July, 2014

Taxing Offshore Transactions in India and the Territoriality Clause - A case for substantial constitutional limitations on Indian Parliament's power to retrospectively amend the Income Tax Act

Khagesh Gautam, *O.P. Jindal Global University*

Taxing Offshore Transactions in India and the Territoriality Clause—A Case for Substantial Constitutional Limitations on Indian Parliament's Power to Retrospectively Amend the Income Tax Act

By Khagesh Gautam

KHAGESH GAUTAM is a Stone Scholar, LL.M. (Columbia), LL.B. (Delhi); Assistant Professor and Assistant Director, Center on Public Law and Jurisprudence, Jindal Global Law School, Sonepat (Haryana), India. The author would like to thank V. Niranjan (Oxford University) for going through and commenting on an earlier draft of this paper. The author can be reached at kgautam@jgu.edu.in

Introduction

In January 2012, a unanimous three-judge bench of the Supreme Court of India in *Vodafone Int'l Holdings v. Union of India*[1] (hereinafter "*Vodafone*") declared that the Indian Income Tax Department cannot, under section 9 of the Indian Income Tax Act, 1961 (hereinafter "the Income Tax Act"), tax *indirect transfers* of capital assets situated in India.[2] Subsequently the Indian Parliament passed the Finance Act, 2012 (hereinafter "the 2012 Amendment"), which amended section 9 of the Income Tax Act with retrospective effect in order to bring such transfer within the tax ambit.[3] *Vodafone* has been the cause of much public debate and discussion.[4] The consequent 2012 Amendment, especially the retrospective part of it, has been cause of more concern, criticism and controversy.

Senior members of the Indian Bar as well as industry experts have strongly criticized the 2012 Amendment.[5] Raghuram Rajan, now the governor of the R.B.I., described the amendment as capricious.[6] A former attorney-general expressed concerns over the length of the retrospectivity of the 2012 Amendment as well as the stated "clarificatory" nature of the amendment.[7] Government appointed "Shome Committee" also observed that the 2012 Amendment "raised concerns regarding the tax implications for foreign investors."[8] A former Supreme Court judge observed that the Parliament can retrospectively amend the income tax act to "remove the basis" of a Supreme Court decision.[9] The then-Finance Minister, Pranab Mukherjee, now the President, clarified Revenue's position, "… where assets are created in one country, it will have to be taxed by that country unless it is covered by the [Double Taxation Avoidance Agreement]."[10] Constitutional concerns have also been expressed on the fate of the 2012 Amendment on two grounds—whether the amendment is truly "clarificatory" and whether it can be given retrospective effect going back 50 years.[11]

This article examines the constitutional competence of the Indian Parliament to enact the 2012 Amendment. It is widely believed that the power of the Indian Parliament to retrospectively amend laws, especially tax laws, which has regularly been upheld by the Supreme Court, is almost unlimited.[12] This article, by pointing out the constitutional restrictions on legislative powers of the Indian Parliament, argues that this widely held belief is not entirely accurate. Specifically in the context of *Vodafone*, this article examines the legislative competence of the Indian Parliament to enact laws that have extraterritorial operation.

The Territoriality Clause of the Indian Constitution[13] provides that a law passed by the Indian Parliament cannot be declared beyond its legislative competence on the ground that such law has "extraterritorial effect." This article examines *Vodafone* and the 2012 Amendment from this territoriality angle and argues that if the Indian Parliament, as a result of the Territoriality Clause, did not have the requisite constitutional competence to tax the income arising out of a given transaction before the 2012 Amendment, it is not possible for the Parliament to acquire such competence after the 2012 Amendment. In other words, the constitutional limitations on legislative power of the Indian Parliament arising out of the Territoriality Clause are substantive restrictions which cannot be overcome by legislation.

The rest of this article is organized as follows. In Part I examines the relevant competing arguments advanced by the Assessee/Taxpayer and the Revenue in *Vodafone* and why, and on what basis, these arguments were rejected or accepted by the Supreme Court. This examination discloses that a substantive constitutional argument based on the Territoriality Clause was never made in *Vodafone*. Next, the submissions made before the Shome Committee in this regard, are examined, which discloses that even though an argument based on the Territoriality Clause was made before the same, it lacked in vigor. The stakeholders did, however, invoke certain other provisions of the Indian Constitution in order to argue that there were substantive restrictions on Indian Parliament's legislative competence to retrospectively amend the Income Tax Act. The academic commentary, while expressing constitutional concerns over the 2012 Amendment, especially the retrospective bits of it, has recognized that a substantive argument based on Territoriality Clause needs to be made.

In Part II, carries forward the academic commentary on the point by developing the Territoriality Argument. Important Indian, as well as a few foreign, cases on point where the dispute arose out of levying income tax on a nonresident are examined. For such levy to survive judicial review, sufficient territorial nexus between the income sought to be taxed, and the authority to levy such tax must be demonstrated before the Courts. If the income does not accrue or arise within the territory of the Indian Union,[14] it cannot be said that the Parliament has the necessary legislative competence to levy a tax on such income. Leading decisions interpreting relevant provisions of, and identifying a Constitutional Dimension to the statutory interpretation of, the Income Tax Act are also examined. This Constitutional Dimension insists on *first* establishing the territorial nexus between the income being taxed and the authority to levy that tax. The article concludes by arguing that taxing the transaction of the sort sought to be taxed by the Indian Parliament in *Vodafone* is beyond its legislative competence. This lack of competence is a result of the Constitutional Dimension as identified in the doctrine of the Court and the interpretation of the Territoriality Clause by the Supreme Court of India. In *Vodafone*, the Supreme Court has denied the jurisdiction to the Revenue to impose tax on a transaction between two nonresidents on the ground that the transfer of asset located in India was indirect, and section 9 does not permit such indirect transfers to be taxed. This interpretation was sought to be subsequently nullified by legislation. But if the assessee can establish that the income accrued or arose as a result of economic activities or operations outside the territory of Indian Union, the parties being nonresidents, Constitutional Dimension and the Territoriality Clause of the Indian Constitution will prohibit taxation of such income.

Part I—Relevant Competing Arguments in Vodafone and Elsewhere

Competing Arguments in Vodafone

In *Vodafone*, a Dutch company, "Vodafone Int'l Holdings" (hereinafter "Vodafone Int'l"), acquired the entire share capital of a Cayman Islands company, "CGP Investments" (hereinafter "CGP").[15] CGP in turn, though indirectly, held 52-percent shareholding interest, with an option to acquire further 15-percent shareholding, in an Indian company "Hutchison Essar Ltd." (hereinafter "Hutch India").[16] As a result of this transaction, Vodafone Int'l ended up acquiring 67-percent controlling interest in Hutch India.[17] Indian revenue authorities wanted to levy capital gains tax on this transaction between Vodafone Int'l and CGP on the ground that CGP, even though not resident in India, held underlying Indian assets.[18]

Revenue authorities made several arguments, all of them based on interpretation of section 9, in order to bring the Vodafone Int'l-CGP transaction within its ambit. One, which was rejected very early in the opinion, was that if a parent company exercises shareholder's influence on its subsidiary, the subsidiary should be deemed resident in the place where the parent company resides.[19] Another was that the Vodafone Int'l-CGP transaction was not a genuine transaction but was a colorable device created to evade payment of taxes legally due to the Income Tax Department.[20] The rejection of this argument resulted in the holding that the initial burden of proof is on the Revenue to establish that the transaction is a colorable device.[21]

A lot of words have been devoted to Revenue's "look through" argument[22] and its counter by the assessee, the "look at" argument.[23] The "look through" argument made two points—

1. The word "through" in section 9 should be read as "in consequence of." Thus, "… if transfer of a capital asset situate in India happens 'in consequence of' something which has taken place overseas (including transfer of a capital asset), then all income derived even *indirectly* from such transfer, even though abroad, become taxable in India."[24]
2. Revenue authorities under section 9 can, "… '*look through*' the transfer of shares of a foreign company holding shares in an Indian company and treat the transfer of shares of a foreign company holding shares in an Indian company as equivalent to the transfer of shares of the Indian company on the premise that Section 9(1)(*i*) covers direct and *indirect transfers* of capital assets."[25]

The stress in all these arguments was essentially on the *indirectness* of the transfer, if at all, of the capital asset situated in India. A close reading of these two arguments will disclose that the Revenue admitted that the transfer of capital assets consequent to the Vodafone Int'l-CGP transaction was indeed indirect and that both parties to the transaction were not resident in India. Having admitted these two facts, the Revenue proposed three methods to in order to create *sufficient territorial nexus* between this transaction and section 9 so as to bring the transaction within the tax ambit.

Firstly, they used the fact that CGP, a Cayman Islands company, *held underlying assets in India* to create this nexus. It was suggested that if a foreign company holds all or substantial part of its assets in India, it should be treated as an Indian company.[26] Thus nexus was proposed to be created by adjusting the identity of one of the parties to the transaction, in this case CGP. Secondly, they used the same fact again, but this time the stress was not on the identity of CGP, but the fact that it indeed held assets in India, which were indeed indirectly transferred to Vodafone-Int'l.[27] This time, nexus was proposed to be created by looking at the location of the assets involved in this transaction. One thing to note while reading these two arguments is that the shares of CGP derived their value entirely from what Revenue labelled *underlying assets in India*, thus Revenue's constant endeavor to equate the identity of CGP shares with assets in India, as if they are one and the same thing for the purpose of the Income Tax Act. If this proposition is accepted it creates a direct link, by legal fiction, between the assets (which are in India) and the shares of the entity 'holding' those assets (which was in the Cayman Islands). This link then leads to another legal fiction which is the creation of the requisite territorial nexus.

