

NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES
THE NUALS MOOT 2025
07TH - 09TH, 23RD FEBRUARY, 2025

IN THE SUPREME COURT OF THEMISTEA
[S.C.R., Order XXI Rule 3(1) (a)]

CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION
(Under Article 136 of the Constitution of Themistea)

S.L.P. (Civil) No. of 2024

BETWEEN

OLYMPUS HOLDINGS PTE LTD	PETITIONER
THE REPUBLIC OF THEMISTEA AND ANR.	RESPONDENT/STATE

To

Hon'ble the Chief Justice of Themistea and His Companion Judges of the
Supreme Court of Themistea.

The Special Leave Petition of the Petitioner most respectfully showeth:

1. The petitioner above named respectfully submits this petition seeking special leave to appeal against the judgment/order dated 30.08.2024 passed by the Hon'ble High Court of Athens in WP(Civil) of 2024.
2. Declaration in terms of rule 3(2): The petitioner states that no other petition seeking leave to appeal has been filed by him against the impugned judgment and order dated 30.08.2024 passed by the Hon'ble High Court of Athens in WP(Civil) of 2024.

SUBMISSION ON BEHALF OF THE PETITIONER

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TABLE OF ABBREVIATIONS

S.NO.	ABBREVIATION	DEFINITION
1.	&	And
2.	AAR	Authority for Advance Rulings
3.	AIR	All India Reporter
4.	Anr	Another
5.	AHI	ARES AND HEPHAESTUS INDUSTRIES
6.	Art	Article
7.	BV	Besloten Vennootschap
8.	CIT	Commissioner of Income Tax
9.	Co.	Company
10.	CONST.	Constitution
11.	Ed.	Edition
12.	e.g.	Exempli Gratia
13.	etc	Et Cetera
14.	DPIIT	Department for Promotion of Industry and Internal Trade
15.	DTAA	Double taxation Avoidance Agreement
16.	FDI	Foreign Direct Investment
17.	FEMA	Foreign Exchange Management Act
18.	GAAR	General Anti Avoidance Rules
19.	Hon'ble	Honourable
20.	i.e.	That Is
21.	Inc.	Incorporated
22.	LIC	Life Insurance Corporation of India
23.	Ltd	Limited
24.	OECD	Organisation for Economic Co-orporation and

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		Development
25.	Ors	Others
26.	Para	Paragraph
27.	PCA	Permanent Court of Arbitration
28.	PLC	Public Limited Company
29.	Pte	Private
30.	Pvt	Private
31.	S.A.	Société Anonyme
32.	SBI	State Bank of India
33.	SEBI	Securities & Exchange Board of India
34.	Sec	Section
35.	SC	Supreme Court
36.	SCC	Supreme Court Cases
37.	SCR	Supreme Court Reporter
38.	SCR	Supreme Court Rules
39.	SLP	Special Leave Petition
40.	SPA	Share Purchase Agreement
41.	SPEs	Special Purpose Entities
42.	SPVs	Special Purpose Vehicles
43.	TRC	Tax Residency Certificate
44.	UN	United Nations
45.	UNECE	United Nations Economic Commission for Europe
46.	UOI	Union of India
47.	v.	Versus
48.	VCC	Variable Capital Company Structure
49.	Vol	Volume
50.	www.	World Wide Web

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11. *Mc Dowell & Company Limited v. The Commercial Tax Officer, 1986 AIR 649.*
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13. *Ramsay Ltd v. IRC, [1982] AC 695.*
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15. *Sir Chunilal V. Mehta And Sons, Ltd v. The Century Spinning & Manufacturing, (1962 AIR 1314).*
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 21. *Vodafone International Holdings BV v. Union of India*, (2012) 6 SCC 613.
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STATEMENT OF JURISDICTION

THE PETITIONER'S HEREBY SUBMIT THE MEMORANDUM BEFORE THE HON'BLE SUPREME COURT OF THEMISTEA BY INVOKING THE SPECIAL LEAVE PETITION WHICH IS GUARANTEED UNDER **ARTICLE 136** OF THE CONSTITUTION OF THEMISTEA.¹

¹**Article 136** - Not with standing anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

STATEMENT OF FACTS

INTRODUCTION

As the world becomes increasingly interconnected, individuals and corporations expanding their reach across borders give rise to intricate tax implications. This case delves into the nuances of international tax laws, highlighting the challenges that arise when navigating the intersecting regulatory frameworks of multiple nations. This case involves the transfer of shares of AHI Limited, a Themistean company to Olympus Holdings a company incorporated in Spain through Prometheus and Ares Hydro Renewables International limited (companies incorporated in Mauritius and Cayman Islands). The main issue in this case is in regard to the payment of advance tax to the income tax authorities of Themistea for the 65% share in AHI Limited, the income tax authorities place Olympus Holdings as responsible for the payment of tax as at present, Olympus Holdings controls 65% of AHI Limited.

PARTIES INVOLVED

- **OLYMPUS HOLDINGS SA ("OLYMPUS")** is a multinational electric utility company incorporated in Spain, specializing in the generation, distribution, and trading of electricity from renewable energy sources. Olympus has an extensive global presence, having expanded its operations over the past 40 years to North America, South America, Europe, and Africa. Olympus is also subject to the **Themistea-Spain Double Taxation Avoidance Agreement (DTAA)**, signed on **January 12, 1995**.
- **ARES AND HEPHAESTUS INDUSTRIES LIMITED ("AHI LIMITED")** is a public limited company in Themistea, which is a leading player in the electricity generation, distribution, and trading sectors. The company has diverse shareholding, with **Prometheus Investments (Holdings) Limited** (through Mauritius subsidiaries) holding 65% of the shares, **Hephaestus Solar Renewables International Limited** owning 15%, **Themistean public shareholders** holding 12%, and **foreign institutional investors** holding 8%.
- **PROMETHEUS INVESTMENTS HOLDINGS LIMITED** is a company based out of the Cayman Islands held three subsidiaries in Mauritius which is collectively called **"Mauritius SPVs"** which collectively hold the Sixty-Five (65) percent stake in AHI Limited. These Mauritius SPVs were established between 2010-2015 and were eligible for benefits under the

Themistea-Mauritius DTAA. The SPVs' sole business activity was holding shares in AHI Limited, with no other substantial business operations.

