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Indirect Transfer of Ambuja Cements & ACC for $10.5 Bn – Tax Free?

May 20, 2022

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1. Introduction

As per the news reports, on 15.05.2022, Holcim has signed a binding agreement with the Adani Group to sell its business in India. This agreement involves transfer of control and ultimate ownership of Ambuja Cements Ltd. and ACC Ltd. As per the reports, Holcim CEO Jan Jenisch while addressing investors after the deal on Monday has stated that "…*according to our analysis, it is a tax-free transaction*". Since this announcement, there has been a lot of buzz surrounding the same. The present Article attempts to discuss the rationale behind such announcement that there shall be no tax implications in India on account of the sale of Indian business.

2. Brief background of transaction arrangement

The sale of Holcim's India businesses involves the sale of an offshore holding company to another offshore vehicle set up by the Adani group.

At present, Holderind Investments, a Mauritius based entity holds 63.2% in Ambuja Cements and 4.48% in ACC. Holderind holds another 50.05% stake in ACC through Ambuja. As per the arrangement, the Adani Group's Mauritius based entity 'Endeavour Trade and Investment Ltd.' will acquire 100% stake in 'Holderind Investments Ltd', also based in Mauritius, from the Netherlands-based Holderfin B.V.

Thus, the transaction involves sale of shares of a Mauritius company (which owns the Indian listed companies) held by a Netherlands company to another Mauritius company.

3. Tax implications in India under the domestic law i.e Income Tax Act, 1961 ('Act')

The Mauritius based company (Holderind Investments) derives its value substantially from assets situated in India (Ambuja Cements and ACC). As a consequence thereto, transfer of shares of Holderind Investments will result in ultimate change in ownership and control of the Indian Companies namely Ambuja Cements and ACC. This being an indirect transfer of shares of Indian Company, gain arising consequent thereto shall be chargeable tax in India as per the provision of domestic law i.e. Income Tax Act, 1961, by virtue of the various amendments made vide Finance Act, 2012, post the infamous Vodafone –Hutch saga, including the insertion of Explanation 5 to section 9(1)(i) of the Act.

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4. Tax implications in India under the India-Netherland DTAA

While the income arising in the hands of Netherlands Company from transfer of Holderind Investments shall be chargeable to tax in India as per the provision of domestic Act, however, since the seller here is a Netherlands Company, it shall be entitled to the benefit of Double Tax Avoidance Agreement entered into between India and Netherlands (‘**India-Netherlands DTAA**’). It is a settled law that provision of DTAA override the domestic provision to the extent they are more beneficial.

Under the India-Netherland DTAA, only Netherland has the right to tax gain arising from sale of shares of a non-Indian Company by a Netherland based entity. In other words, India does not have the right to tax such income. Accordingly, owing to the beneficial provision of the India - Netherlands DTAA, the transaction shall not be chargeable to tax India in the hands of Holcim.

In the above context, it may be relevant to mention that Article 13 of the India-Netherland DTAA allocates the taxing rights, between Netherland and India, on account of capital gain transactions. Under Article 13(1) to Article 13(4), taxing rights on account of capital gain arising with reference to certain specified assets have been allocated between India and Netherland. These assets are (1) immovable properties, (2) moveable property forming part of permanent establishment or fixed base, (3) ships or aircrafts (4) unlisted shares of Company resident in India or Netherland, whose value is derived principally from immovable property situated in that other State, under certain specified circumstances.

In the present case, the shares being transferred are that of Mauritius Company and thus, the aforesaid provisions of Article 13(1) to Article 13(4) shall not be applicable. Article 13(5) is the residuary provision which allocates taxing rights between India and Netherlands for all other assets not specifically covered under Article 13(1) to Article 13(4). The said Article 13(5) reads as under:

“5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident.

However, gains from the alienation of shares issued by a company resident in the other State which shares form part of at least a 10 per cent interest in the capital stock of that company, may be taxed in that other State if the alienation takes place to a resident of that other State. However, such gains shall remain taxable only in the State of which the alienator is a resident if such gains are realised in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other.”

As per the aforesaid Article 13(5) of the India-Netherland DTAA, gains arising from the alienation of any property (other than that referred to in paragraphs 1, 2, 3 and 4)**shall be taxable only in the State of which the alienator is a resident**. The proviso to Article 13(5) makes an exception to the said rule in case the asset transferred is shares of a Netherland company or Indian Company, as the case may be, that too on fulfilment of certain conditions. In the present case, the shares transferred are that of Mauritius Company and not of a Netherland Company or an Indian Company. Thus, the said proviso to Article 13(5) is not relevant.

