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PROFILE OF A PUBLIC INTEREST LITIGATION IN REVENUE MATTERS (The abuse of the Indo-Mauritius Double Taxation Avoidance Convention Case)

“The nations seem caught in a tragic fate, as though, like characters in a Greek drama, they were blinded by some offended God. Bewildered by mental fog, they march towards the precipice while they imagine that they are marching away from it.”

Bertrand Russell, *The Basic Writings of Bertrand Russell* p.
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Glories like glow-worms, afar off shine bright. But looked to near, have neither heat nor light.

John Webster, *The Duchess of Malfi* (IV. ii)

Introduction

The three Chapters 23 (‘The Profile of a PIL in Revenue Matters’), 24 (‘Our World-view and the trends of our times’), and 26 (The Realm of Darkness: the Triumph of Corporatocracy’) constitute a triplet of ideas forming a common spectrum of thought. They would help you to reflect on ‘the moral deficit’ and ‘democratic deficit’ of our times. Whilst the first tries to answer Juvenal’s question: *Quis custodiet ipsos custodes?* (Who will watch the watchers?), the second explores the trends and tendencies shaping our world-view, and the third would show how ‘the instruments of darkness’ “win us with honest trifles, to betray’s in deepest consequence”¹ to create circumstances for the triumph of Corporatocracy, which can smother Democracy, can wither our Republic, and can build a structure of deception that can catch us the unwary! The logic of contextual relevance has made me transpose some of my reflections, pertinent to this Chapter, to Chapter 26: these are: (i) the nature of the tax havens (or the secrecy jurisdictions), (ii) the Structure of Deception and the neoliberal states system replacing the classical states system, and (iii) the Doctrine of Lifting the Corporate Veil. Chapter 24 portrays the world that we are building through our deeds, and ideas. In these Chapters, I have tried to shed some light so that the ‘shadow’ that falls ‘between

the idea and reality, between the motion and the act' is removed. You can access the documents pertaining to this PIL at my www.shivakantjha.org where I have placed them for the information of our citizenry whom I had represented before the courts. For me, it was only a labour of love.

Throughout the course of this PIL, my youngest daughter, Anju Jha Choudhary², herself an advocate of the Supreme Court Bar, assisted me with her extraordinary competence; and she received well-deserved appreciation from the Court, and the counsels of the Respondents. I received some help in preparing the case from some distinguished jurists, viz. Mr. John Cary Sims³, Ray August⁴, and Dr M. L. Upadhyaya⁵, and Prof Sol Picciotto⁶.

I wish you read this Chapter to decode the metaphors of events, to see through them, even things not discussed in so many words. Joseph Conrad in the preface to *The Nigger of the 'Narcissus'* (1897) had aptly told his readers; "My task which I am trying to achieve is, by the power of the written word, to make you hear, to make you feel — it is, before all, to make you see." My task here is no different.

I

PIL IN THE REVENUE MATTERS: A PARADIGM SHIFT

I felt that it was wrong on the part of the Government of the day to see its power of taxation the way the autocrats of the long dead past had seen theirs. Their people had only the obligations to pay, and they only the rights on the resources of people. It took centuries to come to the day when the eminent British Judge Lord Hewart could say that the duty of the tax-gatherers was "in the interests of the general body of the taxpayers", and the tax-gathering was "a public process directed to public ends".

With the emergence of the democratic ideas, the public interest in the resources of the state and their deployment came to be acknowledged. It first manifested itself in the assertion of the Public law view of *locus standi* meaning "the right to be heard in a court of law". Now the claim for taxation was not exclusively a matter between the Government and the individual taxpayers, but it had become a matter of great concern for the people in general. In effect, with the gradual removal of 'democratic deficit' in polity, law registered remarkably great strides. And the credit for such bold assertions goes to the British judiciary. We have followed that view, though not with that steadfast zeal. I felt, in 2000, that it was the right time to drive home to our Government that it must realise that in some situations, its acts could be questioned by any public-spirited person before the courts of law. So taxation has ceased to be a 'sovereign function' in tandem with the notion of 'sovereignty' that has undergone a radical change in our times. First, I would tell you about the British case which inspired me to launch PIL litigation before the Delhi High Court questioning the validity of certain administrative acts of the Central Board of Direct Taxes. Such acts pertained to the administration of the Indo-Mauritius Double Taxation Avoidance Convention (to be referred as the 'Indo-Mauritius DTAC', or 'tax treaty', for short).

Lord Denning refers to an article published in the *New Law Journal* ([1980] NLJ 181) as ' *Locus standi*: The major problem in revenue law ... Who can challenge the legality of a tax concession?' Lord Denning's view of the public law character of

locus standi was upheld in the celebrated decision of the House of Lords in *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd.* ([1981] 2 All ER 93 HL). Our Supreme Court relied on this decision, while determining the frontiers of Public Interest Litigation (PIL for short) by widening the province of *locus standi*, in *S.P. Gupta v President of India* (AIR 1982 SC 149). Justice Bhagwati quoted with approval Lord Diplock's observations that have become *locus classicus*:

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by out-dated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped....”

The Judgment rules that the court can intervene to provide remedy (i) if the Revenue's conduct is unlawful or *ultra vires*; (ii) if the principle of fairness in dealing with the affairs of taxpayers is breached; (iii) if the duty to collect 'every part of inland revenue' is considered a duty owed exclusively to the Crown in the light of *the Treasury case* of 1872; and (iv) if the attitudes towards tax law is unresponsive to the fast changing times and social mores.

As a prelude to this story, I would tell you about my plight in conducting this PIL. The Delhi High Court commended me in the penultimate paragraph of its Judgment (coram: S.B. Sinha, Chief Justice and A.K. Sikri J.)⁷:

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

But our Government, whose cause, in effect, I had espoused before the Court, never thought it fit to seek my help. After all what was there to ask me? What was there which our Government did not know? I am an old man: my mind goes to T. S. Eliot's *Gerontion*, which expresses the feelings of a man in his closing years who had seen enough of things in the locust-eaten years after World War I:

After such knowledge, what forgiveness? Think now
History has many cunning passages, contrived corridors...

The Division Bench of the Supreme Court reversed the High Court in *Union of India vs. Azadi Bachao Andolan*⁸ (coram: BN Srikrishna, Ruma Pal JJ.). It made a remark that cut me without mercy for raising “sound and fury... over the so called ‘abuse’ of ‘treaty shopping’”⁹, and considered it fit to say that the Petition was “said to be by way of public interest litigation.” Whilst the expression ‘sound and fury’ brought to my mind Macbeth's:

‘...it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing’,

the expression “said to be” drove me into the dilemma of Shakespeare's *Hamlet*: ‘To be, or not to be, that is the question’. How well did David Hume say: ‘Beauty is no quality in things themselves: It exists merely in the mind which

contemplates them'. I consider it prudent to be reticent, but I would reveal myself by quoting a well-known *shloka* from the famous *Panchtantra*:¹⁰

नरपतिहितकर्ता द्वेष्यतां याति लोके
जनपदहिकर्ता त्यजते पर्थिवेन्द्रैः
इति महति विरोधे वर्तमाने समाने
नृपतिजनपदानां दुर्लभः कार्यकर्ता

I would tell you what I experienced in our Supreme Court. When I appeared alone on August 16, 2010 before the Chief Justice's Court in response to the Court's notice to appear and plead my Review Petition, I felt embarrassed that under some administrative instructions all the PIL Petitioners, while in the Court to present their cases, were to remain under the close vigil of a guard. So I was in the Court under the vigil of a guard standing close. What pained me most was the insult to the common citizens of our Republic who were not trusted to behave well in own court. We had seen Bharat Mata and persons like Savarkar in chains and irons during the era of servitude. It was difficult not to lose poise on finding oneself addressing the Court under the shadow of an imperious guard when that endeavour, in my 70s, was wholly a labour of love. I felt so bad that I immediately expressed my mind in strong words to the Secretary General of the Supreme Court, and later raised this issue in the Review Petition. But all in vain.¹¹

II

HISTORICAL PERSPECTIVE: THE TROJAN HORSE ON MARCH

As our country has become almost a reflecting mirror of the dominant western economic thoughts, it is important to mark the two phases in this post-World War II period. "Since World War II, international economy has passed through two phases: the Bretton Woods phase in early 1970s, and the period since, with the dismantling of the Bretton Woods system of regulated exchange rates and control on capital movement. It is the second phase that is called "globalization," associated with the neoliberal policies of the "Washington consensus". The two phases are quite different."¹² It is the second phase which gets illustrated in the triplet which Chapters 23, 24 and 26 constitute.