- **ARES HYDRO RENEWABLES INTERNATIONAL LIMITED:** The controlling stake in Prometheus Investments (Holdings) Limited was ultimately held by Ares Hydro Renewables International Limited, a company domiciled and based out of the Cayman Islands. The Mauritius SPVs sole business activity was holding shares in AHI Limited, with no other substantial business operations.

OLYMPUS HOLDINGS GLOBAL OPERATIONS & STRATEGY

In early 2022, Olympus sought to expand its footprint in Themistea, considering the acquisition of a majority stake in a Themistean entity. To this end, Olympus applied for the necessary regulatory clearance from the **Competition Commission of Themistea (CCT)**. Since the combined turnover of Olympus and AHI Limited exceeded the prescribed thresholds for competition review under **Section 6(2)** of the **Competition Act, 2002**, the clearance was granted, allowing the transaction to proceed.

CORPORATE STRUCTURE OF AHI LIMITED

Prometheus Investments (Holdings) Limited, which controlled 65% of AHI Limited, was a subsidiary of **Ares Hydro Renewables International Limited**, a company domiciled in the Cayman Islands. The 65% stake in AHI was held through three Mauritius-based Special Purpose Vehicles (SPVs): **Prometheus Energy Holdings Ltd, Prometheus Power Infrastructure Ltd, and Prometheus Renewables Ltd**, all established between 2010 and 2015. These Mauritius SPVs are eligible for benefits under the **Themistea-Mauritius DTAA**, and their sole business activity was holding shares in AHI Limited, with no substantial operations.

SHARE PURCHASE AGREEMENT (SPA) BETWEEN OLYMPUS & AHI LIMITED

On April 24, 2024, Olympus and **Ares Hydro Renewables International Limited** entered into a **Share Purchase Agreement (SPA)** governed by English law. Under the SPA, Olympus agreed to purchase the entire share capital of **Prometheus Investments (Holdings) Limited** for **US\$ 5 billion** (approximately **Rs. 41,500 Crores**). An independent valuer determined the transaction's valuation, which adhered to internationally accepted valuation methods and was in compliance with the **Foreign Exchange Management Act (FEMA)** regulations. Olympus also obtained the necessary **Department for Promotion of Industry and Internal Trade**

(DPIIT) approval under the automatic route, as the renewable energy sector in Themistea permits 100% **Foreign Direct Investment (FDI)**.

TAXATION DISPUTE ARISES

Olympus received a **show-cause notice** from the **Income Tax Department** of Themistea on May 15, 2024. The notice questioned why **tax was not deducted at source under Section 195** of the **Income Tax Act, 1961**, and why **capital gains tax** was not paid on the indirect transfer of assets situated in Themistea. The department argued that Olympus was liable for capital gains tax arising from the transfer, based on the difference between the transaction value and the fair market value of AHI Limited's assets, including its power plants, infrastructure, and customer contracts in Themistea, valued at approximately **Rs. 35,000 Crores**. The capital gains tax demand was calculated at **Rs. 5,000 Crores** (40% tax rate plus surcharge and cess).

HIGH COURT DECISION & APPEAL TO SUPREME COURT

Olympus, disputing the order, approached the **High Court of Athens** on July 15, 2024, under **Article 226** of the **Constitution of Themistea** to quash the Income Tax Department's jurisdiction. On August 30, 2024, the **High Court of Athens** upheld the tax authority's jurisdiction on three key grounds:

1. The **dominant purpose** of the transaction was the acquisition of significant assets in Themistea.
2. The **Mauritius SPVs lacked commercial substance** beyond merely holding shares in AHI Limited.
3. The **value of the Themistean assets** exceeded Rs. 10 Crores, constituting more than 50% of the total value of Prometheus Investments, thereby triggering the application of **Section 9(1)(i)** of the **Income Tax Act, 1961**, which deals with indirect transfer of assets located in Themistea.

Disagreeing with the High Court's judgment, on **September 15, 2024**, Olympus Holdings filed an appeal before the **Hon'ble Supreme Court of Themistea** under **Article 136** of the **Constitution of Themistea**. Although the Share Purchase Agreement included provisions for arbitration, Olympus opted for constitutional remedies due to the public law nature of the dispute, particularly concerning issues of taxation and sovereign jurisdiction.

STATEMENT OF ISSUES

ISSUE I

Whether the appeal before the Hon'ble Supreme Court of Themistea is maintainable under Article 136 of the Constitution of Themistea?

ISSUE II

Whether the Income Tax Authority possesses the territorial and subject-matter jurisdiction to impose capital gains tax on an offshore transaction between two non- resident entities, when the substantial value of transfers of a foreign company is derived from assets situated in Themistea, particularly in light of the principles of territorial nexus and sovereign jurisdiction under international tax law?

ISSUE III

Whether the threshold requirements for the application of the doctrine of "lifting of corporate veil" are satisfied in the present case, and if so, whether such application is justified in matters of taxation where the transaction structure involves multiple layers of foreign holding companies whose primary asset is shareholding in a Themistean entity?

SUMMARY OF ARGUMENTS

ISSUE 1

THE APPEAL BEFORE THE HON'BLE SUPREME COURT OF THEMISTEA IS MAINTAINABLE UNDER ARTICLE 136 OF THE CONSTITUTION OF THEMISTEA.

