

**CROSS BORDER TRANSACTIONS : CHALLENGES OF FOREIGN  
INVESTMENT AND INTERNATIONAL TAXATION**

AT

**O.P.JINDAL GLOBAL UNIVERSITY, SONIPAT**  
**ON 30<sup>th</sup> OCTOBER,2013**

Dr. Justice Vineet Kothari,  
Judge, Rajasthan High Court,  
JODHPUR.

The present economic scenario in the country, while the growth has taken a down turn along with general worldwide recessionary trends as against the high expectations raised by the Indian Government with the track record of 8-9% growth maintained by the economy, has been a matter of serious debate and concern for the Indian polity and as a student of Economics and Law, it is only opportune that such debates are held for guiding the course of economy in our country and in this perspective, I am happy to be here to be a part of this Conference at the prestigious O.P.Jindal Global University today.

My recent participation by contributing a Paper in an International Conference on `Transfer Pricing' organized by International Association of Tax Judges in Amsterdam in the last week of August, 2013 enlightened me to this kind of debate as to how the international taxation policies can affect the growth of the economy. India, a big economy and a huge market for even

developed western countries, is generally viewed in comparison with another Asian giant, China, which has shown its growth in its symbolic Dragon like manner. In a nutshell, the large number of people of the most populous country on this planet, China, has been utilized in such an optimum manner to produce the large number of goods and thus taking the GDP of the country beyond the frightening scare of inflation. As we all know, inflation is best defined as, 'too much money chasing fewer number of goods', therefore, if the production exceeds the money supply, there cannot be any inflation. Therefore, it is of utmost importance that the production of goods GDP in any economy is kept growing to acquire not only stability but the greater amount of wealth for larger benefit of the populace itself.

With the globalization and liberalization of economies worldwide and also in our country since 1990 onwards, the world has seen seamless and barrierless economies and, therefore, foreign investment and inflow of foreign goods in the Indian markets has also naturally increased tremendously. While the goods brought from outside to be sold in India takes away the Indian money as price thereof, the foreign investment in India for development of permanent structures like infrastructure and manufacturing units etc. become the part of the base for growth of future economy. Therefore, such investment is not only welcome but is in fact of utmost importance for any growing economy like India.

International taxation as we all know plays a vital role in the realm of international trade and foreign investment and, therefore, taxation policies of our country have a great bearing on such inflow of foreign investment. Generating surplus funds for redeployment in our own country is one aspect and for that internal generation of tax revenues in the form of excise duties & income tax contributing major portion & on the other hand the inflow of foreign capital into our country is largely dependent on the international taxation policies.

The present scenario in this regard appears to have taken a beating in our country and that is why despite having the earnest desire of the Government of India to attract such foreign investment and recently we have seen the falling price of Rupees viz-a-viz Dollar being defended by the Government on the ground of attracting more inflow of foreign capital into our country but the unstable international taxation policy largely plays a role in dissuading the foreign investment.

The recent controversies of Vodafone and Shell India being contested before the Bombay High Court by the leading luminary Mr. Harish Salve, who by the way happens to be a Chartered Accountant also, is a hot debate and as I understand Mr. Salve is

going to address a conference today itself in the evening on these issues, being organized by the O.P.Jindal Global University at Delhi. These international giants are against the huge proposed income tax demands against them on the ground of alleged under pricing of the shares issued in favour of the foreign counter parts, whereas, to determine their 'Arms Length Price' at much higher value, the Income Tax Department has sought to tax the difference which has been challenged by these companies in the Bombay High Court as the taxation on '**Hypothetical or Ghost income**'.

Now there can be two aspects of such controversies, like two sides of the coin, and attractive and almost valid arguments can be raised on both the sides and in such cases as contended by the Income Tax Department, it can also be thought possible that the international giants enter the Indian corporate field at a much cheaper price to control the Indian counter part company & fleece away the profits by selling their goods in Indian market or even exporting from here at much higher price. Whereas, on the other hand, as contended by the assessee companies that it is only a matter of guess work and no such hypothetical income can be taxed by Indian Income Tax Department that is also an equally valid & solid argument.