A third way was what I call the "corporate veil piercing" or the "*bona fide* transaction" argument. This argument however does not, at least on the face of it, seem to propose to establish nexus, like the first two do. This argument proposes to examine the structure of the transaction to see if it is a *bona fide* transaction or one which is structured to avoid payment of income tax legally due to the public exchequer. If the transaction uses a nonresident entity (in this case CGP) as a fraudulent device in order to avoid payment of taxes legally due to the public exchequer, the Revenue may disregard the use of such device and proceed to tax the income arising out of the transaction. This argument, if accepted, does nothing to create the requisite territorial nexus for the Indian Revenue authorities to tax a transaction between two nonresident entities. It is tough to see how the Indian Revenue authorities can examine the *bona fides* of any transaction if the Indian Parliament does not have the constitutional competence to enact a law that is applicable to such transaction in the first place. A deeper examination of this particular move by the Revenue is beyond the scope of this article, and I do not propose to deal with the constitutional angles of the "*bona fide* transaction" argument in this paper.

A territoriality argument was also made was in context of "situs" of share of CGP.[28] The argument, as made by the Revenue, goes as follows. CGP is incorporated in the Cayman Islands. But as per their companies law, CGP is an "exempted company" *i.e.*, not entitled to conduct business in the Cayman Islands. Since CGP was a mere holding company, the "situs" of CGP shares should be deemed to be in India, where the "underlying assets" of CGP are situated.[29] This argument was rejected by the Chief Justice since, under the Indian company law, the "situs" of shares is where the company is incorporated, which in this case was admittedly Cayman Islands.[30] Though it is beyond the scope of this article to discuss this in detail, it is worth pointing out that the correctness of this particular holding of the Chief Justice is doubtful. Situs of shares of CGP, a Cayman Islands company, would depend not on Indian company law, but on Cayman Islands company law.[31] Justice Radhakrishnan, however, in his concurrence, held that CGP shares cannot be deemed to be situated in India for CGP being a Cayman Islands company, the law applicable to decide the question is Cayman Islands law.[32]

The only time Territoriality Clause was invoked was in order to resist application of section 195.[33] The argument was accepted by the concurring judge Justice Radhakrishnan—"Section 195, in our view, will apply only if payments are made from a resident to another non-resident and not between two non-residents situated outside India."[34] Applying this test the concurring judge held that the transaction sought to be taxed had no nexus with capital assets in India.[35] Note here that the test being used by Radhakrishnan looks at the identity of the parties engaged in the transaction and the place where transaction was concluded[36] and not the effects of the transaction.[37]

If *Vodafone* was a game of chess, the pieces moved around the interpretation of section 9 with various moves being made by both sides. The Territoriality Clause does find a mention in *Vodafone* though[38] but in context of section 195,[39] which deals with "collection and recovery of tax." In context of section 9 though, a substantive Territoriality Clause argument was not made.

Draft Report of the Shome Committee and other Commentary

After *Vodafone* and the 2012 Amendment and all the controversy surrounding this whole affair, the Finance Ministry of the Indian Government on July 17, 2012 constituted an expert committee "to finalize the guidelines for General Anti Avoidance Rules."[40] This committee came to be known as "Shome Committee" by the name of its chairman Dr. Parthasarathi Shome. A few days later, the terms of reference of the Shome Committee were expanded and it was also asked to "examine the applicability of the [2012 Amendment] on taxation of non-resident transfer of assets where the underlying asset is in India."[41]

Territoriality Clause was specifically invoked by the Stakeholders to express concerns over constitutional validity of the 2012 Amendment.[42] But this argument was not extended to challenge validity specifically of the retrospective bit of the same.[43] Substantive arguments invoking the Equality Clause[44] and the *Ex Post Facto* Clause[45] were however made against the retrospective part of the 2012 Amendment.[46]

Shome Committee divided retrospective amendments into four parts *viz.* (i) ones made to "correct apparent mistakes/anomalies" in the law, (ii) ones made to "remove technical defects, particularly in the procedure, which had vitiated substantive law," (iii) ones made "to 'protect' the tax base from highly abusive tax planning schemes" and (iv) ones made "to 'expand' the tax base."[47] The fourth sort of retrospective amendment, Shome Committee said, was against "basic tenet of the law as it affects the certainty of law"[48] and went on to recommend that this sort of amendment be avoided.[49] It is also interesting to note that the Shome Committee could not find any evidence that the retrospective provisions of the 2012 Amendment are clarificatory.[50] In response to the *Ex Post Facto* Clause argument it was recommended that, "… if retrospective amendments are nevertheless made, then it is unfair and unjustified to levy interest on any additional tax demanded from taxpayers and, in no circumstances, penalty for any default should be levied as the taxpayer complied with the law as actually existed at the earlier point of time prior to the retrospective change."[51]

Doubts have also been expressed on the Validation Clause[52] of the 2012 Amendment.[53] V. Niranjan has, very convincingly, argued that the Validation Clause does not cure all the infirmities as pointed out by the Supreme Court in *Vodafone*. It has been argued that in order for a validation clause in a tax law to be valid, it must remove the basis on which a court has rendered its decision[54] and further must create a legal fiction whereby the old demand would be deemed to have been made under the new law.[55] While the Validation Clause satisfies the first requirement, it does not satisfy the second.[56] While Niranjan has also expressed doubts over the constitutional validity (on territoriality grounds) of the amendments to section 9, he does not go into a detailed examination of the territoriality argument, that being beyond the brief of his article.[57]

Thus we see that the Territoriality Clause has not been invoked in *Vodafone* to mount a substantive challenge against Indian Parliament's legislative competence to tax in the income arising out of the Vodafone Int'l-CGP transactions. Though it has been accepted that the Territoriality Clause does present a substantive challenge and an argument needs to be constructed using the same, so as to examine whether the income arising out of the transactions of the Vodafone Int'l-CGP sort could be validly taxed by the Indian Parliament. Next part of this article attempts to construct an argument based on the Territoriality Clause.

Part II—The Territoriality Argument

Constitutional Dimension to section 9's interpretation

Section 9 and several other connected provisions of the Income Tax Act have been subject to interpretation by the Supreme Court in several leading cases in past half a decade. The Parliament has been constantly amending the Income Tax Act in order to, what some might call, overcome to effect of, and what others have called, overrule by legislation, these cases. The two decisions given within months of each other are important for us to examine.

In January, 2007 a Division Bench of the Supreme Court gave its decision in *Ishikawajma-Harima Heavy Industries v. Director of Income Tax.*[58] The dispute in this case arose out of section 9 of the Income Tax Act as it stood in 2007.[59] In this case, a Japanese company[60] (the Appellant-Assessee) formed a consortium with other nonresident companies and one Indian company[61] and entered into a turnkey contract with an Indian company[62] (Petronet LNG Limited). The question before the Division Bench of the Supreme Court was "… whether the amounts, received/receivable by the applicant from Petronet LNG for offshore supply of equipments, materials, etc. are liable to tax in India under provisions of the [Income Tax Act] and the India-Japan Tax Treaty?"[63] The other question was how much of this amount is "reasonably attributable to operations carried out in India."[64]

Note the use of the expression *reasonably attributable to operations carried out in India*. This test is extremely similar to the one used by the Judicial Committee of the Privy Council in *Wallace Brothers v. Commissioner of Income Tax*,[65] which examined not the location of the entity but the location of the operations carried on by the entity.[66] The commission of substantial operations in a given geographical area, as per *Wallace Brothers*, is adequate to establish sufficient territorial nexus in order to tax the income arising out of those transactions. The question being framed in *Ishikawajma* is pointing in a similar direction. In order for the Revenue to be able to tax the income arising therefrom, there must be some operations that are being carried out in Indian territory. In absence of any such operations there could be no nexus, much less sufficient nexus. Examine the observations of the Court on this point—

> **Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle**… Having regard to the internationally accepted principle and DTAA, it may not be possible to give an extended meaning to the words "income deemed to accrue or arise in India" as expressed in Section 9 of the Act… Whatever is payable by a resident to a non-resident by way of fees for technical services, thus, would not always come within the purview of Section 9(1)(*vii*) of the Act. **It must have *sufficient territorial nexus* with India so as to furnish a basis for imposition of tax**… **It must have a direct live link between the services rendered in India …**[67] (Emphasis Added)

Incidentally, the principle of territoriality has been interpreted by the Supreme Court to be not just for income taxation but for other kinds of taxation as well. In *Commissioner of Wealth Tax v. Consolidated Pneumatic Tools*[68] the question was, "… whether the goods in transit from England to India belonging to a non-resident assessee can be considered as wealth of the assessee during the relevant valuation dates."[69] As it happened, during the relevant valuation dates, the goods were *in* the High Seas.[70] The Division Bench, in a very short opinion, held that, "… High Seas cannot be considered as a part of India *in the absence of anything in the Act making it a part of India*."[71]

If the Indian Parliament does not have the requisite constitutional competence to tax the income arising out of a transaction, it is inconceivable that such constitutional competence can be created merely by an amendment, retrospective or otherwise, of the Income Tax Act.

