



BMR invites you to a
WEBINAR
ON THE Supreme Court judgment
in the Vodafone case

Tuesday, January 24, 2012
with a repeat at

- 1200 IST
- 1430 Singapore
- 1530 Japan
- 1730 Australia
- 2130 IST
- 0800 PST
- 1100 EST
- 1600 GMT
- 1700 CET

  

CLICK HERE TO REGISTER 
Event Password: advisors

Vodafone wins the tax case: Supreme Court pronounces a landmark judgement and emphasizes the need for certainty in tax policy

The Supreme Court of India (SC) earlier today pronounced its much awaited decision in the controversial Vodafone tax dispute. Whilst deciding the USD 2 billion tax dispute in favour of Vodafone, the SC has laid down important principles with respect to offshore transfer of shares having underlying interest in India and principles to be considered in applying the general anti avoidance rules. This alert seeks to provide a summary of the pronouncement in the SC today.

Background, in summary

Vodafone International Holdings BV ("Vodafone") entered into a Share Purchase Agreement ("SPA") with Hutchison Telecommunications International Limited ("HTIL"), Cayman Islands for purchasing the singular equity share of CGP Investment (Holdings) Ltd ("CGP"), a Cayman based wholly owned subsidiary of HTIL. CGP in turn, directly and indirectly, owned approximately 67 percent of the share capital of Vodafone Essar Limited ("VEL"), an Indian entity. The acquisition resulted in Vodafone acquiring control over CGP and its subsidiaries, including VEL. The Revenue authorities issued a notice to Vodafone, treating it as an assessee-in-default for failure to withhold taxes on gains arising to HTIL on the transfer of shares of CGP. The Revenue authorities held that the gains were taxable in India as there was transfer of a controlling stake / business situated in India.

Global Guide to Tax

- ◆ [Getting the Deal Through – Tax on Inbound Investment 2012"](#)
- ◆ [Taxand's Global Guide to M&A Tax. Click here to view media commentary.](#)
- ◆ [Taxand voted Top Tax Planning Advisor in 32 countries in ITR's 2011 poll. Click here to view article.](#)
- ◆ [Taxand conducted Global Survey 2011 – Taxand the CFO. Click here to view full research findings.](#)
- ◆ [PERE together with Taxand produced the 2011 global guide to tax, advising on real estate investment opportunities. Click here to view guide.](#)

Awards & Recognitions

- ◆ [BMR Advisors has been rated as a Tier 1 firm according to International Tax Review, World](#)

Judgment of the High Court

-
Following the writ petition filed by Vodafone in 2010, the Bombay High Court (HC) analyzed the transaction documents, the filings made with regulatory authorities and the various public announcements made by Vodafone and HTIL in detail and came to the conclusion that the business understanding of the parties was to transfer the controlling interest in VEL – which had significant nexus with India.

The situs of the capital asset was held to be a crucial jurisdictional condition that must be fulfilled in order to attract chargeability of income arising from the transfer of a capital asset. It was held that while transfer of a share of CGP per se could not be taxed in India due to lack of situs in India, intrinsic to the transaction were transfer of other rights and entitlements - such 'bundle of rights' also constituted 'capital assets'. It was held that transfer of such rights as were found to have nexus with India could be taxed in India and the consideration should be appropriately allocated over the various rights transferred in the transaction.

In relation to applicability of section 195 of the Income Tax Act, 1961 ('Act'), which provides for tax withholding, it was held that once the nexus with India is shown to exist, withholding tax obligation would arise including on a non resident.

Arguments before the SC

-
The senior legal counsel for Vodafone argued that the provisions of section 9, that defines the scope of income taxable in India, should be construed strictly to deem income to accrue and arise in India only when the capital asset is situated in India. The situs of a share was then argued to be at the place where the company was registered ie Cayman Islands and not the place where the economic interests lie and the manner in which the share is valued were not relevant. It was further contended that in the absence of "look-through" provisions in section 9, the substance of the transaction could not be questioned. On the other hand, the Revenue argued that section 9 should be given the widest possible interpretation and should be interpreted purposively. It was urged that by looking at the terms of the SPA and other documents filed with regulatory authorities and the time to time press releases issued by Vodafone and HTIL, the intention of the parties was clearly to transfer the controlling interest in VEL, which was situated in India.

On the question of reliance on the SC judgment in the case of *Azadi Bachao Andolan*, a preceding landmark decision on tax planning involving tax treaties, Vodafone argued that form of the transaction should be respected and that the corporate veil could be lifted only in the case of a fraud. On the other hand, the Revenue argued that the SC decision in *Azadi Bachao Andolan* should be revisited in light of the previous distinguishing decision in the case of *McDowell*. Heavy reliance was also placed on the Ramsay principle enunciated by the UK Courts which allows application of the "substance over form" approach.

