INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCHES, NEW DELHI

BENCH: D

BEFORE SHRI ANUBHAV SHARMA, JUDICIAL MEMBER
AND SHRI KRINWANT SAHAY, ACCOUNTANT MEMBER

IT(IT)A 1431/DEL/2025 (निर्धारण वर्ष/Assessment Year: **2022-2023**)		
FIREEYE IRELAND LIMITED 70, SIR JOHN ROGERSONS QUAY, 2, DUBLIN, IRELAND - D02R296, DUBLIN-, NOT LISTED	**Vs.**	**ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(3)(1), INTERNATIONAL TAXATION, NEW DELHI** CIVIC CENTRE, MINTO ROAD, NEW DELHI NEW DELHI-110002, DELHI
अपीलार्थी **Appellant**		प्रत्यर्थी **Respondent**
Permanent Account Number of Assessee**:**		**AACCF3351Q**
अपीलार्थी द्वारा/Appellant represented by:		**Sh. Ajay Vohra, Sr. Adv. with Ms. Ishita Farsaiya, Sh. Sparsh Bhargava, Ms. Vanshika Taneja & Sh. Aryan Singh, Advs.**
प्रत्यर्थी द्वारा/Respondent represented by:		**Dr. Shalini Verma, CIT DR**

सुनवाई की तारीख / Date of conclusion of hearing:	**22.07.2026**
घोषणा की तारीख / Date of pronouncement:	**30.09.2026**

आदेश / ORDER

PER SHRI ANUBHAV SHARMA, JUDICIAL MEMBER:

This appeal is preferred by the assessee against the order dated 16.01.2025 passed by the Ld. Assistant Commissioner of Income Tax, Circle,

International Tax -1(3)(1) (hereinafter referred as 'Ld. Assessing Officer' First or in short Ld. 'AO') in DIN & Order No: ITBA/AST/S/143(3)/2024-25/1072224608(1) with the direction of Dispute Resolution Panel-1, dated 19.12.2024 u/s 144C(5) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for AY: 2022-23.

2. Heard and perused the records. FireEye Ireland Limited (FIL or the Company' or "Appellant) is a company incorporated in Ireland. It is a tax resident of Ireland in terms of the India-Ireland Double Taxation Avoidance Agreement (the DTAA or Tax Treaty). The Appellant is a part of the FireEye Group which sold its offerings to customers in the non-America regions (including India). In particular, the Appellant offered cybersecurity solutions in the form of standard software (along with incidental updates and support), consulting services and sale of accessories and appliances to customers in India. The aggregate revenue from sales to parties in India was INR 811,154,698, out of which, the Appellant had offered income from consulting services to income-tax in India in the return of income filed by it.

2.1 The Appellant was a taxable resident of Ireland as demonstrated by the Tax Residency Certificate furnished and had operations with employees (more than 150 employees in 2021). The Appellant claims that it has no physical presence in India and has no PE in India.

2.2 The Ld. AO vide impugned final assessment order made following additions;

(a) Consideration amounting to INR 52,06,95,065 received from sale of software and related services was treated taxable as Fees for technical services (FTS'); and

(b) Capital Gains from transfer of ownership in FE LLC amounting to INR 4,97,73,79,939 was treated as taxable under Article 13(5) of the DTAA.

2.3 As per the impugned order, total income of the Appellant was assessed at INR 562,93,02,990 as against returned income of INR 13,12,27,990 and a demand of INR 75,27,76,170 was determined as payable by the Appellant for AY 2022-23.

3. Aggrieved by the above additions, the Appellant has filed this appeal before this Tribunal, wherein, grounds 2 to 4 are related to challenging the allegation of the Ld. AO that the consideration received from sale of software and related services is taxable as FTS in India and grounds 6 to 10 relate to challenging the addition of Capital Gains under Article 13(5) of the India-Ireland DTAA by the Id. AO.

