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**NATIONAL UNIVERSITY OF ADVANCED LEGAL  
STUDIES**

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**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**

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

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**SUBMISSION ON BEHALF OF THE RESPONDENT**

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**TABLE OF ABBREVIATIONS**

<b>S.NO.</b>	<b>ABBREVIATION</b>	<b>DEFINITION</b>
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.	BEPS	Base Erosion and Profit Shifting Guidelines
8.	CIT	Commissioner of Income Tax
9.	Co.	Company
10.	Comp. Cas.	Company Cases
11.	CCT	Competition Commission of Themistea
12.	Ed.	Edition
13.	e.g.	Exempli Gratia
14.	etc	Et Cetera
15.	DPIIT	Department for Promotion of Industry and Internal Trade
16.	DTAA	Double taxation Avoidance Agreement
17.	EMC	Effective Management and Control
18.	FDI	Foreign Direct Investment
19.	FEMA	Foreign Exchange Management Act
20.	GAAR	General Anti Avoidance Rules
21.	Hon'ble	Honourable
22.	i.e.	That Is
23.	Inc.	Incorporated
24.	ITR	Income Tax Reports

**OLYMPUS HOLDINGS PTE LTD V. THE REPUBLIC OF THEMISTEA AND ANR.**

25.	LIC	Life Insurance Corporation of India
26..	Ltd	Limited
27.	NRE	Non-Resident Enterprise
28.	OECD	Organisation for Economic Co-orporation and Development
29.	Ors	Others
30.	Para	Paragraph
31.	PCA	Permanent Court of Arbitration
32.	PLC	Public Limited Company
33.	PPT	Principal Purpose Test
34.	Pte	Private
35.	Pvt	Private
36.	S.A.	Société Anonyme
37.	SBI	State Bank of India
38.	Sec	Section
39.	SC	Supreme Court
40.	SCC	Supreme Court Cases
41.	SCR	Supreme Court Reporter
42.	SCR	Supreme Court Rules
43.	SLP	Special Leave Petition
44.	SPA	Share Purchase Agreement
45.	SPVs	Special Purpose Vehicles
46.	UN	United Nations
47.	UNECE	United Nations Economic Commission for Europe
48.	UOI	Union of India
49.	v.	Versus
50.	Vol	Volume
51.	www.	World Wide Web

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6. UNECE special purpose entities.
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**STATEMENT OF JURISDICTION**

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THE COUNSEL FOR THE RESPONDENTS HUMBLLY SUBMITS THE MEMORANDUM BEFORE THE HONORABLE SUPREME COURT OF THEMISTEA BY INVOKING THE SPECIAL LEAVE PETITION WHICH IS GUARANTEED UNDER **ARTICLE 136** OF THE CONSTITUTION OF THEMISTEA.<sup>1</sup>

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<sup>1</sup>**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.

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**STATEMENT OF FACTS**

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**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**

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**ISSUE I**

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

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**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?

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**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?

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**SUMMARY OF ARGUMENTS**

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**ISSUE 1**

**THE APPEAL BEFORE THE HON'BLE SUPREME COURT OF THEMISTEA IS NOT MAINTAINABLE UNDER ARTICLE 136 OF THE CONSTITUTION OF THEMISTEA.**

The Respondent contends that the appeal before the Hon'ble Supreme Court of Themistea is not maintainable under **Article 136**, as the dispute arises from a contractual relationship governed by a binding arbitration clause in the Share Purchase Agreement. The dispute involves the interpretation and application of tax laws, including the **Themistea-Spain Double Taxation Avoidance Agreement (DTAA)**, which are contractual and statutory in nature, and therefore arbitrable. The mere involvement of sovereign tax powers does not render the dispute a public law issue that would justify bypassing the agreed-upon arbitration mechanism. Judicial precedent consistently upholds the enforceability of arbitration clauses even in the context of disputes involving government functions or regulatory matters. The Respondent submits that the Hon'ble Court should respect the parties' choice of arbitration and dismiss the appeal on the grounds of non-maintainability.

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ISSUE 2

**THE THEMISTEAN 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.**

The respondent argues that the Income Tax Authority of Themistea has both territorial and subject-matter jurisdiction over the capital gains arising from the indirect transfer of assets located in Themistea, even when the transaction involves non-resident entities. Under **Section 9(1)(i)** of the **Income Tax Act, 1961**, any transfer of capital assets, directly or indirectly, that affects assets situated in Themistea falls under the jurisdiction of the tax authorities, provided the assets have substantial value. The Themistean assets in question exceed **Rs. 10 Crores** and constitute over **50%** of the total value of Prometheus Investments, thereby triggering the provisions of Section 9(1)(i). This satisfies the territorial nexus requirement, allowing Themistea to tax such transactions. This principle is supported by international tax jurisprudence, including the **Vodafone case**, where the Indian Supreme Court affirmed the authority to tax indirect transfers of assets located within the country. Additionally, under the **Spain-Themistea DTAA**, income from immovable property in a contracting state may be taxed in that state, further supporting Themistea's right to tax the transaction. Olympus Holdings, having entered the Themistean market and obtained clearance, should have complied with tax obligations under the Income Tax Act and the DTAA. Therefore, the Income Tax Authority of Themistea has the rightful jurisdiction to tax the capital gains from this transaction.