During her last term as the Prime Minister, Smt. Indira Gandhi was becoming less and less assertive in our nation's economic policies. The Emergency had surely taken a toll on her. The lobbyists left no stone unturned in pleading that on relaxation of the rules under the Foreign Exchange of Regulations Act, 1973, a lot of foreign investments would come from the non-residents of the Indian origin to save the country from the financial crisis that loomed over us. Sri Pranab Mukharjee, the Finance Minister, as he then was, promoted this idea with adroitness. There was an industrial slow-down causing much worry. The Government was all for loan from IMF to overcome the balance of payment crisis assuring, those who mattered, our country's readiness to effect structural changes in the economy. Sri Pranab Mukharjee told the Lok Sabha that the India would not suffer like Mexico and Brazil on account of increasing dependence on the IMF.¹³ In his Budget 1982, the share market investment rules were relaxed in favour of

the non-resident Indians, and the companies and trusts which they owned at least sixty per cent. The rules provided that they could invest directly and could repatriate their funds from India. How this scheme was misused was widely known even in the early 1980s. It facilitated some Indians to float companies in tax havens, like the Isle of Man, to bring investment into their Indian companies. All the features, we notice in the 'shelf companies' or 'paper companies' or 'conduit companies' operating through Mauritius, were clearly evident in the companies which had operated from the Isle of Man: similar profile of directors, analogous capital structure in floating such companies, similar share-holding patterns by a narrow group of shareholders serving the deeper purposes to access the benefits of a tax treaty for an assortment of purposes. Such things were widely known; and we can reasonably infer that they were known to the then Congress Government. You may read something about it in Hamish McDonald's *Ambanis & Sons* (2010). Swraj Paul was a close observer, and also a participant in the show then going on. In his memoir *Beyond Boundaries* he has recorded an interesting account revealing the culture of the economic management and administration in the early eighties. He highlighted the nexus that existed between economic power and political power. He mentioned how in 1982 there were serious efforts to invite NRI investment. Dr. Manmohan Singh, then Governor of the Reserve Bank of India, was all for promoting the policy of NRI portfolio investment. We all know that the most misused Indo-Mauritius Double Taxation Avoidance Convention was done in 1983 when Shri Pranab Mukherjee had been the Finance Minister, and Dr. Manmohan Singh had been the Governor of the Reserve Bank. McDonald's book would show how even in those early years of the onset of the so-called liberalization, scandalous receipts had intruded into our country through craft and collusion.

My reflections on what came into our public domain in early 1980s lead me to think that in contriving the structures of deception through creation of companies, the craftsmen followed the same hackneyed plot which was the subject-matter of Charles Mackay's *Extraordinary Popular Delusions and Madness* (1841) discussed in Chapter 25 of this Memoir. The subsequent craftsmen have tried the old strategy with varying measures of success mostly in proportion to the political patronage they received.

India's contacts with Mauritius were deep and wide. In the general election of 1982 Aneerood Jugnauth became the Prime Minister and Paul Berenger was made the Minister of Finance in August 1982. Prime Minister Mrs. Indira Gandhi visited Mauritius. She supported its claim over the Chagos Archipelago. The Indo-Mauritius DTAC was negotiated in August 1982 though the Government of India notified its commencement in the domestic jurisdictions in 1983. Both India and Mauritius had reasons to adopt the OECD Model of tax treaty. The obvious reason was that both the countries were facing balance of payments crisis. Mauritian economy was under severe economic constraints. "For its size, Mauritius was one of the world's most indebted nations."¹⁴ The great possibilities of this DTAC were noticed; and greed, as the prime-mover in the capitalist system, led the MNCs, their beneficiaries and lobbyists, and many top politicians and mighty bureaucrats, to develop a studied strategy to misuse the said tax treaty. It is different matter that what was just a trickle in the early eighties became a flood in the 1990s, and thereafter. Besides, the misuse (or abuse) of the tax treaty

depends on the capacity of misusing which differs from time to time because of political and economic circumstances, and the opportunities to evade and escape. After the wholesale opening up of our economy, this treaty was turned into a rouge' charter.

While talking to Dr. Manmohan Singh, when my PIL was being heard before the Delhi High Court (in 2001), I got it that the prime object of the Indo-Mauritius tax treaty, when it was made in 1983, was to have more of foreign exchange as India was needing that most at that time. I brought out this fact before the Supreme in the text of my Writ Petition¹⁵, and I mentioned therein that my researches had led me to believe that the maelstrom of the financial crisis in the early eighties was largely stage-managed to provide a free play for the corporate *imperium* which in the early eighties had established its sway, thanks to the policies set afoot by Ronald Regan, the U.S. President under the pressure and persuasion of the U.S. corporate interests. There could have been less precarious ways to get over the crisis. But the 1982 debt crisis was used as a device, dexterously devised by the experts, the corporate interests, and the masqueraders of all sorts, to achieve the agenda of the neoliberal economic ideology.

The model for the tax treaty with Mauritius was adopted to promote the policy of wooing the foreign investors. The foreign investors had their own agenda to pursue. The model adopted for the said tax treaty was the OECD model. None thought: whether the model conformed to our law and Constitution. If this model was to be adopted for a tax treaty, it should have been considered essential to seek legislative approval before the notification giving effect to that was issued. In effect, a tax treaty must be a legislative act as it is in the U.S.A., the U.K., Canada, Australia, and France etc. The words of Section 90 of the Income-tax Act, 1961, are not wider than the corresponding provision in the British Income-tax Act, yet a tax treaty is made there by the Crown only when the House of Commons approves the terms of a tax treaty through a resolution. The procedure accords well with a great Constitutional principle establishing exclusive Parliamentary control on 'taxation'.

III

MATERIAL POINTS IN THE PROFILE OF THE INDO-MAURITIUS DOUBLE TAX AVOIDANCE CONVENTION ('DTAC', OR 'TAX TREATY', FOR SHORT) [As we noted them in 2000]

Here I have no intention to summarise the provisions of the Indo-Mauritius DTAC. As its title goes, it is meant to avoid 'double taxation of income' both by India and Mauritius by the fact that both the countries possessed power to tax income on account of the earners' *residence*, and the *source* of income earned. The concept of Double Taxation has been explained in *Black's Law Dictionary*: "The imposition of comparable taxes in two or more States on the same tax payer, for the same subject-matter or identical goods." On close analysis, the definition contains the following ingredients:

- (i) The imposition must be of *comparable taxes*;
- (ii) The incidence of tax should be on the *same taxpayer*;
- (iii) The *subject matter* (or the taxable event) should be the same subject matter.

Total 'exemption' from taxation, causing wrongful gains to one, and loss to the other, is not warranted by this expression. To say that it warrants even that can be only on the authority to which Lord Atkin referred in his famous dissent in *Liversidge v Anderson*¹⁶:

"I know of only one authority which might justify the suggested method of construction. 'When I use a word' Humpty Dumpty said in rather scornful tone, 'it means just what I chose to mean, neither more nor less'. 'The question is,' said Alice, 'Whether you can make words mean different things'. 'The question is,' said Humpty Dumpty, who is to be the master—that is all."

This Convention was bilateral: only for the benefit of the residents of India and Mauritius. The residents of the third States could not get access to such benefits. George Schwarzenberger (in his *A Manual of International Law* 5th ed. p.160) rightly says: "Treaties confer no legal rights and impose no legal duties on non-parties" If mere incorporation under a Mauritian Law, or mere grant of a Certificate of Residence, be enough, then nothing would prevent Mauritius from providing that status to any person from any country. But if this happens then all other bilateral tax treaties would be reduced to irrelevance and the income-tax law would become a paradise for marauders leaving the people of India to rue their lot. This is not a figment of my imagination. It has already taken place. In *XYZ/ABC Equity Fund, In re*, [2001] 250 ITR 194, the Authority for Advance Rulings had to give its ruling in an interesting case. The Applicant was a collective investment vehicle resident in Mauritius. In modern commerce, such a *vehicle* means: "a privately controlled company through which an individual or organization conducts a particular kind of business, esp. investment" The Authority records in its order:

"It has allotted a large number of shares on a private placement basis to a limited number of prospective investors spread over Belgium, France, Germany, Hong Kong, Japan, Kuwait, the Netherlands, Singapore, Switzerland, the United Kingdom and the United States of America."

If in the spacious "vehicle" an assortment of persons from such large parts of the globe can sail together across the Indian Ocean to India, then why not construct a vehicle, registered in Mauritius, wide enough to be a Noah's ark where all the treaty-shoppers from all the parts of the globe can be accommodated rendering all other agreements irrelevant and otiose. The Indo-Mauritius DTAC could become the vanishing point of all other tax treaties. It is strange that what could have been a mere *reductio ad absurdum* has already happened with the culpable complicity of our own Government!