Five months later, in May, 2007, another Division Bench of the Supreme Court gave its decision in *Commissioner of Income Tax v. Hyundai Heavy Industries*.[72] Factual similarity of the dispute in *Ishikawajma* and *Hyundai* is notable. In *Hyundai*, the taxpayer was a nonresident foreign company incorporated in South Korea.[73] It entered into a contract with an Indian company Oil and Natural Gas Company (ONGC) for designing, fabricating, hooking-up and commissioning of a platform in Bombay High.[74] Hyundai Heavy Industries took the position that the turnkey contract with ONGC[75] was divisible into two parts—fabrication (which was done in South Korea) and installation (which was done in India).[76] Based on this, they argued that fabrication activities being undertaken in Korea were not assessable to tax in India.[77] This divisibility of contract argument was rejected at the assessment stage.[78]

The Revenue authorities were of the view that, "… fabrication and procurement of material were activities having *nexus/linkage* ***to*** *the ultimate activity* of installation and commissioning of platform in Bombay High."[79] Note the mode of reasoning adopted by the Revenue here. They are not rejecting the fact that fabrication activities were indeed commissioned in South Korea. Having admitted that part of the income they wish to tax is a result of activities done outside the territory of Indian Union, they then take the position that the fabrication activity with installation activity are linked in such a manner so as to make the whole transaction one and the same. And since the "ultimate" activity was done in India, they have the territorial jurisdiction to tax this income.[80] On appeal, the Commissioner of Appeals upheld this view.[81] On further appeal, the Income Tax Appellate Tribunal reversed the Commissioner and accepted the divisibility of contract position originally taken by the taxpayer.[82] After the matter was summarily dismissed by the Uttaranchal High Court,[83] the Revenue appealed to the Supreme Court.

Before the Supreme Court, Revenue's main argument was that the turnkey project between the taxpayer and ONGC was "one integrated contract,"[84] a position that they had taken all along. The Court rejected Revenue's position and held that profits earned by the taxpayer, a South Korean company, "cannot be attributed to its Indian [Permanent Establishment]."[85] The reasoning given by the Court was that the Indian Permanent Establishment of the taxpayer came into existence only *after*, "…the fabricated platform was delivered in Korea to the agents of ONGC."[86] The Court observed—

> … not all the profits of the assessee Company from its business connection in India (PE) would be taxable in India, but **only so much of profits having *economic nexus* with PE in India would be taxable in India**.[87] (Emphasis Added)

In order for the Indian Revenue authorities to tax the income arising as a result of offshore activities, as per the standard laid down in *Ishikawajma* and *Hyundai*, they must *first* establish a *territorial nexus* with the transaction income arising wherefrom they wish to tax. Only *after* such nexus has been established, the income can be taxed. As to whether the entire income arising out of such transactions can be taxed or not, the cases discussed here have held that only the income attributable to the operations of Indian PEs can be taxed in India. But a longer discussion on this question is beyond the brief of this paper. Suffice it to note here that territorial nexus is the *first* requirement. In both *Ishikawajma* and *Hyundai*, Revenue sought to create territorial nexus by taking the position that the turnkey contract was an integrated transaction and in both cases held the contracts, for income tax purposes, to be divisible.

In *Ishikawajma*, *Hyundai* and *Vodafone*, the Supreme Court was engaged, primarily, in interpreting section 9. However, in all these cases there is a Constitutional Dimension to the exercise of statutory interpretation, which asserts itself more forcefully in *Ishikawajma* as is clear from the passage reproduced above. The Territoriality Clause of the Indian Constitution constitutionalizes the principle of territorial nexus thus creating a Constitutional Dimension to interpretation of section 9.[88] This Constitutional Dimension talks about the necessity of *first* creating a territorial nexus between what is being taxed and the authority of levying that tax. In other words, the Revenue must show the territorial nexus *first* and then only they can be allowed to levy tax. The Revenue cannot first levy the tax and then find out something to create the requisite territorial nexus. A closer reading of Revenue's arguments in these three cases suggests that having asserted its authority to levy the tax first, the Revenue then attempted to satisfy the Court as to the territorial nexus requirement.

There can be no quarrel with the proposition that the Parliament can amend section 9 and remove the basis on which the Supreme Court decided a case thus rendering the judicial precedent inapplicable for the future cases.[89] But the moment a constitutional dimension enters into the picture, a mere statutory amendment would not be enough to override the Court's interpretation of the statue. In the event the statutory amendment conflicts with the constitutional dimension of the statutory interpretation, the Court could either judicially review and invalidate the amendment, or the Court could harmoniously interpret the amendment so as bring the amendment within the four corners of the constitutional dimension of the previous interpretation. If the Constitutional Dimension is what the Parliament has a problem with, the only course available to the Parliament is to either have the Constitutional Dimension overturned by a bigger bench of the Court or amend the Constitution itself. In the first case, a bench of at least seven judges would be required because a unanimous five-judge bench decision of the Court already holds the field and is discussed later in this paper.[90] In the second case, the taxpayers could challenge the constitutional amendment itself by invoking Basic Structure review.[91] Examining all these possibilities in detail is beyond the brief of this article and is better left for another day.

Affirmation of the Constitutional Dimension in the wake of post *Ishikawajma* Amendments in the Income Tax Act

It would be profitable at this point to discuss the legal developments post the *Ishikawajma* decision. *Ishikawajma* was decided on January 4, 2007.[92] To overcome this decision the Parliament decided to amend section 9 of the Income Tax Act.[93] Accordingly the Finance Act of 2007 was passed by the Parliament that inserted an Explanation at the end of section 9, with retrospective effect from June 06, 1976, which provided—

> For the removal of doubts, it is hereby declared that for the purposes of this section, where income is deemed to accrue or arise in India under clauses (*v*), (*vi*) and (*vii*) of sub-section (1), such income shall be included in the total income of the non-resident, **whether or not the non-resident has a residence or place of business or business connection in India**.[94] (Emphasis Added)

The Constitutional Dimension of section 9's interpretation and this Explanation very soon came into conflict. In *Clifford Chance v. Deputy Commissioner of Income Tax*[95] a Division Bench of two judges of the Bombay High Court had the occasion to interpret section 9 as amended by the Finance Act of 2007. The question before the Court, *inter alia*, was, "Whether the income attributable to the services rendered by the [taxpayer] outside India required to be excluded while computing tax in India?"[96] The taxpayer in this case, a major international law firm resident in the United Kingdom and having no office in India,[97] was advising its resident and nonresident clients about some power projects.[98] Some of this advisory work was done in India and some outside. For the relevant assessment year, the law firm filed its income tax returns and returned the income that was *attributable to its operations in India*.[99] The Assessing Officer rejected this returned income and proceeded to assess tax on "total fees received by the [taxpayer] from all clients."[100]

The taxpayer, *inter alia*, relying on *Ishikawajma* argued that it is the place of performance of service and not the place of utilization that is relevant in order for the taxable income to "accrue or arise" for taxation in India.[101] The taxpayer must be present in India.[102] The Revenue argued that since the legal services were rendered relating to projects in India, therefore on that account alone, the entire income, being related to projects in India, is taxable in India.[103] Citing the above-quoted retrospective amendment, Revenue argued that section 9's *Ishikawajma* interpretation could not be applied to the taxpayer's favor in this case.[104] The Revenue's contentions were rejected, and the High Court applied the Constitutional Dimension of section 9's *Ishikawajma* interpretation.[105] The "performance test" as proposed by the taxpayer law firm was accepted and only those services as "utilized *in* India" were subjected to income tax,[106] and the income as returned by the law firm in its income tax returns was accepted as correct.

To overcome *Clifford Chance*, the Parliament again amended section 9 by passing the Finance Act of 2010, which removed the explanation reproduced above and replaced it, with retrospective effect from July 1, 1976, with a new explanation—

> "For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (*v*) or clause (*vi*) or clause (*vii*) of sub-section (1) and shall be included in the total income of the non-resident, **whether or not—**
>
> **(i) the non-resident has a residence or place of business or business connection in India; or**
>
> **(ii) the non-resident has rendered services in India**"[107] (Emphasis Added)

Clause (*i*) of this new explanation is saying the exact same thing as the previous explanation did. It is clause (*ii*) which attempts to overrule section 9's interpretation in *Ishikawajma* and *Clifford Chance*. However, the constitutional dimension of section 9's *Ishikawajma* interpretation, followed by the Bombay High Court in *Clifford Chance*, is not something that the Parliament can find a way around simply by amending section 9.

Clause (*ii*) makes it irrelevant whether the nonresident has rendered services in India in order for those services to be taxed in India. But there must still be a connection between the income sought to be taxed and the place where it accrues or arises. If a nonresident does not render any service in India, nevertheless to an Indian client, it is hard to see how that nonresident can be compelled to pay tax on that income unless there is an Indian connection involved.

As a thought experiment, one may apply this new Explanation to *Clifford Chance*. A law firm resident in U.K.

is advising its Indian clients on English Law. In the first case, say the advice is tendered on phone or by email, and the member of the firm tendering the advice is sitting in his office in London. After legal services are tendered, his fee is wired from India into the firm's bank account in London. In the second case, a member of the firm flies to India and advises the clients in say, New Delhi or Bombay, and is then paid for his services in India. In the second case the presence of this professional in India is sufficient to create the necessary territorial nexus for his income to be taxed. There is no quarrel with this proposition, and this much was conceded by the taxpayer in *Clifford Chance* as well.[108] But is the Parliament's intention, by this new explanation, to tax the income of the firm earned in the first case?[109] This is where the constitutional dimension of section 9's interpretation comes into conflict with the text of the Explanation as inserted by Finance Act, 2010.

Constitutional Dimension, Withholding Tax Requirement and Territorial Nexus

In *Vodafone*, Justice Radhakrishnan in his concurrence, had accepted the territoriality argument in context of section 195.[110] This particular provision has been subject to interpretation before *Vodafone* in *Commissioner of Income Tax v. Eli Lilly and Company*[111] and *GE India Technology Centre v. Commissioner of Income Tax*,[112] where territorial nexus has been interpreted to be part of section 195 as well, thus making the principle of territoriality a part of not just section 9 but section 195 as well.[113]

In *Eli Lilly* a foreign company entered into a joint venture with an Indian company and seconded four of its employees to the joint venture.[114] The issue in this case was, "… whether the [tax-deduction at source] provisions under the Income Tax Act, 1961 are applicable to payments made abroad by the foreign company, which payments are for income chargeable under the head 'Salaries' and which are made to expatriates who had rendered services in India?"[115] As per the Income Tax Act, the appellant company was required to deduct income tax from the salary paid to these four employees at the time of making payment.[116] Part of the salary was paid in India, from which tax was deducted at source.[117] But part of the salary was paid outside India in foreign currency.[118] The taxpayer (in this case the entity required to deduct tax at the time of payment of salary) took the position that in regard to payment of salary outside India, no tax was required to be deducted.[119] They also argued that tax deduction at source provision could not have extra-territorial operation.[120]

Speaking generally in context of extra-territorial operation of the Income Tax Act, Justice Kapadia (as he then was) held that, "… given a sufficient territorial connection or nexus between the persons sought to be charged and the country seeking to tax him, income tax may extend to that person in respect of his foreign income."[121] Specifically in context of the issue raised in this case, it was held that, "… **if the payments of home salary abroad by the foreign company to the expatriate has any *connection or nexus with his rendition of service in India* then such payment would constitute income which is deemed to accrue or arise to the recipient in India as salary earned in India** in terms of Section 9(1)(*ii*) …"[122] But most importantly, examine the following holding of the Court which clearly gives a constitutional dimension to section 9's interpretation—

> "Lastly, on the question of extraterritorial operation of the Income Tax Act, 1961, it may be noted that **the 1961 Act has extraterritorial operation in respect of the subject-matters and the subjects which is permissible under Article 245 of the Constitution** and the provisions are enforceable within the area where the 1961 Act extends through the machinery provided under it."[123] (Emphasis Added)

As it happened, on facts it was found that the four seconded employees were paid in India and outside India for work that they had performed in India.[124] They had never actually done any work for the foreign company.[125] Accordingly, the income was taxable in India, and the taxpayer was held liable to deduct tax before payment of salary.[126]

*Eli Lilly*is rather similar to *Agassi v. Robinson*[127] where the question of law before the House of Lords was regarding interpretation of sections 555 and 556 of the Income and Corporation Taxes Act of 1988.[128] Andre Agassi, the famous tennis player and not a resident in U.K. was sought to be taxed in U.K. for money that he had received against certain commercial endorsement activities that were done in U.K., but the payment for which he had received outside U.K.[129] By majority it was held that the payments received by foreign sportspersons in connection with their *commercial activities within U.K.* should be subject to taxation in U.K.[130] Note here that what is relevant for taxing the income of a nonresident sportsperson in U.K. is the fact that the activities from which income accrued or arose were carried on *within U.K.* The identity of the person making the payment is irrelevant.[131] Even the dissenting judge accepted the principle that the "fundamental statutory purpose" is to "tax economic activity" that takes place *within U.K.*[132] The concurring judge also accepted this "*within U.K.*" principle.[133]

A closer reading of the majority opinion, however, discloses that the House of Lords was more concerned about the possibility of tax evasion should they hold otherwise.[134] The Revenue argued that foreign sportspersons earning money from commercial sponsorship contracts connected with their professional activities in United Kingdom could easily avoid paying income taxes in United Kingdom by having the money paid to them by foreign companies.[135] The House bought this argument.[136] This particular part of the judicial reasoning in *Agassi* requires a critical look, but doing so is beyond the brief of this paper.

In *GE India*, the appellants were distributors of prepackaged shrink wrapped standardized software from Microsoft and other suppliers outside India.[137] They had made payments to the software suppliers, which they said represented purchase price of the software,[138] and which the Revenue said constituted royalty that could be deemed to arise or accrue in India.[139] On appeal, the Commissioner of Appeals upheld the Revenue's position,[140] but on further appeal the Income Tax Appellate Tribunal reversed.[141]

On appeal before the Karnataka High Court, Revenue changed its stance and argued that unless GE India obtains a permission for nondeduction of tax at source from the Income Tax Department,[142] it cannot contend that the payment made to the nonresident does not give rise to income taxable in India.[143] The High Court accepted Revenue's position. On appeal, the Supreme Court reversed. Speaking for the Court, and interpreting section 195, Chief Justice Kapadia held the expression "*chargeable under the provisions of the Act*" means that a person making a payment to a nonresident is not liable to deduct tax, "… if such sum is not chargeable to tax under the [Income Tax] Act."[144] Rejecting the Revenue's position as one that "obliterates" the expression "chargeable under the provisions of the Act"[145] it was held that—

> The interpretation placed by the Department would result in a situation where even when **the income has *no territorial nexus* with India or is not chargeable in India,** the Government would nonetheless collect tax.[146] (Emphasis Added)

Interpretation of the Territoriality Clause of the Constitution

Finally we may examine *GVK Industries v. Income Tax Officer*.[147] *GVK Industries* was decided on March 1, 2011, by a unanimous Constitution Bench of five judges. The judgment of the Court was delivered by Justice Sudershan Reddy.[148] This case directly dealt with the question of Indian Parliament's constitutional competence to legislate with respect to "aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India."[149] The constitutional questions in this case arose directly from the Territoriality Clause.[150] Note that "territory" of the Indian Union is defined in article 1 of the Indian Constitution.[151]

The legal provision out of which the constitutional dispute arose was again section 9 of the Income Tax Act acting under which the respondent Income Tax Officer had decided that the appellant was liable to withhold certain portions of money being paid to a foreign company.[152] The taxpayer challenged the order of the Income Tax Officer, as well as the constitutional validity of a part of section 9 before the Andhra Pradesh High Court.[153] Relying on a three-judge bench decision of the Supreme Court in *Electronic Corporation of India v. CIT*[154](hereinafter "*ECIL*"), the High Court rejected the constitutional challenge.[155] On appeal, the Supreme Court constituted a Constitution Bench of five judges to examine the constitutional questions that arose.[156] As it happened, the constitutional questions in *ECIL* also arose out of section 9 of the Income Tax Act.[157] It would be worth mentioning that before the Supreme Court, the taxpayer had actually withdrawn its constitutional challenge to section 9 and argued only the nonapplicability of section 9 to the facts of its case.[158] But after being so "pressed" by the Attorney General, the Constitution Bench agreed to "… consider the validity of the requirement of a relationship to or nexus with the territory of India *as a limitation on the powers of Parliament* to enact laws pursuant to [the Territoriality Clause] of the Constitution."[159]

Now, the Court was of the view that there could be three possible positions with respect to limitations on Parliament's legislative competence under the Territoriality Clause.[160] One could be that the "aspect or cause" on which the law is being enacted must "occur, arise or exist or may be expected to do so" *solely within India*.[161] Second was that Parliament was competent to legislate on extra-territorial "aspects or causes" so long as they had or were expected to have "*significant or sufficient impact* on or effect in or consequence for" India.[162] Lastly, if these "aspects or causes" had "*some impact or nexus*" with India, the Parliament would have competence.[163] The Attorney General was of the view that the Parliament had the competence to enact a law *for* any territory notwithstanding the fact whether it was Indian territory or not.[164]

An important distinction needs to be made at this point. Laws made *for* territory that is not Indian territory and law *having operation* in territory that is not Indian territory are two very different things. The founding fathers and mothers of the Constitution were aware of this distinction.[165] The distinction was also made in *ECIL*.[166]

The question in *GVK Industries* was not regarding the restrictions on legislative competence of the Parliament in context of law *having extra-territorial operation*. This distinction was made very clear by the Court in beginning of its opinion.[167]

In *ECIL*, speaking for the Court, Chief Justice Pathak had put in place the "nexus theory," which suggested that Indian Parliament will have no power to legislate such laws which bear *no relationship to or nexus with* India.[168] In *GVK Industries*, the question arose as what kind of nexus is sufficient as per the *ECIL* standard.[169] The first position, which held that the "aspect or cause" on which the law is being enacted must "occur, arise or exist or may be expected to do so" *solely within India*, being based on an incorrect reading of *ECIL*'s holding, was rejected.[170] This error, Court held, was a result of faulty textual interpretation on the Territoriality Clause.[171] The Attorney General's position, which held that the Parliament had the competence to enact a law *for* any territory notwithstanding the fact whether it was Indian territory or not, was also rejected[172] for it resulted in claiming "dominion over" a foreign territory and negated "the principle of self-determination of the people who are nationals of such foreign territory" and the principle of peaceful coexistence of nations.[173] In the end, the Court accepted the third position, which held that if these "aspects or causes" had "*some impact or nexus*" with India, the Parliament would have competence to enact an extra-territorial law.[174] As for the standard by which this "some impact or nexus" was to be judged, the Court held that "the connection to India" should be "real or expected to be real, and not illusory or fanciful."[175]

Conclusion

Even though the taxpayer dropped the legislative competence challenge in *GVK Industries*, the Revenue insisted and the Court agreed to examine the question of the extent to which the Indian Parliament could enact an *extra-territorial law*. The key to answering this question lay in the Territoriality Clause, and the Court went into textual as well as structural interpretation on this clause to answer this question. As to a law having *extra-territorial operation*, the Territoriality Clause was clear—the Parliament can enact such laws. As far as the Constitutional Dimension of section 9's interpretation is concerned, there is certainly no doubt that this provision can has extra-territorial operation. Take for example, once again, *Eli Lilly*.

The taxpayers in that case never argued that the withholding tax requirement (*i.e.*, the requirement to deduct income tax or tax-deduction at source (TDS) at the time salaries are paid to employees) is an *extra-territorial law*. In fact, they categorically argued that the TDS provisions could not have *extra-territorial operation*.[176] The issue framed in that case was also about extra-territorial operation of the TDS provisions and not whether they could be so enacted or not.[177] On the question of extra-territorial operation of the Income Tax Act, Justice Kapadia (as he then was) accepted the standard of *sufficient territorial connection or nexus*[178] and held that Income Tax Act can have extra-territorial operation to the extent allowed by the Territoriality Clause.[179] On facts, the foreign entity that had paid the salary (albeit abroad) to its seconded employees in India was held liable to deduct the income taxes payable in India for the work for which they were paid was done in India.[180] In a previous part of this paper, the similarity between *Eli Lilly* and the English case of *Agassi v. Robinson* has already been examined.

It would be profitable to note that the acceptance of the *sufficient territorial connection or nexus* standard in *Eli Lilly* was in context of the Income Tax Act having *extra-territorial operation*, whereas the *some impact or nexus* standard accepted in *GVK Industries* was in context of Indian Parliament's competence to enact an *extra-territorial law*. It is important to keep this crucial distinction in mind. While *some impact or nexus* standard is certainly wider than the *sufficient territorial connection* standard, both exist in two different domains.

As regards the *extra-territorial law* holding in *GVK Industries* is concerned, two positions could be taken. One way to read this holding is to say that if the Indian Parliament wants to tax a transaction wherein all parties to the transaction are resident in foreign countries, if the subject of such transaction does not have any nexus with the territory of the Indian Union, the Parliament lacks the legislative competence to tax it. This reading of *GVK Industries* gives more importance to the subject of the transaction as compared to parties engaged in the transaction to create territorial nexus which then gives the Parliament the requisite legislative competence. This reading would be in accordance with the standard that it is not the entity but the transaction that is more important. If the transaction involves the transfer of an asset situated in India by a person who owns that asset to a buyer who wishes to acquire this asset, the Indian Parliament can tax the income (including, but perhaps not limited to, capital gains) arising out of this transaction. But if the transaction involves the transfer of an asset situated outside India by an entity situated outside India to an entity situated outside India, it is hard to see by what principle of constitutional law the Indian Parliament can claim the necessary legislative competence to tax this transaction. *Wallace Brothers*, *Ishikawajma*, *Hyundai* and *Vodafone* all stress on the location of the subject of the transaction and not the entity. All these cases read with *GVK Industries* interpretation of the Territoriality Clause suggest that any income that arises out of economic activity done within the territory of India is subject to taxation in India. The location of the entity responsible (as in the case of TDS) or the entity actually liable for paying such income tax is irrelevant. This is the rule not just in India, but also in England.

Another way to read this holding is to say that the requisite nexus is to be created by looking first and foremost on the parties engaged in the transaction. If both parties are residents of foreign countries, *i.e.*, are not Indian subjects, the inquiry ends, and the Parliament does not have the requisite legislative competence to tax the transaction. This reading assumes two things. First, that the transaction originated outside the territory of Indian Union and was also concluded outside the territory of the Indian Union. Thus, the location of the parties engaged in the transaction is the sole factor that is used to create the nexus. The second reading is clearly not in accordance with the consistent jurisprudence in *Wallace Brothers*, *Ishikawajma*, *Hyundai* and *Vodafone*, and lastly the constitutional interpretation in *GVK Industries*.

The 2012 Amendment inserts "Explanation 5" to section 9(1)(i) with retrospective effect from April 1, 1962.[181] This explanation "clarifies" that, "… an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India." This provision creates two legal fictions. One of course is the retrospective effect, which necessarily is a legal fiction.[182] The other fiction is equating shares for a foreign company with capital assets and then deeming that they are situated in India. Speaking of legal fictions, we may briefly note a three-judge bench decision of the Supreme Court of India in *Bharat Sanchar Nigam Ltd. v. Union of India.*[183] In context of indirect taxation and article 366(29A) of the Constitution, Justice Ruma Pal observed that deeming fictions of law do not grant licenses to assume anything in order to fit a transaction within a taxation statute.[184] The appellants in *Ishikawajma* had also submitted that, "… a legal fiction raised under the Act cannot be pushed too far."[185]

Speaking in the context of a constitutional challenge mounted on grounds of territoriality, the Privy Council in *Wallace Brothers* created the test of locating the territory where "major portion of the income of the company arose" in order to establish the nexus required to levy income tax. Speaking specifically in context of section 9, a Division Bench of the Supreme Court of India in *Ishikawajma* stressed that the nexus must be direct and must be between the subject of the transaction and the authority to tax. This was stressed again in *Hyundai* and then again in *GVK Industries*. For such levy to survive judicial review, sufficient territorial nexus between the income sought to be taxed and the authority to tax that income must be demonstrated before the courts. If the income does not accrue or arise within the territory of the Indian Union, it cannot be said that the Parliament has the necessary legislative competence to levy a tax on this transaction.

In *Vodafone*, a substantial constitutional argument based on the Territoriality Clause was not made. The assessee never argued that the levy suffers the infirmity of not having sufficient territorial nexus. The whole exercise was concentrated around interpretation of section 9. Responding to these arguments, Chief Justice Kapadia observed that, "… in case of a non-resident, unless the place of accrual of income is within India, [the assessee] cannot be subject to tax"[186] since any other holding would render the "capital asset situate in India" as nugatory.[187] Justice Radhakrishnan also observed that section 9 is not applicable to income arising from an indirect transfer of capital asset in India.[188]

It is submitted that the Territoriality Argument is a viable argument that could have been made in *Vodafone* itself, which perhaps would have resulted in the constitution of a five-judge bench. Now that section 9 has been retrospectively amended by the 2012 Amendment, this argument becomes even more important to be made before the Supreme Court.

The Territoriality Argument, if accepted by the Court, would result in a substantial restriction on Indian Parliament's legislative competence to amend, retrospectively or otherwise, section 9 of the Income Tax Act. Once it is held that an offshore transaction that does not have any effect, or has at most an indirect effect, on the territory of the Indian Union or on the interest/welfare/well-being/security of India and Indians, this effect being necessary to establish the requisite nexus for the purpose of Territoriality Clause, and thus could not be taxed by the Income Tax Act, this would put such a transaction completely outside the scope of not just the Income Tax Act but the constitutional competence of the Indian Parliament to enact a law to tax such income in the first place. If the Indian Parliament does not have the requisite constitutional competence to tax the income arising out of a transaction, it is inconceivable that such constitutional competence can be created merely by an amendment, retrospective or otherwise, of the Income Tax Act.

ENDNOTES

1 (2012) 6 SCC 613 (India).

2 *Id*. at 673. *See also* Government of India, Draft Report on Retrospective Amendments Relating to Indirect Transfers, 16 (2012) [hereinafter Shome Committee Report], *available* at *www.finmin.nic.in/the_ministry/dept_revenue/draft_report_IT.pdf*, J. Venkatesan, *Parliament can amend law to remove basis of judgment, say legal experts*, The Hindu, *www.thehindu.com/news/national/parliament-can-amend-law-to-remove-basis-of-judgment-say-legal-experts/article3009734.ece*, October 22, 2013.

3 Finance Act, 2012, § 4. This provision amends Income Tax Act, 1961, § 9 with retrospective effect from April 01, 1962. The relevant part of the Income Tax Act, § 9, *before* the amendment, provided—"Income deemed to accrue or arise in India.—(1) The following incomes shall be deemed to accrue or arise in India—(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of Income in India or through the transfer of capital asset situate in India." This provision has been reproduced in *Vodafone*, *supra* note 1 at 672.