The Petitioner asserts that the appeal under **Article 136** of the Constitution of Themistea is maintainable due to the **public law nature** of the dispute, which involves **sovereign taxation rights** and the **territorial scope** of domestic tax laws. The issue at hand pertains to the interpretation of the **Themistea-Spain Double Taxation Avoidance Agreement (DTAA)** and the applicability of capital gains tax on an offshore transaction, raising significant international law concerns. The Supreme Court has the discretion to hear appeals involving matters that affect public policy, sovereign rights, and constitutional governance, which are not subject to arbitration. The dispute is not merely a contractual issue but one that involves critical questions of tax jurisdiction and the enforcement of public law principles. The taxation of foreign entities and the interpretation of domestic laws in the context of international treaties are matters of public interest that extend beyond the private interests of the parties involved. These issues are integral to the country's fiscal sovereignty and international obligations, requiring judicial oversight. Given the substantial legal questions raised, including the interpretation of tax laws and their impact on **cross-border transactions**, the Petitioner's **Special Leave Petition (SLP)** is maintainable, and the Hon'ble Court should exercise its discretion to hear the appeal.

ISSUE 2

THE THEMISTEAN INCOME TAX AUTHORITY DOES NOT POSSESS THE TERRITORIAL AND SUBJECT-MATTER JURISDICTION TO IMPOSE CAPITAL GAINS TAX ON AN OFFSHORE TRANSACTION BETWEEN TWO NON-RESIDENT ENTITIES, WHEN THE SUBSTANTIAL VALUE OF TRANSFERS OF A FOREIGN COMPANY IS DERIVED FROM ASSETS SITUATED IN THEMISTEA, PARTICULARLY IN LIGHT OF THE PRINCIPLES OF TERRITORIAL NEXUS AND SOVEREIGN JURISDICTION UNDER INTERNATIONAL TAX LAW.

Olympus submits that the Income Tax Authority of Themistea lacks both territorial and subject-matter jurisdiction to impose capital gains tax on the offshore transaction between **two non-resident entities**. The share transfer between Olympus and Ares Hydro Renewables International Limited, involving **Mauritius-based subsidiaries**, does not involve any direct transfer of assets situated in Themistea. The mere fact that the underlying assets of AHI Limited are located in Themistea is insufficient to establish jurisdiction, as the transaction itself occurs outside Themistea's territory. Furthermore, the provisions of the General Anti-Avoidance Rules (GAAR) are not applicable, as the transaction does not constitute a tax avoidance scheme, and the deal has been conducted with **full regulatory clearance**. The **Finance Act Amendments** and the principles established in the **Vodafone judgement** underscore that indirect transfers of assets cannot be taxed without a substantial connection to the country. Therefore, Olympus respectfully requests the Hon'ble Court to **quash** the Income Tax Authority's order, as the transaction is **legitimate** and does not warrant taxation under Themistea's laws.

ISSUE 3

THE THRESHOLD REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF "LIFTING OF CORPORATE VEIL" ARE NOT SATISFIED IN THE PRESENT CASE, AND SUCH APPLICATION IS NOT JUSTIFIED IN MATTERS OF TAXATION WHERE THE TRANSACTION STRUCTURE INVOLVES MULTIPLE LAYERS OF FOREIGN HOLDING COMPANIES WHOSE PRIMARY ASSET IS SHAREHOLDING IN A THEMISTEAN ENTITY.

The Petitioner contends that the threshold requirements for applying the doctrine of "**lifting the corporate veil**" are not met in this case. The doctrine allows a court to disregard a company's separate legal personality and impose liability on the persons controlling it when it is evident that the company was created as a sham or to avoid liability, particularly in cases involving fraud or tax evasion. However, the Petitioner asserts that there is **no evidence of fraud or tax evasion** in the present case. The structure **involving Mauritius-based Special Purpose Vehicles (SPVs)** holding shares in a Themistean entity does not lack commercial substance, as it is a **legitimate business structure** commonly used for tax and regulatory reasons in international law. The SPVs are not created to evade taxes but to comply with legal requirements for foreign investment in India. The Petitioner also argues that using offshore entities does not automatically imply tax evasion, as it is a common practice for multinational corporations to employ foreign holding companies for legitimate business and tax planning purposes. The Revenue's argument about tax avoidance is based on suspicion, not concrete evidence. Therefore, the Petitioner submits that there is **no basis** for lifting the corporate veil, as there is **no abuse** of tax law, and the structure is in line with the legitimate avoidance of tax liability through strategic tax planning, which is **permissible** within the legal framework.

ARGUMENTS ADVANCED

1. THE APPEAL BEFORE THE HON'BLE SUPREME COURT OF THEMISTEA IS MAINTAINABLE UNDER ARTICLE 136 OF THE CONSTITUTION OF THEMISTEA.

1.1. Justiciability and Maintainability of the Petition under Article 136 of the Constitution of Themistea

Article 136 of the Constitution of Themistea grants the Hon'ble Supreme Court discretionary powers to entertain appeals from any judgment, order, or decree of any court or tribunal in the country. However, this power is exercised only in exceptional cases, primarily where there are **issues of significant public importance** or where fundamental rights are involved. Furthermore, the Court can **bypass** the usual procedural remedies, including arbitration clauses, when the matter falls within the realm of public law.

In the present case, Olympus Holdings approaches the Hon'ble Supreme Court challenging the jurisdiction of the Income Tax Authority to impose capital gains tax on a cross-border transaction. This is not a mere contractual dispute between two private entities but involves **public law issues** relating to **sovereign taxation powers**, the **territorial reach** of domestic tax laws, and the interpretation of an international treaty. Given the involvement of rights regarding tax jurisdiction and enforcement, the issues raised transcend the scope of ordinary civil disputes and require a constitutional interpretation, justifying the maintainability of the appeal under Article 136.

