Mobilia Sequuntur Personam- Revisited

Taxation of movable property is a complex phenomenon. More specifically, taxation of intangible property such as copyright, trademark, literary works etc. in case of cross border transactions is tricky and has witnessed a plethora of cases both nationally and internationally. In such cases, determining the situs of the property is very crucial. The common law legal maxim 'Mobilia Sequuntur Personam' has emerged as a means to determine the situs of the property and has been interpreted in a number of cases. In the present article, the author has deliberated upon the meaning and nature of this maxim through various case laws. Read on to know more….

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'Mobilia Sequuntur Personam' is an old legal maxim, which literally means that the movables follow the law of the person. This was the bone of contention before the Delhi High Court, recently, in the case of *Cub Pty Limited (Formerly Known as Foster's Australia Ltd) vs. Union Of India & Ors WP (C) 6902/2008*, dt. 25.07.2016.

The doctrine literally means that "movables follow the law of the person", which means that the situs of a movable is determined by the situs of the person

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owning that movable. It is not in doubt that the doctrine emerges from the 'common law' and in fact has not been defined under any statute. However, it is also a fact that over a period of time it has attained recognition worldwide. In a judgment as old as *Rainier Brewing Co. vs. McColgan*, dt. 13.10.1949, the term was defined in the following words, also quoting another older judgment:

"The term "mobilia sequuntur personam" is a maxim defined as meaning, "movables follow the [law of the] person". In Miller vs. McColgan, 17 Cal. 2nd 432, it is said at page 433: "The doctrine of mobilia sequuntur personam has been repeatedly and consistently maintained in determining the taxable situs of intangible property, and as recently as the 1938-39 term the Supreme Court of the United States recognised it in Curry vs. McCanless, 307 U.S. 357....."

In the Indian context, the latest to recognise the maxim is Delhi High Court in *CUB Pty. (supra)*, in the context of arriving at ascertaining the situs of intangibles.

Facts

The facts of the case are that Foster's Australia Limited, the assessee, was owner of trade name, trade mark, brand and other intellectual property related to Foster's Beer. It entered into Indian market, in the year 1997, and granted an exclusive license to Foster's India Limited, to brew, package, label, and sell Foster's Lager (beer) and an exclusive right of use of the trade-marks within the territory of India and also authorised to use the Mark (Foster's) as part of corporate name. During the year 2006, the assessee executed a sale and purchase agreement in Australia, with a UK based company SAB Miller, which was a composite agreement for sale of shares and the transfer of all right, title and interest in India in trademarks, Foster's brand intellectual property and Foster's brewing intellectual property. A ruling from the AAR was sought as to whether transfer of right, title and interest in the assessee's trademarks, brand's intellectual property and grant of exclusive perpetual license of brewing intellectual property is taxable in India under the Income-tax Act and the Double Taxation Avoidance Agreement between India and Australia. The question before the AAR to decide was, whether the situs of the intellectual property viz. trade name, trade mark, brand and other intellectual property related to Foster's Beer, was in India. The AAR concluded that marketing intangibles comprising of Foster's trademarks and brand which were in use for nearly a decade, had their abode in India while reiterating its earlier ruling in the case of *Pfizer Corporation in re (141 Taxman 642)*. It was held that the situs of intangibles being in India, the same is taxable in India.

On a petition filed by the assessee against the ruling, the Hon'ble High Court held reversing the ruling, that there is no such provision with regard to intangible assets, such as trademarks, brands, logos, i.e., intellectual property rights having situs in India. Therefore, the well accepted principle of *'mobilia sequuntur personam'* would have to be followed. The situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset. This is an internationally accepted rule, unless it is altered by local legislation. Since there is no such alteration in the Indian context, the court agreed with the submissions made on behalf of the assessee that the situs of the trademarks and intellectual property rights, which were assigned pursuant to the sale purchase agreement, would not be taxable in India. This is so because the owner thereof was not located in India at the time of the transaction.

Intangibles

The term 'capital asset' has been defined under Section 2(14) of the Act to mean property of any kind held by an assessee whether or not connected with his business or profession. The definition of 'capital assets' clearly reveals that the said expression has been assigned a wide meaning. 'Property of any kind' undoubtedly also includes intellectual property which is but a species of intangible property. Trade marks, brand, goodwill, technical know-how relating to the manufacture of goods would all qualify to be treated as capital assets within the meaning of Section 2(14) of the Act.