The provisions pertaining to the 'avoidance of double taxation' cannot mean creation of 'no-tax situation' for the residents of one country. Capital gains in the hands of the Indian residents are taxable, but these in the hands of the Mauritian residents bear no incidence of tax. 'The doctrine of reciprocity in the tax treatment of their respective citizens' is breached. Under the eye of our laws, income generated through transactions in India, is taxable in India. If a particular assessee wants to escape the incidence of taxation, he must establish with reasonable evidence that he has got a valid case for tax-exemption or tax-mitigation. The

Assessing Officer has the jurisdiction to investigate facts and decide issues. If he finds that the person claiming benefit is not the resident of the States party to the treaty, he must reject the plea for benefit under the treaty. Those residents of the third States, who masquerade as the Mauritian residents are fraudsters causing wrongful loss to India. We call them 'treaty-shoppers' as they shop the benefits under tax treaties to which they have no legitimate claim. When some Indian residents launder their money back to India from Mauritius, their affairs become circular: they are the so-called 'round-trippers'. The tax is charged on the beneficial owners: so the Assessing Officers are under duty to discover them. In *Gee Vee Enterprises v. Addl. CIT*¹⁷ the Delhi High Court aptly held that their statutory and quasi-judicial duties are "to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry." Mauritius had all the typical 'tax haven' features: the facilitation of tax evasion and avoidance of laws, and dense secrecy which could be utilised even for criminal purposes.

IV

AN INSTANCE OF THE TOUCH OF COMUS, THE FRAUDSTER

John Milton's *Comus* was a 'Mask Presented at Ludlow Castle'. It tells us how the spell of deception was cast by Comus on the young Lady through his necromancy and sophistry. Milton contrived the plot to show that she ultimately escapes from the trap. Comus declared, to quote from Milton; "T is only daylight that makes sin.' Our Supreme Court refers to it in *Shrisht Dhawan v. Shah Bros*¹⁸. When I think of this enchanted castle, my mind goes to many modern versions of Ludlow Castle built in the tax havens where the Rogue Finance waxes high, and plays the role of financial wizardry facilitated by a host of global financial wizards, chartered accountants, lawyers, and the experts in geopolitics of micro and macro states, and those skilled in exploring all the possibilities of the Cyberspace. I would revisit this topic in Chapter 26. Here I would shed light on one instance so that you can see how the financial wizardry works; and how a nation of intelligent people is taken for a ride. The general pattern of operation of a 'tax haven' has been well described by Prof. Sol Picciotto¹⁹, who had interviewed me on the misuse of the Indo-Mauritius route, and referred to this PIL in some of his articles presented at international fora. He says :

"The basic principles of tax avoidance through a haven are relatively straightforward. It simply consists of establishing one or more legal entities (company, trust or partnership) in convenient jurisdictions, through which to channel an income flow derived from international investment or business activities. The deployment of a combination of intermediary entities can reduce or eliminate taxation both at source and in the jurisdiction where the intermediary is resident, while insulating the ultimate beneficiary from tax liability (Picciotto 1992, 135-141). It is also possible, especially since the lifting by most countries of exchange controls, for a resident in a country to 'export' funds and return them as investments into the same country, which is generally referred to as 'round-tripping'. This enables a resident to

benefit from tax advantages as well as other inducements offered to foreign investors. Thus, for example, a large proportion of foreign investments into India are routed through Mauritius, due to favourable provisions in its tax treaty with India, and it is suspected that a proportion of these derive from Indian residents.”

On a conjoint appeal by our Government and a ‘tax haven’ company, our Supreme Court reversed the Delhi High Court’s decision quashing the Circular No. 789 of 2000 issued by the Central Board of Direct Taxes. The Supreme Court decided to ignore the facts which the Income-tax Department had gathered in the Assessment Orders (passed by the Assessing Officers in Mumbai) in the case of about 24 assesses. At times facing facts becomes difficult. The High Court ignored them, but took them into account in its judicial deliberations, even without mentioning them in so many words. But our Supreme Court just ignored them lock, stock, and barrel.

After 1991 the ‘treaty shopping’ grew more and more but our Central Government took no notice of that. In the early nineties some bright officers in the Income-tax Department took steps to prevent ‘treaty shopping’. I heard that there was a reference to the Central Board of Direct Taxes stating the impropriety of ‘treaty shopping’ as it caused big loss to the country. It was an administrative reference. A matter of this type generally goes to the Secretary and to the Minister of Finance. It was talked about that our diplomatic mission in Mauritius and the Ministry of External Affairs were against departing from the practice under which the misuse of the tax treaty went unnoticed. The reference was quenched by the issue of the CBDT Circular No. 682 of March 30 of 1994. The subject-matter of the circular is mentioned as: “Agreement for avoidance of double taxation with Mauritius Clarification regarding”. The Circular is mere paraphrase of Article 13 of the Indo-Mauritius DTAC. There was no obvious logic in transmitting down the line a mere paraphrase of Article 13. By countering an important query thus, it was unequivocally suggested that the past practice was to be allowed to operate, the loot of the nation must go on.

But facts speak clear and loud: so I summarise the facts of one of such Assessment Orders. Such orders tell you how the craft of Deception works in this ‘globalised’ world. The great H.W. Fowler aptly observed in the second edition of the *Concise Dictionary of English*: “Define, and your reader gets a silhouette; illustrate, and he has it ‘in the round’”. Hence, I would illustrate with reference to the facts of one of such assessee. The facts that I summarise are from the Assessment Order that had been placed before the Delhi High Court. As the name of the assessee is not material, I have decided to avoid that.

M/s. XY Ltd. filed income-tax return for assessment year 1997-98 as a non-resident in the status of company (FII). The Assessing Officer investigated the case and computed the assessee total income at Rs. 3,88,72,822 which included short term capital gains to the tune of Rs. 2,91,76,094 and long-term capital gains to the tune of 22,56,817. The assessee’s claim that it was entitled to the benefit of the Indo-Mauritius Tax treaty was considered, but the benefit under the treaty was denied. Under Article 13 of the Indo-Mauritius DTAC the capital gains are chargeable in the country of residence. As capital gains are not chargeable in Mauritius, the Mauritian residents do not pay tax on capital gains. The company was registered with the SEBI as a FII, and the assessing officer made assessment

in terms of section 115 AD of the Income-tax Act, 1961 and initiated proceedings for concealment of income. M/s. XY Ltd. was incorporated in Luxemburg. There was no Double Taxation Avoidance Agreement between India and Luxemburg at that time. If the Luxemburg investor had earned on the Indian Stock Market, it would have been treated as a non-resident *simpliciter* and charged to tax as such. The company decided to create a fully owned subsidiary company incorporated in Mauritius. It contacted M/s. A, B. International Management (Mauritius) Ltd., a body professional consultants licensed by Mauritius Offshore Business Activities Authorities, to work as offshore management company. They handled pre-incorporation formalities for incorporation of offshore Mauritius Company. They also provided two professionals to be placed on the Board of Directors. After completing all these formalities. A subsidiary was got incorporated in Mauritius. After incorporation of a Mauritian subsidiary, M/s. International Management (Mauritius) Ltd. was appointed to work as its Administrator, Registrar and Company Secretary. M/s. C.D. Bank AG, a company incorporated in and operating from Switzerland, handled the management of investment which was the sole business of the assessee company. The object clause of Memorandum of Association of Assessee Company made the following provision.

“The object of the company specified in the Memorandum shall be carried on outside Mauritius.”

The Assessing Officers examined the assessee’s plea that its effective control and management was in Mauritius; and also evaluated the company’s various other contentions. The Assessing Officers found:

- (i) that the effective control was in the hands of the holding company with power to override all decisions taken by the Mauritian Directors who were only professionals;
- (ii) that the Board meetings in Mauritius were mere façade to keep the certificate of incorporation alive;
- (iii) that the records in Mauritius were managed as a façade because the conduit company transacted on the instructions of its global custodians and Indian custodians, both outside Mauritius;
- (iv) that the secretaries and the auditors in Mauritius were only for the limited purpose of complying with formalities;
- (v) that the assessee was not allowed to operate Bank Accounts in Mauritius in Mauritian Rupee. [A Dollar account in Mauritius branch of a non-Mauritian bank was maintained by the assessee with the sole purpose to transfer funds from global custodian to Indian custodian through Mauritius branch by telegraphic transfer. This routing of funds was done as a condition for keeping the incorporation certificate of Conduit Company alive.]
- (vi) that the real control of the assessee company remained in the hands of the holding company, and the source of fund was outside Mauritius;
- (vii) that the certificate of incorporation was granted with certain overriding conditions, to mention:
 - (a) it could not acquire any property in Mauritius;
 - (b) it could not deal with any resident of Mauritius;
 - (c) it could not raise any fund in Mauritius;
 - (d) it could not make any investment in Mauritius; and

- (e) it could not conduct any kind of business activity or gainful activity in Mauritius;
- (vii) that the investment managers were group concerns of the holding company and were at the pleasure of the holding company; and
- (ix) that the company was one of the several conduit companies set up for 'treaty shopping' formed after enactment of MOBA in 1993 when Mauritius became a tax haven.

