Budget 2021: India Defines “Liable to Tax” – Will It Facilitate or Fuel the Debate on Interpretation of Tax Treaties?

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Introduction

India’s 2021 Finance Bill proposes to add a definition of “liable to tax” in its domestic direct tax law. As per the definition, the term ‘liable to tax’, “*in relation to a person, means that there is a liability of tax on such person under any law for the time being in force in any country, and shall include a case where subsequent to imposition of tax liability, an exemption has been provided.*”[1]

The term ‘liable to tax’ finds mention in domestic law under provisions for untaxed foreign income of Indian citizens[2] and the income of pension funds[3]. Interestingly, both provisions were inserted by the Finance Act, 2020. India’s tax treaties are largely based on the UN or OECD Model conventions, and accordingly, the term “liable to tax” is also mentioned in most of India’s tax treaties with other countries. The stated intention behind the new definition is to clarify its meaning with respect to both the domestic law provisions[4] and tax treaties.[5]

Usually in tax treaties, ‘liable to tax’ is mentioned in the context of the residence requirement under Article 4[6]. It is here that entity classification becomes intertwined with attribution of income. The determination of residence in one of the two Contracting States acts as a *sine qua non* for claiming treaty benefits.[7] Where a person is unable to establish that it is ‘liable to tax’ in the other jurisdiction, it will not qualify to be a resident of that state, and thus will not be entitled to claim treaty benefit under a DTAA.

Indian rulings on “Liable to tax”

Five landmark rulings have shaped the narrative around “liable to tax” in India.

The first one was in the case of *MA Rafik*[8] where the Authority for Advance Rulings (AAR) held that even though there was no tax on the personal income of a UAE citizen, they would be entitled to treaty benefits. This was because the words liable to tax are followed by the words “by reason of his domicile, residence, place of management or any other criterion of a similar nature”, and these words cannot be ignored while interpreting the treaty.

The second was the case of *Cyril Eugene Pereira*[9] where this view was negated, and it was ruled that treaty benefits were not available if no taxes were paid.

Then came the landmark ruling of the Supreme Court in the case of *Azadi Bachao*[10]. The Supreme Court ruled it is a fallacious premise that liability to taxation is the same as payment of tax. If that was the intent the words would have adequately reflected in the treaty. While arriving at this ruling, the Supreme Court also referred to Klaus Vogel[11] and Philip Baker’s observations on the matter[12]. In Indian jurisprudence, the Supreme Court’s ruling is binding on all lower Courts, unless it is demonstrated that the context of the ruling was different.

However, in a very interesting departure, in the case of *Razak*[13], the AAR relied on the principle laid down by the Supreme Court in *K.P. Varghese**[14]* that while interpreting treaties, regard should be had to *material contemporanea exposition*, also embodied in Article 32 of the Vienna Convention on Law of Treaties (VCLT). Through a series of long winded arguments relying on the VCLT, and going back to deciphering the intent of the governments signing the India-UAE tax treaty as evidenced from speeches and Press Releases, the AAR distinguished the Supreme Court ruling and ruled treaty benefits would not be available. The findings of the AAR were meticulous and exhaustive – the AAR went on to distinguish the language the UAE used in its treaty with India, vs treaties the UAE signed with France, Canada and Germany. In these treaties, individuals were specifically carved out under Article 4 and were not subject to the “liable to tax” requirement. The AAR’s finding was that when the India UAE treaty was signed the UAE government intended to impose some tax on its citizens and basis this understanding the carve out for individuals did not occur in the India-UAE tax treaty, like it did with some of the other UAE tax treaties[15]. The AAR also observed that the Supreme Court’s ruling was in the context of the India-Mauritius tax treaty, for which the government had issued a specific circular, recognizing the Tax Residency Certificate issued by Mauritius, as evidence for claiming treaty benefits. The AAR ruled that since no such circular was issued in the context of UAE, the Tax Residency Certificate issued by UAE may not suffice for claiming treaty benefits. The AAR also relied on observations by Philip Baker while arriving at its ruling[16]. The interpretation of the AAR of reference material under Article 32 of the VCLT and its departure from a principle held by the Supreme Court however remains questionable.