Hence, in the present case, the transaction of sale of shares of Holderind Investments, a Mauritius Company, by a Netherland resident entity to another Mauritius company. shall be governed by residuary provision of Article 13(5) of India-Netherland DTAA. By virtue of such residuary provision, gain arising from transfer of shares of a Mauritius Company by a Netherland Company shall only be taxable in the Country where the seller is the resident i.e. Netherland.

Thus, in view of beneficial provision of India-Netherland DTAA, India shall have no right to tax income arising on transfer of such shares of Mauritius Company.

5. Obligation to withhold TDS in the hands of Adani

Further, as per the provisions of section 195 of the Income Tax Act, every person responsible for paying any sum to a non-resident which is chargeable to tax is required to deduct tax at source at the ‘rates in force’. The expression ‘rates in force’ means the rates prescribed by the Finance Act or the rate as per the Double Taxation Avoidance Agreements (‘DTAA’), whichever is beneficial. It is a settled position that

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in respect of payment made to non-residents which are governed by section 195 of the Act, TDS is to be deducted as per the rate prescribed in the Finance Act or the DTAA, whichever is beneficial. This has also been clarified by the CBDT vide Circular No. 728 Dated 30/10/1995. It is also a settled law that TDS under section 195 is required to be deducted only in respect of such sum that is chargeable to tax and while determining whether a particular sum is chargeable to tax, the provision of section 4, 5, 9, 90, 91 as well as the provisions of DTAA are relevant [Refer: ***G.E. India Technology Centre Pvt. Ltd. Vs. CIT*** [TS-140-SC-2010]].

In the present case, since as per the India-Netherlands DTAA, the payment made by Mauritius based entity of Adani Group shall not be chargeable to tax in India in the hands of a Netherlands Resident entity, the Treaty provisions will also override domestic Indian Income Tax law in the matter of deduction of tax at source. Consequently, there shall be no liability to deduct tax at source by Mauritius based Adani entity as well.

6. Rational for Adani to purchase the shares through a Mauritius based entity

As noted above, Adani Group proposes to make the acquisition from Holderind Investments through 'Endeavour Trade and Investment Ltd.', a Mauritius based entity. One may wonder as to what is the rationale behind the same. The objective behind the same appears to be two-fold.

The first objective appears to be to avoid taxability in India on account of the rigours of proviso to Article 13(5) of India-Netherland DTAA. As noted above, as per the said proviso, India shall have the right to tax capital gain arising from sale of shares of a company resident in India if the shares form part of at least a 10 per cent interest in the capital stock of that Indian company and if the alienation takes place to a resident of India. It may be relevant to point out that Article 13(5) allocates taxing rights to India in respect of capital gain arising on sale of shares of a 'company resident in India', as against on sale of shares of an Indian Company. There is a difference between the two. While the shares being sold are that of Holderind Investments i.e. a Company incorporated in Mauritius, however, given the fact that Holderind Investments derives its value substantially from assets situated in India, Income Tax Department may allege that the place of effective management of such company is in India and consequently, such company shall be treated as a resident of India in terms of section 6(3)(ii) of the Act and in terms of Article 4(1) of the India-Netherland DTAA. In such a situation, given the fact that Article 13(5) allocates taxing rights to India in respect of capital gain arising on sale of shares of a 'company resident in India', as against on sale of shares of an Indian Company, if the alienation takes place to the resident of India, the gain arising on sale of shares of Holderind Investments may have become taxable in India. Thus, the first objective appears to add an additional safety layer by ensuring that the buyer is an entity resident outside India so as to avoid the rigours of Article 13(5).

The second objective appears to be to avoid capital gain tax implications in India on future sale of such business. In this regard, it may be relevant to mention that as per the news reports, the parent of 'Endeavour Trade and Investment Ltd. is proposed to be based out of UAE. It may be relevant to point out that Article 13(5) of India – UAE DTAA also provides for exemption from capital gain tax in India in respect of indirect transfers (similar to India-Netherlands DTAA). Thus, in case Adani Group intends to sell this business in future, then the Dubai based principal company can sell the Mauritius based entity (Endeavour Trade and Investment Ltd.) thereby ensuring that there is no tax in India on such indirect transfer by virtue of Article 13(5) of India – UAE DTAA which also provides for exemption on indirect transfers similar to India-Netherlands DTAA.

