Buyout liable to tax in India; I-T Dept awaits formal pact

Some advantage could be there under Double-Tax Avoidance Agreement: experts

SURABHI
Mumbai, May 8

The $15-billion buyout of e-commerce player Flipkart by US retail giant Walmart is likely to attract capital gains tax under Indian laws, similar to the tax imposed on Vodafone, even though the entities are headquartered abroad. Some investors could, however, get partial relief under the tax avoidance pacts.

A formal announcement on Flipkart's expected 70 per cent stake sale to Walmart is likely to be made this week and tax authorities are also awaiting to understand the exact contours of the deal.

"As of now, there has not been any formal communication and ideally the buying company should deduct the tax, as and when it arises," noted an official, adding that it seems likely that there would be a tax liability arising in the country as the value of its business comes from India.

Large investors

The Bengaluru-based e-commerce retailer is headquartered in Singapore with its parent company Flipkart Ltd registered there. The other large investors in Flipkart — SoftBank, Tiger Global, Naspers and Accel Partners — are all based outside of India.

"Even though the buyer and seller in Flipkart's case are both situated outside India, the transaction may still be liable to income-tax in India following the Vodafone ruling which makes it clear that under Section 9(1) of the Income Tax Act, if the value Indian assets of a company is more than 50 per cent of its global assets, shares will be deemed as Indian shares and gains if any will be liable to tax in India," said Abhishek A Rastogi, Partner at Khaitan & Co.

Abhishek Goenka, Partner and Leader (International Tax), PwC, pointed out that in cases of indirect share transfers, the provisions of the law are clear now. "There is a 50 per cent value test to be satisfied and once that is done, the shares are deemed as Indian shares. Specific facts and circumstances such as benefits under a tax treaty need to be considered," he said.

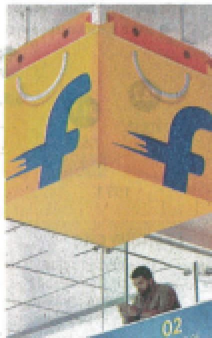
SoftBank role

As of now, it is unclear whether SoftBank, which is the largest investor in Flipkart, will sell or retain part of its stake. Either ways, experts say, the Japanese major would have some tax liability from the deal. However, it could get some advantage from the double tax avoidance agreement (DTAA).

"The DTAA between India and Singapore and India and Mauritius have been recently amended and capital gains tax exemption in India would not be available for any investments made after April 1, 2017 from these countries. Accordingly, if SoftBank would have invested in Flipkart Singapore through these countries, they could be liable to pay capital gains tax in India in respect of investments made after March 31, 2017," said Chirag Nangia, Director, Nangia & Co LLP.

However, the tax rate in India could be half, if the shares acquired after March 31, 2017 are sold before April 1, 2019, he added.

Depending on the length of investments, a long-term capital gains tax of 10 per cent or a short-term capital gains tax of 40 per cent on non-residents may have to be paid and should be ideally deducted by the buying entity and deposited with the tax authorities.



Experts have also warned of possible litigation over the tax liability in the coming years PTI

Open to litigation

Experts have also warned of possible litigation over the tax liability in coming years as well as issues such as the carry forward of losses by Flipkart.

"The transaction could open up tax litigations for Flipkart India or its shareholders, be it issue of taxability of capital gains arising to shareholders from such transaction or the issue of carry forward of existing tax losses of Flipkart India," said Nangia. The outcome of the arbitration proceedings initiated by Vodafone Plc in the UK against the tax department's claims will be keenly watched.

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'Flipkart founders may be liable for 20% capital gains tax after stake sale to Walmart'

BY PTI | MAY 08, 2018, 08.37 PM IST

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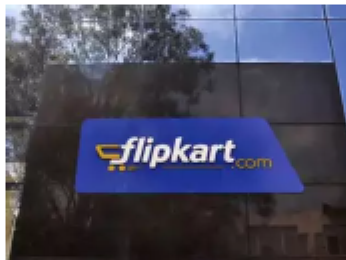
NEW DELHI: Flipkart founders Sachin and Binny Bansal may have to pay 20 per cent capital gains tax if they sell their shares in the company as part of the proposed deal with US retail giant Walmart, say tax experts.