Despite the detailed analysis provided by the AAR, the Appellate Tribunal in various disputes since has come to rule that the question has been settled in *Azadi Bachao Andolan*. In a subsequent ruling of *Green Emirates Shipping**[17]*, the Tribunal noted that while it concurred with the finding in *Cyril’s* case, it was obligated by law to follow the ratio in the Supreme Court’s case in *Azadi Bachao*. A key observation in *Azadi Bachao is* also quoted in *Green Emirates.* It was that payment of tax is not a prerequisite to claiming treaty benefits. The ruling goes on to state that it is thus clear that a tax treaty not only prevents ‘current’ but also ‘potential’ double taxation. Therefore, irrespective of whether or not the UAE actually levies taxes on non-corporate entities, once the right to tax UAE residents in specified circumstances vests only with the Government of UAE, that right, whether exercised or not, continues to remain exclusive right of the Government of UAE.

Subsequent rulings went on to quote *Green Emirates* to state that in light of the findings in *Green Emirates*, the observations in *Azadi Bachao* would prevail[18] and some of these even went on to state that the AAR’s ruling in Razak’s case was not good law. It may be noted here that, in any event, a ruling by the AAR in India has no precedent value – it is only valid for the taxpayer who sought it and for the years and matter which is the subject of the ruling.

It could be said the proposed introduction of the definition of “liable to tax” has its roots in the jurisprudence set out in the above rulings.

There have been other notable rulings as well such as that of the AAR in General Electric Pension Trust[19], where the AAR has distinguished between “liability to tax” and “subject to tax”, and ruled that being liable to tax is not enough, if the treaty provides for the entity to be “subject to tax”. In the case of Linklaters[20] a partnership firm was ruled to be eligible to India-UK tax treaty benefits, as ultimately either Linklaters or its partners were tax residents in the UK. The ruling in the case of Linklaters was more along the international debate on partnerships or their partners are liable to tax, and consequent eligibility for tax treaty benefits[21].

If one were to critically analyse it, the proposed definition disturbs the position of law as settled in *Azadi Bachao* and *Green Emirates*. Instead, it is demonstrably most compatible with the reasoning of the AAR in *Abdul Razak*. The definition does not go as far as *Cyril Eugene Pereira* in saying that actual payment of tax is necessary for liability to tax to arise. Yet it does require that a there is an initial imposition of a liability of tax under laws for the time being in force. Potential or future liability to tax, which was acceptable under the above rulings will no longer be good law.

Implications of the new definition

Evidently, the definition is bipartite. The first half begins with a “means” clause, which is ordinarily understood to set out an exhaustive definition.

This part of the definition is restrictive insofar as it sets out that there must be a “liability of tax on such person under any law for the time being in force in any country”. Without a definition in domestic law, Indian tax tribunals have understood the term to mean that an actual liability of tax is not a condition for a person to be “liable to tax”. The definition adds such exact condition of “actual liability under any law for the time being in force” and, in this manner, can be seen to be restrictive. The significance of the words “time being in force” cannot be lost. There is no longer a question of whether a potential liability is sufficient for the purposes of claiming treaty benefit.

This puts the residency status of various persons in doubt. For instance, some countries do not impose a tax on an individual’s income, and yet the term ‘liable to tax’ is used to determine their residence status. Examples include Maldives, Oman and Qatar. Individuals who could avail of treaty benefit on account of the right of these countries to tax them may no longer be able to, since there is no “liability of tax”. Similarly, in the case of charities and other organizations, where the income is *per se* exempt under the domestic laws of treaty partners, it may be argued that there is no “liability of tax” pursuant to an exemption.

