CHAPTER 8
READING WITH DISCRIMINATION
ON THE USE OF A TEXTBOOK IN A JUDICIAL PROCEEDING

SYNOPSIS

Read not to contradict and confute, nor to believe and take for granted, nor to find talk and discourse, but to weigh and consider.

Bacon, *Essays* 'Of Studies'.

"There is nothing intrinsically wrong with lobbying. It is just a stage name for campaigning. But when companies, foreign governments, P R firms and merchant banks can buy political influence, then lobbying becomes a dirty word."

—Mark Hollingsworth, MPs*For Hire*

1. Norms for selecting Books for Judicial Reliance

The Division Bench of our Supreme Court in *Azadi Bachao* quoted three long paragraphs[1] from Roy Rohatgi's *Basic International Taxation* in order to set forth reasons for sustaining Treaty Shopping. This reliance by the Court raises an important question: what sort of book or textbook should be relied on in judicial decision-making. The author intends to examine this topic under the following heads:

(i) a short review of the judicially evolved norms governing the selection of a book for reliance in a judicial proceeding;

[1]. (2003) 263 ITR 706, 752-753.

(ii) the nature and incidence of the judicial reliance on Roy Rohatgi's *Basic International Taxation;*

(iii) the credentials and the worth of the ideas set forth in Roy Rohatgi's book;

(iv) a critique of the ideas, which have been approved by the Court in *Azadi Bachao.*

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".

We share the British professional tradition. An inductive examination of the decisions of the Supreme Court shows that the Court is extremely selective in matter of selection of books for reliance, especially those that have the potential to clinch the issues under a judicial adjudication. Some books are used merely for obtaining some peripheral information; some are used to provide a supportive reasoning, but some are used to supply core reasons, which tilt the fulcrum. Besides, two more factors are taken into account:

(a) the reputation of the author, and

(b) the date when the book was written.

Only books by the authors with established reputation of scholarship, impartiality and detachment are to be consulted. Date of the writing of a book is important as Time is always a critic with great discrimination. This must be the reason why Ralph Waldo Emerson said in his *Society & Solitude*: "Never read a book that is not a year old." There must not be an occasion for anybody to say, as it was said in the Book of Job: 'That mine adversary had written a book'[2] [which by misfortune became the ground for a decision against me]. With the passage of time a book is weighed, and is discredited if found wanting in worth. People come to know if the author of the book was holding a brief for someone.

Oppenheim's International Law[3] 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."

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[2]. *Job* 31:35.
[3]. (9th ed) at p. 43.

The measuring rod is the principle of proportionality. Determination of the proportionality of all the factors at work is, as Bertrand Russell had said, an exercise in wisdom. Shakespeare said in his Richard *II*:

> *How sour sweet music is*
> *When is broke and no proportion kept!*
> *So is in the music of men's lives.*

It is from this notion that Lord Diplock derived one of the counts on which Judicial Review could be sought (the principle of proportionality). It needs no argumentation that whosoever decides to rely on a book, especially when it is crucial to judicial decision-making; he is under an unfaltering duty to examine the book in the light of the tests mentioned by Oppenheim.

The well settled norms for selecting a textbook and for evaluating the worth of its content are best summarized by Megarry J. in *Cordell v. Second Clanfield Properties*[4]:

> "I would add one comment, in amplification of certain observations that I made when during the argument Counsel cited a passage from the third edition of *Megarry and Wade's Real Property.* It seems to me that words in a book written or subscribed to by an author who is or becomes a judge have the same value as those written by any other reputable author, neither more, nor less. The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation and intermittent opportunities for reconsideration. But he is exposed to the peril of yielding to pre-conceptions and lacks the advantage of that impact and sharpening of purpose, which the detailed facts of a particular case bring to a judge. Above all, he has to form his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law…I would, therefore, give credit to the words of any reputable author in a book or article as expressing tenable and arguable ideas, as fertilizers to them and as a convenient expression of fruits of research in print, often in apt and persuasive language. But I would do no more than that, and in particular, I would expose those views to the testing and refined process of argument. To-day, as of old, by good disputing shall the law be well known."