4. As with regard to **first issue,** of addition of INR 52,06,95,065 being the amounts received from sale of software and related services (software offerings)

revenue taxed as FTS, we find that during FY 2021-22, the Appellant was, inter alia, engaged in the business of selling a wide range of standard FireEye software products in various regions (including India), mainly in the field of cybersecurity, by way of granting restricted user license or subscription. The income arising from the sale of software is claimed to be not taxable in India based on the principles arising from the decision of the Hon'ble Supreme Court of India in **Engineering Analysis [2021/ 125 taxmann.com 42 (SC).** The said consideration also ought not to be treated as FTS as per decision of the Hon'ble Delhi High Court **SFDC Ireland Limited v. CIT, [2024] 298 Taxman 403 (Delhi)** and **CIT vs. Kotak Securities Ltd. (2016) 67 taxmann.com 356 (SC).**

4.1 The Ld. AO for the present year and for previous AYs 2020-21 and 2021 -22 has treated the consideration received from software offerings as FTS and for AYs 2020-21 and 2021-22, co-ordinate bench vide its decision dated 05.06.2026, in ITA No. 825/Del/2023 for AY 2020-21 and ITA 3701/Del/2023 for AY 2021-22, has held that the consideration received from software offerings is not taxable as FTS in India. The relevant discussion in paragraph 6 were brought to our notice and so was the conclusion in paragraph 6.1.

4.2 Ld. DR failed to counter the decision in assessee's own case by pointing out any substantial difference in fact about nature of services and revenue. In the light of aforesaid we are of the considered view that the consideration from sale of software and related support being an issue covered in favour of the assesse is

not taxable as royalty or FTS under the provisions of the Act and the India-Ireland DTAA. In fact the DRP also had taken a view against the assesse on the basis of its findings in earlier years which have been set aside by order dated 05.06.2026 (supra) and thus, we are inclined to sustain ground No. 2 to 4 in favour of the assesse.

5. The second issue pertains to the addition of INR 4,97,73,79,939, as capital gains. Assessee claims that during FY 2021-22, the Appellant as a part of an internal restructuring of the FireEye Group sold its ownership in various entities to Mandiant Ireland Limited (MIL), another group company, vide Share Purchase Agreement dated 23 July 2021. Amongst the various entities transferred one of the entities was FireEye International LIC, a US entity (FE LLC) [which in turn held Mandiant Cybersecurity Private Limited, an Indian Company]. The Appellant while filing its return of income for AY 2022-23, duly disclosed the capital gains arising from transfer of ownership in FE LIC as not taxable in India as per provisions of Article 13(6) of the DTAA. It was also submitted before the Ld. AO that the alienation of shares/ownership in FELL by the Appellant is not taxable as per the domestic laws of Ireland by virtue of exemption available for intra-group transfers. The Ld. AO made an addition of INR 4,977,379,939 as Capital Gains from transfer of ownership in FE LLC. The assessing officer, invoked Article 6 of the MII and did not accept the plea that the Appellant is not liable to be taxed in India on any capital gains by virtue of

Article 13(6) of the DTAA. The ld. AO has observed that the Appellant on transfer of ownership in FireEye International LIC (FE LIC) to Mandiant Ireland Limited (MIL), becomes liable for capital gains under Article 13(5) of the India-Ireland Treaty. The case of department as canvased by ld. DR is that the transaction entailed the transfer of ownership of a US based entity (i.e. FE LLC) by the Appellant to MIL (i.e. two Irish Companies) which has resulted in indirect transfer of shares of an India company, i.e., Mandiant Cybersecurity Private Limited. The aforesaid transaction is taxable as per Explanation 5 to section 9 of the Act as FE LLC derives substantial value from MCPL in India, subject to the relief under the provisions of the DTAA as per section 90 of the Act. The assessment proceedings against the Appellant have been concluded by application of Section 90 of the Act, wherein the Id. AO has held that Section 90 of the Act is for avoidance of double taxation and not for creating opportunities for double non-taxation. The DRP also confirmed the interpretation of Section 90 of the Act.

6. The contention of ld. Senior counsel is that it is trite law that deeming fiction cannot be read into the DTAA in the absence of any specific provisions in Article 13(5) of the DTAA. Therefore, any gains arising on the transfer in FE LLC (which in turn held Mandiant Cybersecurity Private Limited, an Indian company) are not taxable in India as per Article 13(5) of the India-Ireland Tax Treaty. In this regard reliance is placed on the decision of the Hon'ble Delhi High Court in DIT v. New Skies Satellite BV [2016] 382 ITR 114 (Delhi - HC).