Does a liability to tax under Article 4(1) of the OECD MC refer to an existing ‘liability to tax’ or does it also cover potential liability to tax now or in the future? This topic has been extensively discussed by J. Wheeler in her paper “The missing keystone of income-tax treaties”. After extensively discussing leading authorities on the subject such as Vogel, Baker and Couzin and going through several rulings, the author states that even the major textbooks disagree on this point. Wheeler goes onto conclude that whatever be one’s view on “potential liability to tax, there is general consensus that unlimited liability to tax in a state does have the required connection with the state.[22]

At the same time, the phrase “under any law for the time being in any country”[23] is highly expansive and can negate any restrictive effect that the preceding words may have. The literal interpretation of the phrase suggests that a person liable to pay any tax anywhere in the world becomes “liable to tax”, and thereafter becomes entitled to a treaty benefit. It seems improbable that this could be the legislative intent, but the drafting has certainly raised eyebrows. It is possible that this phrase will be contextualized in line with the ‘Taxes Covered’ part in treaties. In this regard, it may be useful to refer to the holding of the Bombay High Court in *Chiron Behring **[24]*** in the context of the India-Germany treaty. Even though the entity did not pay income tax in Germany, it was held to be “liable to tax” in that country on account of being liable to the trade tax being one of the taxes covered under Article 2 of the treaty.

The second part of the definition uses the words “shall include a case where subsequent to imposition of tax liability, an exemption has been provided” to refer to a situation where an exemption is granted subsequent to the imposition of a liability. This means that even where tax is not paid by a person due to an exemption being given subsequent to imposition of liability, the person will be considered liable to tax. This part certainly brings clarity in favour of certain classes of taxpayers. It acknowledges in part the principle laid down in *Azadi Bachao* that “liable to tax” does not imply a situation where tax is actually paid. The memorandum explaining the provisions of the Finance Bill, 2021 expressly brings out this intent in the context of Pension Funds[25], and to this extent, this amendment is a beneficial and a welcome one.

Can India unilaterally define a term in its domestic law for interpretation of treaty?

Though restrictive in nature, Section 90(3)[26] empowers India to define the terms not defined in the treaty provided the meaning assigned is not inconsistent with the domestic law or a tax treaty. This clause has undergone repairs by way of explanation – Explanation 3[27] added in Finance Act, 2012 has clarified that the meaning assigned to such undefined terms shall be deemed to come into effect from the date of such agreement.

To partly undo the above explanation signifying a retrospective application to a treaty, it was clarified by way of Explanation 4[28] that terms used in the agreement shall survive and only in situations where the term is

not defined in the tax treaty, the domestic law provisions shall apply.

A general principle of treaty interpretation is that a state cannot use domestic law as an excuse to justify derogation from international treaty obligations. Such principle is embedded in Article 27 of the VCLT. However, it is arguable that India, by introducing the definition is merely explaining its intent under various tax treaties it has entered into.

As per Article 31, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[29] The good faith principle overrides even the literal text of the treaty, where it leads to an absurd result that could not have been the intention of the parties.[30]

Tools for contextualizing the purpose of a treaty include any connected agreements[31], instruments made by one party in respect of the treaty and accepted by the other[32], agreements specifically for interpretation of the treaty[33], subsequent practice in the application of the treaty which establishes agreement as to an interpretation[34], and any rules of international law applicable to the parties.[35] Supplementary means include preparatory work of the treaty and the circumstances of its conclusion.[36] These can only be used where the meaning is obscure or ambiguous, or where it leads to a manifestly absurd or unreasonable result, or to confirm the meaning arrived at through the primary tools.[37]

A common vein under tools for interpretation under the VCLT is that they focus on common understanding of the treaty partners. Nowhere is a unilateral definition of an obscure term even considered under the VCLT. However, while the Convention is an illustrative tool for interpreting treaties including DTAAs, India is not a signatory to it. Regardless, in determining the object and purpose of a treaty provision, the VCLT has been relied upon by Indian Courts.[38]

Article 3(2) of the Model Conventions and most of India's tax treaties, on the other hand, provide that where a term used in a treaty is not defined therein, a definition under domestic law may be adopted, unless the context otherwise requires. Explanation 4 to Section 90 of the ITA, introduced in 2018, similarly states that a definition under the Act will apply where a term is not defined in an agreement for avoidance of double taxation.[39] An important difference here being the lack of the term "unless the context otherwise requires", an OECD MC standard under Article 3(2).

