

Tax Hotline

June 30, 2008

THE VODAFONE TAX CONTROVERSY NDA COMMENTARIES ON COURT PROCEEDINGS

On Monday, June 30, 2008, Senior Advocate Mr. Iqbal M. Chagla, counsel for Vodafone International Holdings BV (“Vodafone”) began the day in court by refreshing the Hon’ble Bombay High Court’s memory of **submissions made on Thursday, June 26, 2008** regarding the interpretation of the expression “*person*” as used in Section 195 of the Income Tax Act, 1961 (“ITA”). The counsel also emphasized before the division bench, consisting of Justice S. Radhakrishnan and Justice A. V. Nigude, that the instant controversy is a “*test case*” for the Government and the outcome would have a significant impact on cross-border mergers and acquisitions involving India.

The submissions advocated by the counsel for Vodafone essentially examined the constitutional validity of the retrospective amendment made to Sections 191 and 201 of the ITA. It is the contention of Vodafone that the impugned retrospective amendment is against the canons of reasonableness and is harsh, burdensome, and arbitrary. Section 191 provides for recovery of tax from the direct assessee¹, i.e., the receiver of income, for scenarios where the ITA does not provide for deduction of tax at source. It also provides for instances where the person liable to deduct tax at source has not withheld the tax. Section 201 of the ITA, on the other hand provides for the penal consequences of failure to withhold tax or to pay tax withheld. Pursuant to the impugned retrospective amendment, it was submitted by the counsel that, a liability to pay tax as ‘*assessee in default*’ has been fastened on Vodafone, without any attempt being made to recover tax from the direct assessee.

According to the counsel, the provision of the law, as it stood before the impugned retrospective amendment, clearly and unambiguously, excluded the facts of the instant case and contended that no liability as ‘*assessee in default*’ could be fastened to Vodafone. The power of the Parliament to make retrospective amendments was acknowledged as plenary. However, in the same breath, citing various precedents, it was also submitted that such retrospective amendments must not be unreasonable or burdensome, lest they should be struck down as unconstitutional.

Citing the Supreme Court judgment in D. Cawasji & Co v. State of Mysore², it was stated that while *it may be open to the legislature... retrospective operation* [of taxing statutes] *has to be justified on proper and cogent grounds*. It was submitted that the explanatory notes to the impugned amendments, when proposed, merely stated that it was sought to clarify the legislative intent of the said provisions, which hitherto left room for interpretation. To this Mr. Chagla submitted that the impugned retrospective amendments were not clarificatory, but substantive in character, since there was no ambiguity in the scope of Sections 191 and 201. Therefore, it was submitted that since insufficient and improper reasons have been accorded for the impugned retrospective amendments, the same should be declared ultra-vires the Constitution of India. He further submitted that the impugned amendments sought to levy additional burden on to assesses, which should “*shock the conscience of the court*” and that they must be struck down as constitutionally invalid.

The hearing has been adjourned to Tuesday, July 1, 2008, when the counsel for Vodafone is expected to continue with submissions regarding the constitutional validity of the impugned retrospective amendments and thereafter make submissions regarding the chargeability of the capital gains tax.

We will continue to try and bring you regular and accurate updates and analysis of the Vodafone Controversy as it continues to unfold in the courtroom.

- International Tax Team & M&A Team

1 In India the payer of tax is called an assessee
2 150 ITR 648

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

Compendium of Research Papers

April 11, 2024

Third-Party Funding for Dispute Resolution in India

April 02, 2024

Opportunities in GIFT City

March 18, 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

IBC allows automatic release of ED attachments: Bombay HC reaffirms

April 15, 2024

The Midnight Clause

February 29, 2024

Enforceability of unstamped or inadequately stamped Arbitration Agreements

January 10, 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