

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

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