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CASE COMMENT ON CAIRN ENERGY PLC & CAIRN UK HOLDINGS LIMITED V. THE GOVERNMENT OF INDIA- Nikhil Raghav¹**INTRODUCTION**

The Cairn Energy Tax Controversy with the Government of India dates back to 2005-2006. Because the Cairn Energy Tax Controversy concerns both tax and investment problems, it falls under the jurisdiction of Permanent Court Arbitration. The disagreement revolves around a conflict regarding tax, and it is readily comparable to the well-known Vodafone case against the government of India, which culminated in the Indian government drafting the Finance Act, 2012, which retrospectively changed the Income-tax Act, 1961. The case is intertwined with Cairn's Indian partner, Vedanta, as well as topics that include ex post facto laws in the form of retrospective taxes, bilateral investment agreements, and international arbitration between private and sovereign governments. Cairn Energy succeeded in getting an arbitration award in their favor from the Permanent Court of Arbitration, and the Indian government, in the end, could not succeed in getting an arbitration award.

FACTS OF THE CASE

CAIRN Energy Plc. Was A British Based Oil & Gas Exploration Company. It owned 100% shares of CAIRN UK HOLDINGS another Company which was based in Britain, United Kingdom (UK). CAIRN UK HOLDINGS owned 100% shares of CAIRN INDIA HOLDINGS another corporation that was established in Britain, United Kingdom. Further, CAIRN INDIA HOLDINGS held CAIRN's Indian Assets. CAIRN INDIA HOLDINGS held all the assets belonging to the CAIRN in India used for gas exploration. In the year 2006. The company wanted to raise money from India through an Initial Public Offer (IPO). But for raising the money through IPO they needed to establish a company in India. For this purpose, they incorporated a Company known as CAIRN India Limited.

CAIRN UK Holdings (Britain) transferred 100% Equity shares of CAIRN India Holdings UK

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to CAIRN India Limited. In return, CAIRN UK HOLDINGS Britain acquired 69% shares of CAIRN India Limited. After valuing the deal involving CAIRN UK Holdings (Britain) and CAIRN India Limited, the Indian government decided that CAIRN Energy was obligated to pay Taxes under the heading "Capital Gains.". As per the Income Tax Department of India, CAIRN Energy made gains of ₹24,500 crores. CAIRN Energy was required to pay Income Tax under the head "Capital Gains" amounting to ₹6000 crores based on the transaction that took place in the year 2006. The Demand was income tax return was not made initially in the year 2009, Shares of the CAIRN Group in CAIRN INDIA were sold to "Petronas". Petronas was a Malaysia-based Oil and Gas Company. Then in the Year 2011, CAIRN Group sold some of the shares in CAIRN INDIA to Vedanta. Vedanta was a mining company.

The Government of India introduced a retrospective amendment under section 9 of the Income Tax Act, 1961 by inserting Explanation "5" in 2012. The Amendment meant that the CAIRN Group would be liable to pay the Income Tax under the Head "Capital Gains" in India even though they have transferred the shares of an entity situated outside of India. The government contended that the shares of the entity outside India derived their substantial value from the asset situated in India. In 2014, CAIRN Group tried to sell its remaining stake in CAIRN India, which was approximately around 10% in order to exit from India. But the Indian Tax Authorities prevented CAIRN from selling its stake. The Government contended that a tax demand was already due on CAIRN Group in respect of the 2006 case. Therefore, CAIRN Energy was not allowed to sell its stake to any entity. Furthermore, the Income Tax Department sold this stake in CAIRN Energy & took all the proceeds, which were made from selling the stake. They also kept the dividends which the CAIRN Group was entitled to get and they also held back the tax refunds of Cairn India in unrelated Tax matters.

CAIRN Group knew that owing to the Retrospective Amendment made by the government of India in the year 2012 they will not get any verdict in their favour from the Courts in India. CAIRN Group decided to approach the Permanent Court of Arbitration (PCA) situated in The Hague, Netherlands. They contested that the Retrospective Amendment in Law was a gross violation of the Fair and Equitable treatment promised under the India-United Kingdom (UK) Bilateral Investment Treaty.