In *Azadi Bachao* our Supreme Court upheld Treaty Shopping by relying on Rohatgi's book *Basic International Taxation.* The Court quoted with an implied approval three paragraphs from the book. These three paragraphs have been quoted at footnote 3 in the chapter on "The Supreme Court on Treaty Shopping". It is worthwhile to examine the judicial propriety in the light of the observations in *Cordell* before a more pointed discussion about the book is made:

(i) Before Megarry J. a Counsel cited a passage from the third edition of *Megarry and Wade's Real Property.* It deserves to be mentioned here that in course of the whole appellate process before the Division Bench

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4. (1969) 2 Ch. 10 at pp. 16-17.

'the three passages' from Roy Rohatgi's *Basic International Taxation* were never cited (nor the book from which they are said to emanate ever produced) during the arguments by the Counsels. The Rule of *Audi alteram partem* required:

(a) That passages be specifically cited in the course of argument in their full comprehensiveness by producing the book itself because it is always possible that other details in a given book can often render its ideas unreliable; and may even show the author unworthy for being treated "a reputable author".

(b) That, if the ideas set forth in the passages are vital for the disposal of a case, it is expected that the Court should, of its own, "put the point [to the Respondent] during the argument". If above conditions of procedural propriety are breached " there is a breach of the rule of *audi alteram partem* which applies alike to issues of law as to issues of fact"[5].

(ii) The author of *Basic International Taxation*, for reasons to be set forth later, cannot be considered a "reputable author" with juristic credentials. A chartered Accountant by profession with a forte for tax planning dear to the off-shore companies and the tax havens, and close to the adversary in a litigation (in this case, with substantial interests in Mauritius) can not be considered a "reputable author" as understood in common law or civil law jurisprudence.

(iii) Whilst quoting the three long paragraphs verbatim from Roy Rohatgi's *Basic International Taxation* the Division Bench of our Supreme Court missed to notice the difference between "process of authorship is entirely different from that of judicial decision". On probability it can be said that a interested person was writing this book while the PIL was before the Delhi High Court, to rely on it.

(iv) The quality of the content of the passages, to be discussed later, would show that the author did not have "the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation and intermittent opportunities for reconsideration."

(v) The Court should have noticed the author's "pre-conceptions" if it would have gone through the book as its Introduction and the initial chapters betray the author's "pre-conceptions", pre-conceived notions and stock-responses.

(vi) It is understandable for the author to form "his ideas without the aid of the purifying ordeal of skilled argument on the specific facts of a

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[5]. Lord Bridge L.J. in *Goldsmith v. Perrings Ltd.*

contested case" but it is beyond comprehension how and why the Division Bench of our Supreme Court, while deciding *Azadi Bachao*, missed the point so pithily made by Lord Bridge "Argued law is tough law".

2. A Telling case study

As the basic reason in support of the judicial view of Treaty Shopping is founded only on the three long paragraphs extracted from Roy Rohatgi's *Basic International Taxation* it is essential to examine the juristic credentials of the author and the worth of his views so that the readers of this book can evaluate them for themselves.

(i) As to the credentials of the author

As to the credentials of the author the following points deserve to be noted:

(I) He himself writes in his *Basic International Taxation* that he was a partner of Arthur Andersen for about 25 years. In the 80's he spent several years in India as a Managing Partner of the Indian firm of Arthur Andersen, one of the "Big Five" accounting firms, not known for reputation..

(II) He was a consultant who figured in the list of experts on the Website of http:\\www.nishithdesai.com. It was this Nishithdesai & Co which conducted the case of the Mauritian company before the Division Bench. . The website describes him as " a strategy and international tax consultant to several Indian and Overseas companies."