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*,² the Supreme Court held:

"Arbitration clauses are not absolute in all circumstances, especially when public law issues are involved. In cases concerning sovereign rights or public law matters, the jurisdiction of the court may supersede the arbitration agreement, as such issues impact public policy and the rule of law."

Further, in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.*,³ the Court observed:

"Matters involving public policy, sovereign rights, and constitutional obligations are non-arbitrable, as they concern the welfare of the State and society at large."

Thus, the question of territorial taxation jurisdiction in the present case involves **sovereign**

² Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

³ Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751.

powers and **public policy considerations**, making it **non-arbitrable**.

1.2. Public Law Nature of the Dispute and Non-Arbitrability

The distinction between private contractual obligations and public law issues is crucial in determining whether a matter is arbitrable. The Supreme Court has consistently held that disputes concerning the exercise of **sovereign power**, including **taxation** and enforcement of public law, cannot be subject to arbitration, as they involve matters of **public policy** and constitutional governance.

The issue in this case is whether the Republic of Themistea can levy capital gains tax on Olympus Holdings' offshore transaction involving shares in Prometheus Investments. The taxation of foreign entities and the interpretation of domestic tax laws concerning international treaties (such as the DTAA) are matters that concern the **fiscal and regulatory sovereignty of Themistea**. These issues are not just about the enforcement of a private contract but involve the interpretation and enforcement of public law, which affects the overall governance and public interests of the country.

In *Tata Consultancy Services Ltd. v. State of Tamil Nadu*,⁴ the Court ruled that matters involving the interpretation of statutes that concern public policy, like taxation, are non-arbitrable:

"Taxation disputes are inherently public law issues that go to the heart of the State's sovereign rights to collect taxes, and such disputes cannot be relegated to arbitration."

In *Indian Oil Corporation Ltd. v. Amritsar Gas Service*,⁵ the Court held:

"Public law disputes relating to state functions, including the interpretation of statutory provisions affecting public rights and obligations, cannot be subject to private dispute resolution mechanisms such as arbitration."

Therefore, the dispute at hand involving tax jurisdiction and sovereignty cannot be resolved through arbitration, and hence the petition under Article 136 is maintainable.

1.3 Public Law Issues Addressed by Courts Despite Arbitration Clauses

Arbitration clauses are **not absolute** when they conflict with **public law considerations**. Even when a contract mandates arbitration, the courts may still entertain petitions in cases where

⁴ Tata Consultancy Services Ltd. v. State of Tamil Nadu, (2004) 6 SCC 636.

⁵ Indian Oil Corporation Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533.

fundamental public interests, such as tax jurisdiction, are at stake.

The **public law nature of the dispute** and the involvement of **sovereign taxation powers** justify the exercise of the Supreme Court's discretion to entertain the matter. This case deals with the imposition of taxes on an international transaction, an issue that goes beyond the private interests of the parties involved and touches upon the state's sovereign right to tax foreign entities operating within its jurisdiction.

In *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*,⁶ the Supreme Court held:

"Even where an arbitration clause exists, the Court can entertain a writ petition where the dispute involves matters of public law, such as the enforcement of statutory rights and the protection of public policy."

Moreover, in *U.O.I. v. Singh Enterprises*,⁷ the Court emphasized:

"In cases where the dispute has public law implications, such as government revenue and taxation, the courts have jurisdiction, irrespective of the presence of an arbitration clause."

This reinforces that matters involving taxation and public governance are within the purview of judicial review and cannot be relegated solely to arbitration proceedings.

1.4 International Obligations and Public Law in the Context of Tax Jurisdiction

The Hon'ble Supreme Court has often acknowledged the impact of international obligations on domestic tax laws and public policy, especially in the context of bilateral treaties such as the **DTAA**. When an issue involves interpretation of international law, courts retain jurisdiction to ensure the proper application of sovereign laws, especially when it concerns the domestic fiscal policy of the State.

Olympus's challenge involves the interpretation of the **Themistea-Spain DTAA** and whether the indirect transfer of shares in a foreign entity, Prometheus Investments, could be taxed in Themistea. This issue is not simply a private contract dispute but one that involves the interpretation of sovereign tax laws and their application to international transactions, which touches upon public international law and the country's treaty obligations. These matters necessitate judicial intervention.

In *Union of India v. Vodafone International Holdings BV*,⁸ the Court clarified:

"When interpreting tax treaties and the application of tax laws to cross-border transactions, the Court has a duty to examine whether such impositions are in line with international

⁶ *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*, (2000) 2 SCC 642.

⁷ *U.O.I. v. Singh Enterprises*, (2004) 2 SCC 263.

⁸ *Union of India v. Vodafone International Holdings BV*, (2012) 6 SCC 613.

obligations and public law principles."

Thus, the Court's intervention is necessary to ensure that the principles of international law and public policy are adhered to.

1.5 Maintainability of Special Leave Petition (SLP) under Article 136

The petitioners humbly submit that the **Special Leave Petition (SLP)** filed before the Hon'ble Supreme Court is maintainable. As per **Article 136** of the Constitution of Themistea, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence, or order passed or made by any court or tribunal in the territory of Themistea. The SLP is maintainable in this case due to the **substantial question of law** raised by Olympus Holdings regarding the imposition of tax by the Income Tax Department. The case presents a substantial question of law on whether Olympus Holdings is liable for capital gains tax under the domestic laws of Themistea.

In *Sir Chunilal V. Mehta And Sons, Ltd v. The Century Spinning & Manufacturing*⁹, the Supreme Court held that a substantial question of law is one that is substantial between the parties, not necessarily one of public importance. The case at hand involves the interpretation of tax laws that could have wide-reaching implications not only for Olympus Holdings but also for other foreign companies involved in similar transactions. If the High Court of Athens' judgment is upheld, it could lead to gross injustice affecting the financial stability and foundational principles of taxation.

Thus, the SLP filed by the petitioners is maintainable before the Hon'ble Supreme Court of Themistea.