VERDICT

The Permanent Court of Arbitration agreed with the arguments made by the CAIRN Group and

asked the Indian Government to

A. The Government of India has to fully compensate the CAIRNS Group for selling its 10% stake in CAIRN India.

B. The Government of India has to award the refund in the unrelated tax matter

The total amount aggregating Point A and Point B was \$1.2 Billion. In Indian ₹, the amount was equivalent to ₹ 9,000 crores, which the government of India is required to pay the CAIRN Group.

C. The Government of India were also required to pay Interest along with the Legal Costs incurred by the CAIRN Group. The legal costs were around ₹ 170 crores

Appeal

The Government of India refused to comply with the directions of the Permanent Court of Arbitration (PCA) stating that the Permanent Court of Arbitration does not have jurisdiction in Taxation Matters. The Government of India filed a petition in the Dutch Court of Appeals to set aside the Arbitration Award.

The Action sought by the Cairn Group after getting the Permanent Court of Arbitration (PCA) Award in their favour

Cairn Group started contesting in courts of countries like the United States of America, United Kingdom, France, Canada etc. Their aim was to freeze the assets of the Indian Government to honour the Permanent Court of Arbitration's (PCA) 1.2 billion arbitration award. Cairn has identified assets of the Indian Government valued at around \$70 billion which is equivalent to ₹ 5 lakh crores in Indian ₹.

The Order of the French Court

In July 2021, a French Court (**Tribunal Judiciaire de Paris**) allowed the CAIRN Group to freeze Indian Government assets worth ₹ 175 crores. The property consisted of Residential Real Estate owned by the Indian government in Paris, France.

Aftermath

Cairn Energy of the United Kingdom has discontinued all cases against the Indian government and its corporations in courts ranging from the United States to France and Singapore. It is now entitled to a return of around 7,900 crores in taxes gathered to enforce a retrospective tax claim.

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As a component of the settlement attained with the government of India in the 7 old dispute over the levy of back taxes, the corporation - now referred to as Capricorn Energy PLC - has withdrawn every suit brought for collecting the tax refund ordered by an international arbitration tribunal after cancelling retrospective raising of demand.

The Indian government at first declined to honour the December 2020 arbitration award, but in August 2021 passed legislation to cancel all retrospective tax requirements and return revenue obtained, fearing that assets including flats used by its diplomatic personnel in Paris to Air India aircraft in the United States would be seized to recover the refund due. On the 26th of November in 2021, the corporation began the process of withdrawing cases it had filed in numerous countries to implement an international arbitration ruling that had reversed the imposition of “10,247” crore retroactive taxes and directed India to restore the money already collected.

Following the withdrawal of the “Mauritius lawsuit seeking acknowledgement of the arbitration award similar actions were taken in Singapore, the United Kingdom, & Canada”.

On December 15, it asked for and got 'voluntary disposal' of a case it had filed in a court in New York seeking to take Air India assets in order to recover revenue owed to the government. On the same day, it filed an identical motion in a Washington court, asking for acknowledgement of the arbitration award. Before any enforcement measures, such as asset seizure, may be undertaken, the arbitral award must be recognised. Following this, the important case in a French court, which had attached Indian assets on Cairn's petition, was withdrawn, as did the one in the Netherlands.

In an effort to restore India's tarnished image as an investment destination, the government of India enacted new legislation in August 2021 to drop 1.1 lakh crore in outstanding claims against global companies like telecommunications corporation "Vodafone," the healthcare giant Sanofi, and the brewer SABMiller, which is currently controlled by AB InBev and Cairn.

Approximately ₹8,100 crores gathered from corporations under the now-defunct tax provision would be returned provided the companies agree to dismiss all existing litigation, including demands for penalties and interest. Cairn will only be entitled to ₹7,900 crores which is due from Cairn.