He relied Hon'ble Supreme Court decision in Engineering Analysis Centre of Excellence Put Ltd vs CIT [2021/ 125 taxmann.com 42 (SC) at Para 155 which affirmed the view undertaken in New Skies (supra) and the relevant extract is hereunder:

> *"155. In DIT v. New Skies Satellite BV [2016] 68 taxmann.com 8/28 Taxman 577/382 ITR 114 (Delhi) ["New Skies Satellite"), a Division Bench of the High Court of Delhi correctly observed that mere positions taken with respect to the OECD Commentary do not alter the DTAA's provisions, unless it is actually amended by way of bilateral re-negotiation. This was put thus:*
>
> > *"68. On a final note, India's change in position to the OF Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic lan to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. It is imperative that such amendment is brought about in the agreement as well. Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAs."*

7. Ld. Counsel has then submitted that issue is covered in favour of the assesse by the decision in the case of Sanofi Paseur Holding SA Vs. Department of Revenue (2013) (30 taxmann.com 222) (HC-AP) and the relevant part he has referred to is reproduced below:

> *"23. Conclusions on Issues 3 and 4 :*
>
> *On analyses of the relevant facts and attendant circumstances, duly considered in the light of curial and other authority referred to, we conclude:*
>
> *(a) that the transaction in issue (pursuant to the SPA dated 10-07-2009 between MA/ GIMD and Sanofi) is for alienation of 100% ShanH shares held by MA, GIMD and Mr. Georges Hibon in favor of Sanofi falling within Article 14(5) of the DTAA); and constitutes neither the*

transfer nor deemed transfer of shares or of the control, management, or underlying assets of SBL. (ie., not a transfer, within the meaning of the expression as defined in Section 2(47) of the Act);

(b) the consequent tax on the capital gain accrued to MA/ GIMD, is clearly and exclusively allocated to France under the provisions of Article 14(5) of the DTAA;

(c) retrospective amendments to provisions of the Act (by the Finance Act, 2012) per se do not operate to deflect, modify; or subject DAA provisions to provisions of the Act (interpreted on good faith principle and construed in the light of applicable principles of statutory construction). There is no ambiguity in the Article 14(5) expressions - alienation or participation; and since these terms (identical, not synonymous) are neither employed nor defined in the Act, there is no warrant for invoking provisions of Article 3(2) of the DT AA; and thereby provisions of the Act to the transaction in issue; and in transgression of provisions of the DT AA; and

(a) the transaction in issue is not liable to tax in India, under the provisions of the Act read in conjunction with provisions of the DTAA."

8. He also referred the Mumbai decision in Sofina S.A. Vs. ACIT (International Taxation) (2020) 116 taxmann.com 706 (Mumbai – Trib) and the relevant part is reproduced below:

"18..... At this stage, we may herein observe that we are unable to persuade ourselves to subscribe to the view taken by the lower authorities that the order of the Hon'ble High Court of Andbra Pradesh in the case of Sanofi Pasteur Holding SA (supra) is distinguishable on facts. As a matter of fact, the A.O and the DRP had failed to appreciate the principle which bas been laid down by the Hon'ble High Court, and also the manner in which ratio of the judgment was applicable to the facts of the present case. Apart from that, the view taken by the A.O that the aforesaid judgment of the Hon'ble High Court was not to be followed because the SIP filed by the revenue against the order of the Hon'ble High court is pending before the Hon ble Supreme Court, also does not find favour with us. On the basis of our aforesaid observations, we are of the considered view that both the A.O and the DRP are in error in concluding that the gains on the transfer of the shares of Accelyst Put. Ltd., Singapore by the assessee company would be exigible to tax in India as per Article 13(5) of the India-Belgium tax treaty. As observed by us hereinabove, as the current fact pattern of the transaction of transfer of shares is assessable under the residuary provisions ie Article 13(6) of the India-Belgium tax treaty, therefore, the gain, if any arising there from would only be taxable in Belgium i.e the Contracting State of which the alienator of the shares i.e the assessee company is a resident of. Before parting, we may herein observe that as we have concluded that the gains arising from the transaction of transfer of shares of Accelyst Put. Ltd., Singapore by the assessee company are not chargeable to tax in India as per the India-Belgium tax treaty, therefore, we refrain from adverting to chargeability of the same under the provisions of the Income-tax Act, 1961, which having been rendered as academic in nature are thus left open. Accordingly, we'set aside' the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 15-10-2018 and vacate the addition of STCG of Rs.163,97,61,840/ - made in the hands of the assessee."