The appeal before the Hon'ble Supreme Court of Themistea is maintainable under Article 136, given the public law nature of the dispute concerning sovereign taxation rights. The dispute involves fundamental issues of constitutional governance, international law, and taxation, which are non-arbitrable. The Court should exercise its discretion to hear the matter, despite the arbitration clause, as it raises substantial issues of public importance and sovereignty. The Petitioner respectfully submits that the Hon'ble Court should uphold the maintainability of the appeal.

⁹ Sir Chunilal V. Mehta And Sons, Ltd v. The Century Spinning & Manufacturing, (1962 AIR 1314).

2. THE THEMISTEAN INCOME TAX AUTHORITY DOES NOT POSSESS THE TERRITORIAL AND SUBJECT-MATTER JURISDICTION TO IMPOSE CAPITAL GAINS TAX ON AN OFFSHORE TRANSACTION BETWEEN TWO NON- RESIDENT ENTITIES, WHEN THE SUBSTANTIAL VALUE OF TRANSFERS OF A FOREIGN COMPANY IS DERIVED FROM ASSETS SITUATED IN THEMISTEA, PARTICULARLY IN LIGHT OF THE PRINCIPLES OF TERRITORIAL NEXUS AND SOVEREIGN JURISDICTION UNDER INTERNATIONAL TAX LAW.

2.1. Jurisdiction of the Income Tax Authority

Olympus submits that the Income Tax Authority of Themistea lacks territorial jurisdiction to impose capital gains tax on the transaction between **two non-resident entities** i.e., Olympus and Ares Hydro Renewables International Limited. In this case, the petitioner invokes the well-established principles of international tax law, territorial nexus, and the governing provisions of the **Income Tax Act, 1961** which regulate the taxation of capital gains in cross-border transactions.

The core issue before this Hon'ble Court revolves around whether Themistean authorities can exercise jurisdiction over **an offshore transaction** between **two foreign entities**, particularly when the **substantial value of the shares** is derived from assets situated in the territory of Themistea.

A company is said to be resident in Themistea in the following circumstances:

A company is said to be resident in India in any previous year, if - ¹⁰

1. it is an Indian company; or

2. Its place of effective management, in that year, is in India.

Explanation. - For the purposes of this clause "place of effective management" means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole, are in substance made.

Here, in this case it was Prometheus investments holdings which has the 65% of share of the AHI Limited and its controlling stake was with Ares Hydro Renewables International limited. It was from Ares Hydro Renewables International Ltd; the Olympus Holdings bought the 65% share of AHI Limited along with all the properties of Ares. Olympus Holdings which is

¹⁰ Section 6(3), The Income Tax Act,1961.

considered by the Income Tax authorities of Themistea, is **not a resident country** and their place of effective management is also not in Themistea.

Thus, by virtue of **Section 6(3)** of the **Income Tax Act 1961**, Olympus holdings is not liable to pay the taxes.

2.2 International Tax Principles

Sovereign Jurisdiction and **Territorial Nexus**¹¹ are principles of International tax law which recognizes that a sovereign state can impose taxes on foreign transactions only if a territorial nexus exists. The **OECD Model Tax Convention** (to which Themistea subscribes) stipulates that a taxing right arises only when the income has a sufficient connection to the taxing state. In this case, Themistea is attempting to assert jurisdiction over an indirect transfer of shares involving foreign entities, which is an issue of critical importance in international taxation.

The *Vodafone International Holdings B.V. v. Union of India*¹² judgment is central to this issue. The Indian Supreme Court in Vodafone emphasized the importance of territorial nexus and jurisdiction, stating:

"A state can exercise its taxing rights only where there is a direct or indirect link between the income and the territory of that state. The exercise of taxing rights must be based on sound principles of international taxation, which seek to avoid double taxation and prevent taxing rights from being exercised arbitrarily."

Applying this rationale, it is clear that the mere fact that the underlying assets are located in Themistea does not automatically confer jurisdiction to levy taxes on a transaction between foreign entities with no substantial presence or operations in Themistea.

2.3. Absence of Direct Link Between the Transaction and Themistea

In the present case, Olympus, a Spanish entity, and Ares Hydro Renewables International Limited (domiciled in the Cayman Islands), are engaging in a transaction involving the purchase of shares in a Mauritius-based holding company. The shares of the holding company derive value from assets in Themistea, but the transfer itself occurs outside the jurisdiction of Themistea and does not directly involve the local infrastructure or assets.

Furthermore, the share transfer takes place through a Mauritius entity, a jurisdiction with which Themistea has entered into a **Double Taxation Avoidance Agreement (DTAA)**. Under this

¹¹ INDIA CONST. ART.245.

¹² Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 613.

agreement, capital gains arising from the transfer of shares in foreign companies should not be taxable in Themistea unless there is a direct connection to the country's assets.

The argument put forth by the **Hon'ble High Court** regarding the “**substantial value**” derived from Themistean assets fails to recognize that the transfer of shares in an **offshore entity** is not subject to taxation simply because the assets of that entity happen to be situated in Themistea. **No capital gain** arises within the **territorial jurisdiction** of Themistea since the transaction is between **non-residents**, and **no direct sale of local assets** is involved.

2.4. The Application of General Anti-Avoidance Rules (GAAR)

The **General Anti-Avoidance Rules (GAAR)**, introduced in the **Finance Act**, are applicable to curb tax avoidance schemes, but only when the dominant purpose of a transaction is to obtain a tax benefit. These provisions are not applicable in the present case, as the transaction between Olympus and Ares Hydro Renewables International Limited **does not involve the abuse of provisions or manipulation aimed at avoiding taxes**.

Olympus is **not engaged** in any **tax avoidance strategy** that seeks to **misuse** the DTAA between Themistea and Mauritius. The transaction was carried out in **good faith** with the approval of regulatory authorities, including the **Department for Promotion of Industry and Internal Trade (DPIIT)**, and the necessary **FEMA** clearances were obtained.