Much before Explanation 4 was added, the law on adopting a definition from domestic law in a DTAA had been laid down in *Hindalco Industries Ltd.*[40] The Tribunal had been called upon to adjudicate on the meaning of the term 'property' with regard to the US-India tax treaty. It recognized that domestic law definitions could be imported for interpreting the term under Article 3(2). However, the Tribunal also considered principles governing the interpretation of tax treaties and made note of commentaries and decisions from other jurisdictions. It observed that the principle of good faith in interpretation also applies to tax treaties and laid out a clear preference for the object and purpose of words in a treaty over the technical and literal meaning. The Tribunal set out that a question to be considered whenever a definition is to be imported is whether the context of the treaty requires a meaning different from the domestic meaning[41].

Along this line of reasoning, it is possible to argue that the definition of 'liable to tax' in the Act should not be adopted because it does not match with the context of the term used in Article 4. As per the OECD Treaty Override Report (1989), in the application of Article 3(2), the context of the treaty takes precedence over an interpretation derived from national laws.[42]

Taking cue from the principles laid down in the VCLT, a long-term acceptance by India in not questioning the understanding that the term 'liable to tax' does not require actual liability assumes significance in the context of its treaties. In fact, after a series of decisions unfavourable to the revenue in the context of India-UAE treaty, the tax treaty was amended, but instead of providing a clarification for the term 'liable to tax', the parties chose to remove the term for UAE residents. In not removing the term from its other treaties, and instead continuing to provide treaty benefits to persons who do not have a liability of tax, it is arguable that India has accepted the connotations with its conduct. However, the proposed amendment may alter the landscape.

The absence of the term "unless the context otherwise requires" in Explanation 4 noted earlier may suggest a shift from the purposive approach taken in *Hindalco* while adopting a domestic law definition. Provisions of the ITA only apply to the extent that they are more beneficial to the assessee.[43] It remains to be seen whether this principle can imply a preference to Article 3(2) over Explanation 4.

Implications for Non-Resident Indians and Pension Funds

The Memorandum explaining the Bill specifically identifies two sections in the ITA, i.e., Section 6 and Section 10(23FE) where the term 'liable to tax' finds mention. The reason to define the term seems to bring certainty for the above limited purpose. Therefore, to understand the implications of the new definition, we have formed our analysis on the implications to these.

Section 6 was amended by Finance Act 2020 to bring stateless income of Indian citizens under the tax net. This amendment deemed Indian citizens to be tax residents in India in situations where they were not 'liable to tax' in any other country.[44] Subsequently, CBDT clarified vide Press Release dated 2 February, 2020, carving out of *bona fide* cases where an individual has income earned outside India, out of the purview of the amended Section 6. Hence, this deeming provision is only limited to bring those cases where Individuals shift their stay in low or no tax jurisdiction primary to avoid payment of tax in India. The contention of taxpayers that a potential future tax liability in a country to cover a 'person liable to tax in that country', can now be negated with the new definition giving a definitive meaning to the term to cover a case where (i) there is a "liability to tax under any law of any country" (ii) and subsequent to which, there could be an exemption. For instance, a citizen of India who could previously claim to be "liable to tax" in UAE on account of potential future liability shall not be able to do so, and hence, shall be covered under the new deemed residency provisions.

The other instance of 'liable to tax' that the amendment seeks to clarify is in relation to the exemption that is given to Pension Funds (PFs).[45] The implications of the new definition here may be different. In the OECD Model, PFs are recognised as residents even without being "liable to tax". Article 4 defines resident to include "that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State". Section 10(23FE) gives an exemption to PFs only when they are not liable to tax, as now defined. It would be interesting to see if there is a debate around exemption for pension funds in the context of their recognition in the model OECD tax treaty. It could be contended by the Indian Revenue that a fund which is "not liable to tax" as defined in the ITA would not be eligible to the exemption under Section 10.

