

ClientAlert

India Practice

February 2012

Supreme Court of India's Vodafone Judgment: Implications for International Investors

On January 20, 2012, the Supreme Court of India (the "Supreme Court") delivered a landmark judgment in *Vodafone International B.V. v. Union of India & Anr.*¹ ruling that the transfer of shares of a company incorporated outside India from a seller resident outside India to a buyer resident outside India is not taxable by the Indian tax authorities even if such transfer indirectly transfers an asset in India. The outcome brings to closure a fairly contentious chapter for Vodafone Group ("Vodafone"), in which the Indian tax authorities sought to recover approximately US\$2.5 billion in taxes in connection with Vodafone's indirect purchase in 2007 of a controlling stake in Hutchison Essar Limited, one of India's largest telecommunications services providers, from The Hutchison Group, a Hong Kong company. The Supreme Court judgment provides clarity to international investors in structuring a variety of cross-border transactions involving India in a tax efficient manner. The following are the key points that emerge from the Supreme Court judgment for international investors looking to engage in cross-border transactions involving India:



If you have questions or comments regarding this Alert, please contact one of the lawyers listed below:

Nandan S. Nelivigi
Partner, New York
+ 1 212 819 8958
nnelivigi@whitecase.com

John T. Lillis
Partner, New York
+ 1 212 819 8512
jjillis@whitecase.com

William Kirschner
Partner, Singapore
+ 65 6347 1301
wkirschner@whitecase.com

David M. Eisenberg
Partner, London
+ 44 20 7532 2104
deisenberg@whitecase.com

or your regular contact person at White & Case. For further information on our India Practice, click [here](#).

1. Section 9(1)(i) of the Indian Income Tax Act, 1961 which, among other things, provides for taxation of income arising from transfer of capital assets in India, does not apply to the extent such transfer occurs indirectly pursuant to a transfer of shares of a company incorporated outside India.
2. International investors may structure their investments into India through holding companies in jurisdictions such as Mauritius for both tax and commercial reasons. If a holding company was created without any commercial or business substance only to avoid tax, then the tax authorities may ignore such a holding company. Structuring transactions to achieve tax efficiency is permissible provided that the structure used is not a sham or a colorable tax avoidance device.
3. Whether a structure represents a genuine tax planning on the one hand or a sham or a colorable device to avoid tax on the other has to be determined at the threshold by looking at the transaction as a whole in the context to which it properly belongs and not by dissecting the individual parts and looking at them in isolation. The burden is on the tax authorities to ascertain the dominant purpose of a transaction and to establish that a given transaction is a sham or a colorable device designed to avoid tax.
4. The factors that the tax authorities and courts should consider in ascertaining whether a structure is permissible or not while viewing it in a holistic manner include, without limitation: (i) duration of time for which such structure has been in existence, (ii) the

White & Case Pte. Ltd.
(India Business Division)
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

¹ *Vodafone Int'l Holdings B.V. v. Union of India & Anr.*, (2012) (India), available at <http://supremecourtsofindia.nic.in/>

period of business operations in India, (iii) the timing of the exit, and (iv) the continuity of business on such exit.

5. According to the Supreme Court, examples of colorable devices include structures that are “used for circular trading or round tripping or to pay bribes.” On the other hand, structures designed to avoid the lengthy approval and registration processes in India may be permissible.

Implications

The Supreme Court has validated legitimate tax structuring to implement transactions which are justified by overall commercial and business rationale. While the tax authorities may try to use some of the imprecise language in the Supreme Court judgment to challenge legitimate tax structures, if parties pay careful attention to overall commercial objectives, corporate formalities, corporate substance and proper documentation governing a transaction, legitimate tax structures should be able to withstand such challenges. International investors investing in India should consider reviewing their corporate structures and determine if their future corporate strategy would be better served by the existence of intermediary entities especially in countries like Mauritius, Singapore and Cyprus, which have favorable tax treaties with India, to hold assets in India.

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the White & Case website.

No US or English law firm, including White & Case, is authorized to practice law in India. This Client Alert is provided for your convenience and does not constitute advice on Indian law.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.