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ISSUE 3

**THE THRESHOLD REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF "LIFTING OF CORPORATE VEIL" ARE SATISFIED IN THE PRESENT CASE, AND 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.**

The respondent submits that the threshold requirements for applying the **doctrine of "lifting the corporate veil"** are met in this case due to the artificial structure created by the **Mauritius Special Purpose Vehicles (SPVs)** for the sole purpose of avoiding tax liability under the **Themistea-Mauritius Double Taxation Avoidance Agreement**. The SPVs, which hold the shares in AHI Ltd, lack any substantial business activity and are used as a conduit for tax avoidance. The Supreme Court has previously held that the corporate veil can be lifted in cases of tax evasion, where the arrangement lacks commercial substance or is designed solely to avoid tax obligations (*CIT v. Meenakshi Mills Ltd., 1967 AIR 819*). The use of the Mauritius SPVs is a clear example of such avoidance, as they were interposed to avail tax benefits without any genuine business purpose. Moreover, the concept of **"single economic entity"** can also justify lifting the veil when associated companies are inextricably connected and operate as one concern. The respondent argues that the true economic transaction should be examined, disregarding the corporate structure, as the arrangement was intended to circumvent taxation, thus justifying the lifting of the corporate veil.

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ARGUMENTS ADVANCED

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**1. THE APPEAL BEFORE THE HON'BLE SUPREME COURT OF THEMISTEA IS NOT MAINTAINABLE UNDER ARTICLE 136 OF THE CONSTITUTION OF THEMISTEA.**

**1.1 Arbitration Clause and the Exclusivity of Arbitration in Contractual Disputes**

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The presence of an arbitration clause in the Share Purchase Agreement (SPA) is a critical aspect of the contractual framework governing the dispute. *Once the parties have agreed to resolve their disputes through arbitration, the Court must respect this choice and refrain from intervening unless exceptional circumstances exist that justify judicial intervention.*<sup>2</sup>

The Share Purchase Agreement executed between Olympus Holdings and Ares Hydro Renewables International Limited clearly stipulates an arbitration mechanism to resolve disputes arising out of or in connection with the agreement. The Petitioner, despite the existence of a binding arbitration clause, has bypassed this mechanism by approaching the Hon'ble Supreme Court of Themistea under Article 136. There is no exceptional or public law issue in this case that justifies bypassing the contractual arbitration process. The dispute pertains primarily to the interpretation of tax laws and the application of a bilateral tax treaty, which are ordinarily matters for arbitration in contractual disputes.

In Hon'ble Supreme Court emphasised in *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*<sup>3</sup>, that

*"Where an arbitration clause exists, the Court should generally stay judicial proceedings unless the case presents exceptional circumstances that justify judicial intervention."*

Similarly, in *Rashtriya Ispat Nigam Ltd. v. D.K. Bansal*<sup>4</sup>, the Court held:

*"Arbitration clauses must be respected, and judicial intervention should be minimal, particularly when the dispute arises from a contractual relationship."*

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<sup>2</sup> Section 5, Arbitration and Conciliation Act, 1996.

<sup>3</sup> *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal*, (2000) 2 SCC 642.

<sup>4</sup> *Rashtriya Ispat Nigam Ltd. v. D.K. Bansal*, (2007) 6 SCC 92.

This indicates that, in the absence of exceptional circumstances, the dispute should be referred to arbitration and not entertained by the Court.

## 1.2. Public Law Exception to Arbitration Does Not Apply

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While it is accepted that arbitration cannot resolve disputes involving public law matters such as constitutional rights, the dispute in this case pertains to an interpretation of tax law and not an issue that inherently involves public law or constitutional rights. The enforcement of sovereign taxation rights does not, by itself, create a public law issue that overrides the arbitration agreement in a commercial contract.

The Petitioner seeks to challenge the Income Tax Department's jurisdiction over an international transaction, which is a matter of domestic taxation law. The mere fact that this involves a foreign entity or international tax law does not convert the dispute into a public law issue. The dispute is fundamentally about the interpretation of tax provisions under the **Income Tax Act, 1961**, and the **Themistea-Spain Double Taxation Avoidance Agreement (DTAA)**. There is no question of constitutional rights being violated or matters of public governance being at stake. Hence, there is no justification for circumventing the agreed-upon arbitration clause.