The vital question is whether such tug-of-war will have what

impact on the investment environment in the country. Mere high figures of the proposed income tax demand need not be taken as a possible actual revenue because essentially it is a matter of estimation and guess work as to whether the international giants have purchased such shares of Indian companies at deliberately reduced price or not and whether such capital investment in the share capital of the Indian counter part company can give rise to the transfer pricing adjustments under the relevant provisions of Income Tax Act.

I was happy to note in my Amsterdam experience that even the western countries look at the Indian Judiciary with high respect and hopes even for adjudication in the matter of transfer pricing and international taxation and they admitted that the large volume of such jurisprudential exercise in the Indian courts is not found in the western world also. While this debate is not likely to end very shortly as even after the Bombay High Court judgment, the matters are very likely to reach the Apex Court of the country and may take few years before it is finally settled by the Supreme Court of India but in the meanwhile the impact of such debate on the investment environment is certainly a matter of concern for all of us.

The cross border investment is likely, it is assumed, to be adversely affected, if the international giants like Vodafone and Shell

India are 'discouraged' by such international taxation disputes embroiling them in the judicial process in the courts of law, which admittedly in our country is not as quick and fast as it should be, for a large number of reasons. Though the Apex Court of the country and other High Courts have vital and proactive role in testing and pronouncing upon such complex taxation policies of the Government and try to decide such cases on priority, fully appreciating their importance of early decisions, therefore, it cannot be said that merely the fear of having such adverse effect on the foreign investment should deprive the Indian judicial system or the Government itself of having such debates at all. A fair and reasonable debate in this field is rather essential and good for the economy for stable and long period settlement of controversies. The process of such debate and its impact on the foreign investment is an on going process and it is not that the foreign companies wanting to invest in a big country like India will shy away from India merely because of such questions raised. In fairness they must answer such questions and participate in the fair debates and it is not with a view to antagonize them and dissuade them that tax department raises such questions but in fact there may be a semblance or modicum of truth in their stand as well.

Undoubted it is, that it is very necessary to quickly and fastly decide such disputes in the courts of law so that the clarity is

achieved as early as possible and the path for foreign investment is guided in our country by the Government and a balance is maintained between the requirements of collection of tax revenue from such international transactions and to maintain the balance of the investment environment in our country. While we are not wholly dependent on foreign investment only for the growth of our country and a country like India, rich with natural resources, if its production priorities and growth of manufacturing sector is maintained, which is lacking and felt to be so for last few years, then the major portion of the growth engine will be inhouse development of the economy but at the same time the importance of foreign investment in our country, particularly in infrastructural sector and manufacturing sector cannot be undermined and, therefore, a **'friendly, welcoming and dispute free investment environment'** deserves to be provided to such foreign investors. For this, in my humble opinion, not only the taxation policies, before being framed and pronounced, deserves to be debated at appropriate forums like Parliament & legal circles but it is also necessary that the disputes are not dragged in the courts of law, lest the delay in the decisions by the court may create any adverse effect on such investment environment in the country. Fairly appreciating these aspects, the Government of India as well as the Indian Judiciary are all set to resolve such disputes and I am sure that the forth coming decisions on these current issues from Bombay High Court as well Supreme Court of India will very soon clear the

clouds and red carpet welcome to the foreign investment will not suffer a set back on this account.

### **Factors other than International Taxation Policies affecting FDI**

Besides taxation policies, actually overall stability of governance, good law & order, simplified land acquisition & assisting Bureaucratic intervention are also very necessary for attracting foreign investment. The slackness in governance, unnecessary delays in project clearance & rampant corruption can be stumbling blocks.

The Government of the day has to scrupulously avoid such stumbling blocks, if it really wants to create a suitable & favourable environment for FDI. The constant vigil by watchdog agencies & civil society groups in a democratic set up is essential. The Commerce & Industry Ministries have to act in a businesslike manner, hold constant talks with worthy foreign corporates, invite & encourage them to invest in India, assure & reassure them of smooth & hassle free project clearance & implementation & tie up even joint ventures according to well considered privatization of investment in our economy. We should avoid our market to become only a dumping ground but instead combine FDI with Indian

corporate investment in an optimal combination & for that so many factors & organs have to work in well designed tandem. A clear vision, able leadership & effective implementation are the hallmarks of good governance.

I am sure, the debate of this level at the prestigious forum like this University and even Parliament and other public forums will contribute to the legislative wisdom and the Indian economy will definitely give a boost by the simplified international taxation policies.