

# Tax Hotline

January 09, 2007

## THE AUTHORITY FOR ADVANCE RULINGS OVERTURNS ITS OWN DECISIONS THE FIDELITY GROUP HELD TAXABLE IN INDIA AFTER ALL

Deviating from its own rulings in earlier cases, the Authority for Advance Rulings ("AAR") held, in the matter of 39 American and Canadian Fidelity group entities, that the income of a Foreign Institutional Investors ("FI") would be characterized as capital gains and not business income - suggesting that FIs may legally only *invest* in shares and not *trade* in shares.

This position not only differs from the decisions of the AAR in the matters of [In re: Fidelity Series VIII](#) and [In re: General Electric Pension Trust](#), but also appears to digress from the soon to be finalized [draft instructions issued by the Central Board of Direct Taxes \("CBDT"\)](#) on the various factors that would be determinative of the nature of income from trading in shares as 'income from business'. This is surprising given that the structure and method of operation of the Fidelity entities in these cases was substantially similar to that followed by the applicants in the earlier cases, in respect of which the AAR had held that income from transacting in securities on a frequent basis would be business income. This new decision appears to deviate from various classic judgments, including decisions of the Supreme Court.

Although an advance ruling is binding only on the tax department and the applicant in the matter, the decisions of the AAR no doubt have persuasive value in all other similar cases. The tax department is likely to use this new decision of the AAR to revisit the tax treatment of the income of all FIs. The AAR had so far taken into account the volume and frequency of trade, manner and method of operation, etc and ruled that the income of FIs being its 'business income' would not be taxable in India in the absence of a permanent establishment ("PE") under the applicable tax treaty. As a result, FIs, especially from treaty countries such as the USA were not taxable in India in the absence of a PE. This has apparently changed.

Now, irrespective of the existence of a PE in India, capital gains from trading in Indian shares would be taxable in India. The FIs that will not be adversely effected by this ruling are those investing through jurisdictions like Mauritius or Singapore.

While one hopes that this will not unsettle the booming Indian capital markets, it must be noted that the decision is indeed a blow to the ends of stability and certainty in taxation of non-residents; the end with which the AAR had been constituted.

- [Annapoorna Jayaseelan & Bijal Ajinkya](#)

Source:

- [The Economic Times, January 9, 2007](#)
- [Business Standard, January 9, 2007](#)

### DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.

## Research Papers

### Handbook on Labour Codes

April 29, 2024

### Compendium of Research Papers

April 11, 2024

### Third-Party Funding for Dispute Resolution in India

April 02, 2024

## Research Articles

### Private Client Insights - Sustainable Success: How Family Constitutions can Shape Corporate Governance, Business Succession and Familial Legacy

January 25, 2024

### Private Equity and M&A in India: What to Expect in 2024?

January 23, 2024

### Emerging Legal Issues with use of Generative AI

October 27, 2023

## Audio

### Third-Party Funding: India & the World

April 27, 2024

### IBC allows automatic release of ED attachments: Bombay HC reaffirms

April 15, 2024

### The Midnight Clause

February 29, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

[Click here to view Hotline archives.](#)

## Video

### Cyber Incident Response Management

February 28, 2024

### Webinar : Navigating Advertising Laws in India Part II Fireside Chat

with Manisha Kapoor

February 27, 2024

**Webinar : Navigating Advertising  
Laws in India**

February 20, 2024