The Supreme Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*<sup>5</sup>, clarified: *"The presence of an arbitration agreement between the parties is enforceable unless the dispute concerns issues of public law that are beyond the purview of arbitration, such as constitutional rights or enforcement of public obligations."*

In this case, the dispute about tax jurisdiction does not fall under such a category, as it is a private commercial dispute governed by domestic tax laws and international tax treaties.

In *Indian Oil Corporation Ltd. v. Amritsar Gas Service*<sup>6</sup>, the Court stated: *"A mere question of tax jurisdiction or a dispute involving statutory rights does not automatically elevate the dispute to a public law issue that would invalidate an arbitration agreement."*

Therefore, the dispute about tax jurisdiction does not justify overriding the arbitration clause.

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<sup>5</sup> Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532.

<sup>6</sup> Indian Oil Corporation Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533.

### **1.3. The Sovereign's Right to Tax and International Treaties Are Not Public Law Issues for Arbitration**

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The exercise of sovereign tax powers is a routine aspect of the State's ability to regulate its domestic affairs, including its right to impose taxes on cross-border transactions. The fact that international tax treaties are involved does not elevate the dispute to a level where it becomes non-arbitrable. International treaties, including those related to tax matters, do not create inherent public law issues that make them immune from arbitration.

The Petitioner's argument that the dispute involves international tax law or the interpretation of a tax treaty does not convert the dispute into a public law matter. The sovereign right of Themistea to tax transactions involving its assets and operations is a matter of domestic tax law, which has been consistently held to be arbitrable. The dispute concerns the application of tax law provisions to a private contract, and as such, it should be resolved through arbitration as per the SPA.

In *Tata Consultancy Services Ltd. v. State of Tamil Nadu*<sup>7</sup>, the Supreme Court ruled:

*"Sovereign functions such as taxation and revenue collection, though vital to the state, do not automatically render a dispute non-arbitrable. The exercise of these powers in the context of a private contractual relationship is still a matter for arbitration."*

In *U.O.I. v. Singh Enterprises*<sup>8</sup>, the Court reiterated:

*"A dispute related to the interpretation of statutes, even when involving state functions, remains arbitrable as long as it pertains to private contractual obligations."*

Thus, the dispute over tax jurisdiction and its impact on the transaction is still a matter that can be addressed through arbitration.

### **1.4. Judicial Precedent Upholding Arbitration Despite Public Law Contentions**

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The Court has repeatedly held that where an arbitration agreement exists, and the dispute is primarily contractual, judicial intervention should be minimal, even if the dispute involves statutory provisions or issues of public policy, unless there is a clear public law dimension.

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<sup>7</sup> *Tata Consultancy Services Ltd. v. State of Tamil Nadu*, (2004) 6 SCC 636.

<sup>8</sup> *U.O.I. v. Singh Enterprises*, (2004) 2 SCC 263.

Even though the Petitioner has raised the argument of tax jurisdiction and the sovereign right of the State, the dispute remains contractual in nature because it relates to a business transaction between two private entities. The resolution of the issue involves applying tax laws to a private cross-border transaction, which is a matter for arbitration and does not require the intervention of the Supreme Court under Article 136.

In *Essar Oil Limited v. HDFC Bank Ltd.*<sup>9</sup>, the Court held:

*"Disputes involving the interpretation of commercial contracts and statutory provisions are ordinarily arbitrable, and the mere fact that the dispute concerns government functions or regulations does not automatically make it non-arbitrable."*

Furthermore, in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*<sup>10</sup>, the Court ruled:

*"Where an arbitration agreement exists, the Court must respect the intent of the parties to resolve their disputes through arbitration, even if the dispute involves statutory or regulatory matters."*

The Court thus affirmed that even public law matters, when connected to private commercial transactions, do not invalidate an arbitration agreement.

The Respondent submits that the appeal before the Hon'ble Supreme Court is not maintainable under Article 136, as the dispute is governed by an arbitration clause that should be respected. The issues raised by the Petitioner are contractual and involve the interpretation of tax laws and international treaties, which are arbitrable. The mere involvement of sovereign tax powers does not elevate the dispute to a public law issue that justifies overriding the arbitration agreement. Accordingly, the Respondent respectfully requests that the Hon'ble Court dismiss the appeal on the grounds of non-maintainability and uphold the arbitration process agreed upon by the parties.

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<sup>9</sup> *Essar Oil Limited v. HDFC Bank Ltd.*, (2013) 9 SCC 568.

<sup>10</sup> *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.