Further, the expert committee report on GAAR published by the Ministry of Finance in 2016 stated:¹³

"The GAAR provisions are intended to target only those transactions that lack economic substance and are structured solely for tax avoidance. In the case at hand, there is no evidence to suggest that the sole purpose of the transaction was to evade taxes, particularly given the transparency of the deal and regulatory clearances obtained."

The **share purchase agreement (SPA)** was a **legitimate business transaction** aimed at expanding Olympus' operations into the renewable energy sector in Themistea. Therefore, invoking GAAR provisions would be inappropriate in this case.

2.5. Finance Act Amendments and Impact on Cross-Border Transactions

The **Finance Act** introduced amendments to **Section 9(1)(i)** of the Income Tax Act, which clarified the scope of **capital gains tax** on **indirect transfers** of **Themistian assets**.

¹³ Shome committee report, Expert committee report on the General Anti Avoidance rule.

Specifically, it provides that capital gains tax will apply to indirect transfers only if the foreign entity transferring shares has at least 50% of its assets located in Themistea. This provision is a key development in addressing **cross-border tax issues**.

In the present case, the underlying assets in Themistea are not directly owned by the foreign entity (Prometheus Investments), but rather by the **operating entity**, AHI Limited. The Finance Act amendments underscore the necessity of a **direct nexus** to the **Themistean economy** for capital gains taxation to apply. This threshold is not met in Olympus's case, as the substantial value of AHI Limited's assets is **merely incidental** to the shareholding structure, rather than indicative of a direct transfer of local assets.

Therefore, in light of these amendments, the transaction in question **does not meet the requisite conditions** for taxation under Section 9(1)(i) or its analogous provisions in Themistea's tax law.

Olympus respectfully submits that the Income Tax Authority of Themistea lacks both territorial and subject-matter jurisdiction to impose capital gains tax on the offshore transaction. The transfer of shares between non-resident entities in Mauritius does not constitute a taxable event within Themistea's territorial limits. Moreover, there is no abuse of the DTAA, and the GAAR provisions do not apply to the facts of this case.

The **transaction is legitimate**, and the Income Tax Authority's attempt to impose tax fails to meet the requirements of both domestic and international tax principles. In line with this jurisprudence, Olympus respectfully requests the Hon'ble Supreme Court to **quash** the order of the Income Tax Department and uphold the appeal.

3. THE THRESHOLD REQUIREMENT FOR THE APPLICATION OF THE DOCTRINE OF “LIFTING THE CORPORATE VEIL” ARE NOT SATISFIED IN THE PRESENT CASE, AND SUCH AN APPLICATION IS NOT JUSTIFIED IN MATTERS OF TAXATION WHERE THE TRANSACTION STRUCTURE INVOLVES MULTIPLE LAYERS OF FOREIGN HOLDING COMPANIES WHOSE PRIMARY ASSET IS SHAREHOLDING IN A THEMISTEAN ENTITY.

3.1. The threshold requirements for the application of the Doctrine of “Lifting the Corporate Veil” are not satisfied in the present case.

In law, a company is a legal entity distinct from its members, laid down by the House of Lords in 1897 in the leading case of *Salomon v. Salomon & Co*¹⁴. The hon’ble Supreme Court of India recognised the **juristic personality of a company** as **distinct** from its shareholders in *Bacha F. Guzdar v. CIT, Bombay*¹⁵. But there have been inroads in the **doctrine of corporate personality** propounded in the said decision¹⁶ by statutory provisions as well as by judicial pronouncements. By the process, commonly described as “lifting the veil”, *the law either goes behind the corporate personality to the individual members or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies*. This course is adopted when it is found that the principle of corporate personality is too flagrantly opposed to justice, convenience or the interest of the Revenue¹⁷.

It is humbly submitted before this Hon’ble Supreme Court that the threshold requirements for the application of the doctrine of “lifting the corporate veil” are not satisfied in the present case.

1.2. Doctrine of Piercing the Veil

The **doctrine of piercing the veil** allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. This principle is applied in scenarios wherein it is evident that the company was a **mere camouflage or sham** deliberately created by the persons exercising control over the said company for the purpose of **avoiding liability**. Therefore, the application would depend upon the peculiar facts and circumstances of each case¹⁸.

¹⁴ Salomon v. Salomon & Co, 1897 AC 22.

¹⁵ Bacha F. Guzdar v. CIT Bombay, 1955 AIR 740.

¹⁶ Bacha F. Guzdar v. CIT Bombay, 1955 AIR 740.

¹⁷ New Horizons Ltd. v. Union of India, (1995) 1 SCC 478.

¹⁸ Balwant Rai Saluja v. Air India Ltd, (2014) 9 SCC 40.

The corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc.¹⁹. The power of the Revenue to pierce the corporate veil was explained as one available to be invoked where it be found on facts that the transaction was a sham or a tax avoidance mechanism²⁰.

3.3. No element of Fraud or Tax Evasion in the present case.

From the analysis of the facts of the present case, it can be understood that there has been **no element of fraud** or **no steps taken for tax evasion** and therefore it can be said that the present case does not fulfil the threshold requirements for the application of the doctrine of ‘lifting the corporate veil’ since the application of the said doctrine varies depending on the facts and circumstances of each case. The Hon’ble High Court of Athens ruled that the Mauritius SPVs lacked commercial substance beyond shareholding among other grounds. A transaction lacking in commercial substance that leads to tax evasion as has been contended by the respondents in the present case is one of the grounds on which the ‘corporate veil’ may be pierced which is not satisfied here.