In view of the above facts the Assessing Officer held that the assessee company was not a resident of Mauritius but was a mere 'treaty-shopper' not entitled to the benefits under the Indo-Mauritius DTAC. Mauritius knew about the nature of juristic person that was created by the holding companies of some third country.

Storm in the tea cup: the context and the *casus belli*

For years the resources of the country were looted. Everybody knew but inertia prevailed. Any query, which the Assessing Officer made, put the powerful lobbyists on high alert. It was believed that their tentacles of influence worked at all levels. Some remarkable officers passed certain Assessment Orders in 2000 as such proceedings were to get barred by limitation on March 31, 2000. These Orders had the effect of volcanic eruptions on the Stock Market and the corporate world. Assuming that the M/s XY Ltd. (and all others sailing in the same boat) had a valid grievance, it could have gone on statutory appeal, or could have sought appropriate constitutional remedy from our superior courts. The lobbyists painted the lurid picture of the melodrama of the collapse of the Stock-Market. They adopted dexterously their old and tested strategy of advancing threats and crypto-psychic pressure whenever their wishes were not fulfilled. They pleaded that the wealth of the nation would vanish, hot money would go into hot air, and the high GDP would decline to drag India down into gutter! They worked overtime to plead their well-crafted brief. The politicians were made to realise that the nation was in crisis, and our economy was at the point of its doom. And then it happened what happens these days always. Our sovereign government thought it prudent to bend. Efforts had to be made to wipe their tears, to soothe their ruffled feelings, and to tell them in confidence that the government existed for them though at times it had to pretend to be doing something also for the 'great beast' we call *aam aadami* waiting tongue-tied for the 'trickle-down effect' from the phoney wealth that the Stock Exchange creates!! As always, the pressure worked, the persuasion worked, the magic worked. The Finance Minister became their Good Samaritan. Perhaps, it was felt that selective amnesia was at times good. The CBDT acted post-haste: it issued its Circular 789 of 2000 to satisfy the angry plutocrats and their minions. It forgot the Income-tax Act, 1961, it forgot the Constitution, it forgot that it had no power to dispense with the law by creating, through administrative directions, an insurmountable bar in a legal proceeding by creating 'a conclusive presumption' which are always created only by the legislative acts. We were back to the days of the Stuarts!

The Central Board of Direct Taxes issued a Circular number 789 dated April 13, 2000. The effect of the Circular can be summarised in the following propositions :

- (i) Incorporation in Mauritius makes, *per se*, a company an entity "liable to tax" under the Mauritius treaty law, and therefore to be considered as resident of Mauritius in accordance with the DTAC.

- (ii) A Certificate of Residence issued by the Mauritian Authorities “will constitute sufficient evidence for accepting the status of residence”.
- (iii) A Certificate of Residence issued by the Mauritian Authorities “will constitute sufficient evidence for accepting ...beneficial ownership for applying the DTAC.”
- (iv) The “FIIs etc., which are resident in Mauritius, would not be taxable in India on income from capital gains arising in India on sale of shares as per paragraph 4 of Article 13”.
- (v) The circular “shall apply to all proceedings which are pending at various levels.”

The statutory Assessing Officers investigated, and framed many Assessment Orders under the Income tax Act, 1961 rejecting the claims of many wrongfully trying to access benefits under the Indo-Mauritius DTAC. The Circular No. 789 invalidated them, and the authorities were required to go under blinkers.

V

MAURITIUS MAKES HAY WHILE THE SUN SHINES: THE CIRCUMSTANCES HELPED THE EMERGENCE OF THE ENTENTE CORDIALE OF COLLUSION AND FRAUD.

Mauritius transformed its legal regime and administrative culture in the full view of the world, but our Government refused to see what was happening there, and the purpose for which that was happening. Mauritius became a tax haven by way of design. Mauritius knew that her native resources were not sufficient to invest in India either as foreign direct investment or as portfolio investment. But it could become a good route for making investments by the residents of other countries. In 1992, Mauritius underwent great change to become tax haven. It structured its legal regime for that purpose.

Our diplomatic mission did not give good account of itself

After 1994, the Income-tax Department kept on drumming into the ears of the Central Government that the Indo-Mauritius route was being abused under the colour of the tax treaty but nothing was done to prevent it. India had a strong diplomatic mission in Mauritius. It was the imperative role of the mission to take note of the events taking place there, and to report them to the government of India along with their careful analysis and evaluation from the point of view of India’s national interests. The Indo-Mauritius DTAC was negotiated in 1982. By 1992 Mauritius was all out to establish a legal regime by enacting several laws to transform herself into a tax haven. The Indo-Mauritius DTAC was founded on a profile of facts which underwent a sea change. The change, brought about through the laws newly enacted, and the administrative style, shaped by push and pressure of tax haven culture, was so fundamental that the Government of India was duty bound to consider them to see if the *consensus ad idem* which had produced the treaty was still surviving; if not, whether some action was called for in view of the material changes in circumstances. It was the duty of the diplomatic mission to take note of the misuse of the Indo-Mauritius DTAC by those not entitled to the benefits under the bilateral tax treaty²⁰. The abuse was so flagrant, so staring, and so massive that not taking note of such things was an evident

dereliction of duty. But such lapses had become endemic. Hamish McDonald refers, in his *Ambani & Sons* (at p. 145) to the efforts of Mr. Bhure Lal, the Director in the Enforcement Directorate, to find out someone's financial trails, but failed because everything was shrouded in darkness. McDonald was led to comment on the role of our embassy in words which are saddening:

“India's own embassies in foreign capitals were worse than useless. In a later note on his 1986 inquiries, Bhure Lal complained that any information given to Indian mission was usually passed on to the suspect.”

VI

THE PUBLIC INTEREST LITIGATIONS

(a) The Abuse of a Tax Treaty Case before the Delhi High Court²¹

I spent half a decade (2000-2005) conducting the so-called 'the Abuse of a Tax Treaty Case'. I decided to move a Writ Petition before the Delhi High Court challenging the Circular 789 of 2000 which could delight the denizens of the world of Finance and the Stock Market, because the secrecy it ensured and the presumptions it created, came to help greatly the tax-evaders, money-launderers, and fraudsters. They could also be utilized to facilitate the operations of crooks, narco-criminals, corrupt politicians and bureaucrats, and the terrorists of all sorts. I felt something must be done to bring to the Court's notice this administrative remissness. Besides, I felt the provisions of the said Circular were contrary to the law that authorized the CBDT to issue circulars for the purpose of the administration of the Income-tax Act, 1961. Such a power had not been conferred to subvert the statute by preventing the statutory authorities from exploring facts of the cases in which claims were made for the benefits under the tax treaty. The law never conceived an administrative circular to become the vanishing point of the tax law. I got light and inspiration from *A Rickshaw Puller vs. A Rickshaw Puller*, about which you can read in Chapter 27 of this Memoir. I argued before the Court (Chief Justice S.B. Sinha, and Justice A.K. Sikri) for a week, and ended with my peroration quoting Lord Nelson's words expressed through light signal to his forces in the Battle of Trafalgar: "England expects that every man will do his duty". I cannot forget that subdued and much-restrained smile writ large on the face of the Chief Justice. Again I ended my *Judicial Role in Globalised Economy* (2005) with those words lacing the quote with my gloss: India expects everyone to do his duty.

The legality of the Circular No. 789 of 13th April, 2000 was specifically questioned, though I made broad spectrum submissions. The High Court decided all the issues upholding my position. It quashed the said Circular, and held, among others:

1. The power of CBDT to issue instructions to subordinate authorities was only for *proper administration* of the provisions of the Income-tax Act, and not otherwise.
2. The government cannot, through an international treaty, lay down a procedure or evidentiary value of document clearly *dehors* the provisions of the Income-tax Act.

3. The Assessing Officers' function is judicial in nature which "can be regulated but cannot altogether be prohibited".
4. The residential certificate issued by the Mauritian authorities could not stop the tax authorities in India from discharging their statutory duty to investigate and decide cases.²²
5. The authorities have jurisdiction to lift the corporate veil of the corporations to observe the operative realities where it is fair to do so.
6. The tax treaty must conform to section 90 of the Income-tax Act, 1961: no transgression could be permissible. .
7. "An abuse of the treaty or treaty shopping is illegal and thus necessarily forbidden." "No law encourages opaque system to prevail."
8. The judicial attitude towards 'tax avoidance' has undergone change to protect the public interest in revenue.

