutual fund dividends are not an indicator of the profitability of a mutual fund scheme. High mutual fund dividends do not mean that the fund is doing very well or otherwise. When a mutual fund scheme

declares a dividend, the NAV (Net Asset Value) of the concerned scheme falls by a corresponding amount.

16. The most vital aspect of investment in shares and investment in mutual funds is that while in selling of shares the possibility of rigging the share prices leading to heavy capital gain and siphoning out the gains to tax heavens, cannot be ruled out. There can be no rigging of the price or artificial appreciation of the capital gains.

17. Thus there is no doubt left that under the Indian Laws, the shares and mutual fund both are different forms of securities and investment in both of them have significant differences in terms of the rights of investors, regulation, nature of return and taxability under the domestic laws. Equity Mutual Funds are merely a class of mutual funds. They may be treated along with equity shares for giving exemption or rate of taxation by virtue of section 10(38) or 112 of the Act, but for the DTAA the gain on sale of Equity Mutual Funds cannot be said be out of alienation of 'shares'.

18. The aforesaid decision discussion is further bolstered by the decision by of Hon'ble Supreme Court in the Apollo Tyres Ltd Vs. CIT (2002) 255 ITR 273/122 Taxman 562/174 CTR 521 (SC) wherein the Hon'ble Supreme Court while examining the question whereby business of buying and selling of units by the UTI by the assessee company amounted to a speculation business or not, discarded the revenue's argument that units purchased by the assessee company

from UTI were shares. The Hon'ble Supreme Court has held that in the absence of any specific deeming provision in regard to units as shares it would be erroneous to apply the provision of Section 32(3) of UTI Act, which provided income from Units to be dividend, the purpose of holding that units as a share. Hon’ble Bombay High Court in the case of CIT Vs. Hertz Chemicals Ltd (2016) 386 ITR 39 (Bom) as held relying on the case of Apollo Tyres Ltd (supra) that there is no specific provision which would show that units in the mutual fund and/or bonds to be shares either for the purpose of the Income Tax Act, 1961 or for any other purposes. Further, Mumbai Bench of this Tribunal in the case of Vanguard Emerging Markets Stock Markets Stock India Fund Vs. ACIT (2025) 172 taxmann.com 515 (Mum-Tri) has dealt with this issue in regard to Article 13(6) of India-Ireland DTAA and while dealing with the question of short term capital gain on the sale right entitlement (RE) of shares of Indian company that assessee had claimed to be exempt under Article 13(6) of India-Ireland DTAA which provided that gain from transfer/ alienation of any property other than those mentioned in Article 13(1) and Article 13(5) would be taxable only in Ireland has held that rights entitlement to equity shares of a company does not fall in definition of ‘shares’. This indicates that the deeming provisions for purposive interpretation cannot be extended absurdly to include in the definition of shares even a right entitlement to allotment of the shares of a company. Then in ITO Vs. Satish Beharilal Raheja [2013] 37 taxmann.com 296 (Mumbai Trib) while dealing with Article 13(6) of the India Swiss DTAA, the coordinate bench has following the decision of the of Hon'ble Supreme Court in the case of Apollo Tyres Ltd (supra) held that the units of mutual fund cannot be treated as shares of a company. Similarly in ***DCIT (International taxation) Vs. K. E. Faizal [2019] 108 taxmann.com 545 (Cochin Trib),*** the coordinate Bench Cochin while dealing with Article 13(5) of the India-UAE DTAA has observed as under:-

> *"6.1 As per Article 13(5) of the Tax Treaty, income arising to a resident of UAE from transfer of property other than shares in an Indian company, are liable to tax only in UAE. On the other hand, Article 13(4) of the Tax Treaty provides that income arising to a resident of UAE from transfer of shares in an Indian company other than those specifically covered within the ambit of provisions of other paragraph of Article 13 may be taxed in India. Article 13(4) of the Tax Treaty covers within its purview capital gains arising from transfer of `shares' and not any of the property. Therefore, Article 13(4) of the Tax Treaty cannot be applied in the instant case unless the units of mutual funds transferred by the assessee qualify as shares for the purpose of Tax Treaty.*
>
> *6.2 The term "share" is not defined under the tax treaty. As per Article 3(2) of the tax treaty, any term not defined under the tax treaty shall, unless the context otherwise requires, have the meaning which it has under the laws of the country whose tax is being applied. Therefore, the term "share" would carry the meaning ascribed to it under Act, and if no meaning isprovided under the Act, then the meaning that the term carries under other allied Indian laws would need to be applied. The Act does not define the term "share". However, section 2(84) of the Indian Companies Act, 2013 defines the term "share" to mean "a share in the share capital of a company and includes stock". Further, the term "company" has been defined to mean a "company incorporated under the Companies Act, 2013 or under any previous company law". Under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1995, mutual funds, in India can be established only in the form of "trusts", and not "companies". Therefore, the units issued by Indian mutual funds will not qualify as "shares" for the purpose of Companies Act, 2013. Further, under the Securities Contract (Regulation) Act, 1956, a security is defined to include inter alia – (a) shares, scrips, stocks, bonds, debentures, debenture stock or other body corporate; and (b) units or any other such instrument issued to the investors under any mutual fund scheme.*

6.3 From the above definition of "securities", it is clear that "shares" and "units of a mutual fund" are two separate types of securities. Applying the above meaning to the provisions of the tax treaty, the gains arising from transfer of units of mutual funds should not get covered within the ambit of Article 13(4) of the tax treaty, and should consequently be covered under Article 13(5) of the tax treaty. Therefore, the assessee, who is a resident of UAE for the purposes of the tax treaty, STCG arising from sale of units of equity oriented mutual funds and debt oriented mutual funds should not be liable to tax in India in accordance with the provisions of Article 13(5) of the tax treaty.

6.4 Reliance is also placed on the decision of the Mumbai Bench of the Tribunal in the case of Income-tax Officer v. Satish Beharilal Raheja [(2013) 37 taxmann.com 296], wherein on similar facts and in the context of the Treaty between India and Switzerland, the Tribunal held as under:

> *"In our view in the absence of any specific provision under the Act to deem the unit as shares, it could not be considered as shares of companies and therefore, the provisions of Article 13(5)(b) (of the Indo-Swiss Treaty) cannot be applied in case of units. We agree with the findings of the Commissioner (Appeals) that provisions of Article 13(6) (of the Indo-Swiss Treaty) are applicable in case of units as per which capital gains cannot be taxed in India."*

19. These decisions though have not specifically dealt with Equity oriented mutual funds but what can be concluded is that as for the purpose of taxing an income earned from selling a security the DTAA should be strictly interpreted and if any security is not specifically mentioned then by any fiction or way of purposive interpretation a distinct nature of security cannot be considered akin to one giving rise of taxable income. In the light of the aforesaid discussion, we are inclined to sustain the grounds raised.

20. In the result, the appeal of the appeal of assessee is allowed.

Order pronounced in the open court on 25.06.2025.

Sd/-	Sd/-
(MANISH AGARWAL) ACCOUNTANT MEMBER	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated:25th June, 2025.

dk/ AKK

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi