

## **Vodafone Not Liable Under Retrospective Law: Soli Dastur**

Shri. S. E. Dastur, eminent Senior Advocate, gave a lecture yesterday (20.3.2012) where he meticulously analyzed the Finance Bill 2012 and provided brilliant insights into its implications.

On the retrospective amendments made to overcome the judgement of the Supreme Court in Vodafone International vs. UOI 341 ITR 1, Mr. Dastur pointed out that while parliament had the power to enact retrospective legislation, there were three aspects to be considered.

The *first* was whether a retrospective amendment could affect the party itself who had secured a favourable verdict from the Court.

The *second* was whether such an amendment was constitutional in the peculiar facts of Vodafone's case.

And the *third* was whether the proposed amendments achieved the object of bringing an off-shore transaction to tax.

On the first aspect, Mr. Dastur suggested that while the retrospective law could affect other parties, it could not affect the party who had secured a favourable verdict from the Court. In support of this proposition, he cited the judgement of the Supreme Court in Re Cauvery Water Disputes Tribunal 1993 SCC Supl. (1) 96 where it had been held:

*“The legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large but it cannot set aside an individual decision inter-parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or Tribunal”*

(see also S.R. Bhagwat & Ors vs The State Of Mysore 1996 AIR 188)

Mr. Dastur suggested that the better course of action would have been for the Government to have waited till the retrospective amendments became law and then filed a review petition pointing out that the basis of

the law had changed and so the judgement required review. He cited the judgement in Raja Shatrunji Vs. Mohammad Azmat Azim Khan (1971) 2 SCC 200 where it had been held that one of the grounds for review is an error apparent on the face of record and where a statute has been amended retrospectively, a judgment applying the unamended law would constitute an error apparent on the face of record.

He stated that the fact that the Government had already filed a review petition, which had been dismissed, raised the issue as to whether a second review petition was maintainable.

On the issue of constitutional validity of the amendment, Mr. Dastur pointed out that the case was not one of an assessee who had earned the income (the recipient) but was one of a payer who was sought to be held liable for non-deduction of tax at source.

He explained that Vodafone was being treated as the statutory agent of the Government for purposes of TDS. He said that the principal could not tell his agent that though the agent was right in not deducting tax at source on the basis of the law as it then stood, the agent should now pay up because of a change in law made by the principal. That would be contrary to Article 14 of the Constitution as being harsh, unreasonable and arbitrary opined Mr. Dastur. It would be *"really unjust and contrary to all principles of equity"* for a party who has not deducted tax at source – and who according to the Supreme Court was right in doing so – to now be called upon to pay the tax said Mr. Dastur.

On the third aspect, Mr. Dastur explained that to overcome Vodafone, two approaches had been taken. The first was the proposed amendment of s. 2(47) and 2(14) and the second was the proposed insertion of Explanations 4 & 5 to s. 9(1)(i). On the first aspect, Mr. Dastur pointed out that s. 2(14) and 2(47) provided that if rights in India are transferred owing to a transfer of an asset outside India, then those rights are deemed to be a capital asset giving rise to capital gains. However, if one confined the capital asset to the "rights" such as the "right to vote", the "right to control" and the "right to carry on business", then as no cost of acquisition can be determined in respect of these rights, there would be no liability as per **B. C. Srinivasa Setty** 128 ITR 294 (SC).

As regards the proposed insertion of Explanations 4 & 5 to s. 9(1)(i) to provide in effect that where there is a share situated abroad in respect of which substantial rights are situate in India, that share is deemed to be situated in India, the problem is as to what is meant by the term "substantially" and "indirectly".

*(Source: itatonline.org)*