4 Two senior Supreme Court lawyers, one a known activist and the other, a reputed tax expert, publicly debated the meaning of *Vodafone*. *See* Prashan Bhushan, *Capital gains, everyone else loses*, The Hindu, February 23, 2012, *www.thehindu.com/opinion/lead/article2920912.ece*, where, as the title would suggest, he criticizes the decision as causing massive loss to the public exchequer and Arvind P. Datar, *Vodafone is a misunderstood case*, March 2, 2012, *www.thehindu.com/opinion/op-ed/vodafone-is-a-misunderstood-case/article2951103.ece*, where Datar responds to Bhushan's misreading of the decision and explains why the no income tax could possibly be imposed on this transaction by the Indian Revenue authorities. *See also* Prashan Bhushan, *Legitimising Tax Avoidance*, Economic and Political Weekly, Vol. XLVII, No. 9, 37.

5 *See* Nikhil Kanekal and Kian Ganz, *Vodafone-Hutch deal | Retrospective change to the I-T Act*, LiveMint, March 17, 2012, *www.livemint.com/Politics/n4zC41fejoQ7ObfL4Bue6N/VodafoneHutch-deal--Retrospective-change-to-IT-Act.html*.

6 *Decision to amend IT Act retrospectively 'capricious', says economist Raghuram Rajan*, April 12, 2012, *http://articles.economictimes.indiatimes.com/2012-04-12/news/31331228_1_retrospective-effect-tax-net-vodafone-type-tax-haven*.

7 Venkatesan, *supra* note 2.

8 Shome Committee Report, *supra* note 2, at 17.

9 Venkatesan, *supra* note 2.

10 Ashok Dasgupta, *Retrospective Amendment of I-T Act not specific to Vodafone Case: Pranab*, March 19, 2012, *www.thehindu.com/news/national/retrospective-amendment-of-it-act-not-specific-to-vodafone-case-pranab/article3009809.ece*.

11 G Mahadevan, *Vodafone International Holdings BV—A Critical Review of Pre and Post Ruling Impact and Future Course of Actions*, Business Law International, Vol. 13, Issue 2, 223-234, Matthew Gilleard, *Retrospective Amendments: The Worrying Trend which has taxpayers looking over their shoulders*, International Tax Review Vol. 23, Issue 8, 30, Manoj Mitta, *Pranab's Vodafone plan vulnerable to legal attacks*, March 18, 2012, *http://articles.timesofindia.indiatimes.com/2012-03-18/india/31207164_1_vodafone-case-retrospective-effect-retrospective-amendment*.

12 This view is based on the five-judge unanimous Constitution Bench decision given by the Supreme Court of India in *Shri Prithvi Cotton Mills v. Broach Borough Municipality*, (1969) 2 SCC 283 (hereinafter "*Prithvi Cotton Mills*"). Speaking for the Court, Chief Justice Hidayatullah held, "If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions." Most of the commentary that takes the view that the Indian Parliament's constitutional competence to enact a retrospective law is unlimited cites this case as the *locus classicus* for their proposition or otherwise builds the constitutional argument in Parliament's favor around this case. A deeper examination of whether this view correct or not is beyond the scope of this this article. But assuming this view is correct, it is abundantly clear from *Prithvi Cotton Mills* that without first having the requisite constitutional competence to enact a law on a given subject matter, the Parliament cannot claim the constitutional authority to retrospectively legislate on that subject matter.

13 India Const. art. 245—"Extent of laws made by Parliament and by the Legislature of States.—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by the Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation".

14 India Const. art. 1—"Name and territory of the Union.—(1) India, that is Bharat, shall be a Union of States".

15 Vodafone, *supra* note 1 at 654.

16 *Id*. at 654, 666. Chief Justice Kapadia (majority opinion) found, "To sum up, CGP held 42.34% in [Hutch India] through 100% wholly owned subsidiaries (Mauritius companies), 9.62% indirectly through TII and Omega (i.e. pro rata route), and 15.03% through GSPL route."

17 *Id*.

18 *Id*.

19 *Id*. at 669.

20 *Id*.

21 *Id*. at 671. Chief Justice Kapadia (for majority) held, "…the onus will be on the Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colorable or artificial device."

22 *Id*. at 671.

23 *Id*. at 675.

24 *Id*. at 671.

25 *Id*. at 673.

26 It is submitted that this is the only fair reading of this argument that has been recorded above (see *supra* note 24). It would be an absurdity to read Revenue's argument to mean that it was of the view that if a foreign company holds *any* assets in India, it should be treated as an Indian company. Factually also, in this case, practically all the assets of CGP were underlying Indian assets. In this context, it would be a fair reading of Revenue's argument to mean that only in the event of a foreign company held all or substantial amount of assets in India should it be treated as resident in India for income tax purposes.

27 *See supra* note 25. The point made here was that so long as a capital asset is situated in India is transferred, the income arising out of this transaction is taxable. For the purposes of this article, I do not question this proposition and accept it as true. Furthermore I assume that the Vodafone Int'l-CGP transaction indeed involved transfer of capital assets. However, an admitted fact in this case was that this transaction resulted in an indirect transfer of capital assets that were located in India. Thus Revenue's argument that all indirect transfers of capital assets are also covered by section 9.

28 *Id*. at 683.

29 *Id*.

30 *Id*. Chief Justice Kapadia (for majority), "… under the Indian Companies Act, 1956, the suits of shares would be where the company is incorporated and where its shares can be transferred. In the present case, it has been asserted by [Vodafone Int'l] that the transfer of the CGP share was recorded in the Cayman Islands, where the register of the members of CGP is maintained… In the circumstances, we are not inclined to accept the arguments of the Revenue that the situs of the CGP share was situated in the place (India) where the underlying assets stood situated."

31 *See MacMillan v. Bishopgate* [1995] 1 W.L.R. 387 (Court of Appeal) (Eng.) at 405 where it was held that the relevant law, in order to decide as to who has the title to shares in a company, would be the law of the place where the shares are situated.

32 Vodafone, *supra* note 1 at 736. Justice Radhakrishnan (concurring), "Situs of shares situates at the place where the company is incorporated and/or the place where the share can be dealt with by way of transfer. The CGP share is registered in the Cayman Islands and material placed before us would indicate that the Cayman Islands law, unlike other laws does not

recognize the multiplicity of registers… The facts in this case as well as the provisions of the Cayman Islands Act would clearly indicate that the [CGP] share situates in the Cayman Islands."

33 *Id*. at 755; Income Tax Act § 195 is reproduced *id*. at 754. The relevant part of § 195 provides—"Other sums.—(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or other sum chargeable under the provisions of this Ac (not being income chargeable under the head 'Salaries') shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force …"

34 *Id*. at 757.

35 *Id*.

36 *Id*. Justice Radhakrishnan (concurring), "In order to establish a nexus, the legal nature of the transaction has to be examined and not the *indirect transfer of rights and entitlements* in India." (Emphasis Supplied).

37 *Id*. Justice Radhakrishnan (concurring), "*In the present case, the transaction was between two non-resident entities through a contract executed outside India. Consideration was also passed outside India.* That transaction has no nexus with the underlying assets in India." (Emphasis Supplied).

38 *Id*. at 755.

39 *Id*.

40 Shome Committee Report, *supra* note 2, at 67 (Annexure-1).

41 *Id*. at 69, 70.

42 *Id*. at 27, §4.1.1.

43 *Id.* at 29, § 4.1.2. The stakeholders invoked the Territoriality Clause of the Indian Constitution to argue that all the law enacted by the Indian Parliament must have sufficient territorial nexus with the territory of India. They also invoked the principle of sovereign rights of other nations to support this point. In footnote 10, the Report cites the famous Privy Council case *Wallace Brothers v. CIT* (*infra* note 56) and the unanimous five-judge Constitution Bench decision of the Supreme Court of India given in *GVK Industries v. Income Tax Officer* (*infra* note 79). These two cases make for the core of the Territoriality Argument (*infra* Part II). But these cases are not discussed in the text of the report anywhere. In my opinion, the Territoriality Clause was indeed invoked by the Stakeholders but no attempt has been made to develop a substantive argument by using this clause.

44 *Id*. at 29, § 4.1.2. *See* India Const. art. 14—"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." "State" is defined in article 12 and includes the Indian Parliament.

45 *Id*. at 56, § 4.12. *See* India Const. art. 20, § 1—"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

46 Shome Committee Report, *supra* note 2, at 29, § 4.1.2.

47 *Id*. at 30, § 4.1.2.

48 *Id*.

49 *Id*. at 34 (Recommendation).

50 *Id*. at 33-34, § 4.1.2.

51 *Id*. at 56.

52 Finance Act, § 119, which deals with "Validation of demands, etc., under Income-tax Act, 1961 in certain cases."

53 V. Niranjan, *Defective Validation Clause: The Impact of the Finance Act, 2012 on Vodafone and other Assessees*, (2012) 5 SCC (Journal) 25.

54 *Id*. at 31.

55 *Id*. at 33.

56 *Id*. at 37.

57 *Id*. at 46

58 (2007) 3 SCC 481 (India).

59 The relevant part of section 9 has been reproduced *id*. at 499.

60 *Ishikawajma*, *supra* note 58 at 488.