**2. THE THEMISTEAN 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.**

**2.1. Jurisdiction of the Income Tax Department to Tax the Transaction**

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**Section 9(1)(i)** of the **Income Tax Act, 1961**, as applicable in Themistea, provides that income accruing or arising directly or indirectly through the transfer of a capital asset situated in the territory of Themistea is deemed to accrue or arise in Themistea.<sup>11</sup> Explanation 5 to this section clarifies that an asset or capital asset includes indirect transfers, where a share or interest in a foreign entity derives substantial value from assets located in Themistea.<sup>12</sup> In the present case, the share transfer between Olympus Holdings and Ares Hydro Renewables International Limited indirectly involves the assets of AHI Limited, which are situated in Themistea. As noted in the High Court judgment, more than 50% of the value of Prometheus Investments is derived from assets in Themistea, triggering Explanation 5.

For a transaction to be taxed under **Explanation 5** to **Section 9(1)(i)**, the assets in India must constitute substantial value of the overall transaction. Substantial value implies a threshold wherein the Indian assets form a significant portion of the valuation matrix. In the present matter, this condition is fulfilled, as noted by the valuation report.

**2.2 Doctrine of Territorial Nexus and Sovereign Taxing Rights**

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The doctrine of territorial nexus<sup>13 14</sup> mandates that a state can levy tax on foreign entities if there exists a sufficient territorial connection between the transaction and the taxing state. The

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<sup>11</sup> Section 9(1)(i), Income Tax Act, 1961

<sup>12</sup> Explanation 5, Section 9(1)(i), Income Tax Act, 1961

<sup>13</sup> INDIA CONST. ART.245

<sup>14</sup> Wallace Brothers & Co. Ltd. vs The Commissioner Of Income-Tax, (1948)50BOMLR482; The State Of Bombay vs R. M. D. Chamarbaugwala, 1957 AIR 699,

indirect transfer of AHI Limited's shares significantly impacts the infrastructure and economy of Themistea. The control over AHI Limited's assets, including its power plants and customer base, has shifted as a result of the transaction. This creates a sufficient nexus for Themistea to exercise its taxing powers.

In *G.E. India Technology Centre Pvt. Ltd. v. CIT*<sup>15</sup>, the Court observed:

*"A nexus to the taxing jurisdiction is sufficient where income or capital gains have a source, origin, or connection within that jurisdiction. The principle of territorial nexus ensures sovereign taxing rights over such income."*

Similarly, *Azadi Bachao Andolan v. Union of India*<sup>16</sup>, reaffirmed the sovereignty of states to interpret DTAA provisions in light of their domestic laws, provided there is no conflict. Also, in this case the AHI Limited is situated in Themistea and the 65% of it is controlled by Olympus Holdings. Thus, Olympus Holdings has the liability to pay tax for the profit that they get from the shares situated in Themistea. *The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.*<sup>17</sup>

### 2.3. Commercial Substance and Abuse of Treaty Provisions

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The Themistea-Mauritius DTAA permits tax exemption on capital gains arising from the transfer of shares of a Mauritius-based entity, provided the entity has commercial substance and is not used solely for treaty abuse.

The Mauritius SPVs, as outlined in the facts, serve no commercial purpose other than holding shares in AHI Limited. Their lack of operational activities and their sole role as intermediaries make them mere conduits for tax avoidance. The shifting focus from form to substance in international tax law has been integral in curbing tax avoidance through indirect transfers of shares involving low-tax jurisdictions.<sup>18</sup>

The Supreme Court in *Union of India v. Azadi Bachao Andolan*<sup>19</sup>, held:

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<sup>15</sup>G.E. India Technology Centre Pvt. Ltd. v. CIT, (2010) 327 ITR 456 (SC).

<sup>16</sup> Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1

<sup>17</sup> Article 7, Themistea-Spain DTAA.

<sup>18</sup> Indirect Transfer of Shares and the Impact of Treaty Abuse, Journal on Transfer Pricing and International Tax Planning (Volume 45, Issue 3, pp. 231-245).

<sup>19</sup> Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1.

*"Treaty benefits cannot be extended to entities set up solely to exploit the provisions of the DTAA without any legitimate commercial substance."*

Further, in *Cairn Energy PLC v. Union of India*<sup>20</sup>, the Court emphasized the principle of substance over form:

*"When determining tax liability, the substance of the transaction must be scrutinized rather than its form, particularly where treaty benefits are sought."*

#### **2.4. Indirect Transfer Rules under International Tax Law**

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The **OECD Model Tax Convention** and the **UN Model Tax Treaty** recognize the principle of taxing indirect transfers if substantial value is derived from immovable property or assets in the source state. AHI Limited's infrastructure, customer base, and power plants represent immovable property and capital assets situated in Themistea. These assets provide substantial value to the overall transaction, meeting the international thresholds for taxing indirect transfers. The **Commentary on Article 13** of the **OECD Model Tax Convention** states: *"Gains derived from the alienation of shares in a company may be taxed in the state where the immovable property is situated if such property constitutes substantial value."*

#### **2.5. Arbitration Clause and Public Law Nature of Dispute**

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The petitioners had alternative remedies like arbitration and they have approached the SC without exhausting it. The **doctrine of exhaustion of remedies** requires that a person exhaust all the alternative remedies before filing a special leave petition. In this case, both the taxation laws of the Themistea as well as the Themistea-Spain DTAA enables the Income tax authority of the Themistea to tax the petitioners.