(III) The book was published in 2002 under ISBN 90-411-9852-0 Copy Righted 2002. The Writ Petitions [PIL] No.5646/2000 and No.2802/2000 were being pursued before the Delhi High Court during the period while the book was being written. The book was not referred before the Delhi High Court. On all probability, the book was completed when the Special Leave Petitions(C) Nos.22521-22522 of 2002 were under consideration before the Supreme Court. Two strange things happened when this matter was *sub judice* before our Supreme Court. First, a silhouette from Mauritius, M/s Global Business Institute Ltd, descended soliciting the Court for being impleaded as a co-Appellant in the proceeding initiated by the Union of India under Art. 136 of the Constitution of India. M/s Nishith Desai & Co. was conducting the case of the Mauritian company on day to day basis though the matter was argued for grant of leave by Shri Arun Jaitely, Sr. Advocate (who a few days after became the Law Minister of India), and then by Shri Harish Salve, Sr.Advocate (who had argued this very case, as Solicitor General of India, for Union of India before the Delhi High Court).

(IV) Roy Rohatgi's is a FCA, M.B.Cs., B.Sc. His website roy@itpa.org mentions:

> "Is a strategy and International Tax Consultant to several Indian and Overseas Companies. He is currently writing a book on Basic International Taxation will be later this year, Kluwer Law International'

There is nothing to indicate that he held any judicial office or was an advocate. He was not trained in a judicial tradition, not methodised under jural discipline; and lacked judicial sensibility and detached perspective. Roy Rohatgi's deep interest in the Mauritius affairs is evidenced by the fact that he delivered several lectures on international taxation and tax planning in Mauritius to offshore professionals, particularly over certain years. During 2001 he was engaged as an advisor on the plans for development of the global business activities in Mauritius *[http://www.Mauritius-finance.com]*. He became the First Academic Director in an institute under/associated with the Financial Services Promotion Agency in Mauritius when the FSPA decided to run a course on international tax planning in August 2003. Even the academic pursuit is designed to a cause. International tax planning, it is admitted, uses knowledge of international taxation to develop, what the advisors of the offshore companies say, 'efficient tax structures on cross-boarder transactions'. In the Advanced Course (Professional) the Second Semester is devoted to 'Off-shore Financial Centres', and the Semester Four is devoted to 'Mauritius Taxation and Legal System'. The object of the course was so designed that the participants should have:

> "Learned how to apply the basic rules of international tax planning in practice and how to develop sound and cost-effective tax structures for overseas clients to add further value to their professional services rendered in Mauritius"

The Financial Services Promotion Agency (FSPA) is a wing of the Mauritius administration. Roy Rohatgi was appointed as the first Academic Director with plenary powers.

(V) His association with LL.M. programme in international taxation at St Thomas University School of Law hardly goes to establish his credentials. This author (who had himself been an examiner and paper-setter of LL.M course of several reputed universities, at Calcutta, Patna, and Nagpur) is of considered view that the LL. M. Course at the St Thomas University of Law, Miami, U.S.A. is strongly skewed in favour of the offshore tax-planners, almost tailor-made for those whose ingenuity is used to avoid rightful incidence of taxation.

(VI) The reviewer of Roy Rohatgi's *"Basic International Taxation "* published in 2002 Kluwer Law International, ISBN 9041198520, 704pp very perceptively observes:

> "With this in mind, Rohatgi is at pains to point out that any information he gives should not be used as the basis for providing advice without further consultation and research. The point is well made and taken in the Preface and Chapter One. Thereafter the notes to that effect at the beginning of each chapter are largely superfluous. The reader simply needs to review the chapter of recent developments to be aware of the avalanche of continuous change that would make it dangerous in the extreme to rely solely on a textbook such as this to provide specific technical advice to a client."

Roy Rohatgi deserves to be appreciated for his candour (though even in its absence the reality would not have gone unnoticed): he said—

> "Unfortunately, every rule in international taxation has many exceptions. The interested reader is advised to research them further, where appropriate"[Preface]
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> "No book, not even a weekly updated loose-leaf service, can be a substitute for appropriate research and professional advice on current situation. *The information contained in this book should not be relied upon to undertake any transaction without such advice.*" [Italics supplied].

