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   RESULTS & DISCUSSION

   FINDINGS

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- Hunker, H.L. and A.J. Wright (1963), "Factors of Industrial Location in Ohio" Ohio State University, Nigeria.

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A STUDY ON VODAFONE TAXATION – INDIA'S VIEW

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ABSTRACT
Pursuant to section 45 of the Income Tax Act, any gain arising from the transfer of a capital asset during a previous year is chargeable to tax under the head Capital gains. Pursuant to section 5(2)(b) read with section 9(1)(i) makes it clear that where an Indian asset has been transferred, the amount paid is deemed to have accrued or arise in India and therefore taxable in India. In May 2007, Vodafone bought Hutchison Telecommunications International Ltd's (HTIL) 66.98% stake in Indian telecom company Hutch Essar Ltd for $11.2 billion (around Rs.52,300 crore today). , Vodafone should have deducted capital gains tax at source before paying HTIL. In this article the author discussed about the tax liability of Vodafone and the relevant issues in detail.

KEYWORDS
Capital Gains, Tax Liability, Direct Tax Code, Supreme Court, Land Mark Judgement.

INTRODUCTION
In May 2007, Vodafone bought Hutchison Telecommunications International Ltd's (HTIL) 66.98% stake in Indian telecom company Hutch Essar Ltd for $11.2 billion (around Rs.52,300 crore today). Hutchison controlled its Indian telecom subsidiary through a CaymanIsland company called CGP. CGP's shares were sold to Vodafone, which consequently became majority owner of the Indian telecom firm.

Pursuant to section 45 of the Income Tax Act, any gain arising from the transfer of a capital asset during a previous year is chargeable to tax under the head Capital gains. If the shares/securities (assets) are held for more than 12 months immediately prior to its transfer, then it is long-term capital assets. Any profit arising from the transaction is called as long term capital gain.

According to tax department view, the overseas transaction was related to assets acquired in India and hence, Vodafone should have deducted capital gains tax at source before paying HTIL. As Long term capital gains tax is levied at the rate of 20 %, Vodafone will have to shell out $1.7 billion as tax liability, a penalty of an equal amount and a tax on both sums at 18% per annum. The total outgo for Vodafone could exceed $4 billion. Hence Vodafone was proceeded against under section 201(1) as assessee in default for failing to deduct taxes under section 195 of the Income Tax Act 1961.

Pursuant to section 5(2) (b) read with section 9(1) (i) makes it clear that where an Indian asset has been transferred, the amount paid is deemed to have accrued or arise in India and therefore taxable in India. Hence, in September 2007, the I-T department issued show cause notice to Vodafone asking why tax was not with-held. And in October 2007,

However Vodafone in its petition to the apex court contended that "Section 9 (1) of the Income Tax Act merely provides that income accruing or arising from the transfer of a capital asset situated in India shall be deemed to accrue or arise in India. There is no legal fiction deeming the transfer of a capital asset (taking place outside India) to take place in India". Further the company said that it had purchased the entire share capital of non-resident company CGP Investments (Holdings) from HTI Holdings, a foreign company having no presence in India. The entire consideration for the share capital purchase was paid outside India without deducting tax at source. Vodafone's contention all along has been that existing Indian law does not give Indian tax authorities jurisdiction over an overseas transfer of the kind it did. The tax authorities dispute the contention and say Vodafone should have deducted tax at source before paying Hutchison.

RELAVANT SECTION
Income deemed to accrue or arise in India.

(1) The following incomes shall be deemed to accrue or arise in India:-

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India,or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explalnation. For the purposes of this clause-

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India;

(d) in the case of a non-resident, being-

(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or

(3) a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;

Vodafone challenged the I-T department's jurisdiction over the deal in Bombay High Court. Alleging that the I-T department had no jurisdiction over a deal between two parties incorporated overseas, the Netherland-based company's appeal said that "the high court appear to have rejected the contention of the department that there is a consequential transfer of control over an Indian company, the gain, if any, on the transfer of offshore shares between the offshore entities give rise to capital gains in India." It further said that "having held so, the high court, however, held that thereby certain contractual arrangement entered into which shows that the transaction was a composite transaction. On this basis, the high court has held that there was an independent transfer of certain capital assets that is rights in contractual arrangement and these capital assets are situated in India."

