

Tax Hotline

June 27, 2008

THE VODAFONE TAX CONTROVERSY

NDA Commentaries on Court Proceedings

The Vodafone tax controversy concerns with a cross-border M&A transaction between non-resident entities and its taxability in India. The facts before the Bombay High Court are unique and unprecedented, and the outcome could have a telling impact on global mergers and acquisitions indirectly involving an Indian subsidiary. Nishith Desai Associates had reported **nascent developments** in the controversy and have, thereafter, received numerous queries regarding the case. The final hearings have now begun and we bring you updates on the proceedings as and when they develop in the courtroom.

Senior Advocate Mr. Iqbal M. Chagla, counsel for Vodafone International Holdings BV ("Vodafone"), was on his feet for a marathon two hours before the Bombay High Court on Thursday, June 26, 2008. His submissions before the division bench, consisting of Justice S. Radhakrishnan and Justice A. V. Nigude, essentially dealt with the scope of the expression "*person*" as used in Section 195 of the Income Tax Act, 1961 ("**ITA**"). Any person, under this provision, making a payment to a non-resident would be liable to deduct tax at source. It is the contention of the Income Tax Department ("**Revenue**") that Vodafone, a Dutch company was liable to deduct tax at source from the payment made to a Cayman Islands company for the acquisition of another Cayman Islands company, which indirectly holds shares in an Indian company.

The crux of the submissions advocated by Mr. Chagla was that the expression "*person*" cannot be interpreted to include a person having no presence in India. According to him, a plain reading of the expression in Section 195 would imply that even a foreign company without any presence in India would be liable to deduct tax at source. However, he submitted, the Court must "read down" the expression and interpret "*person*" to mean only persons, resident or non-resident, having a presence in India.

Mr. Chagla's submissions can be divided into the following broad heads:

1. When can a person be made liable to deduct tax at source in India?
 - Only a person who has a factual or taxable presence in India can be made liable to deduct tax in India.
2. The competency of a sovereign parliament to pass legislations with extra-territorial operation & the doctrine of 'economic nexus':
 - The Indian Parliament being a sovereign and plenary parliament and in light of Article 245 of the Constitution of India, has the authority to pass laws with extra-territorial operation. However these must be explicit in their extra-territorial ambit – for example Section 9, ITA. These may, however, not always be enforceable.
3. Contextual interpretation as warranted by Section 2 of the ITA:
 - The definition of "person" must be interpreted in the context of what was intended by the legislature in light of the language used in Section 2 of the ITA. Section 2, which defines various terms used in the ITA begins with: "*In this Act, unless the context otherwise requires...*".
4. The workability test in the interpretation of a fiscal statute:
 - The workability test was laid down by the House of Lords in Clark v. Oceanic Contractors [1983] 1 All ER 133, which has been upheld by various Indian judicial precedents, should be followed and the interpretation accorded to a provision should be enforceable. According to the counsel, the broader interpretation, if accorded to the expression "*person*", would render the provision unenforceable.
5. The rule of "reading down":
 - The rule of "reading down" must be applied to the expression "*person*" so as to make it compatible with the workability test.

The hearing has now been adjourned to Monday, June 30, 2008, when the counsel for Vodafone will put forth his detailed submissions on the constitutional validity of the retrospective amendment to Section 201 of the ITA. He proposed to put forth his submissions on the issue of chargeability of capital gains tax on Tuesday, July 1, 2008.

We will attempt to bring to you accurate updates and analysis on the Vodafone Controversy as it unfolds in the courtroom.

- International Tax Team & M&A Team

DISCLAIMER

Research Papers

Taxing Offshore Indirect Transfers in India

February 28, 2025

Unlocking Corporate Philanthropy

February 27, 2025

Digital Health in India

February 26, 2025

Research Articles

Re-Evaluating Press Note 3 Of 2020: Should India's Land Borders Still Define Foreign Investment Boundaries?

February 04, 2025

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

Key changes to Model Concession Agreements in the Road Sector

January 03, 2025

Audio

CCI's Deal Value Test

February 22, 2025

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice

December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps

November 19, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business

March 19, 2025

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.

SIAC 2025 Rules: Key changes & Implications

February 18, 2025

How Cross Border M&A Will Shape the AI Age

February 13, 2025