Roy Rohatgi admits at the outset of Chapter 2 that it "is not meant to be comprehensive." When even an ordinary client is advised to make his research before coming to a view on a litigious issue, the materials in the 'three paragraphs' under reference could at best be material for a research. It is unreasonable and arbitrary to use them as ex cathedra wisdom in judicial decision-making. And again to say the obvious, the outcome of that research cannot be used against anyone without putting the result of the research across to him.

(VII) Roy Rohatgi is an interested witness. The view of an interested witness should be scrutinized with great caution and accepted only when it finds corroboration. Courts require as a rule of prudence that the evidence of interested witnesses should be scrutinized with care [AIR 1976 SC 2304; AIR 1973 SC 492]. In case of foreign law a judge, barrister, advocate, or attorney will be competent, but not a merchant unconnected with the law though possibly acquainted with it. [Sarkar p.790]. This author scanned through all the cases decided by the Supreme Court but has not found it ever relying on a book of this sort.

(VIII) There is a special reason to become very meticulous in evaluating a book. Hired experts to prove a cause are not new phenomena. Roy Rohatgi's book tries to make out a case for the corporate *imperium*. It is so easy for any protagonist of *Pax Mercatus* to get a hack to write for it a treatise promoting its case as in this globalised market economy everything is *res commercium*, everything is for sale?

(ii) As to the worth of his exposition

It is respectfully, submitted, that the exposition of law in *Basic International Law* is flawed in many ways: to mention some—

(a) For the propositions he made, Roy Rohatgi relied on the footnotes 102 to 105 of his book:

> *fn*. "102 Stef van Weeghel, The Improper Use of Tax Treaties, pp. 119-160.
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> *fn*. 103–J.David, B.Oliver, Access to tax treaties (Intertax 1989/8-9, p 330)
>
> *fn*. 104–Stef van Weeghel, The Improper Use of Tax Treaties, pp. 257-
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> *fn.* 105 – For example, United States does not discourage Treaty Shopping for outbound investment by US companies. Similar principles are applied in Germany and the Netherlands by tax Courts. It appears that countries apply a double standard if it is in their favour."

The Court should have examined the three paragraphs it quoted in its judgment with reference to the footnotes to evaluate their worth. The reader of this book should go through the three paragraphs from Roy Rohatgi's book which forms footnote 3 of the chapter on "Supreme Court on Treaty Shopping". If Roy Rohatgi had mentioned the full title of the book written by Stef van Weeghel the cat would have been out of the bag. The full title of the book is the *Improper Use of Tax Treaties with Particular Reference to the Netherlands and the United States* (ISBN 90-411-0737-1). He had written within a specific frame of reference. Stef van Weeghal of Stibbe, Simont, Monahan, Duhl, Amsterdam, the Netherlands has no established juristic credentials on our criteria of judging the worth of the publicists worthy to be referred and relied upon in judicial proceedings. In the same way neither David nor Oliver has any juristic credential. The author is wrong in drawing up footnote 105 which would be shown in the next para.

The proposition of which footnote 105 is the support occurs in the para quoted in *Azadi Bachao*. Roy Rohatgi has not cited any material to support his view "For example, United States does not discourage Treaty Shopping for outbound investment by US companies." There is no U.S. Court decision to support Treaty Shopping. That in certain tax treaties the U.S.A permits the marginal cases of Treaty Shopping is hardly a material point in the present context as we are concerned with the *legality* of the transactions. His statement with reference to Germany is wrong. Perhaps he got his idea from *Phillip Baker* who has written in course of his discussion with reference to Germany:

> "In Germany, therefore, a distinction seems to be made between "outbound" Treaty Shopping by residents of Germany, which is subject to domestic anti-

avoidance provisions, and "inbound" Treaty Shopping by non-residents which is permissible unless there are express anti-abuse provisions in the relevant treaty"[6].