(b) The Supreme Court reverses the High Court on Appeal : A critique

[*Union of India & Anr. v. Azadi Bachao Andolan & Shiva Kant Jha.*
(2004) 10 SCC 1]

The Union of India appealed to the Supreme Court where, at the persuasion of Sri Arun Jaitley, Senior Advocate, 'a tax haven' company was allowed to become a co-appellant! I was amazed that Mr. Harish Salve, Senior Advocate, who had appeared in this case before the Delhi High Court, as our country's Solicitor General, represented the Mauritius Company before the Supreme Court. Mr. Soli Sorabjee the Attorney General, represented our Government making common cause on all points with the co-appellant. He had appeared in *McDowell's Case* and lost it to the Government of India, but now as India's Attorney General he pleaded against that, and saw to it that the Court turned critical of that decision, even went to the extent of ridiculing that Constitution Bench decision by calling it 'a hiccup' and 'temporary turbulence'! The bastion of the Revenue suffered a quake. It was a strange spectacle to see how a deep fraternity between the 'tax-haven' company and our Government grew. At the end of the day, the Division Bench of the Supreme Court overruled the Delhi High Court by dubbing it as one in which the High Court had 'erred on all counts in quashing the impugned circular'.

In course of that litigation, I had many situations which amazed me as a citizen of this Republic. Some of these were the following:

- (i) The Delhi High Court had decided in *Shiva Kant Jha & Anr v. Union of India*²⁴ only one issue: the validity of CBDT's Circular 789 of 2000. The Court observed in so many words in its judgment:

"From the discussions made hereinbefore we are of the opinion that the statutory power of the assessing authority cannot be taken away by reason of the impugned circular. Be it recorded that counsel for the parties have argued before us at great length and raised before us a large number of questions which have been noticed hereinbefore, but keeping in view the fact that only an interpretation of the statute *vis-à-vis* the impugned circular. We are of the opinion that we need not go further and leave the other contentions for being determined in an appropriate case."

As the High Court had decided only the legality of the impugned Circular, it was not proper for this Supreme Court, on appeal, to decide in *Union of India v. Azadi Bachao Andolan & Anr*²⁵ wholly extraneous issues of 'treaty-making' power by invoking concepts of 'sovereignty' and 'political question'. Over the decades the Supreme Court has held that no constitutional issue should be decided unless it is *essential* for the actual decision of the case.²⁶ In *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr*²⁷ our Supreme Court had observed:

"As this Court has frequently emphasized, in dealing with constitutional matters it is necessary that the decision of the Court should be confined to the narrow points which a particular proceeding raises before it. Often enough, in dealing with the very narrow point raised by a writ petition wider arguments are urged before the Court, but the Court should always be careful not to cover ground which is strictly not relevant for the purpose of deciding the petition before it. Obiter observations and discussion of problems not directly involved in any proceeding should be avoided by courts in dealing with all matters brought before them: but this requirement becomes almost compulsive when the Court is dealing with constitutional matters."²⁸

So, it can be said, on sound reasons, that all the observations on 'Treaty-Making issues in *Azadi Bachao* are mere *obiter* observations not needed for the actual decision.

- (ii) It was not proper to exclude from consideration the facts found in the statutory assessment orders on the ground that those assesseees were not before the Court. The Court failed to appreciate that the Petitioner's grievance was against the wielders of the public power in our country, not against any beneficiary of the public power. It was amazing to see that concrete facts establishing fraud, both *actus reus* and *mens rea*, were ignored on the ground that the company was not before the Court to answer. I had felt that such companies could never be the necessary parties²⁹ in the PIL, because the grievance was only against our Government, not against X or Y or Z. If an unauthorized house is demolished under a legal order there is no reason to bother about what happens to the rats and cockroaches which swarmed in the house. The effect of what the Court did by circling out the factual substratum was to destroy the very foundation of the case without which the judicial perspective could neither be concrete, nor correct. Didn't a character in John Webster's *The Duchess of Malfi* find it difficult to stand the ravishing beauty of the dead Duchess? He uttered: 'Cover her face; mine eyes dazzle; she died young.' My mind goes to Act V Scene 2 of Shakespeare's *Othello* where before killing the most gracious Desdemona, Othello says :

Yet she must die, else she'll betray more men.
Put out the light, and then put out the light:

If someday someone sees facts, truth would surely prevail. I have given in this Chapter only some silhouette of those facts.

- (iii) It is an interesting point to note how one's 'role perception' determines one's decision. *Azadi Bachao* narrowed the Court's 'judicial role perception' by invoking the ancient doctrine of "*Juices est. jus dicer, non dare*" (the duty of

the Court is to decide what law is, and then to apply it; not to make it). The Bench narrowed its role, and decided not to be creative to promote what Justice demanded. It is commonplace to say that when the perception of the role itself is wrong, the decision is bound to be wrong. If the 'observation-post' is wrong, things observed can never be right. The Court illustrated the neo-constitutionalism of the neo-liberals by not providing remedy against the fraud of 'treaty-shopping', and by not subjecting the executive process to the sunshine. In effect, it has fostered the opaque system to go on in our country. It simply wished our government and Parliament to provide remedies against the abuse of treaties, but till now its *cri de coeur* (a cry from the heart with some appeal) has been just all in vain. We see things around us which keep on drumming into our ears that when the interests of the plutocrats and corporations are involved, the unholy alliance of the politicians, top bureaucrats, and the world of Business would never allow the *cri de coeur* to have any effect. The narrowing of the Judicial Role led to a sad consequence. The Court failed in providing judicial remedy against abuse of the tax treaty. In many jurisdictions, the courts have judicially evolved anti-abuse provisions. At my request, Prof. Ray August³⁰ of Washington State University and the author of *International Business Law* (4th ed. 2004) had written to me:

“In countries that do not have specific anti-abuse legislation, the problem of treaty shopping is attacked using general principles of equity. Common law countries (including Australia, Canada, and the United Kingdom) use a “substance over form” approach. That is, their tax authorities attempt to determine if the movement of income between foreign affiliated companies is based on legitimate commercial reasons or if it is merely a sham set up in order to obtain treaty benefits. Civil law countries (including France and Germany) use an “abuse” approach. In other words, their tax authorities ask whether a particular arrangement of companies constitutes an abuse, a misuse, or an improper use of a tax treaty.”³¹

- (iv) I was amazed to see that the Court uncritically adopted the ideas of an 'interested' person's book by quoting three long paragraphs. The serious breach of Natural Justice was on account of relying on Roy Rohatgi's *Basic International Taxation*. This author had been a partner of the infamous M/S Arthur Andersen for many years. The book was published in 2002 when the matter was before the Supreme Court. It was being written when the PIL was being pursued before the Hon'ble Delhi High Court. Its author was an advisor to many tax haven companies. It was written from the point of view of the OECD and tax havens. India is not a member of the OECD despite the occasional honeymoon we see between the spokespersons of India Incorporated and the OECD. In my considered view, it was this book which led the Court to express ideas so apparently flawed as these:
- “There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long-term development....”

Had this book been ever brought into focus in course of hearing, the Court could have been persuaded to agree that such a book could not ever be the basis of a judicial decision.³² Reliance on a book of this type was contrary to the principles of Natural Justice. Lord Bridge L.J. in *Goldsmith v. Sperrings Ltd.* [1977] 2 ALL ER 566 at 590 had aptly observed:

“...But the fourth and most important reason is that this part of the Master of Rolls’ judgment decides against the plaintiff on a ground on which Mr. Howser, for the plaintiff, has not been heard. This is because Mr. Comyn never took this point, and the Court did not put the point to Mr. Howser during the argument. Hence there is a breach of the rule of *audi alteram partem* which applies alike to issues of law as to issues of fact. In a court of inferior jurisdiction this would be ground for *certiorari*; and I do not think that this Court should adopt in its own procedure any lower standards than those it prescribes for others.” (Italics supplied)

The principles, which guide the courts in selecting textbooks for reliance, are well settled. *Hood Phillips’ Constitutional and Administrative Law*, (7th ed.) at p 24, states:

“Whether a text-book will be treated as authoritative this special sense is determined by the tradition of the legal profession and the practice of the courts, and depends on such factors as the reputation of the author and the date when the book was written”.

*Oppenheim’s International Law*³³ states:

“...the work of writers may continue to play a part in proportion to its intrinsic scientific value, its impartiality and its determination to scrutinize critically the practice of States by reference to legal principle.”