3.4. Commercial Substance of Mauritius SPVs

The petitioner humbly submits before this Hon’ble court that the impugned transaction **does not lack commercial substance** which is prima facie evident from the facts of the case. The **three subsidiaries** of Prometheus Investments (Holdings) Limited (Cayman Islands), based out of Mauritius, collectively called **Mauritius SPVs** held 65% of the shares of AHI Ltd (Themistea). The sole business activity of Mauritius SPVs was holding shares of AHI Ltd with no other substantial business operations and hence qualify as a **Special Purpose Vehicle** (as has been reiterated in the proposition).

¹⁹ LIC v. Escorts Ltd, (1986) 1 SCC 264.

²⁰ Tiger Global International iii v. The Authority for Advance Rulings, 2024 SCC OnLine Del 5987.

Generally, SPVs also called **Special Purpose Entities** are legal entities created to fulfil narrow, specific or temporary objectives and/or to gain fiscal advantages. They may be owned by one or more other entities²¹. Fiscal SPEs are entities owned or controlled by the general government that are resident in another territory and used for fiscal purposes. Such entities are resident in their economy of incorporation or registration, not in the economy of their owner.

A **shell entity**, by itself, is **not an illegal entity**, but it is their act of abatement of, and being part of, financial maneuvering to legitimize illicit monies and evade taxes, that takes it actions beyond what is legally permissible. These entities have every semblance of a genuine business- its legal ownership by persons in existence, statutory documentation as necessary for a legitimate business and a documentation trail as a legitimate transaction would normally follow. The only thing which sets it apart from a genuine business entity is the lack of genuineness in its actual operations. The operations carried out by these entities, are only to facilitate financial maneuvering for the benefit of its clients, or, with that predominant underlying objective, to give the colour of genuineness to these entities²².

3.5. SPVs are not always used for tax evasion.

A Special Purpose vehicle is not always used for the purpose of Tax evasion. The **Mauritius Variable Capital Companies Act, 2022** allows the creation of SPVs as part of a **Variable Capital Company (VCC) structure**.

Special purpose vehicles (SPVs) and holding companies have a place in legal structures in Themistea (similar to that in India), be it in company law, the Takeover Code under SEBI or even under the income tax law. Holding structures are recognised in corporate as well as tax laws²³.

There is no fact to prove that Ares as a holding company has interposed the Mauritius based special purpose vehicle with the objective of routing investment to India and evading tax. We cannot conclude the motive for tax evasion in this share transfer structure merely from the fact that the sole business operation of the Mauritius SPVs is to hold shares in AHI ltd. From the

²¹ UNECE special purpose entities.

²² DC IT v. Leena Power Tech Engineers Private ltd, ITA 1330/Mum/20.

see also, Superb Mind Holding Ltd., New Delhi v. Acit Circle Int Tax 3(1)(2) New Delhi. *Case No. ITA No. 1832/DEL/2023*.

²³ *Supra* note 20, at 78.

fact that the controlling stake of the Mauritius SPVs is with Ares Hydro Renewables, that makes Ares the holding company and Mauritius SPVs its subsidiary, we cannot conclude that Mauritius SPVs is under the control of Ares Hydro Renewables limited and is used as a tool for tax evasion. In the present case, the holding company and the subsidiary are **incorporated in different territories.**

3.6. The legal relationship between Holding Companies and Subsidiaries

Subsidiaries are often created for tax or regulatory reasons. It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Themistean companies through an **interposed foreign holding or operating company**, such as a Cayman Islands or Mauritius-based company for both tax and business purposes. In doing so, foreign investors are able to avoid the lengthy approval and registration processes required for a direct transfer (i.e. without a foreign holding or operating company) of an equity interest in a foreign invested Indian company. genuine strategic tax planning is not ruled out²⁴.

Moving offshore or using an **Offshore Financial Center** does not necessarily lead to the conclusion that they involve in the activities of tax evasion or other criminal activities. The multi-national companies are attracted to offshore financial centers mainly due to the reason of providing attractive facilities for the investment. Many corporate conglomerates employ a large number of holding companies and often high-risk assets are parked in separate companies so as to avoid legal and technical risks to the main group²⁵.

Legal relationship between a holding company and its subsidiary is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence²⁶.

3.7. The burden of proof is on the Revenue

In *Bacha F. Guzdar v. CIT*²⁷, the Hon'ble Supreme Court held that *shareholders' only right is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders' meeting.*

²⁴ Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

²⁵ *Id.* at 51.

²⁶ *Id.* at 58.

²⁷ *Bacha F. Guzdar v. CIT*, AIR 1955 SC 74.

In the light of the ownership structure, we cannot conclude from the facts of the case that Ares, as a Group holding company, had a legal right to direct its downstream companies in the matter of voting, nomination of directors and management rights.

The legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the **law of its incorporation**. No multinational company can operate in a foreign jurisdiction save by operating independently as a "good local citizen". Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. In case of multinationals, it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. The directors of the subsidiary under their Articles are the managers of the companies. If new directors are appointed even at the request of the parent company and even if such directors were removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors.

Therefore, though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary has to protect its own separate commercial interests²⁸.

3.8. The Legal standards for piercing the Corporate Veil in Tax matters

When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structure(s). In the application of a judicial anti-avoidance rule, **the Revenue may invoke the substance over form principle or piercing the corporate veil test only after it is able to**

²⁸ *Supra* note 24.

establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidance²⁹.

The circumstances under which the Revenue could pierce the corporate veil is restricted to extremely **narrow circumstances** of tax fraud, sham transactions, camouflaging of illegal activities and the complete absence of economic substance and the establishment of those charges would have to meet stringent and onerous standards of proof and the Revenue being required to base such conclusions on cogent and convincing evidence and not suspicion alone. It is only when the Revenue is able to meet such a threshold that it can disregard the presumption of validity³⁰.