It is strange that Roy Rohatgi showed no awareness of what *Klaus Vogel* writes taking into account subsequent events:

> "In contrast, the new $ 50d Abs. 1a of the German EstG, in force since 1 January 1994, is directed against the abuse of double taxation treaties by foreign entities, rather than by resident ones. According to this provision, a foreign entity has 'no claim to tax relief' (including an exemption or tax credit under a DTC**) to the extent that—**
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> - 'persons participate in the entity to whom the tax relief **would not be available** if they were to receive the income themselves, and
> - **there are no economic** or otherwise acceptable reasons for the interposition of the foreign entity, and it displays **no economic activity of its own".**[7]

Roy Rohatgi showed no awareness of the fact that no court of law in this wide world upheld Treaty Shopping. How can there be a shopping of treaty benefits? In some situations persons not party to a treaty may be beneficiaries of a treaty. But this can happen only when the fount of benefits in their favour is recognized. How can *good faith* which supports and upholds *pacta sunt servanda* become wares to be traded on counters for the benefit of bad-faith purchasers. Treaty benefits operate under the law of obligations; and are res *extra commercium.* Every treaty must be performed in good faith. [8]

Roy Rohatgi showed no awareness of the juristic principles universally accepted. In France invoking the doctrine of the *"less principles generaux du droit."* by Conseil d'Etat frustrates fraud. The Netherlands Supreme Court (the Hoge Raad) in 1986 applied, with impact, the doctrine of *fraus legis* to discover the reality of a conduit company. *Fraus* is a Latin expression, which means 'deceit'. *Fraus legis* means "fraud on law". In Roman law it means: to quote from *Black's Law Dictionary*:

> "Evasion of the law; specif., doing something that is not expressly forbidden by statute, but that the law does not want done."

This doctrine has been thus explained[9]:

> 'The doctrine of *fraus legis* may apply if a chosen structure – though legally different –produces the same results as another structure provided by the tax legislation and if it can be proved that there are no commercial reasons for this particular structure other than tax avoidance. In such a case the courts may disregard the

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6. Phillip Baker p. 101.
7. Klaus Vogel on Double Taxation Conventions p. 128.
8. Art. 26 of the *Vienna Convention on the Law of Treaties.*
9. Philkip Baker, Double Taxation Conventions and Internation Law 2nd ed. p. 99-00,ol.

> artificial structure if it conflicts with the purpose and the spirit of the law, and they might look to the final result before passing judgment.'"

The Netherlands Supreme Court (the Hoge Raad) applied the doctrine of *fraus legis*, and called upon the subordinate court to appraise the abuse of the 'double taxation avoidance claim' in this light. Analogous approach is evident in the jurisprudence of the German courts. Phillip Baker's discussion of the Swiss approach leads to the following conclusions:

(a) Switzerland felt so strongly against Treaty Shopping that a domestic legislation was framed.

(b) The Bundesgericht adopted the civil law approach to defeat *fraus legis*, which is substantially analogous with the approaches in the common law jurisdictions.

By holding that the partnership should not be treated as a resident of Switzerland for *treaty purposes* the Court adopted the same functional approach which the House of Lords adopted in *Furniss v. Dawson* by ignoring the interposed company without negating its existence as a company.

Roy Rohatgi did not consider the relevance of *Furniss v. Dawson* to the point under issue. The central doctrine of the House of Lords in *Furniss v. Dawson* [1984] 1 All ER 530, [1984] AC 474 can be invoked to frustrate Treaty Shopping. Philip Baker is of the view that it can be so utilized. He observes:

> "The interesting question is whether, even apart from such specific provisions, the Inland Revenue could attack Treaty Shopping under the doctrine enunciated in *Furniss v. Dawson.* That doctrine applies where there is a "pre-ordained series of transactions" and steps are "inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax". Where the doctrine applies the Revenue may impose tax ignoring the inserted steps. The most recent House of Lords case on the subject has added the requirement that the inserted step must be an element without independent effect."