Conclusion

The new definition brings a significant change in the understanding of residence in relation to DTAAs. Several questions may arise as the answers to which may not be found in existing indigenous jurisprudence. Some of these questions are:

1. Do the decisions in the *Azadi Bachao* and *Green Emirates* still represent the current position of law? The term "liability of tax" suggests otherwise, and raises the threshold for residence. However, usually when a Supreme Court ruling is overruled through legislation, the intention is specified clearly.
2. What is the scope of liability of tax "under any law of any state"? Does it extend only to the Taxes Covered provision in treaties, or beyond? A related policy question also arises on account of the term "any law for the time being in force in any country". Why should residence be governed by the liability of a tax that is *prima facie* not connected to residence, but is instead paid on a transactional basis by all persons alike?[46]
3. How does the new definition affect a person in possession of a tax residence certificate (TRC)? Previously, the existence and production of tax residence certificate by an appropriate authority of a country had been held as sufficient evidence to establish that the person was a resident in that country.[47] The *Abdul Razak* ruling that is in the backdrop of this amendment suggests otherwise. The AAR had ruled that TRC would be proof of residence only in respect of the India-Mauritius treaty, and only because of Circular 789. Can a person on whom there is no "liability of tax" under any law (to whom this circular does not apply) press his residence on the basis of a TRC?
4. Can reading the definition into Article 4 deny benefits of a DTAA to a person despite being "less beneficial to the assessee" for the purposes of Section 90(2)[48]? Notably, this section only applies to persons who are covered under a tax treaty. Since "liable to tax" is used in making the determination of whether a person is covered, it would be possible to argue that Section 90(2) only takes effect after the determination is made.

It is possible and hoped that before its actual insertion in the ITA, the language of the proposed law will be altered for sake of clarity and adherence to treaty obligations. If the intention behind introducing this definition was only to recognise a situation where an exemption is granted, the same can be achieved by retaining only the inclusive part of the definition. The same would be in line with Indian jurisprudence and an international approach.

In our view, this definition, as it currently stands, seems to have disturbed the jurisprudence on the subject in general, and in particular, the Supreme Court ruling of Azadi Bachao on liability to tax to include potential future tax.

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[1] Interestingly, the memorandum explaining the provisions of the Finance Bill states ". The Act currently does not define the term —liable to tax though this term is used in section 6, in clause (23FE) of section 10 and various agreements entered into under section 90 or section 90A of the Act. Hence, it is proposed to insert clause (29A) to section 2 of the Act providing its definition. The term liable to tax in relation to a person means that there is a liability of tax on that person under the law of any country and will include a case where subsequent to imposition of such tax liability, an exemption has been provided."

[2] Section 6(1A) of the Income-tax Act, 1961, inserted by the Finance Act, 2020, w.e.f. 1-4-2021.

[3] Section 10(23FE) of the Income-tax Act, 1961, inserted by the Finance Act, 2020, w.e.f. 1-4-2021.

[4] Both the provisions were amended by India last year – one to bring to tax untaxed global income of Indian citizens and the second to encourage foreign investment by pension funds and sovereign wealth funds. It appears the introduction of the term "liable to tax" was introduced in the context of clarifying these provisions, however the explanation to the Finance Bill made it clear that it recognized it would also impact India's tax treaties .

[5] Memorandum to the Finance Bill 2021-22.

[6] This Article in the OECD Model Convention reads, "For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is *liable to tax* therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein." The UN Model Convention and most of India's treaties have near identical provisions as well.

[7] Article 1, OECD Model Convention.

[8] Mohsinally Alimohammed Rafik v. Commissioner of Income-tax (1995) 213 ITR 317 (AAR)

[9] [1999] 239 ITR 650 (AAR)

[10] (2003) 263 ITR 706 (SC)