61 *Id*. at 488. The members of the consortium were the appellant, Ballast Needam International BV, Itochu Corporation, Mitsui & Co. Ltd., Toyo Engineering Corporation and Toyo Engineering (India) Ltd. According to an article in the financial press the consortium was made in Japan, *see*, Sriram Seshadri,*A key ruling on turnkey contracts*, Business Line, January 13, 2007, *www.thehindubusinessline.com/todays-paper/tp-opinion/a-key-ruling-on-turnkey-contracts/article1646323.ece*.

62 *See www.petronetlng.com/contactus.aspx*, (accessed October 28, 2013) for information on Registered and Corporate Office of Petronet LNG (which is in New Delhi).

63 Ishikawajma, *supra* note 58 at 488.

64 *Id*.

65 1948 AIR PC 118 (I. App.). The dispute in this case arose from section 4A of the Income Tax Act of 1922, which provided that if the income of an assessee arising in British India in an assessment year exceeds its income arising outside British India for that assessment year, the assessee will be deemed resident in British India and its entire income would be taxable in British India. The question is this case was whether section 4A was *ultra vires* the legislative competence of Indian Federal Legislature and sections 99(1) and 100 of the Government of India Act, 1935 on the grounds of having extra-territorial operation. Article 245 of the Constitution was modelled on these two provisions. Being a pre-independence decision it is not binding on the Supreme Court of India, though the Court usually has given due respect to all foreign precedents cited before it.

66 *Id*. at 121. Lord Uthwatt (for the Privy Council)—"In their Lordships' opinion—they confine their attention to companies—*the necessity that the territorial connection should be residence at understood for the purpose of the British Income-tax Acts*, is not embedded in the terms of the power." (Emphasis Added).

67 Ishikawajma, *supra* note 58 at 514.

68 (1972) 4 SCC 428 (India).

69 *Id*.

70 *Id*.

71 *Id*. at 429 (Emphasis Added).

72 (2007) 7 SCC 422 (India).

73 *Id*. at 425.

74 *Id*.

75 *Id*. at 427. That the contract between Hyundai Heavy Industries and ONGC was a turnkey contract was a finding of fact that was not disputed at any stage of the litigation.

76 *Id*. at 425.

77 *Id*. at 425-26. Another argument made by Hyundai Heavy Industries based on this divisibility of contract position was that they did not have a permanent establishment (PE) in India. Since the duration or the Indian part of their operations (*i.e.*, installation) was less than nine months they were entitled to exemption under the Convention for Avoidance of Double Taxation.

78 *Id*. at 426.

79 *Id*. (Emphasis Added).

80 *Id*. Justice Kapadia (as he then was) took note of Assessment Officer's view, which was that, "… a part of the profits arising even from Korean operations was taxable in India as such portion of the profits was attributable to the work of installation and commissioning of the platform in Bombay High."

81 *Id*. at 427. The Commissioner of Income Tax (Appeals) was of the view, "… that the activity of designing and fabrication on one hand and the activity of installation and commissioning of platforms on the other hand constituted *one integrated activity*." (Emphasis Added).

82 *Id*. at 428.

83 *Id*.

84 *Id*. at 429.

85 *Id*. at 431.

86 *Id.*

87 *Id*. at 432.

88 One may compare this territoriality principle with the law in United Kingdom where territoriality has been held to be a mere rule of construction and not a rule of constitutional law. *See e.g.*, *Clark v. Oceanic Contractors*, [1983] 2 A.C. 130 at 145. But even so, the legal position in United Kingdom is fairly well settled that unless there is anything expressly contrary in the legislation, the same cannot have extra-territorial effect. Supreme Court of India held similarly in *Commissioner of Wealth Tax v. Consolidated Pneumatic Tools*, *supra* note 68.

[89] Prithvi Cotton Mills, *supra* note 12. *See also Bakhtawar Trust v. M. D. Narayan*, (2003) 5 SCC 298 at 307 (India), Chief Justice Khare (relying on Prithvi Cotton Mills) holding that, "This power to make retrospective legislation enables the legislature to validate prior executive and legislative Acts retrospectively after curing the defects that led to their invalidation and thus makes ineffective judgments of competent courts declaring their invalidity. It is also well settled that a validating Act may even make ineffective judgments and orders of competent courts provided it, by retrospective legislation, removes the cause of invalidity or the basis that led to those decisions." But for a contrary position *see* the dissenting opinion of the single dissenting judge Justice A. N. Sen in a five-judge Constitution Bench decision given in *Lohia Machines v. Union of India*, (1985) 2 SCC 197 (India) at 274, Justice Sen (dissenting) holding that, "To withdraw with retrospective effect the benefit of relief unequivocally granted by the section to an assessee who qualified for such relief and was lawfully entitled to enjoy the benefit of such relief and has in fact in many cases enjoyed the benefit for all these years, prior to the present amendment with retrospective effect, cannot in my opinion, be said to be on any just and valid grounds and cannot be considered reasonable."

[90] *Infra* note 147.

[91] The Doctrine of Basic Structure was first laid down by a thirteen judge bench of the Supreme Court in *Kesavanand Bharti v. State of Kerala*, (1973) 4 SCC 225 (India). For a detailed discussion of the *ratio decidendi* of this case *see* Joseph Minattur, *The Ratio in the Kesavananda Bharti Case*, (1974) 1 SCC (Journal) 73, Nani Palkhiwala, *Fundamental Rights Case: Comment*, (1973) 4 SCC (Journal) 57. On standards of judicial review in Indian Constitutional Law generally and 'basic structure review' specifically *see* Sudhir Krishnaswami, Democracy and Constitutionalism in India—A study of the Basic Structure Doctrine (2009).

[92] *Supra* note 58 at 481.

[93] *See* S. S. Palwe, *'Source Rule' reaffirmed*, Business Line, March 01, 2007, *www.thehindubusinessline.com/todays-paper/tp-economy/source-rule-reaffirmed/article1650977.ece*.

[94] Income Tax Act, 1960, § 9(2), Explanation (as inserted by the Finance Act, 2007).

[95] [2009] 111 (1) Bom.L.R. 428 (Bombay High Court).

[96] *Id*. at 440, ¶ 35. The first question before the High Court was to see whether fee charged for composite activity is chargeable to tax. Whether or not the contract was of a composite or divisible nature was also a question raised and argued in *Ishikawajma* case. *See Ishikawajma*, *supra* note 58 at 500, ¶¶ 30-32, 501, ¶¶ 39-41. The attempt throughout, on assessee's part was to establish that the turnkey contract was, for taxation purposes, a divisible contract and on Revenue's part that it was in indivisible contract. One may note that a very similar line of argumentation was advanced by Revenue in *Vodafone* as well, except this time the indivisibility pressed into service was not of the contract but of the transaction *i.e.*, the location of the underlying asset being in India was sufficient to create territorial nexus. In *Clifford Chance*, the location of projects in regards to which legal services were tendered being located in India was sufficient to create territorial nexus. This argumentation strategy and the assessee's response to it deserves to be examined a little more and deserves more than a footnote, but being beyond the brief of this paper. For a brief discussion on this divisibility aspect, *see* Sriram Seshadri, *A key ruling on turnkey contracts*, Business Line, January 13, 2007, *www.thehindubusinessline.com/todays-paper/tp-opinion/a-key-ruling-on-turnkey-contracts/article1646323.ece*.

[97] *Id*. at 432.

[98] *Id*. at 433.

[99] *Id*. The assessee returned a total income of INR 50,887,950/-.

[100] *Id*. at 434. The assessee's returned income was rejected and tax was levied on INR 172,638,634/-.

[101] *Id*. at 435, ¶ 22 read with 436, ¶ 29. Assessee argued that for the income of a nonresident to be taxed in India, firstly the income must accrue or arise in India, and secondly, only such part of income as is reasonably attributable to the operations carried on in India could be taxed. Relying in *Ishikawajma*, the assessee argued one must look at the place where services were performed and not the place where the services were utilized in order to see whether the income accrues or arises in India.

[102] *Id*. at 437, ¶ 30. The assessee argued that, "… the presence in India is the criteria in ascertaining the situs and the performance of the service by legal professional."

[103] *Id*. at 437, ¶ 31. Revenue argued that the phrase "attributable to" is wider in its meaning than "derived from."

[104] *Id*.

[105] *Id*. at 440-42.

[106] *Id*. at 442. Justice Daga (for the High Court)—"Thus, the income of the Assessee is charged on hourly basis in India and utilized in India shall only by chargeable to Income Tax Act as disclosed in the return of Income." *See also Barendra Prasad Ray v. Income Tax Officer*, (1981) 2 SCC 693. In this case an English barrister was engaged to argue a patents suit before the Calcutta High Court. With the leave of the Court under section 32 of the Advocates Act of 1961, the Barrister appeared before the High Court. The question was whether income earned by way of fee by the Barrister could be taxed in India under section 9 of the Income Tax Act of 1961. A unanimous three-judge bench, after *first* finding that there existed a *real and intimate connection* answered in the affirmative.

[107] Income Tax Act, 1960, § 9(2), Explanation (as substituted by the Finance Act, 2010).

[108] *Clifford Chace*, *supra* note 95 at 435, ¶ 22.

[109] Another connected issue is whether the first case would be governed by the Income Tax Act or the Double Taxation Avoidance Agreement. *See, for example*, T. N. Pandey, *Proposals not backed by reasons*, Business Line, April 07, 2007, *http://thehindubusinessline.come/todays-paper/tp-opinion/proposals-not-backed-by-reason/article1654627.ece*.