Commenting on *Furniss v. Dawson* Philip Baker makes the following perceptive comments. "Several decisions of the courts on the application of the *Furniss v. Dawson principle* have stressed that the principle is one of the statutory construction. In case of Treaty Shopping, the provisions being construed would be the relevant treaty provisions, and the courts have held that a wide and purposive approach should be taken to the interpretation of tax treaties particularly, through a wide interpretation of the "beneficial owner" concept to exclude situations where the recipient, though technically the owner of income, was obliged to pay all or virtually all of the amount he receives to a third country resident…." A careful study of the judicial decisions of various European jurisdictions led Klaus Vogel (Klaus Vogel *on Double Taxation Convention*, p. 119) to state what has emerged as a crystallized anti-abuse norm to frustrate Treaty Shopping. He rightly mentions that "in spite of differing categorization in common law and civil

law countries, there is, as has been correctly observed, 'a striking similarity in approach and result'".

The exposition of law in Roy Rohatgi's book is unsound as it is written from the OECD and tax haven point of view. India is not a member of the OECD. The following comments are considered appropriate.

(i) Roy Rohatgi does not state the correct law: 'the purpose of tax treaties differ from that of domestic tax law'. A tax treaty in the Indian context is only for avoidance of double taxation in case where a non-resident comes to bear an incidence of taxation both in the source country and in the country of residence. It is a patently mistaken view of law to think that there is anything like *customary* International Law of taxation.

(ii) That under Indian law all policy considerations are legislatively enacted in the Income Tax Act. The executive is incompetent to pursue any policy in matters of levy and collection of taxes *de hors* the statute. This position is common in India and in the U.K. with one material difference that in the U.K. statutory tax provisions are *per se* final whereas in India even such provisions are under constitutional limitations. If the executive does anything in matters of levy of tax or grant of exemption from tax from mere non-tax considerations (and without statutory authorization) such an executive act is contrary both to our constitution and the law. The whole confusion in Roy Rohatgi's book is on account of not taking into account the constitutional provisions in different countries. In some countries the constitutions grant specific priority to treaties whereas in most other countries tax treaties are legislatively enacted though in some of such countries such statutory provisions are amenable to visible and invisible provisions of the entrenched rights under their constitutional law. The fallacy in the entire approach is that the author is not observing the differentials having bearing on tax treaties as operative in different jurisdictions.

(iii) It is settled by our Supreme Court that the statutory power can be used only for the purpose for which it is granted. It cannot be used even for noblest purpose if it is not within the province of the purpose for which it is granted. Only such non-tax considerations can be allowed to be at work, which come within the statutory purpose. The doctrine of *ultra vires* can be evoked to set right such violations.

(iv) The paragraph 3 in the long quotation from Roy Rohatgi's book is an assortment of confused propositions. The intended benefits in a bilateral tax treaty can only be for the benefit of their residents. Their residents 'can mean' only the real residents, not a band of mask wearers. The public policy which civilized jurisprudence always promotes is that deception, howsoever dexterous never triumphs. In a bilateral tax treaty

third state residents have no place. Intention of a treaty is always spelt out from its Personal scope, and not by sophistry.

(v) The Statement 'the prevention of tax avoidance including the proper use of tax treaty may or may not be explicit or sole purpose of a tax treaty' is a typical thesis dear to offshore companies consultants thriving on the tax heaven manipulations. The only authority for this view cited by Roy Rohatgi is Stef van Weeghal's Book about which this author has already submitted that it is unworthy of reliance; first because it is in the context of USA and Netherlands which have different constitutional and geo political consideration and second because no Court of Law in the World has given its nod to a proposition like this.

(vi) Roy Rohatgi's statement is unsound in Indian context as it promotes purposes extrinsic to purpose of Income-tax Act. A democratic republic gets defaced, defiled, and, in the end, destroyed if it evades constitutional discipline. The Delhi High Court quoted the observations of the Supreme Court in *S. R. Chaudhary v State of Punjab* to stress this fundamental norm:

> "There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental power."
>
> "Constitutional restraints must not be ignored or bypassed if found inconvenient or bent to suit "political expediency. We should not allow erosion of principles of constitutionalism."