3.9. Legitimate tax planning and the “Look at” principle

The present case only involves a **strategic tax planning** and **no tax evasion**. A strategic tax planning has been recognised by the Courts as legitimate. The Revenue cannot reject every case of strategic investment/tax planning undertaken on the ground that the insertion of the entity was effected with the sole intention of tax avoidance. The *case of McDowell*³¹ held that *"tax planning may be legitimate provided it is within the framework of law"*

In *Craven (Inspector of Taxes) v. White (Stephen)*³² it was held that the Revenue cannot start with the question as to whether the transaction was a tax deferment/saving device but that the Revenue should apply the look at test to ascertain its true legal nature. It observed that genuine strategic planning had not been abandoned.

The **Westminster principle** states that, *"given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance"*.³³

There is a conceptual difference between a **preordained transaction** which is created for tax avoidance purposes, on the one hand, and a **transaction which evidences investment** to participate in Themistea. In order to find out whether a given transaction evidences a preordained transaction in the sense indicated above or investment to participate, one has to take into account the factors namely, (1) duration of time during which the holding structure existed, (2) the period of business operations in India, (3) generation of taxable revenue in India

²⁹ *Supra* note 20.

³⁰ *Id.* at 79.

³¹ *Mc Dowell & Company Limited v. The Commercial Tax Officer*, 1986 AIR 649.

³² *Craven (Inspector of Taxes) v. White (Stephen)*, (1988) 3 All. E.R. 495.

³³ *Inland Revenue Commissioners v. Duke of Westminster* 1936 AC 1.

during the period of business operations in India, (4) the timing of the exit, (4) the continuity of business on such exit, etc.³⁴

No such information regarding the above are enumerated in the facts of the case. Therefore, we cannot assume that such a structure was a preordained transaction intended to tax avoidance. Thus, it cannot be said that the structure was created or used as a sham or tax avoidance. It cannot be said that Mauritius SPVs or the Ares Hydro Renewables International Ltd was a "fly by night" operator/ short time investor.

Legitimate avoidance of tax liability i.e. strategic tax planning is permissible provided it is within the framework of law. It is only colourable devices, dubious methods and subterfuges to evade tax which are impermissible. It is a cornerstone of the law that every taxpayer is entitled to arrange his affairs so that his taxes shall be as low as possible and he is not bound to choose that pattern which will replenish the treasury.

The motive for a transaction is to avoid tax does not invalidate it unless a particular enactment so provides; but it is essential that the transaction has some economic or commercial substance. To determine whether a transaction or device is **legitimate or colourable**, it is task of Revenue and court to ascertain true legal nature of transaction concerned by first applying look at principle i.e. by looking at the entire impugned transaction as a whole and not by adopting a dissecting approach nor by looking at the impugned transaction isolated from the context to which it properly belongs. Revenue or court cannot start with the question as to whether the transaction was a tax evasion device but should first apply the 'look at' test to ascertain its true legal nature.

The "**look at**" principle enunciated in *Ramsay case*³⁵ in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so **it has to look at the entire transaction as a whole and not to adopt a dissecting approach**. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature.

Also, in the present case Mauritius SPVs is a resident of Mauritius and it can be assumed that it holds a **valid TRC** (as nothing contrary to it is mentioned in the preposition), as such, is entitled to apply the provisions of DTAA between India and Mauritius i.e. **Article 13(4)** of the

³⁴ *Supra* note 24.

³⁵ *Ramsay Ltd v. IRC*, [1982] AC 695.

said treaty, wherein, tax on capital assets needs to be borne in the resident state, which is admittedly, Mauritius in the instant case. Thus, it is submitted that going by the provisions of **Section 90** of the Income Tax Act, which provided a choice to assessee to adopt the Act or DTAA whichever is more beneficial, the assessee sought the benefit of Themistea - Mauritius DTAA. Therefore, in this case, there has been **no treaty shopping**³⁶.

Therefore, in the light of the above analysis, it is humbly submitted before this Hon'ble court that there has been no tax evasion or fraud on the part of the petitioners and therefore this situation does not qualify for the lifting of corporate veil.

³⁶ Superb Mind Holding Ltd., v. Acit Circle Int Tax 3(1)(2) Case No. ITA No. 1832/DEL/2023.

PRAYER

Wherefore in the light of the issues raised, arguments advanced, and authorities cited, the Petitioner most humbly and respectfully pray that this Hon'ble Supreme Court may kindly adjudge and declare that:

- I. THE APPEAL BEFORE THE HON'BLE SUPREME COURT OF THEMISTEA IS MAINTAINABLE UNDER ARTICLE 136 OF THE CONSTITUTION OF THEMISTEA.**

- II. THE THEMISTEAN INCOME TAX AUTHORITY DOES NOT POSSESS THE TERRITORIAL AND SUBJECT-MATTER JURISDICTION TO IMPOSE CAPITAL GAINS TAX ON AN OFFSHORE TRANSACTION BETWEEN TWO NON- RESIDENT ENTITIES, WHEN THE SUBSTANTIAL VALUE OF TRANSFERS OF A FOREIGN COMPANY IS DERIVED FROM ASSETS SITUATED IN THEMISTEA, PARTICULARLY IN LIGHT OF THE PRINCIPLES OF TERRITORIAL NEXUS AND SOVEREIGN JURISDICTION UNDER INTERNATIONAL TAX LAW.**

- III. THE THRESHOLD REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF "LIFTING OF CORPORATE VEIL" ARE NOT SATISFIED IN THE PRESENT CASE, AND SUCH APPLICATION IS NOT JUSTIFIED IN MATTERS OF TAXATION WHERE THE TRANSACTION STRUCTURE INVOLVES MULTIPLE LAYERS OF FOREIGN HOLDING COMPANIES WHOSE PRIMARY ASSET IS SHAREHOLDING IN A THEMISTEAN ENTITY.**

And may kindly pass any order that this Hon'ble Supreme Court may deem fit.

And for this act of kindness the counsels for the Petitioner shall in duty bound for ever pray.

Date:

Place:

Counsels for Petitioner