

Kraft's liability on Cadbury buy limited

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The takeover of Cadbury India by US-based Kraft Foods is different from Vodafone's buyout of Hutchison Essar in 2007, said Indian tax experts.

"Kraft's acquisition of Cadbury is a global acquisition, where some value is attributable to India. This is different from Vodafone, where the transfer of a single share of the offshore company by Hutch resulted in the Indian business getting transferred to Vodafone," said Pranay Bhatia, associate partner at legal firm Economic Laws Practice.

Cadbury was taken over globally by Kraft in a \$19.6-billion transaction last year. The Income Tax department has initiated an inquiry into the takeover for alleged tax evasion and flouting of buyout norms, following a Delhi High Court directive. The high court had asked the government to complete the probe within eight weeks.

"The Vodafone issue involved acquisition of a company in Cayman Islands, which held equity in an Indian company with several subsidiaries in between. The Bombay High Court's verdict was that while what was transferred were shares of a Cayman Island company, the agreement showed what was intended to be transferred was the business carried on in India. In contrast, Kraft had acquired the global business of Cadbury. The Indian business was a small part of it. And while the current tax laws are silent on overseas transactions, the yet-to-be-passed direct tax code says if there is an overseas transfer of shares then it will be liable for tax in India if the value of the business is over 50 per cent here," said Dinesh Kanabar, KPMG's deputy chief executive, and chairman, tax.

Tax experts, however, feel that Kraft has a strong ground to defend itself in this matter.

The Delhi High Court's direction came in response to a petition filed by one Ved Prakash, seeking action against the entities involved for allegedly flouting takeover laws and evading tax.

"We are aware of the petition. The court has not granted any reliefs to the petitioner and has instead suggested he file a representation with the Centre and the Income tax department so that appropriate steps can be taken. Kraft Foods is fully committed to complying with Indian law," a Kraft spokesperson said.

Even as the company gears for a possible long battle ahead, experts believe raking up the issue now will throw a spanner in the works of global deals.

Siddharth Shah, head, corporate and securities practice, Nishith Desai Associates, said, "Relying on the Vodafone case, transfer of any offshore entity to another offshore entity, where the controlling stake in the Indian subsidiary is transferred, could give rise to a tax liability in India as it could be regarded as an indirect transfer of an Indian asset. The gains attributable to the Indian asset could be liable for tax. In such situations a tax liability could act as a deal breaker, increasing negotiations among the parties concerned. Today the tax indemnity agreement is as much negotiated as the share purchase or merger agreement is. All the purchases will now be exposed to the risk of withholding tax under Indian law." , Shah's firm had acted as advisor for Vodafone.