A property or an asset is intangible by its very nature of not being in physical form. Intangibles may consist of anything from copyright, trademark, literary works, goodwill, competition etc.

The emergence of interpreting the doctrine of *mobilia* arises mainly in the cases of deciding the situs of intangibles. It is known to everyone that while determining the taxability of income arising out of capital assets, in the context of cross border transactions, the situs plays a very important role. In case of tangible properties whether movable or immovable, it is easier to infer the situs because of their physical presence, which is no doubt further easier in cases of immovables. In a judgment of Supreme Court of South Carolina, in the case of *Geoffrey, Inc vs. South Carolina Tax Commission*, the Hon'ble court said that *'it is not the character of the property that makes it subject to such a tax, but the fact that the property has a situs within the state and that the owner should give appropriate support to the government that protects it. That duty is not less when the property is intangible than when it is tangible.'*

Tricky- Situs of Intangibles

The Hon'ble High Court in the case of *CUB Pty (supra)* has recognised the fact that ascertaining situs of an intangible is a tricky one. This trickiness can also be understood in the words of the U.S. Supreme Court in a very old judgment in the case of *Curry vs. McCanless, 307 U.S. 357 (1939)*, in the following words:

"Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognises by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective through control over and protection afforded to those persons whose relationships are the origin of the rights. Obviously the source of actual or potential wealth, which is an appropriate measure of any tax imposed on ownership or its exercise – they cannot be dissociated from the persons from whose relationships they are derived."

The situs of intangible or incorporeal property viz. trade-mark and goodwill was the subject matter of disquisition in American courts, when the issue of territorial nexus of a particular State to tax the subject was to be tested on the anvil of due process clause of the U.S. constitution. The case of *Geoffrey Inc. vs. South Carolina Tax Commission (supra)* decided by the Supreme Court of South Carolina was one such.

Methods for Ascertaining 'Situs'

A very ancient judgement of the Supreme Court of Texas had tried to analyse the different methods to ascertain the situs in the case of *Humble Oil & Refinery Co. vs. Calvert, 414 S.W. 2nd 172 (1967)*. It attributed four methods to fix the situs of any capital asset, equally to the intangibles. The tests were stated to be common law or *mobilia*, location of payer test, business situs test and commercial domicile test.

Doctrine of *mobilia* is said to be adopted by the common law through the maxim *'mobilia sequuntur personam,'* which taught that movables follow the person. Under *mobilia*, the courts indulge the fiction that intangibles are associated with the person of the owner and that situs is at the domicile of the owner.

'Location of payer' is an exception to *mobilia*. Under it, the domicile of a debtor or a payer in the case of interest and declaring corporation in the case of dividend as the location of business receipts without regard to the domicile of the payee.

The 'commercial domicile' test affords still another exception to *mobilia*. A corporation's commercial domicile is where the principle place of business is located and from which the corporation's activities function and manage.

'Business situs' is another exception to *mobilia*, whereby instead of locating the payer or payee, it locates the place where the intangible property is actually "employed as capital" or if the possession and control of the property has been localised in connection with a business, trade or profession in a state so that its substantial use and value attached to and become an asset of the business, trade or profession in the state. It has been used as an exception both to *mobilia* and commercial domicile test.

It is pertinent to mention here that the arguments made on behalf of the revenue in the case of *CUB Pty (supra)* that the intangibles having nurtured in India over a period of time and trade

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mark having been registered in India, should be held to have situs in India, perhaps was based on the method of 'business situs'.

Local Laws

There cannot be denying the fact that if there is a specific local law with regard to situs of a specific intangible in a given situation, there cannot be any reason to look for anywhere else and the problem not only gets solved, in fact the problem does not arise at all. The problem arises only in cases where no such specific provision is provided under the law. For instance, with respect to shares and interest in a company registered outside India, Explanation 5 has been added to Section 9(1)(i) of the Act by virtue of Finance Act, 2012, with retrospective effect from 1.04.1962 to provide that the 'situs' of such shares is always intended to be in India.