- (v) The Court’s obsession with the procedures in other countries made it impervious to see what differentiated us from them. It borrowed its perspective from the OECD jurisdictions and the OECD Commentaries. Sir Francis Bacon, the Lord Chancellor of England (1618-21), had rightly noted the fallacy in one’s analogical reasoning³⁴ (quoted in Chapter 22 of this Memoir). The technique of an analogical reasoning works well only when all the relevant factors are taken into account, and the irrelevant ones are excluded; and then the inclusions and exclusions are given due importance in the decision-making process without allowing pre-conceived notions, inhibitions and stock responses to intrude into the process.
- (vi) It is great that the Judicial Role Perception of *Azadi Bachao* has been disapproved by the Constitution Bench of our Supreme Court in *Standard Chartered Bank*³⁵. In *Standard Chartered Bank* our Supreme Court (Coram: N. Santosh Hegde, K.G. Balakrishnan, D.M. Dharmadhikari, Arun Kumar and B.N. Srikrishna, JJ.) reversed the view, taken in *Assistant Commissioner of Income-tax v. Velliappa Textiles & Ors*³⁶, on the role of judiciary. In *Velliappa*, the Court had taken the same view of its judicial role as it had taken in *Azadi Bachao*. Hon’ble Justice B.N. Srikrishna, who had delivered the Court’s

judgment in *Azadi Bachao*, said in his dissenting Judgment in *Velliappa* (on behalf of Justice N. Santosh Hegde and himself):

“The interpretation suggested by the learned counsel arguing against the majority view taken in *Velliappa*, which has appealed to our learned brothers Balakrishnan, Dharmadhikari and Arun Kumar, JJ., would result in the Court carrying out a legislative exercise thinly disguised as a judicial act.”

VII

MY MOST HUMBLE COMMENTS MOST HUMBLY SUBMITTED

The Supreme Court’s decision in *Azadi Bachao* received some insightful comments from our experts. Many articles criticising the decision in *Azadi Bachao* came out, but I do not think it worthwhile to refer to them. India is not the U.K. where the criticism by Prof. Glanville Williams had led the House of Lords to overrule its recent decision in *R v. Shivpuri*³⁷ observing: “If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better”. I quote from what Shri Murlidharan wrote in *the Hindu Business Line* of Dec. 27, 2003:

“ The Delhi High Court, in *Shiva Kant Jha v. UOI* (2002) 256 ITR 536, seized the moral high ground when it quashed CBDT Circular 789 of April 13, 2000, by permitting the tax authorities to lift the corporate veil and find out whether assessee-companies registered in Mauritius were doing real business there or were only resorting to treaty-shopping so as to take advantage of the beneficial provisions of the Indo-Mauritian treaty *vis-à-vis* the one applicable to them. The Supreme Court has poured cold water on the Delhi High Court judgment by reversing it in *UOI v. Azadi Bachao Andolan* [2003] 263 ITR 706....”

(A) What shocked me most; what a comedown for our great nation!

I had several reasons for my agony in course of the conduct of the PIL about which I have written in this Chapter. But the agony of having a barbed iron in my soul was most acute in certain situations, a few of which I mention by way of illustrations.

- (a) Our Government argued before the Delhi High Court that it saw no basic difference in granting tax benefits between the Indian residents and the foreigners. Mr. Salve, the then Solicitor-General of India, waxed wide on this point, but got a deserved curt judicial comment from the High Court:

“So far as submission of the learned Solicitor General to the effect that Mauritius route may be taken recourse to for gaining benefit as is done by the industrialist setting up industries in M.P or some other place in the country where tax benefits are given is concerned, the same is stated to be rejected. ” [2002] 256 ITR p. 583.

Our Government seemed to have forgotten that the Indians live to swim or sink with the lot of our country, and can never be its mere fair weather

friends. If the Government's morbid assumption is interiorized by our people, all patriotic ideas would vanish exposing us to the servitude of some hegemonial power, be that a foreign State, oligarchic institution, or the corporations, whatever be their structure. And then no power would be able to bring our past back to us to inspire and enlighten us, and even the light at the end of the tunnel would get extinguished.

- (b) When I read the decision in *Azadi Bachao*, I felt aghast that the Court considered it fit to quote three long paragraphs from *Roy Rohatgi's* book *Basic International Taxation*. As Thomas Hobbes, in his *Leviathan*, whored his intellect to propagate the ideas of the foolish James I, as Prof. Hayek and Milton Friedman theorized for the neo-liberal paradigm, the authors, like Roy Rohatgi, acted merely as the apologists for the present-day Finance in love with secrecy jurisdictions for understandable reasons. They illustrate what Prof. John Kenneth Galbraith said in his *A Short History of Economics: The Past as the Present* (at p. 236):

“Here another great constant in economic life: as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently much preferred.”

One of the three paragraphs quoted in the Judgment runs thus:

“Developing countries need foreign investments, and the treaty shopping opportunities can be an additional factor to attract them. The use of Cyprus as a treaty haven has helped capital inflows into eastern Europe. Madeira (Portugal) is attractive for investments into the European Union. Singapore is developing itself as a base for investments in South East Asia and China. Mauritius today provides a suitable treaty conduit for South Asia and South Africa.”

If the principle of “proportionality” is an attribute of wisdom, the comparison of India with Cyprus, Madeira (Portugal), and Singapore is a sacrilege. If the doctrine of toleration of Evil “in the interest of long term development”, is allowed to have a grip over our thinking, even God would leave us to groan only under the Slough of Despond. This sinister doctrine has always worked as the supreme justification for what the dictators, tyrants, crooks, and scamsters have done in all times, and in all lands. Mrs. Gandhi justified the ignominious Emergency by telling us the shibboleth of Necessary Evil. The reasoning founded on such comparison, appears to me to suffer from the grossest error that the Fallacy of Similitude can ever beget. The analogical reasoning with reference to Madeira, Cyprus, and Mauritius is shocking. It would be the end of our tradition if we degrade our nation down to such a dunghill as to deserve comparison with Madeira, a tiny piece amongst the terrestrial tiny tots well-known only for what is the best in wine. Our Sanskrit grammarians too had felt that one could easily go on merry errands after taking मदिरा (*madira*, wine).

- (c) After quoting three long paragraphs from *Basic International Taxation*, the Division Bench of our Supreme Court set forth its reasons for upholding ‘treaty shopping’ in these words:—

“There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing

economy, in the interest of long term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the Petitioners over the so called 'abuse' of 'treaty shopping', perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into.A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy.”³⁸

As the above paragraph seems to be the very synopsis of Roy Rohatgi's book, I must express my agony at ideas expressed in such masterly tone:

- (i) One cannot 'tolerate' or 'encourage' an unworthy practice. A nation 'tolerates' what is unworthy only when it is turned a slave [as Germany had to do for some time after the Treaty of Versailles]. 'Treaty shopping' cannot be 'encouraged' as it is a fraud.
- (ii) How can something which is 'unintended, improper or unjustified', be tolerated by our Republic so long our values do not get destroyed, and our Constitution does not become a mere scarecrow.
- (iii) Under whose authority what is 'unintended or unjustified' can be tolerated ? Are we being ruled by some sinister Shadow from some opaque and foggy world? The tsunami of economic globalization has subordinated the political realm (to which our judicial institutions belong) to the economic realm (ruled by the economists³⁹, corporations and 'the the protagonists of the Rogue Finance') established under the overweening majesty of *Pax Mercatus*. Robert L. Heilbroner says:

“Perhaps of greater importance in perceiving Smith's world as capitalist, as well as market-oriented, is its clear division of society into an economic and a political realm.”
- (iv) Roy Rohatgi justifies his greed-stuffed thesis that 'treaty shopping' is considered justified for "other non-tax reasons". And those reasons, they say, are known only to the "Invisible Hand" of Adam Smith fast turning into a vampire for the society of the common people running the risk of losing their soul, self, liberty, and property. The Paris-based *Financial Action Task Force on Money Laundering*⁴⁰, in its Report on the Laundering Typologies 2003-2004, had aptly pointed out how the 'politically exposed persons' (an euphemism for the persons holding public offices) concealed their ill-gotten wealth, and how many 'accountants and lawyers assist in a money-laundering scheme': 'legal professionals facilitate in money laundering', and the 'accountants provide financial advice'. They advise and lobby how to organize the structures of transactions to become the instruments of darkness. 'A lawyer uses offshore companies and trust accounts to launder money' and 'a solicitor uses his client's account to assist money laundering'.
- (v) Rohatgi allows 'treaty shopping' 'unless it leads to a significant loss of tax revenues'. Who has the legitimate authority to say that it can go on unless it leads to a significant loss of tax revenues? 'Significant' by whose assessment? Why were the Delhi High Court, and the CAG and

the JPC not trusted when they had reasons to hold that massive loss of resources had been caused? Why were the facts of heavy concealment of income and evasion of tax, evidenced through more than 20 Assessment Orders, distrusted, and ignored? Facts speak, and facts must be allowed to speak. Why was the propriety of those Assessment Orders not allowed to be tested before our tribunals and courts? Why should we facilitate Fraud to have the last laugh? It is amazing that the following statement was appreciated:

“Moreover, several of them allow the use of their treaty network to attract foreign enterprises and offshore activities.”

But whose voice is this?: of the ‘high net worth looters’ with chest outside the country, or of the creeping, cowering and cringing ‘crushed’ millions we call ‘We, the People’?

