

SC Ruling In Mauritius Case To Impact Economic Management Of India!

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BY Shiva Kant Jha

I have heard that the Delhi High Court's decision in Shiva Kant Jha v. Union of India Ors (C W P NO. 5646 of 2000 delivered by the High Court on May 31, 2002) [popularly known as the Mauritius tax treaty case] has been set aside by the Hon'ble Supreme Court. The appeal had been filed by the Union of India. A Mauritius company joined with the leave of the Court for the first time before the Supreme Court.

The Hon'ble High Court had held:

(i) that the Circular issued by the CBDT was ultra vires; hence it was quashed as it was issued by the CBDT in exercise of delegated power; and the CBDT had no jurisdiction to issue instructions de hors the provisions of the Income-tax Act having the effect of taking away the jurisdiction of the quasi-judicial authority

(ii) that a mere production of a purported residential certificate issued by a Mauritian authority could not make the statutory authorities put off their hands: hence the circular could be ultra vires. Conclusiveness of a certificate of residence granted by the Mauritius tax authorities is not contemplated under the treaty or under the Income-tax Act. Whether a statement shall be conclusive or not must be provided for under a legislative act e.g. Indian Evidence Act, not by an executive circular.

(iii) that the authorities have jurisdiction to lift the corporate veil to observe the operative realities to find out if the benefits under the Indo-Mauritius Tax Treaty is wrongfully availed of by those not entitled to them under our statute law.

(iv) that a tax treaty must conform to section 90 of the Income-tax Act, 1961, which does not confer an unguided or unbridled power. As the purpose of entering into a tax treaty is avoidance of double taxation the power in terms of section 90 is to be considered having regard to that.

(v) that the avoidance of double taxation would mean that a person has to pay tax at least in one country. An assessee cannot be held to be entitled to take benefit of the treaty although it neither pays income-tax in India nor in Mauritius. Such an action would be ultra vires.

(vi) that 'An abuse of the treaty or treaty shopping is illegal and thus necessarily forbidden.' 'Treaty Shopping which amounts to abuse of the Indo-Mauritius Bilateral treaty may amount to fraudulent practice and cannot be encouraged.' The company although had obtained residential certificate in Mauritius but had nothing to do therewith and factually. It got itself registered only for the purpose of tax avoidance so as to obtain benefit of the treaty. 'No law encourages opaque system to prevail'

(vi) that 'suggestion to the effect that in such cases (of tax frauds) the attention of the Central Government can be drawn and the matter can be taken up at the government level is not contemplated in the statute. No law encourages opaque system to prevail.'

(vii) That:[the Court observed]:

'We would however like to make an observation that the Central Government will be well advised to consider the question raised by Shri Shiva Kant Jha who has done a noble job in bringing into focus as to how the Government of India had lost crores and crores of rupees by allowing opaque system to operate'

As I am at present in a remote corner of Bihar conducting the activities of the Bhagvadgita Swadhyaya Kendra which I have established I could not be present before the Hon'ble Court. I shall be able to comment on the judgment comprehensively only when I go through it.

But on coming to know the Hon'ble Court's decision setting aside the High Court's judgement with an observation that the High Court had gone wrong on all the points, I feel that the observations and the findings of the High Court summarised above do not survive. This appears to me even without reading the judgement the obvious logical corollaries of the reversal of the Hon'ble High Court's decisions. If that be the

position it is obvious that the Mauritian tax treaty would now become a Noah's arc on which persons of third countries can masquerade to maraud India's resources, and all other tax treaties would become redundant.

The impact of the judgement would be felt in the whole sphere of economic management of our country. The Executive Government and the politicians in power who had brought about, what I as a citizen feel, the loot of the country, can do havoc in many other areas of economic management in this global world without worry. I had taken the whole matter to the Court on behalf of the common people of India: now it is for them to think. I did my duty in the light of my conscience. I had expressed my gratefulness to the greatness of the Court when one of the Hon'ble Judges recognised my right to evaluate the Court's judgement when delivered. I hope someday, if I remain alive and fit, I shall place before the people what this humble citizen of this great Republic did on their behalf, and with what outcome.

The issues involved matters touching international taxation, international public law, constitutional law, and matters to public policy both under our domestic jurisdiction and international public law. The issues involved in this case are of global importance; and the courts of the various jurisdictions in the world would keep on examining them.

Many persons ask me what made me, a comfortable retired officer, to file the PIL before the High Court; and to argue for days before the Courts. I took up the cause for reasons I have recorded in my unpublished autobiography: to quote-

'I told her: Two rickshaw pullers came from Bihar and settled down in the J.J Colony (Jhuggi Jhopari Colony) at the outskirts of New Delhi. By greasing the palms of those who mattered they got two small pieces of plots of lands each measuring 4' x 4'. As they were under obligations to maintain their families they had brought them also. To economize on their resources and to reduce the drudgery of the domestic chores they entered into a gentleman's agreement that whilst lunch is prepared in the house of one, the dinner be in the house of the other. They were good friends and had no reason to doubt good faith of each other. The arrangement worked for sometime. It could not work for all times as one of the two contracting parties developed greed and wanted to take advantage of what was not due under the agreement. He racked his brains for some scheme. He got one, which with Lucifer's logic he pursued for his gains. He not only sent his wife and two children to eat in the house of the other but also sent children of some other persons (for consideration, of course) to eat food as the beneficiaries of the agreement. When questioned, he argued that he was competent to adopt as many children he wished. To make his point solid he would invoke custom of his community. As if it was not itself too much, he sent several ladies whom he described as his wives. They all had, in a sense, certificates evidencing relationship, which entitled them to the benefits under the pact. But this state of affairs could not last long. His friend rightly felt enough was enough. His domestic economy had already crashed. The wreck could have been avoided if he would have listened to his wife's advice to end the gentleman's agreement at the earliest. The original meeting of minds has lost significance. Fraud was evidently at work. After narrating this story I asked my wife: 'Well dear, was it fair and just for the first rickshaw puller to do what he did?' My wife instantly replied: 'It was unfair.'

I have narrated this story in some detail with a purpose. I would recall this case, which I presented before my wife as A Rickshaw Puller Vs A Rickshaw Puller. Thank God! My wife was not proficient at law otherwise she would have dismissed my story with words: 'I don't believe there's an atom of meaning in it'. Her intuitive verdict accorded well with what I felt fair and just. I do not want to be apologetic for testing my legal conclusion in the light of the verdict by a housewife. The most celebrated judgement for all times known to me had been pronounced by Gandhari who told her son when he had come to seek her blessings before leaving for the theatre of the great Mahabharat War. Gandhari said: 'Yato Dharmahstato Jayah (Where dharma is, victory is surely there).' Gandhari was a housewife.

And nearer our own time C.G. Jung said: 'Great innovations never come from above; they invariably come from below'. [from] the much-derided silent folk of the land - those who are less infected with academic prejudices than great celebrities are wont to be.'

I had closed my argument before the Hon'ble High Court with what Lord Nelson had signalled to his fleet in the battle of Trafalgar: 'England expects every one to do his duty'. I had done mine. I had quoted before the Hon'ble Supreme Court from the Bhagvadgita with which I close this note :

***atmai'va hy atmano bandhur
atmai'va ripur atmanah.***

(The views expressed are strictly personal to the author and has nothing to do with the editorial policy of taxindiaonline.com Pvt LTd)