[110] *Supra* note 34.

[111] (2009) 15 SCC 1 (India).

[112] (2010) 10 SCC 29 (India).

[113] *Id*. at 34. Chief Justice Kapadia (for the Court)—"While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. *Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of [Double Taxation Avoidance Agreement] are also relevant, while applying tax deduction at source provisions*." (Emphasis Added) and at 35, "… Section 195 has to be read in conformity with the charging provisions i.e. Sections 4, 5 and 9."

[114] *Supra* note 111 at 8-9.

[115] *Id*. at 21.

[116] *See* Income Tax Act, 1961, § 192. Relevant part of §192 (reproduced *id.* at 20) provides—"Any person responsible for paying any income chargeable under the head 'Salaries' shall, at the time of payment, deduct income tax on the amount payable at the average rate of income tax computed on the basis of rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year."

[117] *Supra* note 111 at 9.

[118] *Id*.

[119] *Id*. at 13. Counsel for the taxpayer argued that, "… on facts, the payment of salary by the foreign company in Netherlands was not on behalf of or on account of the tax deductor assessee herein and, consequently, it was not under statutory obligation to deduct tax from the entire salary including the home salary, particularly when the expatriate(s) did not exercise the option under Section 192(2) requiring the tax deductor assessee herein to deduct tax from their aggregate salary income."

[120] *Id*.

[121] *Id*. at 23.

[122] *Id*. at 24 (Emphasis Added).

[123] *Id*.

[124] *Id*. at 28.

[125] *Id*.

[126] *Id*.

[127] [2006] 1 W.L.R. 1380 (House of Lords) (Eng.).

[128] *Id*. at 1382. Lord Scott of Foscote (for Lord Nicholls of Birkenhead, Lord Hope of Craighead and himself)—"This tax appeal raises a point of construction of section 555 and 556 and, in particular, the question whether section 555(2)

should be given its literal effect or a limited effect so as to exclude from its scope persons who neither reside or carry on any trade in the United Kingdom."

[129] *Id*. at 1382-83.

[130] *Id*. at 1386-87. Lord Scott of Foscote (for Lord Nicholls of Birkenhead, Lord Hope of Craighead and himself)—"My Lords, I have come to the clear conclusion in the present case that the legislative intendment in relation to section 555 and 556, and their statutory predecessors in the 1986 Act, was that foreign entertainers and sportsmen who, or whose controlled companies, receive payments *in connection with their commercial **activities in the United Kingdom*** should be subject to the section 18(1)(a)(iii) charge to tax and that the territorial principle cannot be applied so as to limit the effect of the clear language of section 555(2)." (Emphasis Added).

[131] *Id*. at 1387. Lord Scott of Foscote (for Lord Nicholls of Birkenhead, Lord Hope of Craighead and himself)—"The identity of the payer is, in my opinion, as a matter of construction of section 555(2), irrelevant to the question."

[132] *Id*. at 1389. Lord Walker of Gestingthrope (dissenting)—"The fundamental statutory purpose [the Revenue argued] was to tax economic activity which takes place in the United Kingdom. I have no difficulty with this last submission …"

[133] *Id*. at 1391. Lord Mance (concurring)—"In short, there is no incongruity about a primary tax charge being levied on a sportsman or entertainer who performs an activity within the United Kingdom and receives or is treated as receiving a payment from whatever source for that activity."

[134] *Id*.

[135] *Id*. at 1386.

[136] *Id*. at 1387. Lord Scott of Foscote (for Lord Nicholls of Birkenhead, Lord Hope of Craighead and himself)—"I am impressed by revenue's point that, if Mr. Agassi is right, the ease with which the tax liability imposed by section 556 could be avoided simply by ensuring that the potentially taxable payments were made by foreign entities with no residence or trading presence in this country would render payment of tax to all intents voluntary. That cannot, in my opinion, have been Parliament's intention."

[137] *Supra* note 112 at 31-32.

[138] *Id*. at 32.

[139] *Id*.

[140] *Id*.

[141] *Id*.

[142] *Id*. This can be done by making an application to the concerned Income Tax Officer under section 195(2).

[143] *Id*.

[144] *Id*. at 33-34. Chief Justice Kapadia also observed that section 195 is applicable not only to "pure income payments" but also to "composite payments that have an element of income embedded or incorporated in them."

[145] *Id*. at 35.

[146] *Id*. at 36.

[147] (2011) 4 SCC 36 (India).

[148] *Id*. at 48.

[149] *Id*. at 48, 49. Justice Reddy (for the Court) framed two questions. One of those questions was, "Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or cause that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequence for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, well-being of, or security of inhabitants of India, and Indians?" The other question dealt with the Indian Parliament's constitutional competence, "… to legislate "for" any territory, other than the territory of India or any part of it?"

[150] *Id*. at 49.

[151] India Const. art. 1. Art. 1, § 3 provides that the territory of "Indian Union" (article 1(1) declares that India is a "Union of States") is comprised of the territory of its States, territory of its Union Territories specified in the First Schedule of the Constitution and such other territories as may be acquired.

[152] GVK Industries, *supra* note 147 at 50.

[153] *Id*. The taxpayer challenged constitutional validity of sec. 9(1)(vii)(b) of the Income Tax Act on two grounds—lack of legislative competence on Parliament's part and violation of the Equality Clause (*i.e.*, art. 14) of the Constitution.

[154] (1989) Supp (2) SCC 642 (India). The Bench comprised on Chief Justice R. S. Pathak, Justice Ranganath Misra and Justice M. N. Venkatachaliah.

[155] *GVK Industries*, *supra* note 147 at 50

[156] *Id*. at 51.

[157] *Id*.

[158] *Id*.

[159] *Id*. (Emphasis Added).

[160] *Id*. at 49.

[161] *Id*.

[162] *Id*.

[163] *Id*.

[164] *Id*.

[165] *Id*. at 69. Justice Reddy discusses the drafting history of the Territoriality Clause and finds that the use of the phrase "extra-territorial operation" as against "extra-territorial laws" during the drafting stage was clear evidence of the fact that the "drafters were acutely aware of the difference" between making of laws and operation of laws.

[166] *Id.* at 53. Justice Reddy (for the Court), "We are of the opinion that the distinction drawn in *ECIL* between 'make laws' and 'operation' of law is a valid one, and leads to a correct assessment of the relationship between clauses (1) and (2) of Article 245."

[167] *Id*. at 51. Justice Reddy (for the Court), "A further clarification needs to be made before we proceed. **The issue of whether laws the deal entirely with aspects or causes that occur, arise or exist, or may be expected to do so, within India, and *yet require to be operated outside the territory of India* could invalidated on the grounds of such extra-territorial operation is not before us**." (Emphasis Added).

[168] *GVK Industries*, *supra* note 147 at 53.

[169] *Id*.

[170] *Id*. at 60-61.

[171] *Id*. at 61. Justice Reddy (for the Court), "Such a narrowing of the ambit of clause (1) of Article 245 would arise by substituting 'in' or 'within,' as prepositions in the place 'for' in the text of Article 245 … The consequence of such a substitution would be that Parliament could be deemed to not have the powers to enact laws with respect to extra-territorial aspects or causes, even though such aspects or causes may be expected to have an impact on or nexus with India, and laws with respect to such aspects or causes would be beneficial to India."

[172] *Id*. at 63. Justice Reddy (for the Court), "Is Parliament empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India? The answer would have to be no."

[173] *Id*. at 63-64, 79. Justice Reddy (for the Court), "… **we must hold that Parliament's power to enact legislation, pursuant to clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact or nexus with India**." (Emphasis Added).

[174] *Id*. at 78-79.

[175] *Id*. at 79.

[176] Eli Lilly *supra* note 112 at 13.

[177] *Id*. at 21 and 23.

[178] *Id*. at 23. Justice Kapadia (for the Court), "*One the question of extraterritorial operation of the [Income Tax] Act* the general concept as to the scope of income tax is that, given a sufficient territorial connection or nexus between the person sought to be charged and the country seeking to tax him, income tax may extend to that person in respect of his foreign income." (Emphasis Provided). Justice Kapadia was citing with approval a passage from Kanga and Palkhiwala, The Law and Practice of Income Tax

[179] *Id*. at 24. Justice Kapadia (for the Court), "Lastly, on the question of extra-territorial operation of the Income Tax Act, 1961 it may be noted that the 1961 Act has extraterritorial operation in respect of subject-matters and the subjects which is permissible under Article 245 of the Constitution."

[180] *Id*. at 28.

[181] Finance Act 2012, § 4(a).

[182] *See* Niranjan, *supra* note 53.

[183] (2006) 3 SCC 1 (India).

[184] *Id*. at 30. Justice Rume Pal (Justice Bhandari and herself), "By introducing

separate categories of 'deemed sales,' the meaning of the word 'goods' was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remains static. The Courts must move with the times. But the Forty-sixth Amendment does not give a license, for example, to assume that a transaction is a sale and then to look around for what could be the goods." (Emphasis Added, Internal Citations Omitted).

[185] *Ishikawajma*, *supra* note 58 at 492.

[186] *Vodafone*, *supra* note 1 at 672.

[187] *Id*. at 673.

[188] *Id*. at 750.