- (vi) The expression *holistic* is meaningless unless we know whether the common suffering souls of this country are within this *holos* (the whole), or they are out of it! In Rohatgi’s *holos*, Gandhi’s talisman stands sold for a pebble. General J.C. Smuts, the author of *Evolution and Holism*, would have shuddered at the use of this word: *holos*. It is quite understandable, for the former partner of Arthur Anderson to invoke holism to drape his agenda. But it baffles us most when it rings in the judgment of our Supreme Court for which we have highest admiration, and from which we have the greatest expectation.
- (d) It cannot be a matter of honour for the people of the Republic of India that Fraud is allowed to masquerade on the unseemly ground of ‘Necessary Evil’ Long back Jawaharlal Nehru had aptly said: “Evil unchecked grows, evil tolerated poisons the whole system.” And Einstein said: “No man is justified in doing evil on the ground of expedience.” The common people of our country believe that ‘Tolerance of evil is always Satan’s delight’. And ‘Good for whom? good for the common people of this country, or for the big corporations and the ‘High Net Worth Individuals’? The central light of the Budapest Sunday Circle⁴¹, George Lukas, like Kant, endorsed the primacy of ethics in politics⁴². This is what Mahatma Gandhi had said, in his edict on the board in Gandhiji’s *Wardha ashram*⁴³. To justify something on the specious plea of ‘Necessary Evil’ is to reject the central ideas of John Rawls expressed in *A Theory of Justice*, often referred to by the courts in our country. The effect of the flawed view led the Court, in *Azadi Bachao*, to uphold the Fraud of ‘treaty shopping’.
- (e) It was strange to see that craze for foreign investments for promoting private profits prevailed over the claims of our Consolidated Fund. I fail to understand the wisdom to starve our Consolidated Fund, meant for welfare of our nation, by crafting such terms in the Double Taxation Agreements which facilitate our country’s loot, even unmindful of national security issues, thus creating the evident conditions for the emergence of two Indias: one of the common-run of ‘We, the People’, the suffering millions whose existence is being fast forgotten, and the other, the ‘High Net Worth Individuals’, corporations, fraudsters, tricksters, masqueraders operating

through mist and fog from various tiny-tots of the terra firma and cyberspace. I would come to this in Chapter 26 ('The Realm of Darkness: The Triumph of Corporatocracy')

(B) The futility of the Court's *cri de coeur*

The Division Bench of the Supreme Court (Coram: B. N. Srikrishna and Ruma Pal, JJ.) considered 'treaty shopping', bad but did not provide a remedy against that abuse. The Court sustained "treaty shopping" but made a *cri de coeur* to the Executive and Parliament to provide remedies against the abuse! *Azadi Bachao* was decided on 7 Oct. 2003, yet nothing has yet been done either by our Parliament or the Executive government to stop this abuse. Our Parliament made several statutory changes after that date, but no step has been taken to stop the evil of the treaty abuse. Parliament inserted some provisions in section 90 of the Income-tax Act, 1961, by the Finance Act, 2003, and again it inserted section 90A by the Finance Act, 2006. Our Executive government implemented the provisions pertaining to the Mutual Agreement Procedure provided in the DTAC to settle disputes at the executive level. This step subverted the role of the statutory authorities in order to provide scope for the settlement of claims under the opaque administrative system. Our Government keeps on asserting that it has taken steps against the abuse of the tax haven routes. Should we believe such claims? I think: "No". The obnoxious Circular No. 789 of 2002 still continues ensuring the operation of an opaque system. It ousts the statutory jurisdiction to examine the correctness of the facts presented. It prevents our statutory authorities from discharging their public duties. Our Government, I believe, wants the treaty abuse to go on. Instead of withdrawing that Circular, it is planning to bring that sort of provision in the Act itself. The *cri de coeur* is lost in the wilderness. Our Supreme Court should consider this as the price for trusting the executive government overmuch. I have discussed in Chapter 17 how the Direct Taxes Code Bill, 2010 proposed to incorporate the core provisions of that Circular 789 of 2000 in the statute itself to ensure the continuance of secrecy provisions, and uninhibited operation of the strategy of deception. It is not difficult to understand our Government's schizophrenic response to the taming of the gross abuse. One can see an evident hiatus between the words and deeds of our Government. Even the legislation is made skewed to protect the interests of a few whose silhouettes alone we can see in the poor visibility procreated by the system. Such things happen only in 'a failed' state. Are we moving towards that?

(C) The Role of the Lobbyists in tax matters: The inscrutable workings of Providence: Weren't the Furies at work somewhere some way?

It was surprising that the Union of India and the 'tax haven' company, the co-appellant before the Supreme Court, sailed together working hand in glove with each other. I saw how the lobbyists acted imperiously, and they acted fast. The corridors of the North Block were abuzz with rumours that if nothing was done to make the tax haven and its beneficiaries comfortable, our country would face economic disaster. I had argued before the Supreme Court that a tax treaty could be entered into only in exercise of power under section 90 of the Income-tax Act, 1961; not under the exercise of executive power (in terms of Article 73 of our constitution). 'Taxation' had gone outside the Executive's domain long back. I

had argued before the Supreme Court that the Indo-Mauritius DTAC went beyond the ambit of the objective for which the treaty could have been made under the legal provision. Section 90 of the Income-tax Act, as it stood then, did not authorize the government to enter into a tax treaty to promote trade and investment. Hence, the treaty went wrong by promoting extraneous objectives. This argument could not be answered by the Attorney General; and the Mauritian company stood wholly checkmated. But the unseen and mysterious Aeschylean Furies (I would call them the 'super fast-lobbyists') acted with skill and aggressiveness. The Finance Act, 2003, brought about an amendment to remove this vulnerability from which the said Agreement suffered. This is how governments are made to act these days. Whilst conducting the PIL, I often wondered which Furies haunted our government so effectively. The CBDT issued the Circular 789 of 2000 which went against the Department's own position over years. The High Court's decision was wholly in our government's favour. I could not know which Furies drove our Government to come to the Supreme Court to lose what it had rightfully gained. What I saw reminds me of what a distinguished person so aptly said: "The nations seem caught in a tragic fate, as though, like characters in a Greek drama, they were blinded by some offended God. Bewildered by mental fog, they march towards the precipice while they imagine that they are marching away from it."

VIII

"QUIS CUSTODIET IPSOS CUSTODES? (WHO WILL WATCH THE WATCHERS?)"

During the BJP regime, it was widely talked about that Sri Yashwant Sinha, the then Finance Minister, was responsible for getting the Circular 789 of 2000, issued. It was in the air that one of his relations had been a portfolio manager⁴⁴ for some foreign investment funds handling Indian operations. And the then Prime Minister turned a blind eye to all that was going on (reported in the Indian Express of June 5, 2000).

I was surprised when the Attorney General, representing our Government, and Shri Salve, representing the Global Business Institute Limited of the Cathedral Square, Mauritius, submitted before the Supreme Court that the use by the third country resident of the Mauritius tax treaty was "perhaps" "intended at the time when Indo-Mauritius DTAC was entered into". But the Court did not decide the point suggested: but the probability of this assertion colouring the judicial approach could not be ruled out. The unstated, but dexterously suggested, idea was just to free the BJP government (and its then Finance Minister, Mr. Sinha) from the remissness in promoting 'treaty shopping', and to put the blame on the Congress as the Indo-Mauritius DTAC had been signed when Mrs. Gandhi had visited Mauritius in 1982 along with Mr. Pranab Mukherjee. It was unbecoming of both the counsels to suggest this, even in pregnant aside. As the Petitioner, I contradicted them, and even asserted in my Curative Petition: "This conclusion is based on no material."⁴⁵ In my letter to Shri Jaswant Singh, the Minister of Finance (during 2002-04) in the BJP Government, I brought to the knowledge of the Government how things had moved, and I requested the then Finance

Minister to take appropriate actions: to consider whether some legislative change was worthwhile, or whether it was feasible to move the Supreme Court for a reconsideration of its decision in *Azadi Bachao* so that public revenue and public values were not jeopardised. In the penultimate paragraph of that letter I wrote to then Finance Minister:

‘This letter is just *pro bono publico* in the interest of the common people of this country with per capita income just U.S. dollars 440 [when in Mauritius it is U.S. dollars 3,540]. We can forget only at our peril Gandhiji’s *talismar*: “Recall the face of the poorest and weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it?”’

But the Government took no action. Even the letter went unacknowledged. The reasons for inaction were understandable.

Under the UPA regime, things were no different. The Common Minimum Programme of the Congress-led United Progressive Alliance, formed in 2004, formulated as one of the items in its programme: “Misuse of double taxation agreements will be stopped.” I thought that the Supreme Court’s veiled deprecation of the misuse of the Indo-Mauritius DTAC, in *Azadi Bachao*, would bear some fruits. I felt the Court’s *cri de coeur* would receive a good response, and our Executive, or our Parliament, would take effective remedial steps in the matter. But nothing happened. In the recent months we have witnessed a lot of Brownian motion where things seem to move, but do not move.