According to the Article 136, a Special Leave Petition can be filed when:

- i. Substantial question of law
- ii. Gross miscarriage of justice
- iii. Violation of principles of natural justice
- iv. Violation of fundamental rights

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<sup>20</sup> Cairn Energy PLC v. Union of India, PCA Case No. 2016-7, (2020) 3 SCC 453.

In this case, there is no substantial question of law as the laws related to the taxation are clearly mentioned in the Code and even as per the taxation laws of Spain, Olympus Holdings is liable to pay the tax to Income tax authorities of the Themistea. There is no miscarriage of justice or violation of fundamental rights or principles of natural justice in the decision rendered by the High Court of Athens. The decision of the High Court is purely based on the laws and facts of the case. *Pritam Singh v. The State*<sup>21</sup> established that the Supreme Court should not interfere with High Court decisions except in exceptional circumstances. Upon admission of an appeal, the appellant may challenge any erroneous legal determinations by the High Court. The Court should apply uniform criteria when granting special leave to appeal.

## 2.6. Interpretation of "Capital Asset"

The Income Tax Act, 1961 defines "**capital asset**" to include property of any kind, whether movable or immovable, tangible or intangible.<sup>22</sup> The definition is expansive, and the term "capital asset" includes shares of companies, which may also indirectly be classified as assets due to the underlying immovable property or business interests. In the present matter, although the shares of Prometheus Investments Holdings Ltd. are intangible assets, the underlying business assets in Themistea – including power plants, customer contracts, and infrastructure – are tangible and substantial in value. Hence, for the purpose of taxation under **Section 9(1)(i)** and **Explanation 5**, these shares should be considered to indirectly derive substantial value from the capital assets situated in Themistea.

In *CIT v. D.P. Saxena*<sup>23</sup>, the Delhi High Court explained:

*"The definition of capital assets under Section 2(14) of the Income Tax Act is inclusive and covers both tangible and intangible property. When shares derive value from immovable property in a foreign jurisdiction, such transfer becomes subject to taxation in the source state."*

In this case, the shares' value is directly tied to the power plants in Themistea.

## 2.7. The Principle of "Effective Management" in Tax Jurisdictions

The principle of "**Effective Management and Control**" (EMC) is often employed in international tax law to determine the country of tax residence for corporate entities. This is

<sup>21</sup> Pritam Singh v. The State, 1950 AIR 169, 1950 SCR 453.

<sup>22</sup> Section 2(14), Income Tax Act, 1961.

<sup>23</sup> CIT v. D.P. Saxena, (1982) 138 ITR 301 (Delhi)

especially relevant where foreign companies may be domiciled in jurisdictions offering favorable tax regimes, but the actual management and control occur elsewhere. The decision-making and operational control of AHI Ltd. have always been executed from Themistea, particularly in relation to the acquisition and management of the power plants and infrastructure. Therefore, Olympus's claim that the transaction involves merely offshore entities without a sufficient nexus to Themistea is refuted by the principle of effective management.

In *Hindustan Coca-Cola Beverages Pvt. Ltd. v. CIT*<sup>24</sup>, the Court held:

*"In cases where management and control of a foreign entity are effectively exercised from the jurisdiction where the assets are located, the entity is deemed to be a resident of that jurisdiction for tax purposes."*

This principle is critical in the present case because the business operations directly tie Olympus Holdings to Themistea's tax jurisdiction, particularly through its controlling interest in AHI Limited's assets.

## 2.8. "Capital Gains" Taxation under the DTAA

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**Article 14** of the **Themistea-Spain DTAA** specifically deals with "Capital Gains." It provides that capital gains arising from the transfer of shares or interests in a company shall be taxable in the state where the assets of the company are located. *"Gains derived by a resident of a Contracting State from the transfer of shares or other rights in a company or entity, the assets of which consist wholly or principally of immovable property situated in the other Contracting State, may be taxed in the other State."*<sup>25</sup>

Since the underlying assets of AHI Limited are primarily located in Themistea, including immovable property (e.g., power plants, energy infrastructure), Themistea reserves the right to tax capital gains arising from the transfer of shares in Prometheus Investments Holdings Ltd., a company that indirectly holds these assets. This triggers the capital gains taxation in Themistea under the DTAA. The **OECD Commentary on Article 13 (Capital Gains)** of the Model Tax Convention further clarifies: *"Where the value of the shares transferred is derived from immovable property situated in the source state, the state in which the property is situated has taxing rights over the capital gains from such transfers."* This aligns with the position taken

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<sup>24</sup> *Hindustan Coca-Cola Beverages Pvt. Ltd. v. CIT*, 2007 (8) SCC 463.