(Emphasis supplied by us)

9. We have given thoughtful consideration to the material on record and find that the Id. Tax authorities below have relied the concept of 'transfer' in section 2(47) of the Act for interpretation of the word 'alienation' as used in Article 13(5) of the India-Ireland Tax Treaty to hold that the transaction between the Appellant and MIL is taxable in India. We find that assertion that the word 'alienation' is a synonym of the word 'transfer' as defined in the Act, has no legal basis. We are of considered view that while interpreting the terms or words in context to the DTAA the ordinary meaning given to terms in their context and in the light of its object and purpose need to be given. The ordinary meaning is not the technical legal meaning but it is the meaning the words carry in context used. The ‘purpose or intent’, of use of the term is crucial and departure from plain meaning is permissible only to avoid absurdity. A tax treaty is an agreement and not a taxing statute. The principles adopted in the interpretation of statutory legislation are not applicable to treaties. Hence, the meaning of the term 'transfer' could be imported from section 2(47) of the Act only if there was some ambiguity in use of term in context to the relevant clauses of the DTAA. The objective of such exercise and recourse to Article 3(2) of the Tax Treaty, cannot be to expand the scope of transaction described by words ‘alienation’, to hold that the transaction between FIL and MIL resulting in an indirect transfer of assets located in India is covered by the DTAA.

10. Now, if we consider the relevant Article 13 of the India Ireland Tax Treaty in relation to the transfer of ownership in FELLC which sold MCPL to MIL, the clause by clause implication of Article 13 was well explained to the DRP as coming up from the contents to copy of Form 35A dated 24.04.2024 available at page No. 115-180 of the paper book and part of page 41 of the said form. The same establishes that when clause by clause implications of Article 13 of the treaty are considered Article 13(1) is in regard to gains derived by resident of contracting state for alienation of immovable property referred in Article 6 and situated in the other contracting state which may be taxed in that other state only and the impugned transaction before us is not with regard to any transfer of such immovable property as the company does not own any immovable property in India. Article 13(2) concerns alienation of movable property forming part of business property of a permanent establishment and certainly this clause is not applicable as the issue is not with regard to alienation of any movable property forming part of permanent establishment. Article 13(3) provides for gains arrived by enterprise of a contracting state for the alienation of specific assets like ships or aircrafts and this clause is not applicable in regard to the impugned transaction as the company had transferred ownership in FELLC by transfer of shares. Article 13(4) provides for the alienation of shares of companies in a partnership or trust which is not the case here. Article 13(5) is in regard to alienation of shares where in it is mentioned in paragraph 4 in a company which is resident of contracting state and the same may be taxed in that contracting

state. In the impugned transaction the company has transferred ownership in FE LLC which is not an Indian entity and not a resident of India, thus, Article 13(5) is not applicable. Article 13(6) provides alienation of any property other than that referred to in aforesaid paragraph 1 to 5 and provide that the income shall be taxable only in the contracting state of which the alienator is a resident. Here in the impugned transaction the company has transferred ownership in FE LLC. As per Article 13(6) such alienation does not trigger any income tax liability in India. Thus, very apparently the question of interpretation the word 'alienation' does not arise so as to give opportunity to the tax authority in India to take recourse to any internal or external aid of interpretation and rely a part of the definition of transfer in Section 2 (47) of the Act to claim that as the underline assets to the shares transferred are involved, thus, Article 13(5) shall become applicable.