The Indian e-commerce major is in discussions to sell majority holding to Walmart and an announcement to this effect is likely to be made soon, sources close to the development said.

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Walmart is likely to buy stakes of multiple Flipkart investors, including that of Tiger Global and Japanese conglomerate Softbank, to end up with 60-80 per cent holding for roughly USD 12 billion.

According to experts, there would be two taxation angles to the deal once it goes through.

The first will be taxation of capital gains earned by the sellers (Flipkart investors).

Secondly, whether Flipkart India is allowed to carry forward the losses for the adjustment against income tax payable by the company.

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Nangia & Co Director Chirag Nangia said the taxability of the foreign investors in Flipkart will depend on the country through which the money is routed and whether India has a tax treaty with those nations.

"However, if the Indian promoters of Flipkart India intend to sell their shareholding, being Indian residents, they would be liable to pay

ncome tax in India on capital gains arising from such transaction," Nangia said.

Transaction Square Founder Girish Vanvari said the I-T law provides that taxes have to be withheld by the buyer if the share purchase agreement is being entered into with a non-resident entity.

"With regard to share purchase agreement entered into with India resident entity, Sachin Bansal and Binny Bansal in this case, capital gain would be charged in their hands and they have to pay 20 per cent income tax," Vanvari said.

The deal would be taxable in India since a substantial value of Flipkart's shares is being derived from India, the experts noted.

Singapore-registered Flipkart Pvt Ltd holds majority stake in Flipkart India. As per the proposed deal, Walmart is expected to acquire shares of the Singapore entity. This will effectively result in transfer of ultimate ownership in Flipkart India.

Nangia said if the seller/transferor of such shares in Flipkart Singapore is a tax resident of Singapore/ Mauritius or any other country, which has a tax treaty with India that exempts capital gains from income tax in India, then the seller may claim treaty benefits.

The tax treaties between India and Singapore and India and Mauritius have been amended and exemption from capital gains tax in India were provided till March 31, 2017.

Experts say if Softbank's investment in Singapore-registered Flipkart has been routed through these countries and came in after April 1, 2017, the Japanese group could be liable to pay capital gains tax in India.

SoftBank Vision Fund had pumped in an estimated USD 2.5 billion in Flipkart in August last year.

While short-term capital gains tax in the hands of foreign investors is 40 per cent, long-term capital gains tax is levied at 20 per cent for shares sold after 24 months of purchase.

"However, such applicable long-term capital gains tax rate in India could be reduced by half, if such shares acquired after March 31, 2017, are sold before April 1, 2019," Nangia said.

He added that Tiger Global would be exempt from taxes in India after the proposed Walmart deal if the funds were routed through Mauritius or Singapore and if the money was invested before March 31, 2017.

As per indirect transfer provisions of I-T laws, value of shares of a foreign company is deemed to be substantially derived from India if the value of the Indian assets is greater than 50 per cent of its worldwide assets, a criteria that is apparently met in Flipkart's case.

"Despite the fact that shares of Flipkart Singapore (a company registered outside India) will be transferred to Walmart, gains arising from such transfer could be subject to tax in India considering that substantial value of such shares is being derived from India," Nangia said.

With regard to carry forward of losses, Section 79 of the I-T Act says that carry forward and set-off of losses cannot happen when more than 51 per cent of shareholding change hands.

"However, Section 72A of the Act provides that if there is demerger and merger, the company can carry forward the losses. It remains to be seen how the Flipkart-Walmart deal would be finally structured," Vanvari said.

Nangia, however, said since even after the proposed transaction, the immediate majority shareholding of Flipkart India would remain with Flipkart Singapore, Flipkart India may be allowed to carry forward such tax losses to future years.

"Proposed transaction may open up tax litigations for Flipkart India/its shareholders, be it the issue of taxability of capital gains arising to shareholders from such transaction or the issue of carry forward of existing tax losses of Flipkart India," Nangia said.

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