The interesting view emerging out of the above amendment, as analysed by the Hon'ble Delhi High Court is that, wherever and in whichever situation the legislator intended to define such situs to be in India that has been done specifically by inserting such provisions at appropriate places in the statute. This further explains the mind of the legislator that in cases which have not been so specifically dealt with, there is no intention to straightaway take the situs as India. These are the circumstances in which the courts have to analyse and infer on the facts and circumstances of the case, the situs of the intangibles in question. Here comes the role of four tests as specified hereinabove. In the case of *Humble Oil Refinery (supra)*, the Supreme Court of Texas has held for such a situation that *'a statute of doubtful meaning that has been construed by the proper administrative officer, when re-enacted without any substantial change in verbiage, will ordinarily receive the same construction.'*

This kind of perception, keeping in mind the Hon'ble Delhi High Court in the case of *CUB Pty. (supra),* has held the legislator providing an explanation in respect of share transfer, having not done so for intangibles such as trade name, trade mark, goodwill, logo etc. Intellectual property, in a way paved way for courts to decide the situs, surely based on orthodox principles.

Registration-Whether Can Be Decisive?

One of the arguments raised before the AAR as well as the Hon'ble High Court on behalf of the revenue was that since the trade marks were registered in India, they have situs in India. The observation of the AAR was that there cannot be any doubt that the registration of trade-mark has no bearing on the ownership in view of the *Supreme Court in CIT vs. Finlay Mills Ltd. (AIR 1951 SC 464)*, which says that the registration of trade-mark does not create an asset. However, registration confers statutory remedies for its effective protection. Yet, it was observed that registration of the applicant's trade-mark in India is one of the relevant factors pointing to the roots it had taken and the recognition it has gained in India.

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Before the High Court, it was pleaded on behalf of the assessee that the rights in a trademark are of common law origin and are protected thereunder. A trademark does not derive its existence from any statute and is protected even in the absence thereof. The statute, more or less, fortifies the common law by conferring a statutory title to the trademark on the owner. Reliance was placed on the decision in the case of *Norwich Pharmacal Company vs. Commissioner of Internal Revenue: 1934 BTA Lexis 1344*, wherein it was observed as under:-

> *"A trade-mark does not derive its existence from any statute, state or Federal, but exists independent of statutes, and is protected even in the absence thereof. Trade-marks are not created by the trade-mark statutes. Such statutes merely fortify the common law right to a trademark by conferring the statutory title on the owner."*

In furtherance to these arguments, it was also argued that if the grant of a licence shifted the situs of the trademarks from Australia to India, the cancellation of the very same licence would, in any event, entail shifting back of the situs of the trademark to Australia.

Though the Hon'ble High Court preferred not to make any observation on this aspect of the matter, however one can understand the nature

of registration of trade marks by the following observation of the Apex Court in the case of *CIT vs. Finlay Mills Ltd.* reported in *(1951) 20 ITR 475*:

"By registration, the owner is absolved from the obligation to prove his ownership of the trade mark. It is treated as prima facie proved on production of the registration certificate. It thus merely saves him the trouble of leading evidence, in the event of a suit, in a court of law, to prove his title to the trade mark. It has been said that registration is in the nature of collateral security furnishing the trader with a cheaper and more direct remedy against infringers. Cancel the registration and he has still his right enforceable at common law to restrain the piracy of his trade mark. In our opinion, this is neither such an asset nor an advantage so as to make payment for its registration a capital expenditure. In this connection it may be useful to notice that expenditure incurred by a company in defending title to property is not considered expense of a capital nature. In Southern (H. M. Inspector of Taxes) v. Borax Consolidated Limited, it is stated that where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital asset of the company. In our opinion, the advantage derived by the owner of the trade mark by registration falls within this class of expenditure. The fact that a trademark after registration could be separately assigned, and not as a part of the goodwill of the business only, does not also make the expenditure for registration a capital expenditure. That is only an additional and incidental facility given to the owner of the trade mark. It adds nothing to the trade mark itself."

It is to be understood that the Hon'ble Supreme Court was deciding the issue whether the expenses incurred on registration of trade mark was of capital or revenue in nature. It has been very clearly stated herein that even without the registration, the owner of the property remains the same. Therefore the argument that the trade mark having registered in India has situs in India does not hold good.

That again triggers our age old maxim of *mobilia* to come into play. So, the verdict is quite clear that for deciding the situs of an intangible, the owner of that intangible is the most important factor. Wherever the owner is situated, the situs of the intangible lies there. This issue is settled as of now by the Delhi High Court as long as any other contradictory view of the Apex Court comes on this aspect. ■