<sup>25</sup> Article 14, Themistea-Spain DTAA.

by Themistea's tax authorities in the present matter. The presence of substantial immovable assets within Themistea provides a legitimate basis for taxation of capital gains arising from Olympus's acquisition of Prometheus Investments.

### **2.9. Principles of Tax Neutrality and Non-Abuse of Double Taxation Agreements**

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The **principle of tax neutrality** suggests that a taxpayer should not engage in tax avoidance through structuring transactions in a way that artificially shifts tax burdens to more favorable jurisdictions. The creation of Mauritius SPVs with no substantial business activities other than holding shares in AHI Limited is an artificial structure to obtain tax relief under the Themistea-Mauritius DTAA. The lack of substance in these Mauritius-based entities undermines the legitimate purpose of the DTAA, which is designed to avoid double taxation, not to facilitate tax avoidance.

In *DCIT v. Stanbic Bank Ltd.*<sup>26</sup>, the Authority for Advance Rulings held:

*"The avoidance of tax through the use of conduit companies in a third jurisdiction where there is no real business presence is an abuse of the provisions of the DTAA."*

Furthermore, in *Geoffrey Jones v. A.G.*<sup>27</sup>, the Supreme Court clarified:

*"When a taxpayer sets up an intermediary entity purely for the purpose of benefiting from treaty provisions, without real economic substance, such structures will be disregarded in determining tax liability."*

This reinforces the Respondent's argument that tax relief should not be granted under the DTAA given their lack of substance.

### **2.10. Abuse of Treaty Provisions – The "Principal Purpose Test" (PPT) under the OECD Model**

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The **"Principal Purpose Test" (PPT)** has become a cornerstone of international tax law to prevent treaty abuse. Under the OECD Model Tax Convention, the PPT clause provides that a tax benefit under a treaty may be denied if obtaining that benefit was one of the principal purposes of the transaction.<sup>28</sup> The transaction appears designed primarily to exploit the tax benefits provided under the Themistea-Mauritius DTAA, while lacking any genuine

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<sup>26</sup> DCIT v. Stanbic Bank Ltd., AAR No. 935 of 2004.

<sup>27</sup> Geoffrey Jones v. A.G., (2005) 293 ITR 209 (SC).

<sup>28</sup> Article 29(9), OECD Model Tax Convention.

commercial substance in Mauritius. The creation of Mauritius-based entities as mere conduits for holding shares in AHI Limited raises concerns regarding abuse of the DTAA. The primary purpose behind setting up these entities was to avoid paying capital gains tax in Themistea, which is indicative of treaty shopping.

In *Shell India Markets Pvt. Ltd. v. CIT*<sup>29</sup>, the Court noted:

*"Where the principal purpose of a transaction is to obtain tax benefits from a treaty, and the transaction has no real economic substance, it should be disregarded, and the benefits under the treaty should not apply."*

Similarly, the OECD Model Tax Convention introduced the PPT clause in **Article 29(9)**, asserting that: *"A benefit under a tax treaty shall not be granted if it is reasonable to conclude that obtaining the benefit was one of the principal purposes of the arrangement or transaction."* This is highly relevant to the facts, where Olympus has structured its acquisition to obtain tax benefits, thus triggering the PPT clause.

## **2.11. Distinction Between Direct and Indirect Transfer – Extending the Concept of "Indirect Transfer" to the Present Case**

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**Section 9(1)(i)** of Themistea's Income Tax Act covers capital gains tax on **"indirect transfers"** of assets located in the country. This includes situations where a foreign entity is sold or transferred and the underlying value of the company derives from assets situated within the jurisdiction. Although the transfer is structured as a sale of shares in Prometheus Investments Holdings Ltd., the transaction is in substance an indirect transfer of assets located in Themistea. The value of Prometheus Investments is largely tied to the value of AHI Limited's assets, which are situated in Themistea. Thus, the indirect transfer rules should apply, and the capital gains arising from the transfer of shares should be taxed in Themistea, even though the sale itself occurred offshore.

When shares in a company deriving substantial value from local assets are transferred, the source state (where the assets are located) has the right to tax the capital gains arising from such transfers, irrespective of the jurisdiction of incorporation of the company.<sup>30</sup> The use of

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<sup>29</sup> *Shell India Markets Pvt. Ltd. v. CIT*, (2018) 2 SCC 477.

<sup>30</sup> Lang, M., *International Tax Law: Principles and Policy*, 2nd Edition, p. 142.