[11] According to Klaus Vogel "Double Taxation Convention establishes an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax-claims are expected, or at least theoretically possible. In other words, the Contracting States mutually bind themselves not to levy taxes or to tax only to a limited extent in cases when the treaty reserves taxation for the other contracting States either entirely or in part. Contracting States are said to 'waive' tax claims or more illustratively to divide 'tax

sources', the 'taxable objects', amongst themselves." Double taxation avoidance treaties were in vogue even from the time of the League of Nations. The experts appointed in the early 1920s by the League of Nations describe this method of classification of items and their assignments to the Contracting States. While the English lawyers called it 'classification and assignment rules', the German jurists called it 'the distributive rule' (Verteilungsnorm). To the extent that an exemption is agreed to, its effect is in principle independent of both whether the other contracting State imposes a tax in the situation to which the exemption applies, and of whether that State actually levies the tax. Commenting particularly on German Double Taxation Convention with the United States, Vogel comments: "Thus, it is said that the treaty prevents not only 'current', but also merely 'potential' double taxation". Further, according to Vogel, "only in exceptional cases, and only when expressly agreed to by the parties, is exemption in one contracting State dependent upon whether the income or capital is taxable in the other contracting state, or upon whether it is actually taxed there."

[12] The Hon'ble Supreme Court also referred to the commentary of Philip Baker to bring out the import of the phrase "liable to tax" employed in Article 4(1) which reads as under:

"It seems clear that a person does not have to be actually paying tax to be 'liable to tax'–otherwise a person who had deductible losses or allowances, which reduced his tax bill to zero would find himself unable to enjoy the benefits of the Convention. It also seems clear that a person who would otherwise be subject to comprehensive taxing but who enjoys a specific exemption from tax is nevertheless liable to. tax, if the exemption were repealed, or the person no longer qualified for the exemption, the person would be liable to comprehensive taxation." (emphasis, italicized in print, supplied) It is thus clear that 'liable to tax' connotes that a person is subject to one of the taxes mentioned in Article 2 in a Contracting State and it is immaterial whether the person actually pays the tax or not."

[13] This was the case of an Indian citizen, who was a tax resident of UAE. (2005) 276 ITR 306 (AAR)

[14] *K.P. Varghese*[14] *v. ITO* [1981] 131 ITR 597

[15] The AAR in *Mohsinally Alimohammed Rafik* on the other hand dealt with this as –

"*There was no such tax there when the earlier limited agreement of 1989 was entered into which provided the occasion for discussions on a more comprehensive tax treaty and there can be no doubt that both the States were fully aware of this position. The fact that such a comprehensive DTAA was considered necessary in spite of a clear knowledge that there was no such tax in UAE can only mean that the DTAA was intended to encourage the inflow of funds from Dubai to India for investment. In this context, it is necessary to remember that UAE provides one of the largest export markets for India in West Asia.*"

[16]Philip Baker in the Commentary of OECD at para 4B.01 remarks:

"*it is thus possible for a person to be a resident in both Contracting States under the two domestic laws involved (or resident in neither State)." He cited the decision of the Lower Court of Amsterdam, dt. 25th Nov., 1971 (Case No. 312 of 1971) holding that the taxpayer was not resident in the Netherlands despite a stay of two and a half years. We are in accord with the view expressed by the learned author.*"

[16] The AAR in a later para stated it would be apposite to refer to the following comment of Philip Backer in Cyril Eugene Pereira's case:

"*The later position of the Authority seems more correct since 'liable to tax' must surely mean liable to one of the taxes which are the subject-matter of the Convention. If a State imposes no tax, then it is hard to see how one can ever be liable to that tax (until such a tax is enacted–always assuming the Convention then applies to that tax).*"

[17]*Assistant Director of Income-tax (International Taxation) v. Green Emirates Shipping & Travels* [2006] 100 ITD 203, at para 6.

[18]*Meera Bhatia v. Income-tax Officer* [2010] 38 SOT 95 (Mumbai)

Income-tax Officer (IT)-3(1), Mumbai v. Rameshkumar Goenka [2010] 39 SOT 132 (MUM.)

Deputy Director of Income-tax, Circle-2(2), New Delhi v. Mushtaq Ahmad Vakil [2010] 3 taxmann.com 780 (Delhi – Trib.)