7. Requirement to establish eligibility to claim benefit of India Netherland DTAA

The entire premises for holding that the transaction is not chargeable to tax in India is the resort to the beneficial provision of India-Netherland DTAA. In this regard, it may be relevant to point out that Tax Department may require the Netherland based seller to establish its entitlement to claim benefit under the DTAA.

- **Principle Purpose Test and Preamble of MLI**

In the above context, it may be noted that both India and Netherlands are signatories to Multi-Lateral Instrument (MLI). By virtue of Article 7 of the MLI, Principle Purpose Test provision has been incorporated

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in the India-Netherland DTAA to prevent Treaty abuse. As per the principle purpose test, the benefit of DTAA shall not be available where having regard to all relevant facts and circumstances, it is reasonable to conclude that obtaining that benefit of the DTAA was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the DTAA.

Further, Article 6 of the MLI has also amended the preamble of the DTAA to clarify that the intent of the DTAA is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Convention for the indirect benefit of residents of third jurisdictions).

The incorporation of Principle Purpose Test, amendment in the preamble by virtue of MLI being newly born, its impact in India is yet to be tested before the Indian Courts. While Holcim may argue that the Group structure being old and in operation since long, there should not be any allegation of the arrangement being structured to take tax benefit under the Treaty (Article 7 of MLI), however, in the present case, it appears that the transaction will not suffer tax in any country (Netherland, Mauritius as well as India). Accordingly, the Tax Department may argue that the entire structure was to engage in Treaty shopping and accordingly, Article 6 and Article 7 of the MLI may be invoked by the Tax Department to deny the benefit of India-Netherland DTAA to Netherlands-based Holderfin B.V.

Holderfin B.V may accordingly be required to demonstrate before the Indian Tax Authorities that the case is not that of Treaty shopping and that the grant of treaty benefit in the present case is in accordance with the object and purpose of the India-Netherland DTAA.

- **Beneficial ownership test**

Another aspect that may pose a challenge in claim for entitlement of DTAA benefit is the *'beneficial ownership*' test. It may be relevant to point out that the ultimate parent of Netherlands-based Holderfin B.V. is domiciled in Switzerland (Holcim Limited, Switzerland). In such a case, the Tax Department may require Netherlands-based Holderfin B.V to establish as to who is the 'beneficial owner' (Netherlands-based Holderfin B.V. or Holcim Limited, Switzerland) before granting the benefit of India-Netherland DTAA.

The Courts have in some cases considered as to whether the 'legal owner' of capital gain is also the 'beneficial owner' so as to be eligible to claim benefit under the relevant Article of DTAA dealing with capital gains and have held that Treaty benefit under Article 13 shall not be available to the 'legal owner' in case the 'legal owner' is not the 'beneficial owner'. It may, however, be relevant to highlight that most of such cases have proceeded on the presumption that concept of 'beneficial ownership' is to be read into relevant Article dealing with capital gains.

The fundamental question that thus arises for consideration is that whether concept of 'beneficial ownership' of the 'capital gains' can even be read into the scheme of Article 13 of India-Netherland DTAA. Recently, vide order dated 17.05.2022, **Hon'ble ITAT Mumbai** in ***Blackstone FP Capital Partners Mauritius V Ltd vs. Deputy Commissioner of Income Tax,*** [TS-381-ITAT-2022(Mum)] has considered the said aspect. In the said case as well, the assessing officer denied the Treaty benefit to Mauritius based assessee on the ground that the beneficial owner of the capital gain is an entity based out of Cayman Islands. The Hon'ble ITAT held that the assessing officer has presupposed, or proceeded on the underlying fundamental assumption that the concept of beneficial ownership of the capital gains can indeed be read into the scheme of Article 13 of the Indo Mauritius tax treaty and there is a fallacy in the said approach. The ITAT held that the assessing officer ought to have first evaluated the foundational issues, i.e. whether the concept of "beneficial ownership" is inbuilt in the scheme of Article 13 and, if so, what are the connotations of "beneficial ownership" in this context.