One of its effects is that, despite all the sound and fury, the major political parties promote only the capitalist agenda where tax havens constitute strategic devices for tax evasion, tax-mitigation, and amassing ill-gotten wealth. The tax havens or secrecy jurisdictions function as the veritable Alsatia (a sanctuary for criminals), and centres for money-laundering. The *Wikipedia* concludes that Mauritius based “front companies of foreign investors are used to avoid paying taxes in India utilising loopholes in the bilateral agreement on double taxation between the two countries, *with the tacit support of the Indian government*”.⁴⁶

Whether it is Mrs. Gandhi, or Atal Bihari Vajpayee, whether it is Pranab Mukherjee or Yashwant Sinha, the fate of the country is the same: to suffer. It was suggestively said by someone: if Raja Ram becomes the King, Sita is banished, if Duryodhana rules, Draupadi is openly humiliated: Sitas and Draupadis have suffered this way. Bharat Mata’s plight, as our deeds attest, is no better. It is the duty of every citizen to think about it. I would be the happiest person if my distressing conclusions are proved wrong. We must not forget what Thomas Jefferson said: “Eternal vigilance is the price of liberty”. And we wish that the persons in power keep in their mind what Walt Lippman said :

“Those in high places are more than the administrators of Government bureaux. They are the custodians of a nation’s ideals, of the beliefs it cherishes, of its permanent hopes, of the faith which makes the nation out of a mere aggregation of individuals. They are unfaithful to their trust when by word and example they promote a spirit that is complacent, evasive and acquisitive”.⁴⁷

In *Liversidge v Anderson*⁴⁸, the dissenting Judge Lord Atkin referred to the court “being more executive-minded than the executive”. I saw in the course of

the PIL that our Government was more corporate-minded than corporations! I also found evidence sufficient to appreciate what Prof. Allen said: “There is, apparently, something in the tranquil atmosphere of the House of Lords which stimulates faith in human nature.”⁴⁹ I appeal to the brooding omnipresent Justice to ensure that someday Truth triumphs, and Dharma rules. I hope someday the Judgment, which failed to provide remedy against our nation’s loot, would be overruled with the comment that *Liversidge’s Case* [1942] AC 206 had deservedly received from Lord Diplock in *R. v. Rossminster*⁵⁰: “this House . . . were expeditiously and, at that time, perhaps, excusably wrong,”

Dear reader, I have just told you in brief certain aspects of one of the PILs I conducted experiencing anguish at the ways our Government behaved. I never considered myself a party to the litigation. I, “a single public-spirited taxpayer” had brought the matter before the court to “vindicate the rule of law and get the unlawful conduct stopped”; and thereafter, I acted only *pro bono publico* to assist the court as an ordinary citizen of the Republic.⁵¹ I had used Chesterton’s observation as an epigram in Chapter 12 of this Memoir. I would end this Chapter hoping that our nation would never become “one vast vision of imbecility”.

NOTES AND REFERENCES

1. Shakespeare, *Macbeth* (Act I scene iii)
2. Her photograph with me and Mr. Sims can be seen on my website <http://shivakantjha.org/openfile.php?filename=photographs/photographs.htm>
3. Shiva Kant Jha, Mrs. Anju Jha Choudhary, Advocate and Mr. John Cary Sims, Professor of Law at McGeorge School of Law , Sacramento, USA
4. Professor of Business Law, Washington State University and the author of *International Business Law* (4th ed. 2004)
5. Prof. (Dr.) M.L. Upadhyaya Ph. D. former Professor & Dean of the University of Calcutta, now Professor & Vice President, Amity Law School, New Delhi
6. Lancaster University Law School
7. *Shiva Kant Jha vs UOI* (2002) 256 ITR 536
8. (2003) 263 ITR 706 SC
9. “Treaty shopping,” is a wrongful access to the benefits under a tax treaty. When the residents of the third states intend to derive benefits under a bilateral treaty, in the scope of which they do not come, they are called ‘treaty shoppers’. In doing so, they are the masqueraders. The Indo-Mauritius DTAC is bilateral tax treaty between India and Mauritius. If the residents of the third States adopt the device to access benefits under this treaty, they cause wrongful gains to themselves, and wrongful loss to others.
10. I would translate the *shloka* thus: If one works only in the King’s interest, people have reasons to get angry, if one works in the interest of people, the King becomes wrathful. Good workers, working *pro bono publico*, suffer between Scylla and Charybdis, and find it difficult to survive.
11. Review before the Supreme Court of India in the Special Leave to Appeal (Civil) No(s).19751/2010.
12. Noam Chomsky, *The Essential Chomsky* P.. 334
13. The Hindustan Times, July 27, 1983
14. *Britannica Book of the Year* 1984, p. 521
15. Writ Petition (C)No.445 of 2006 before the Supreme Court of India
16. (1942) A.C. 206, at 245
17. (1975) 99 ITR 375 at 386.
18. *AIR* 1992 SC 1555
19. Prof. Sol Picciotto, Lancaster University Law School at <http://www.tni.org/crime-docs/picciotto.pdf>

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20. For the functions of a diplomatic mission see Art. 3 of the *Vienna Convention on Diplomatic Relations of 1961*.
21. *Shiva Kant Jha v. Union of India & Ors* [Reversed in *Union of India vs. Azadi Bachao Andolan & Anr.* (AIR 2004 SC 1107)]
22. "The core issue is as to what should be done when, on investigation, it is found that the assessee is a resident of a third country having only paper existence in Mauritius without any economic impact with a view to take advantage of the double taxation avoidance scheme. No attempt has been made to answer the question on behalf of the Central Government."
23. (1985)154 ITR 148.
24. (2002) 256 ITR 563 (Delhi).
25. 2003-(263)-ITR -0706 -SC
26. *Basheshar Nath v. CIT* (AIR 1959 SC 149).
27. *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr* AIR 1967 SC 1 (Bench of 9 Hon'ble Judges)
28. AIR 1967 SC 1 at p. 7 para 16.
29. "Necessary parties are parties "who ought to have been joined", that is, parties necessary to the constitution of the suit without whom no decree at all can be passed "In order that a party may be considered a necessary party defendant, two conditions must be satisfied, first, that there must be a right to some relief against him in respect of the matter involved in the suit, and second, that his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit." (Mulla in his CPC 14th ed at p 868)
30. Professor of Business Law, Washington State University and the author of *International Business Law* (4th ed. 2004). The extract from his e-mail to Shiva Kant Jha.
31. Deloitte, Haskins & Sells International, *Treaty Shopping: An Emerging Tax Issue and its Present States in Various Countries*, p. 7 (1988).
32. *Hood Phillips' Constitutional and Administrative Law* (7th ed) at p 24; *Oppenheim's International Law* (9th ed.) at p. 43; Shiva Kant Jha, *Judicial Role in Globalised Economy* (2005) , Chapt. 8 : 'Reading with Discrimination on the use of a textbook in a Judicial proceeding'.
33. (9th Ed.) at P. 43.
34. "I found in my own nature a special adaptation for the contemplation of truth. For I had a mind at once versatile enough for that most important object—— I mean the recognition of similitudes—and at the same time sufficiently steady and concentrated for the observation of subtle shades of difference." Legouis & Cazamian, *A History of English Literature* p. 368
35. [2005] 275 ITR 81 (SC).
36. [(2003) 184 CTR Reports 193].
37. [1986] 2 All ER 334 H.L. (Lord Hailsham of St. Marylebone L C, lord Elwyn-Jones, Lord Scarman, Lord Bridge of Harwich and Lord Mackay of Clashfern).
38. (2003) 263 ITR 706 , 753.
39. Robert L. Heilbroner rightly observed in his article in the *Encyclopedia Britannica*: "Thus did the appearance of capitalism give rise to the discipline now called economics."
40. contact@fatf-gafi.org.
41. Its other members were Arnold Hauser, Karl Mannheim, Bela Balazs, Anna Leznai, Bela Bartok.
42. Arpad Kadarkay, *George Lukas, Thought and Politics* p. 195 (Oxford).
43. Quoted in Chapter 3.
44. *The Indian Express* of June 5, 2000 : "One reason for the allegations against Sinha was that the fund for which his daughter-in-law works has done exceedingly well compared to 135 other Mauritius-based funds.."
45. Curative Petition of 2004 in Review Petition No (Civil) 1917-1918 of 2003 before the Supreme Court
46. http://en.wikipedia.org/wiki/Tax_haven
47. Quoted in the *Shah Commission of Inquiry*, Interim Report II P. 143
48. (1942) A.C. 206
49. Allen, *Law and Orders* 3rd ed. p.297
50. (1980) A.C. 952
51. The quoted expressions are from Lord Diplock's speech in the House of Lords in *Inland Revenue Comrs v. National Federation of Self-Employed* referred in the section I of this Chapter.