

# Tax Hotline

January 30, 2008

## AN UPDATE ON THE RECENT INTERNATIONAL TAX RULINGS IN INDIA

### 1. *The Supreme Court rejects the review petition of the revenue in the case of Morgan Stanley*

The Supreme Court of India (“**Supreme Court**”) dismissed the review petition filed by the Income-Tax Department (“**Revenue Authority**”) in the case of Morgan Stanley & Co. U.S (“**Morgan Stanley**”)<sup>[1]</sup>, relating to taxation of back office operations of foreign companies in India. Thus, the favourable ruling in the case of the outsourcing industry has become the law of the land in India.

The Revenue Authority by means of a special leave petition (“**SLP**”) had initially challenged the ruling of the Authority for Advance Rulings (“**AAR**”)<sup>[2]</sup>, wherein the AAR had ruled that captive service provider would not form a permanent establishment (“**PE**”) of Morgan Stanley.

The SLP filed by the Revenue Authority was disposed off by the Supreme Court<sup>[3]</sup>. While disposing the SLP, the Supreme Court held that services rendered by personnel of the parent company on deputation to the captive service provider would constitute a PE. However, if the personnel of the parent company were engaged in stewardship activities in the captive group company, then the same would not constitute a PE in India. Further, the Supreme Court also held that an arm’s length relationship between a non-resident enterprise and its PE in India absolved the non-resident enterprise from any further profit attribution.

The SC entertains review petitions against its own rulings in very rare cases. The dismissal of the Revenue Authority’s review petition brings with it the much need certainty that was required in relation to taxation of back office operations of foreign companies in India.

### 2. *The Vodafone Saga!*

The Writ Petition filed by Vodafone Essar Limited (“**Company**”) before the Bombay High Court Division Bench (“**High Court**”) against the show cause notice issued by the Revenue Authority is currently sub-judice. The Revenue Authority via the show cause notice had raised a tax demand of approximately US\$ 2.1 billion from the Company.

Hutchison had sold shares of its Cayman Islands holding company to Vodafone International Holdings BV (“**Vodafone International**”), a Dutch Company. The Revenue Authority alleged that Vodafone International had indirectly acquired the beneficial interest in the Company and it would get ownership and control of assets in India. The Revenue Authority also alleged that the Company had a Business Connection with the seller i.e. Hutchison and hence gains earned by Hutchison would be subject to capital gains tax in India. Since Vodafone International had failed to withhold the tax at source, its Indian subsidiary was held to be its ‘agent’ and an ‘assessee (taxpayer) in default’.

The Revenue Authority raised a preliminary objection on the ground of maintainability of the Writ Petition. Writ Petitions are normally entertained inter alia only if all alternative remedies are exhausted or there is prejudice in the minds of revenue. Presently, the High Court has put a stay on the the tax demand raised from the Company and fixed the matter for final hearing on March 10, 2008. A similar case has also been initiated by the Revenue Authority in the case of Genpact, which was the captive outsourcing subsidiary of GE. GE sold a part of its stake to private equity investors. Genpact has filed a Writ Petition which is scheduled to be heard by the Delhi High Court in early February.

This case will have a significant bearing on many inbound investment structures where shares of overseas holding companies are transferred.

- Vivek Mimani, Dhruv Sanghavi & Bijal Ajinkya

[1] (2007) 7 SCC 1

[2] <http://www.nishithdesai.com/tax-hotline/2006/Tax-hotline-Feb22-2006.htm>

[3] <http://www.nishithdesai.com/tax-hotline/2007/Tax-hotline-Jul-9-2007.html>

## Research Papers

### Clinical Trials and Biomedical Research in India

April 22, 2025

### Structuring Platform Investments in India For Foreign Investors

March 31, 2025

### India’s Oil & Gas Sector— at a Glance

March 27, 2025

## Research Articles

### 2025 Watchlist: Life Sciences Sector India

April 04, 2025

### Re-Evaluating Press Note 3 Of 2020: Should India’s Land Borders Still Define Foreign Investment Boundaries?

February 04, 2025

### INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals

January 15, 2025

## Audio

### CCI’s Deal Value Test

February 22, 2025

### Securities Market Regulator’s Continued Quest Against “Unfiltered” Financial Advice

December 18, 2024

### Digital Lending - Part 1 - What’s New with NBFC P2Ps

November 19, 2024

## NDA Connect

Connect with us at events, conferences and seminars.

## NDA Hotline

[Click here to view Hotline archives.](#)

## Video

Vyapak Desai speaking on the danger of deepfakes | Legally Speaking with Tarun Nangia |

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.

**NewsX**

April 01, 2025

**Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business**

March 19, 2025

**SIAC 2025 Rules: Key changes & Implications**

February 18, 2025