(vii) The concept of (sovereign jurisdiction) is totally meaningless under our Constitutional system, especially in tax matters as the income tax law has only intra-domestic operation, and is administered by the tax authorities that are duty bound to levy tax on income emanating under domestic economic transactions, the taxable events.

(viii) The statement by Roy Rohatgi that 'in Principle the use of treaty provisions by third country residents can never be improper provided it meets their objectives' is an atrocious proposition. First, the statement suffers from the fallacy of circular reasoning. In the context of the use of a treaty by third country residents, the word 'their' would be referring the expression 'third country residents'. The expression 'the treaty provisions' cannot be the referent of 'their' as to convey this import the correct expression would be 'these' or 'those'. This is so because Roy Rohatgi thinks that even the third-States residents can exploit a bilateral tax treaty. But this view goes against all law and public policy, domestic and international.

(ix) No court of justice of any major developed country has given its benediction to Treaty Shopping. If any government allows Treaty Shopping in some attenuated form it does so as a tax treaty is framed with legislative

approval. In India the executive does it in exercise of a delegated power. It is not difficult to understand why the US Government is not strict with tax havens dotting the Caribbean Sea, or why the U.K. is so much tolerant to the Island of Mann or to the Virgin Islands. The mega capitalists of these countries use these tax havens for parking funds off public gaze, for money laundering, and for deflecting tax-incidence. Barbados is one of the few tax havens in the world with which the U.S.A., has a tax reducing treaty. 'Operators such as Prince Talal Bin Abdul-Aziz el Saud's (P.O. Box, Riyadh, Saudi Arabia), Vanguard N.V. (Handelskada 6, Curaco, Netherlands Antilles) and many other foreigners hold billions of dollars worth U.S. real estate through Antilles holding companies, where once treaty benefits provided extensive tax relief.'[10] The Chief of state of Virgin Islands (U.S.) is the President of the United States. The Island of Man is a crown dependency of the United Kingdom whose Chief of State is the British Monarch. The Chief of the State for the Bahamas or Bermuda or Barbados is the British Monarch. The mighty U.S.A. and the U.K. know that their top capitalists use tax havens. It has already been mentioned how even a fleeting scrutiny by the Paris-based Financial Action Task Force led in 2001 to the banning of anonymous ownership of more than 100,000 international business companies registered in the Bahamas. Besides, they know where to draw the lines. At the same time they are powerful enough to discipline these tiny countries with their massive might, if things become too much for them. The Government of India is not powerful enough in the global politics to shape the policies of these tax havens if their policies become detrimental to our country. Let us not evade our hard realities.

Roy Rohatgi's statement that Treaty Shopping is justified 'for other non-tax reasons' unless it leads to a significant loss of tax revenues is simply shocking. Revenues, which go to the Consolidated Fund of India, bear different attributes, and are under Parliamentary Control. The consolidated Fund is a real wealth of the country under Public Trust. It is true that nobody knows how much loss sharp operators from lands near and far inflicted on this country. The different agencies of the government know about such revenue losses but pretend ignorance. Even if the total loss of revenue in the 24 cases, which were disposed of by the Mumbai tax authorities in 2000, would have been taken into account, some idea as to the extent of loss we could have been got. As our Government was itself shielding them, and arguing their case, this fact is never likely to be known to people. But it is clear from the judgment of the High Court, the Report of the Joint Parliamentary Committee Report, and the CAG's Report 13 of 2005 that loss to the nation was massive. What this loss of resources means for the poor country can be appreciated only by

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10. http://www.offshore-manual.com/224_3.html.

applying Gandhiji's *talisman* (referred in the Chapter on "Towards The Sponsored State"), but unfortunately our Government has lost it for the benefit of the High Net Worth Individuals whose welfare alone determines the measure of our country's economic development.