The provisions of taxability of the income on transfer of shares of an offshore company is still not clear are absent under the Income Tax Act, 1961. However under the proposed Direct Tax Code Bill tabled in parliament on 30 August, clearly identifies situations in which transactions of the Vodafone kind can be taxed. The scenario from 1 April 2012 (when DTC is likely to be introduced) will be completely different.

In December 2008, the Bombay High court rules in favour of the department and asked Vodafone to reply to the show cause notice. In June 2009, the matter reached the Supreme Court. It appreciated the following points into consideration:

HTIL has received dividend from HEL and on its account books filed with the authorities in HK, its own disclosures to its shareholders and to regulators across the world, it treats HEL as an Indian asset. When parties themselves understand the transaction to be one where an Indian asset is being transferred, why should they be permitted to avoid paying tax on it by adopting a different position before the tax authorities?

Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

Still legal issue raised in the case of Vodafone is not fully resolved. The Supreme Court has observed that the sale of shares involve not only transfer of asset but also bundle of rights such right to preferential allotment etc and has directed the department to work on the same.

The Income tax Department has taken another interesting stand that as to why Vodafone should not be treated as representative assessee of Hutchison under section 163 of the Income Tax Act, 1961. This has driven to file a writ petition before the High Court of Bombay.

The Supreme Court directed Vodafone to go back to the department. And in May 2010,the tax department issued an order affirming its jurisdiction and slaps a tax liability of Rs. 12,000 crore. Also in the month of June this year, Vodafone once again approached Bombay High Court but finally the court ruled in favour of the Income Tax department. The view is the courts have partially upheld the positions of both sides and the tax authorities have to unbundle the different rights conferred through the shareholding as per in Indian Taxation laws.

The case has significant in the sense that it decides on the question as to whether Indian government can extend its sovereign power of taxation to the transactions held outside its jurisdictions.

CASELAWS RELATING TO SECTION 9 OF THE INCOME TAX ACT

Explanation to section 9 inserted by Finance Act, 2007, with retrospective effect from 1-6-1970. Income actually received is outside the scope of deeming fiction.

TURNER MORRISON & CO. LTD. V. CIT

Where the income, profits and gains are actually received in India, it is no longer necessary for the revenue authorities to have recourse to the fiction.

CARBORANDUM CO. V. CIT

Actual accrual is different from deemed accrual - The concept of actual accrual or arising of income in the taxable territories, although not dependent upon the receipt of the income in the taxable territories, is quite distinct and apart from the notion of deemed accrual or arising of the income.

'Deemed' involves a number of concepts, like place, person and year –

CIT/CEPT V. BHOGILAL LAHERCHAND

The term 'deemed' brings within the net of chargeability income not actually accruing but which is supposed notionally to have accrued. It involves a number of concepts. By statutory fiction income which can in no sense be said to accrue at all may be considered as so accruing. Similarly, the fiction may relate to the place, the person or be in respect of the year of taxability.

G.V.K. INDUSTRIES LTD. V. ITO

It is not necessary that income falling in one category under any one of the clauses of section 9(1) should also satisfy the requirements of the other clauses to bring it within the ambit of the expression 'income deemed to accrue or arise in India'

Profits of PE must be computed as independent units –

CIT V. HYUNDAI HEAVY INDUSTRIES CO. LTD.

It is clear that under the Act, a taxable unit is a foreign company and not its branch or PE in India. A non-resident assessee may have several incomes accruing or arising to it in India or outside India but so far as taxability under section 5(2) is concerned, it is restricted to income which accrues or arises or is deemed to accrue or arise in India. The scope of this deeming fiction is mentioned in section 9. Therefore, as far as the income accruing or arising in India is concerned, an income which accrues or arises to a foreign enterprise in India can be only such portion of income accruing or arising to such a foreign enterprise as is attributable to its business carried out in India. This business could be carried out through its branch (es) or through some other form of its presence in India such as office, project site, factory, sales outlet, etc. [PE]. It is, therefore, important to note that under the Act, while the taxable subject is the foreign General Enterprise (GE), it is taxable only in respect of the income including business profits which accrue or arise to that foreign GE in India. The Act does not provide for taxation of PE of a foreign enterprise, except taxation on presumptive basis for certain types of income such as those mentioned under sections 44BB, 44BBA, 44BBB, etc. Therefore, since there is no specific provision under the Act to compute profits accruing in India in the hands of the foreign entities, the profits attributable to the Indian PE of foreign enterprise are required to be computed under normal accounting principles and in terms of the general provisions of the Act. Therefore, ascertainment of a foreign enterprise's taxable business profits in India involves an artificial division between profits earned in India and profits earned outside India. The Act is concerned only with the profits earned in India and, therefore, a method is to be found out to ascertain the profits arising in India and the only way to do so is by treating the Indian PE as a separate profit centre *vis-a-vis* the foreign enterprise. This demarcation is necessary in order to earmark the tax jurisdiction over the operation of a company. Unless the PE is treated as a separate profit centre, it is not possible to ascertain the profits of the PE which, in turn, constitute profits arising to the foreign GE in India. The computation of profits in each PE (taxable jurisdiction) decides the quantum of income on which the source country can levy the tax. Therefore, it is necessary that the profits of the PE are computed as independent units –

