

Merger and acquisition synopsis

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Synopsis Roll No. 09BAL102 CRITICAL ANALYSIS OF VODAFONE-HUTCH MERGER CASE PROJECT FOR THE SUBJECT OF Mergers and Acquisition SUBMITTED BY ALOK RATNOO Semester — VII B. A. LL. B. (Hons.) UNDER THE GUIDANCE OF Mr. Victor Nayak Asst. Prof., ILNU Submitted to INSTITUTE OF LAW NIRMA UNIVERSITY, AHMEDABAD ACADEMIC YEAR (2012-13) Title: CRITICAL ANALYSIS OF VODAFONE-HUTCH MERGER CASE Introduction

Vodafone was embroiled in a \$2.5 billion tax dispute with the Indian Income Tax Department over its purchase of Hutchison Essar Telecom services in April 2007. It was being alleged by the Indian Tax authorities that the transaction involved purchase of assets of an Indian Company, and therefore the transaction or part thereof was liable to be taxed in India. Vodafone Group Plc. entered India in 2007 through a subsidiary based in the Netherlands, which acquired Hutchison Telecommunications International Ltd's (HTIL) stake in Hutchison Essar Ltd (HEL)—the joint venture that held and operated telecom licenses in India. This Cayman transaction, along with several related agreements, gave Vodafone control over 67% of HEL and extinguished Hong Kong-based Hutchison's rights of control in India a deal that cost the world's largest Telco \$11.2 billion at the time. The crux of the dispute had been whether or not the Indian Income Tax Department has jurisdiction over the transaction. Vodafone had maintained from the outset that it is not liable to pay tax in India; and even if tax were somehow payable, then it should be Hutchison to bear the tax liability. In January 2012, the Indian Supreme Court passed the judgment in favor of Vodafone, saying that the Indian Income tax department had "no jurisdiction" to levy tax on overseas transaction between companies incorporated outside India.

However, Indian government thinks otherwise. It believes that if an Indian company, Hutchison India Ltd., conducts a financial transaction, government should get its tax out of it. Therefore, in 2012, India changed its Income Tax Act retrospectively and made sure that any company, in similar circumstances, is not able to avoid tax by operating out of tax-havens like Cayman Islands or Lichtenstein. In May 2012, Indian authorities confirmed that they were going to charge Vodafone about Rs. 20000 crore (US \$4.5 billion) in tax and fines. The second phase of the dispute is about to start.

Significance of the study The study is significant because there will be implications in the Vodafone and other cases involving tax liability of about Rs 40,000 crore, the government has amended the IT Act with effect from 1962 to bring under net all overseas transactions involving domestic assets.

" There is large number of similar (Vodafone type) cases which, could be impacted. The rough assessment is that total impact of such cases would have been to the tune of Rs 35,000-Rs 40,000 crore." The position of the government is that the intention of the legislature on the initial stage was very clear that the transaction like the Vodafone, are subject to taxation in India. The amendment will apply to all past transactions concerning assets in India. In the Vodafone case, the Supreme Court had held that the Income Tax department does not have the jurisdiction to levy Rs 11,000 crore as withholding tax on Vodafone for its \$11 billion acquisition deal with Hutchison Essar in 2007. The study is also significant as it deals with important issues of M&A in similar cases. They are: 1. Interpretation of Section 9(1)(i) of the Act. 2. Extinguishment of HTIL's interests. 3. Role of CGP in the transaction. 4. Holding and Subsidiary structures. 5. Rights and

entitlements. 6. Anti-avoidance Rules and earlier decisions in McDowell and Azadi Bachao Andolan case. Aims and Objectives The main objective underlying the project on “ CRITICAL ANALYSIS OF VODAFONE-HUTCH MERGER CASE" is to study the impact of SC’s decision and Retrospective amendment by the Indian Government regarding the Cross Border Mergers and Acquisitions and their taxability. Scope In this research project the researcher has taken Vodafone-Hutchison Essar Merger and the chronology of events happening in and around it as the universe of the project.

Hypothesis and Research questions The Hypothesis and the research questions are: 1. Whether all offshore share transactions which indirectly involve transfer of underlying Indian assets are taxable in India? 2. Whether withholding is required on the entire consideration or there needs to be an apportionment? 3. Is there any inconsistency on the aspect of controlling interest not being a capital? 4. Will the Vodafone case create a negative perception of India in the eyes of foreign investors? Research Methodology

Kinds of methodology applied- The research methodology applied in this project is doctrinal and not empirical. The doctrinal research included all the primary resources as well as secondary resources. Tools used for research- The tools used in this project research are Library, Books, Bare acts, Articles, Journals, Commentary. How the research has been completed- The research has been completed after Reading the books related to the topic. The research would have been incomplete without the bare texts of conventions. The articles and journals gave an additional help in the research work of the project. And the initial guidance by the faculty was very helpful for the same.

Review of Literature Books referred 1. Trusts Law: Text and Materials,

Graham Moffat, Gerard M. D. Bean, Gerry Bean, John Dewar, Cambridge University Press (2005) Cambridge. With its unique contextual emphasis and authoritative commentary, *Trusts Law: Text and Materials* is a book that no serious undergraduate on trust law courses can afford to be without. The book is divided into four main parts: trusts and the preservation of family wealth; trusts and family breakdown; trusts and commerce; and trusts and non-profit activity. Within each of these parts, leading cases, statutes, and historical and research materials are placed alongside the narrative of the author's text to give emphasis both to general theories of trust concepts and to the practical operation of trusts. Attention is also given to important themes such as the developing relationship between trusts law and other areas of private law such as the Law of Restitution. This new edition takes account of all relevant judicial and legislative developments since the third edition, and expands discussion of key themes in current developments of the law.

2. *Commentary on the Indian Trusts Act*, S Krishnamurthi Aiyar, Universal Law Publishing (2012), New Delhi. An exhaustive, analytical and critical commentary on the Indian Trusts Act, the book dealing with a very important branch of civil law is an established treatise on its own merit. Having traversed the entire landmark judicial decisions of the English Common Law as well as the statute law on trusts the present edition, as earlier, also incorporates the most recent important decisions of the Supreme Court as well as a different High Courts of our country. The current seventh edition of the book deals with both private and public trusts and is effectively poised to provide the readers an understanding of the basic content of international and domestic laws in a manner most lucid and easy

to understand. Articles referred 1. Taxability of Charitable & Religious Trusts, By Dr. Ravi Gupta. 2. Trust Property and Legal Implications, By S SELVAKUMAR. 3. Trust and Trust Laws in India, By Hanisha Amesur and Bijal Ajinka of Nishith Desai Associates. 4. The Functions of Trust Law: Comparative Legal and Economic Analysis, By Henry Hansmann and Ugo Mattei. 5. Law Commission of India 17th Report, 1961. 6. Indian Trust Act — A Corporate Perspective, By Madhavi Swaroop. 7. Effective Estate Planning Through Creation of Trusts, By C Jayaram.