(x) It is the constitutional mandate that every paise of revenue must be collected, as not even the whole of the executive is competent to waive single paise of taxes of Income Tax raised under the statute. This is the rationale why the executive cannot writes off even a paise of revenue. The write-off procedure in the Income tax Department is merely a process for transferring the uncollectable dues to the Register of Dead Demands to be pursued for recovery, if possible, within the period of limitation. Foreign exchange or foreign investment does not belong to this category of the country's resources. Nobody knows, not even the Reserve Bank, what is the chemistry of the foreign exchange.

(xi) Roy Rohatgi states that treaty network is built to attract foreign enterprises and offshore activities. It is contrary to international public law. P*acta sunt servanda*, which is founded on *good faith*, cannot be turned into a device for turning good faith into wares of sale. Any such attempt is a clear fraud.

(xii) Roy Rohatgi overlooks the fundamental difference between the tax-incentives given in the domestic tax laws and the benefits under a tax treaty. As a citizen this author, a respondent before the Court, was aghast when Shri Harish Salve stated before the the Delhi High Court that as the residents of a particular State in the Union of India derives advantages of tax incentives by setting up industries in underdeveloped areas in our own country, so do the non-residents operating through the Mauritius route. The Delhi High Court rejected this argument with a well-reserved curt comment:

> "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 benefit are given reconcerned, the same is stated to be rejected. Economic activities in different states by grant of exemption to the industries are done in terms of the provisions of the statures. Such exemptions are granted in furtherance of the legislative policy so as not only to put the local resources including human resources to optimum use but also for development of the country. Such benefits and exemptions are granted by way of payment of sales tax and electricity subsidy etc but the same principle cannot be said to be applicable for the purpose of double taxation avoidance scheme."

(xiii) If any tax concessions are to be given they must be given in transparent form so that the people of the country can judge the propriety of the grant of such benefits.

(xiv) Roy Rohatgi counsels us through a meaningless sentence; 'Overall countries need to take, and do take, the holistic view'. Holism in philosophy is a theory that certain holes are to be regarded as greater than the sum of their parts. He has not spelt out the parts of the whole, nor we know whether the 'hole' [whole] has any space for common Indians. As a dictator sells dreams, these financial consultants promote their interests by merely painting a rainbow. It is not clear how the calculus of revenue losses and non-tax benefits works; and if it works, for whose benefit it works. The argument put forth by Roy Rohatgi brings to mind what Baron Anderson had said in *R v. Hodge*[11]:

> "the mind was apt to make a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected the whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

(xv) The rainbow that the author has painted on specious pleas would vanish if Joseph Stiglitz's discussion of the Role of Foreign Investment in *Globalization and its Discontents* is gone through. It is unwise to evade realities. While investing in India the FIIs are interested in reaping quick profits. They are hardly interested in our economic growth. What they bring is 'hot money' which comes in and goes out through financial market strategy and stratagem. Often this is a device for bringing ill-gotten wealth parked outside the country; often it is a device to transmit ill-gotten wealth inside the country into some booming foreign market or into the safe haven of secretive offshore bank accounts. They extract special privileges from the Government The CBDT's Circular 789 is a morbid example how things are maneuvered for their benefits. The tax treaties are the other ignoble examples of how special privileges are extracted by them from our Government not only to escape the right incidence of taxation, but also to become beneficiaries of a special procedure of disputes settlements under the tax treaties' Mutual Agreement Procedure. Despite our Constitution, we live in an unequal world with unequal laws.

In fine, the author states that his criticism is made with utmost good faith *pro bono publico*. If any point of my criticism smacks of canting, the author apologizes without reservation. For the Court the author has the highest regards, and holds himself eternally grateful to it. He admires Mr. Roy Rohatgi for writing a thought-provoking book of a remarkable range. He was surely within his rights to

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hold his views. He would be magnanimous enough to tolerate my democratic right to judge him with candour. This Chapter may end with what Jonathan Swift said in “On the Death of Dr Swift”:

Yet malice never was his aim;
He lashed the vice, but spared the name;
No individual could resent,
Where thousands equally were meant.