Mauritius SPVs, which lack substance and were created to avoid tax, should not be allowed to circumvent the legitimate tax rights of Themistea.

In *Vodafone International Holdings B.V. v. Union of India*<sup>31</sup>, the Supreme Court held: "*Where the value of shares of a foreign company is derived from assets situated in India, the transfer of shares is considered an indirect transfer of capital assets situated in India.*"

In *Sanofi Aventis (India) Ltd. v. CIT*<sup>32</sup>, the Court affirmed that:

*"The principle of indirect transfer applies when assets in India constitute a substantial portion of the value of shares, even if the transaction occurs outside India."*

This reasoning should be extended to the current case, where the assets in Themistea constitute the bulk of the value of Olympus's acquisition.

## 2.12. Non-Recognition of Structures That Lack Economic Substance Under International Law

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Under international tax principles, jurisdictions are entitled to disregard structures that lack economic substance, particularly if such structures are used primarily to avoid taxation. The Mauritius SPVs that held shares in AHI Limited did not engage in any business activity other than holding the shares of AHI Limited, thereby lacking economic substance. According to international tax law and principles of OECD guidelines, such structures should not be eligible for tax exemptions or reductions under the DTAA between Themistea and Mauritius.

The tax treaty between the countries must be applied in light of its true purpose and substance. Structures established without economic substance will not be recognized for the purposes of tax exemption. Tax structures that lack economic substance should be disregarded by tax authorities, as they fail to meet the genuine intent of tax treaties.<sup>33</sup> Thus, Olympus's reliance on Mauritius SPVs, with no real economic activity, should be disregarded.

## 2.13. Interpretation of "Indirect Transfer" in the Context of the OECD BEPS Guidelines

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The **OECD Base Erosion and Profit Shifting (BEPS) Guidelines** address the taxation of indirect transfers, including cases where assets located in one jurisdiction are transferred via a

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<sup>31</sup> *Vodafone International Holdings B.V. v. Union of India*, (2012) 6 SCC 613.

<sup>32</sup> *Sanofi Aventis (India) Ltd. v. CIT*, (2015) 371 ITR 574 (SC)

<sup>33</sup> J. J. Poisson, *The Challenge of Abuse of Tax Treaties*, *Journal of International Taxation*, 2016.

foreign holding company. This is relevant in cases where the transfer involves the acquisition of a company with substantial assets in the source jurisdiction. Given that Olympus's acquisition of Prometheus Investments Holdings Ltd. is essentially an indirect transfer of assets located in Themistea (i.e., AHI Limited's power plants and infrastructure), it falls under the purview of the OECD BEPS guidelines, which advocate for taxing indirect transfers when the underlying assets are in the source jurisdiction.

The **OECD BEPS Action 6 Report** states: *"In cases where a foreign company derives substantial value from immovable property or other assets located in the source country, the source country has a legitimate right to tax the capital gains arising from the transfer of such shares."*

#### 2.14. Article 6 of Spain-Themistea DTAA

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**Article 6** of the Themistea Spain DTAA deals with the income from immovable property.

1. *Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in other Contracting State may be taxed in that other State.*
2. *The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships, boats and aircraft shall not be regarded as immovable property.*
3. *The provisions of paragraph 1 shall also apply to income derived from the direct use, letting or use in any other form of immovable property.*
4. *The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance or independent personal services.*

In the present case, AHI Limited is a company which is situated in Themistea. The provisions of the Themistea-Spain DTAA make it clear that the state from which the income is accrued has the right to tax. Here, the income tax authorities of Themistea has the right to tax the Olympus holdings as the profit of 65% share of AHI which they control have been accrued

from Themistea. In Article 7 of the Themistea Spain DTAA, it is held that the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.

The Respondent thus respectfully requests the Hon'ble Supreme Court to uphold the decision of the High Court, affirming the jurisdiction of the Income Tax Department to tax capital gains arising from the transaction. The Income Tax Department's jurisdiction is well-grounded under the provisions of the Income Tax Act, the principles of territorial nexus, and the relevant provisions of the Themistea-Spain DTAA.

Olympus's attempts to avoid capital gains tax through a tax-neutral conduit structure in Mauritius must be rejected, as it constitutes an abuse of the treaty provisions. The Respondents respectfully pray that the Hon'ble Supreme Court uphold the High Court's decision, affirm the tax authority's jurisdiction, and reject Olympus's claims.

The Income Tax Department's jurisdiction is valid under both domestic laws and international tax principles. The transaction lacks commercial substance beyond tax avoidance, and the substantial nexus of the assets to Themistea justifies the levy of capital gains tax. The Respondents respectfully pray that the Hon'ble Supreme Court dismiss the appeal and uphold the tax authority's jurisdiction.