With regard to the requirement to withhold tax, it was contended by Vodafone that it should be triggered only if there is a presence in India whereas the Revenue argued

[Tax Guide 2012 for the fifth consecutive year.](#)

- ◆ [BMR Advisors is ranked fourth most active financial advisor for India in Thomson Reuters Mid-Market Insight.](#)
- ◆ [BMR Advisors is ranked second Most Active Transaction Advisor \(Private Equity\) according to the Venture Intelligence League Table for the first quarter of 2011](#)
- ◆ [BMR wins India Case of the Year and Best Use of the Internet awards at 5th International Tax Review Asia Awards, 2010.](#)
- ◆ [BMR is ranked Tier 1 in ITR's "World Tax 2011" guide, to the World's leading tax firms.](#)
- ◆ [BMR is rated Great Place to Work 2010: Great Place to Work Institute](#)

Contacts

- ◆ Mukesh Butani, New Delhi
+91 124 339 5010
mukesh.butani@bmradvisors.com
- ◆ Rajeev Dimri, New Delhi
+91 124 339 5050
rajeev.dimri@bmradvisors.com
- ◆ Gokul Chaudhri, New Delhi
+91 124 339 5040
gokul.chaudhri@bmradvisors.com
- ◆ Bobby Parikh, Mumbai
+91 22 3021 7010
bobby.parikh@bmradvisors.com
- ◆ Abhishek Goenka, Bangalore
+91 80 4032 0100
abhishek.goenka@bmradvisors.com
- ◆ Sriram Seshadri, Chennai
+91 44 4298 7000
sriram.seshadri@bmradvisors.com
- ◆ Sumeet Hemkar, Singapore
+65 6408 8004
sumeet.hemkar@bmradvisors.com

that the term “any person” should also include a “foreign company”. It was further argued that Vodafone had a presence in India on account of its shareholding and joint venture with another Indian telecom company.

Judgment of the SC

The three member bench of the SC, headed by Chief Justice Kapadia delivered its verdict in favour of Vodafone setting aside the judgment of the Bombay High Court.

The Bench stated that a “look-at” approach needs to be adopted for the transaction, rather than a “look through” approach in interpreting the relevant tax provisions. The Bench held that investment structures had to be respected and it was to be determined whether an investment was made for participation in the entity or whether it was a pre-ordained transaction aimed at avoidance of taxes.

The Bench also examined the need to review the decision of the SC in *Azadi Bachao Andolan* and concluded that there seemed to be no reason to refer the decision for reconsideration by a larger Bench.

The SC also stated that genuine strategic tax planning could not be ruled against. The CGP structure was in place since 1998, and it could not be said that this was a pre-ordained transaction. Further, it could not be said that CGP had no role to play, since apart from holding shares, it also assisted in smooth foundation of the entire structure. This was not a sham transaction, or a transaction aimed at avoidance of tax.

With respect to splitting of the consideration amongst different assets and rights, the SC held that merely because certain values were indicated in correspondence between parties, did not mean that parties have agreed to bifurcate values amongst different assets and rights. The Vodafone deal was a consolidated transaction and each right and asset could not be dissected in order to apply section 9 of the Act.

The CGP share was located outside India and therefore India had no jurisdiction to tax the same. Thus, the withholding tax provisions would not be triggered in the current case. Similarly, section 163 of the Act, which provides for taxation on a representative assessee basis, also could not be invoked. The subject matter of the transaction was the share of CGP share and India had no right of jurisdiction to tax such a transaction.

Chief Justice Kapadia concluded his speaking order by forcefully stating that certainty is integral part of the rule of law, especially in matters of tax policy. Limitation on benefits and “look through” provisions are matters of policy, and the Government needs to play its role to avoid conflicting interpretations. Investors need to know where they stand and this would also help the tax administration.

This judgment will help address several contentious issues including those with respect to scope and sanctity of tax planning, applicability of anti avoidance rules, taxation of overseas transactions, issues regarding situs of shares, and applicability of withholding tax provisions in case of non residents not having a presence in India.

This alert is based on the pronouncement in the court; detailed analysis of the SC's judgement will follow shortly.

Disclaimer:

This newsletter has been prepared for clients and Firm personnel only. It provides general information and guidance as on date of preparation and does not express views or expert opinions of BMR Advisors. The newsletter is meant for general guidance and no responsibility for loss arising to any person acting or refraining from acting as a result of any material contained in this newsletter will be accepted by BMR Advisors. It is recommended that professional advice be sought based on the specific facts and circumstances. This newsletter does not substitute the need to refer to the original pronouncements.



Quality tax advice, globally
www.taxand.com

[Contact US](#) | [Archives](#)

BMR Advisors | 22nd Floor | Building No. 5 | Tower A | DLF Cyber City | DLF Phase III | Gurgaon 122 002

Tel: +91 124 339 5000 | Fax: +91 124 339 5001

The information contained in this communication is intended solely for the use of the individual or entity to whom it is addressed and others authorized to receive it. This communication may contain confidential or legally privileged information. If you are not the intended recipient, any disclosure, copying, distribution or action taken relying on the contents is prohibited and may be unlawful. If you have received this communication in error, or if you or your employer do not consent to email messages of this kind, please notify us immediately by responding to this email and then delete it from your system. No liability is accepted for any harm that may be caused to your systems or data by this message. Unless related to BMR business, the opinions, conclusions and other information contained within this email are those of the sender alone and do not necessarily constitute those of the Firm.



© Copyright 2011, BMR Advisors. All Rights Reserved

In case, you do not wish to receive this newsletter, click here to [unsubscribe](#)