The ITAT observed that unlike in article 10 or article 11 of the Indo Mauritius tax treaty, which specifically provides for beneficial ownership of interest or dividend in order to be entitled for a treaty protection, there is no such provision in article 13 of the Indo Mauritius tax treaty. In absence of a similar rider in Article 13, ITAT observed that it would appear that the concept of beneficial ownership being a sine qua non to entitlement to treaty benefits cannot, in the absence of specific provision to that effect, be

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inferred or assumed. Further, the ITAT also referred to the elaborate debate on the concept of 'beneficial ownership' in the light of United Nations Committee of Experts on International Cooperation on Tax Matters pursuant to which Prof. Philip Baker QC in his consultation paper: (i) noted the irrelevance of the domestic law meaning of 'beneficial ownership' and justifiability of its international fiscal meaning, (ii) observed that the inclusion of a beneficial ownership limitation in the capital gains article of specific bilateral conventions is not part of the current tax treaty practice of any State, (iii) and concluded that "*there was ultimately only limited support for inserting beneficial ownership in article 13*"; In light of this, the ITAT observed when the beneficial ownership test is not embedded in the treaty provision itself, reading such a test is rather than a permissible interpretation of the treaty provisions, a rewriting the treaty provision itself. The ITAT thus held that the concept of beneficial ownership, it could possibly be argued, is utterly foreign to the scheme of article 13 of the Indo Mauritius tax treaty and that unless a condition is specifically set out in the treaty provision itself, it cannot possibly be inferred. With the said observations, the ITAT remitted the issue back to the file of the assessing officer to examine the aforesaid foundational issues.

In the case of India-Netherland DTAA as well, while there is a rider of beneficial ownership under Article 10 (Dividends), Article 11 (Interest) or Article 12 (Royalties and Fees for Technical Services), there is no explicit rider under Article 13 (capital gains). Accordingly, in view of the above discussion, one may argue that in absence of a rider of 'beneficial ownership' in Article 13 of the India-Netherland DTAA, the concept of 'beneficial ownership' cannot be read in Article 13 of the India-Netherland DTAA as well and thus, the fact that the ultimate parent is domiciled in Switzerland should not any have any bearing on the transaction.

In any case, one may argue that the fact that the ultimate parent is based out of Switzerland does not have any adverse bearing on the issue as such. In this regard, it may be relevant to point out that had Holcim Limited, Switzerland directly invested in Mauritius based Holderind Investments as against investing through a Netherlands-based Holderfin B.V, then too, there may not have been any tax implication in any of the Country (Switzerland, Mauritius or India). In this regard, it may be relevant to highlight that Article 13(6) of the India-Swiss DTAA also provides for exemption in respect of capital gain arising on account of indirect transfers in India (similar to Article 13(5) of India Netherlands DTAA). Accordingly, one may argue that that setting up an entity in Netherlands does not confer any additional advantage as such. It appears that risk of denial of Treaty benefit may be relatively lower in structures where ultimate parent is based out of Switzerland vis-à-vis structures where ultimate parent is based out of UK or USA as there is no exemption from tax in India in respect of indirect transfers under India-UK or India-USA Treaties whereas indirect transfer is exempt under India-Switzerland DTAA.

- **Applicability of GAAR**

As regards the applicability of 'General Anti Avoidance Rules' (GAAR), it may be relevant to mention that as Rule 10U(d) of the Income Tax Rules, 1962, the provisions relating to GAAR are not applicable in respect of any income accruing to any person from transfer of investments which were made before 1st April, 2017 by such person. In the present case, as the investments are understood to have been made long before 2017, accordingly, the provision relating to GAAR should not be applicable.

8. Concluding remarks

In view of the above, by virtue of the beneficial provision of India-Netherland DTAA, there shall be no tax liability on Holcim and consequently no withholding tax obligation on Adani entity as well. The non-taxability of indirect transfers in India by virtue of beneficial provision of Tax Treaties, despite the amendments made vide Finance Act, 2012, is not an alien concept and has in fact been adjudicated by Tax Courts in past as well. In this context, it may be relevant to mention that in the case of***Sanofi Pasteur Holding SA versus Department of Revenue, Ministry of Finance,*** [TS-57-HC-2013(AP)], the **Hon'ble Andhra Pradesh High Court** has held that in absence of any corresponding amendment in the India-France DTAA, the indirect transfer of shares are not taxable despite the amendments made by Finance Act, 2012.

Having said the above, given the fact that the transaction is not suffering tax in any country and given the incorporation of Principle Purpose Test (Article 7 of MLI) and amendment in preamble (Article 6 of MLI) of the India-Netherland DTAA, in all likelihood, the Netherlands-based Holderfin B.V may be required

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to establish its entitlement to claim benefit of India-Netherland DTAA.

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