BUSINESS CONNECTION

There must be element of continuity as well as real and intimate connection –

CIT V. R.D. AGGARWAL & CO.

The expression 'business connection' undoubtedly means something more than 'business'. A business connection involves a relation between a business carried on by a non-resident which yields profits or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in the taxable territories. The expression 'business connection' postulates a real and intimate relation between trading activity carried on outside the taxable territories and trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity

'Business' include profession, vocation and callings - The expression 'business' does not necessarily mean trade or manufacture only. It is being used as including within its scope profession, vocations and calling from a fairly long-time.

BARENDRA PRASAD RAY V. ITO

In the context in which the expression 'business connection' is used in section 9(1), there is no warrant for giving a restricted meaning to it excluding 'professional' connection, from its scope.

CIT V. FRIED KRUPP INDUSTRIES

Mere purchase abroad and use in India is not 'continuing business' - The term 'business connection' postulates a continuity of business relationship between the foreigner and the Indian. There is no question of continuing business relation when a person purchase the machinery or other goods abroad and uses them in India and earns profit.

ANGLO-FRENCH TEXTILE CO. LTD. V. CIT (NO. 2)

Isolated transactions are not covered - An isolated transaction between a non-resident and a resident in British India without any course of dealings such as might fairly be described as a business connection, does not attract the application of section 9, but when there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India who receives or realises the profits, such relationship does constitute a business connection

LAND MARK JUDEMENT

The abstract of the Judement says that: In the instant case, indisputedly, CGP share was transferred offshore. Both the companies were incorporated not in India but offshore. Both the companies have no income or fiscal assets in India, leave aside the question of transferring, those fiscal assets in India. Tax presence has to be viewed in the context of transaction in question and not with reference to an entirely unrelated transaction. As per Section 253 of the Income Tax Act.

Section195 would apply only if payments made from a resident to another non-resident and not between two nonresidents situated outside India. In the present case, the transaction was between two non-resident entities through a contract executed outside India. Consideration was also passed outside India.

That transaction has no nexus with the underlying assets in India. In order to establish a nexus, the legal nature of the transaction has to be examined and not the indirect transfer of rights and entitlements in India.

Consequently, Vodafone is not legally obliged to respond to Section 163 notice which relates to the treatment of a purchaser of an asset as a representative assessee.

AMENDMENT PROPOSED (WITH RETROSPECTIVE EFFECT FROM 1 APRIL 1962) AND IMPACT ANALYSIS

♦ Finance Bill, 2012 ('the Bill') laid down before the Parliament seeks to tax indirect transfer of capital assets in India by inserting clarificatory explanations to Sections 2(14), 2(47), 9(1) and 195 of the ITA.

Definition of capital assets- Explanation to Section 2(14) of the ITA

♦ The Bill proposes to insert an explanation in Section 2(14) of the ITA in order to clarify that 'property' includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.

♦ The insertion of the explanation widens the definition of capital asset and clarifies that the term 'property' includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any rights whatsoever.

♦ This amendment is also directed to overrule observation in the case of Vodafone (supra), wherein it has been held that the capital asset transferred were the shares of a foreign company and transfer of controlling interest is not a capital asset in itself but is incidental to transfer of shares.

♦ After the amendment, transfer of shares (at any level) which result in transfer of controlling interest of an Indian Company could give rise to a taxable event in India.

CONCLUSION

The amendment has nullified the decision of the Hon' ble Supreme Court in the case of Vodafone and as the amendments have been inserted as explanations this will affect all pending cases and also there is threat of re-opening of cases based on the amendment. This type of uncertainties in tax laws will have adverse effect in foreign investments. The Indian Government should have a broader view on this issue instead of looking at it as a revenue generating measure.

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