11. Thus, in the instant case, the ordinary meaning of the term 'alienation' needed to be adopted for the subject transfer of ownership in FE LIC, and not the meaning as per the term 'transfer' under section 2(47) the Act. Here we are also of considered view that the expression 'transfer' has been defined in section 2(47) of the Act by giving description of various kinds of transactions by way of a 'inclusive definition', and to rely same to expand the scope of word 'alination' in the Treaty is not sustainable in law. We are of considered view that Article 3(2) of the DTAA has been erroneously taken recourse to invoke clauses of section 2(47), without a genuine ambiguity in the meaning of a term used in the

treaty, where alination is merely referred to enforceable contractual transaction based on some valuable consideration determined in such contract itself. The Hon'ble Delhi High Court in CIT (Intl. Tax) vs. Telstra Singapore Pte. Ltd.: [2024] 165 taxmann.com 85 (Delhi) expounded on the scope of Article 3(2) of the India - Singapore Tax Treaty, and opined in paragraph 77 that unilateral amendments introduced in a domestic law cannot be accorded an overriding effect over the provisions of the DTAA. The ratio of this decision makes it abundantly clear that Article 3(2) is confined to resolving genuine ambiguities in treaty terminology and cannot be pressed into service to override or alter the substantive taxing rights allocated under the treaty by introducing element of uncertainty. A see-through or look-through approach cannot be adopted in a transaction falling under a specific head and no such construction can be imported from domestic law.

12. The decision in Sofina S.A. v. ACIT (International Taxation) [2020] 116 taxmann.com 706 (Mumbai - Trib.) was in context to Article 13(5) of the India-Belgium DTAA, and said Article applies only where the shares transferred are of a company resident in a Contracting State (India or Belgium); since the shares transferred were of a Singapore company, Article 13(5) was inapplicable and the gains fell within the residuary Article 13(6), taxable only in Belgium. The Tribunal held that unlike Article 13(4), the Article 13(5) does not employ the words "directly or indirectly" and hence does not permit a "see through"

approach; the transfer of shares of the foreign holding company cannot be regarded as a transfer of shares of its Indian subsidiary, following Sanofi Pasteur (supra) the bench further held that the deeming fiction in Explanation 5 to Section 9(1)(i), being a unilateral amendment to domestic law, cannot be read into the tax treaty; amendments to the Act, whether retrospective or prospective, do not modify or subject treaty provisions to the Act. Hence, the present transaction wherein the shares of MCPL are indirectly transferred (in terms of the deeming fiction under Explanation 5 to section 9(1)(i) of the Act) through the sale of ownership in FE LL by the Appellant to MIL are not taxable under Article 13(6) of the DTAA.

13. Thus the Ld. Tax authorities have incorrectly interpreted section 90(1)(b) of the Act to hold that capital gains arising to the Appellant are taxable in India. Here assessee is a tax resident of Ireland and the deeming provision in Explanation 5 to section 9 of the Act is confined to the Act and does not apply to the DTAA. The gains from the transfer of ownership in FE LLC to MIL was thus not taxable in India as per Article 13(5) of the India-Ireland DTAA. No case of treaty abuse is established by any specify enquiry or allegation and specially on basis of possible interpretation of a term, to the benefit of revenue, the provisions of Article 6(1) of the Multilateral Instrument to the preamble of the India-Ireland Tax Treaty, should not have been relied. The provisions of the MLI have been invoked on an incorrect basis that the Appellant has structured

the transfer of shares of an Indian Company indirectly outside India which has led to double non-taxation and consequently, the Appellant has abused the Tax Treaty. Such assertion needed some evidence which is not there. On the contrary it comes from the submission of assessee that it is an entity established in 2013 with substantial business operations and employees, and at the same time held investments in various entities. The SPA dated 23.07.2021, is a document vide which the Appellant has transferred its ownership in seventeen entities to MIL. There is substance in contention that it is too narrow a view to allege that the Fireye group underwent global re-structuring and the Appellant alienated the shares of various entities only to transfer' the shares of MCPL. In the light of aforesaid discussion we are inclined to sustain the corresponding grounds in favour of assesse.

14. Accordingly, the **appeal of the assesse is allowed** with consequences to follow as per the determination of grounds above.

Order pronounced in the open court on 30.09.2026

Sd/-	**Sd/-**
KRINWANT SAHAY	**ANUBHAV SHARMA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Delhi
Dated: 30.09.2026
Rohit, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT DELHI