Income-tax Officer (IT)-4(1) v. Mahavirchand Mehta [2011] 45 SOT 137

Additional Director of Income-tax (International Taxation) v. ICICI Bank Ltd. [2012] 149 TTJ 797 (Mumbai); affirmed by the High Court of Bombay in *Director of Income-tax (International Taxation) v. ICICI Bank Ltd.* (2015) 370 ITR 17

KPMG v. Joint Commissioner of Income-tax [2013] 142 ITD 323

ADIT v. Simatech Shipping Forwarding LLC [2014] 146 ITD 48 (Mumbai)

Prashant Kumar Gulati v. Income-tax Officer (International Taxation), Nagpur [2014] 66 SOT 224

Income-tax Officer (International Taxation), Gandhidham v. Martrade Gulf Logistics FZCO-UAE [2018] 191 TTJ 575 (Rajkot – Trib.)

[19] A.A.R. No. 659 of 2005

[20] ITA 1690/MUM/2015

[21] *R. Galea, The Meaning of "Liable to Tax" and the OECD Reports: Their Interaction and Ambiguous Interpretation, 66 Bull. Intl. Taxn. 6 (2012), Journals IBF*1D0.

[22] Para 2.3.5 at Page 12

[23] It is also interesting to note here the memorandum explaining the provisions of the Finance Bill use the words "under the law" as against "under any law" used in the Finance Bill.

[24] *Director of Income-tax (International Taxation) v. Chiron Behring Gmbh & Co.* [2013] 351 ITR 115 (Bombay)

[25] Clause 5 of Memorandum Explaining Provisions to the Finance Bill 2021

[26] Section 90(3), Income-tax Act, 1961.

[27] Explanation 3 to Section 90, Income-tax Act, 1961.

[28] Explanation 4 to Section 90, Income-tax Act, 1961.

[29] Article 31(1), VCLT.

[30] *N. Bravo, Interpreting Tax Treaties in the Light of Reservations and Opt-Ins under the Multilateral Instrument, 74 Bull. Intl. Taxn. 4/5 (2020), Journal Articles & Papers* (pg. 4)

[31] Article 31(2)(a), VCLT.

[32] Article 31(2)(b), VCLT.

[33] Article 31(3)(a), VCLT.

[34] Article 31(3)(b), VCLT.

[35] Article 31(3)(c), VCLT.

[36] Article 32, VCLT.

[37] *Ibid.*

[38] *Ram Jethmalani and Ors. vs. Union of India (UOI) and Ors.*, (2011) 8 SCC 1; held –

"*While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.*";

See also: *Sanofi Pasteur Holding SA and Ors. vs. The Department of Revenue Ministry of Finance*, (2013) 354 ITR 316.

[39] Explanation 4.—For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government.

[40] *Hindalco Industries Ltd. v. DCIT* (2005) 94 ITD 242

[41] "*[E]ven when connotations of a treaty term are to be adopted as per the domestic law in the country of taxability, it cannot be done so as a thoughtless and mechanical process. Such meaning needs to be ascertained in order to ask whether context suggests a differential interpretation and, in the light of the weight given to the alternative interpretation, whether the context requires a different interpretation of the said term. Therefore, it is not merely the task [o]f lifting the meaning of that term as per the domestic law in the country of application and applying the same without having regard to the totality of circumstances and scheme of things in the tax treaty.*"[41]

[42] Report of the Committee on Fiscal Affairs of 29 June 1989 on Tax Treaty Override [DAFFE/CFA/89.13] (2nd Revision), at paragraph 19(b).

[43] Section 90(2), Income-tax Act, 1961.

[44] Section 6(1A) of the Income-tax Act, 1961, inserted by the Finance Act, 2020, w.e.f. 1-4-2021.

[45] Section 10(23FE) of the Income-tax Act, 1961, inserted by the Finance Act, 2020, w.e.f. 1-4-2021.

[46] This has been a point of criticism for the *Chiron Behring* [2013] 351 ITR115 (Bombay). A fiscal transparency paying the German Trade Tax was held to be a resident of Germany, since the tax was one of those covered in Article 2 of the relevant treaty.

[47] Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)

[48] Section 90(2), Income-tax Act, 1961 –

"*Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.*"