

“Whatever strength one may have, but if things are not planned properly to use strength, results are bound to go haywire.”

The latest example of same comes in the form of dismissal of Writ petitions filed by Aditya Birla Nuvo Limited (FKA Indian Rayon & Industries Limited) and Tata Industries Limited in the matter of service of notice by Director of Income Tax (International Taxation) on non-deduction of TDS u/s 195 of the Income Tax Act, 1961 while remitting sale proceeds to AT&T Mauritius towards purchase of remaining shares in the Joint Venture Company “Idea Cellular Limited” (FKA Birla Communications Limited) pursuant to ROFR (Right of First Refusal) contained in the JV Agreement of 1995.

It was really interesting to read the 97 page landmark judgment given by Hon’ble Bombay High Court delivered on July 14, 2011 and to see arguments extended on behalf of revenue by Additional Solicitor General against some of the legal eagles of the country in this skirmish debate.

Following is my analysis of what led decision to go against petitioners.....

The foremost and biggest reason is shoddy drafting of the documents dealing whole deal, a decision has come which has unsettled some of the settled practices and led revenue to lift the corporate veil which was normally not resorted to under such circumstances under Indo-Mauritius Tax perspective. This decision will go long way in determining the fate of existing and future investments coming to India from other locations via Mauritius route. Thus it becomes not only imperative to find out reasons leading such decision but to examine the subsisting arrangements in terms of the decision.

Facts of the Case:

- a) March 4, 1995 Idea Cellular Limited was formed by Birla Group;
- b) December 5, 1995 a Joint Venture Agreement was entered into between AT&T Corp, USA and Grasim Industries Limited on behalf of Birla Group ***“to carry on wireless telecommunication service in India”*** by obtaining license from Department of Telecom and where Ideal Cellular Limited will act as Joint Venture Company (JVC) wherein 51% stake was agreed to be held by Birlas and 49% by AT&T.
- c) ***Pursuant to above said agreement all powers of management and control by all modes were vested in the founders viz AT&T and Birla and it was also provided that shares in the JVC shall be held by founders in their own name or through a “permitted transferee” who shall be wholly owned subsidiary of each party. Entire obligations of the transactions were on founders....Such permitted transferee was bound by founder.***
- d) ***All Notices were to be sent to AT&T, USA***
- e) Pursuant to above transaction AT&T, USA invested through its “permitted transferee” AT&T Mauritius and held 49% stake in JVC... where all rights were vested in AT&T, USA. Although it was not obliged to pay any amount still it paid the whole amount of investment made by it in JVC.
- f) ***AT&T, Mauritius was not made party to the Joint Venture Agreement.***

- g) In December 2000 Tata Industries Limited also became JV Partner to JV agreement and new Shareholders' agreement was entered between AT&T, Birla, TATA and new shareholding pattern emerged. *This Shareholders' agreement recorded AT&T Group controls AT&T wireless Services Inc., USA and also stated that "AT&T Wireless Services Inc. is operating cellular services in Maharashtra and Gujarat circle of India by making payments in AT&T, Mauritius."*
- h) In October, 2004 AT&T Wireless Inc. USA was acquired by Cingular Wireless LLC, USA and AT&T was renamed as New Wireless LLC, USA (NCWS).
- i) In July, 2005 NCWS got irrevocable offer from Indian Tele Ventures Limited from independent party to purchase its stake at USD 0.4035 per share aggregating to USD 300 Million and accordingly in terms of ROFR it has offered such shares to Birla and Tata to which they agreed to buy and before entering into share purchase transaction ABNL written to DIT (IT) for no TDS under section 195 and were accordingly given permission in terms of Circular No.682 dated 30th March 1994 and Circular No.789 dated 13th April 2000.

Further, it was also informed by Additional Solicitor General before Hon'ble High Court, on behalf of revenue that while applying nil TDS, following documents were not shared with assessing officer which has led to permission of nil TDS while remitting sale proceeds.

1. JV agreement of 1995;
2. Offer and Acceptance Documents;
3. Share Purchase Agreement with Tata;
4. Share Purchase Agreement with Birla;
5. Declaration made by NCWS (FKA AT&T USA) before SEC in USA;
6. Bank Details of AT&T Mauritius showing transfer of sale consideration

Reasons/Grounds for Dismissal:

- a) *AT&T, Mauritius was merely a legal owner and not a beneficial owner and it was also not made party to the JV Agreement;*
- b) *AT&T, Mauritius transferred immediately sale proceeds to AT&T, USA on receipt of sale consideration from India;*
- c) *All rights including right to sell shares of JVC owned by AT&T USA but registered in the name of AT&T, Mauritius were with AT&T USA;*
- d) *All the letters written for purchase of shares of JVC and held in the name of permitted transferee were made to AT&T, USA by Birla and TATA;*
- e) *Letter dated September 8, 2005 written by ABNL to AO stated that " We would like to submit as these shares were directly allotted by the Idea Cellular Limited to the AT&T Cellular Pvt. Limited, Mauritius, there is no specific agreement relating to purchase of shares."*
- f) *All efforts of petitioners to take protection under following decisions of the various courts were also rejected on the grounds of difference of facts leading to decision with the instant case*

i) **Mrs. Bacha F Guzdar vs. CIT** wherein it was held that assets held by Wholly owned subsidiary cannot be regarded as the assets of parent company and in terms of section 47(iv) and 47(v) of the Income Tax Act, 1961 that holding company and subsidiary companies are two different entities and assets owned by subsidiary cannot be termed as that of its holding company.

ii) **Howrah Trading Company Limited vs. CIT** wherein it was decided that person under whose name shares are registered shall be regarded as holder of the shares.

iii) **Jaipur Udyog Limited vs. CIT** wherein it was held that once the NIL TDS certificate is issued for Section 195 then no action can be taken on the ground that certain material facts were not placed before assessing officer.

The revenue contended that benefits in this case cannot be decided in terms of Indo-Mauritius Treaty as the control and management was with USA company and accordingly Indo-USA treaty be applied, thus question of obtaining protection under decision of Apex Court under Azadi Bachao Aandolan, Circular No.682 dated 30th March 1994 and Circular No.789 dated 13th April 2000. AT&T USA did the filing with Securities Exchange Commission, USA and disclosed receipt of sale proceeds for sale of shares of Idea Cellular Limited.

Conclusion: Till date such cases are decided in favour of assessee and considerable number of investors had invested in the pattern and enjoyed treaty shopping under Article 13(4) and Circular No. of Circular No.682 dated 30th March 1994 and Circular No.789 dated 13th April 2000 on the Indo-Mauritius DTAA, but this decision has raised shadow on the continuity of treaty shopping. The trend of judiciary seems to be to plug the loopholes as appears from recent decisions in the matter of Richter Holdings, Limited, Vodafone etc.

Entities Mentioned in the Order:

- a) Aditya Birla Nuvo Limited (FKA as Indian Rayon and Industries Limited)
- b) New Cingular Wireless Services Inc. (Entity acquiring AT&T Wireless, USA) (NCWS)
- c) Tata Industries Limited
- d) MMM Holdings LLC, USA (MMM merged with NCWS)
- e) Idea Cellular Limited (FKA Birla Communications Limited)
- f) AT&T, Mauritius
- g) India Tele Ventures Limited

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