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3. THE THRESHOLD REQUIREMENT FOR THE APPLICATION OF THE DOCTRINE OF “LIFTING THE CORPORATE VEIL” ARE SATISFIED IN THE PRESENT CASE, AND SUCH AN 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.

**3.1. The threshold requirements for the application of the Doctrine of “Lifting the Corporate Veil” are satisfied in the present case.**

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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.*<sup>34</sup>. The Hon’ble Supreme Court of India recognised the juristic personality of a company as distinct from its shareholders in *Bachaa F. Guzdar v. CIT, Bombay*.<sup>35</sup> But there have been inroads in the doctrine of corporate personality propounded in the said decision 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 Revenue.<sup>36</sup>

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. The intent of piercing the veil must be such that it would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case<sup>37</sup>. The Hon’ble Supreme Court in *India Waste Energy Development Ltd. v. Govt of NCT of Delhi*<sup>38</sup>, held that

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<sup>34</sup> *Salomon v. Salomon & Co.*, 1897 AC 22: (1895-9) All ER Rep 33.

<sup>35</sup> *Bachaa F. Guzdar v. CIT, Bombay*, MANU/ SC/ 0072/ 1954.

<sup>36</sup> *New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478 at page 495 para 27.

<sup>37</sup> *Balwant Rai Saluja vs Air India Ltd.*, (2014) 9 SCC 40 para 71.

<sup>38</sup> *India Waste Energy Development Ltd. v. Govt of NCT of Delhi*, (2003) 114 Comp. Cas. 82 Del.

lifting the corporate veil is permissible in cases of tax evasion even in the absence of any statutory provisions.

The Hon'ble Supreme Court in *State of U.P. And Ors v. Renusagar Power Co. And Others*<sup>39</sup> held that 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.

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.<sup>40</sup>

### 3.3. Prevention of tax evasion

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The court may lift the 'corporate veil' in order to pay regard to the economic realities behind the legal facade. It is established by the Supreme court in the case of *The Commissioner of Income-Tax, Madras v. Sri Meenakshi Mills Ltd. & Ors*<sup>41</sup>, that the court has the power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation.

The Taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. But the legal effect of a transaction cannot be displaced by probing into the "**substance of the transaction**"<sup>42</sup>.

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<sup>39</sup> State of U.P. And Ors v. Renusagar Power Co. And Others, (1988 AIR 1737).

<sup>40</sup> LIC v. Escorts Ltd., (1986) 1 SCC 264 at page 334 para 90.

<sup>41</sup> The Commissioner of Income-Tax, Madras v. Sri Meenakshi Mills Ltd. & Ors, 1967 AIR 819.

<sup>42</sup> V.B. Rangaraj vs V.B. Gopalakrishnan And Others, AIR 1992 SC 453.

Tax avoidance involves the legal exploitation of tax laws to one's own advantage. Every attempt by legal means to prevent or reduce tax liability which would otherwise be incurred, by taking advantage of some provisions or lack of provisions in the law is tax avoidance. The Indian Government intends to target tax avoidance which is technically legal (in that it is not evasion which is illegal) but may represent tax planning with the sheer objective of obtaining a tax benefit without any supporting justification in terms of commercial, economic or business purpose through the **General Anti Avoidance Rules under the Income Tax Act, 1961**<sup>43</sup>.

**Section 96(1)** of the **Income Tax Act 1961**, lays down twin conditions, i.e **the purpose test of obtaining tax benefit** and **tainted element test as under clauses (a) to (d)** to satisfy an impermissible avoidance arrangement.

**i. THE PURPOSE TEST:-**

The purpose test is that, in an arrangement, the main purpose or one of the main purposes of which is to obtain a tax benefit. 'Tax benefit' includes a reduction or avoidance or deferral of tax or amount payable under the Act.<sup>44</sup>

The Income Tax Act gives instances for determining whether a tax benefit exist as:-<sup>45</sup>

*(i) the parties who are connected persons in relation to each other may be treated as one and the same person;*

*(ii) any accommodating party may be disregarded;*

*(iii) such accommodating party and any other party may be treated as one and the same person;*

*(iv) the arrangement may be considered or looked through by disregarding any corporate structure.*

*A party to an arrangement shall be an accommodating party, if the main purpose of the direct or indirect participation of that party in the arrangement, in whole or in part, is to obtain, directly or indirectly, a tax benefit (but for the provisions of this Chapter) for the assessee whether or not the party is a connected person in relation to any party to the arrangement.*

It is very well seen from the facts of the case that the Mauritius SPVs, whose sole business activity is to hold the shares of AHI Ltd is an accommodating party in this share transfer

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<sup>43</sup> Shome committee report, Expert committee report on the General Anti Avoidance rule.

<sup>44</sup> Section 102(2)(a), The Income Tax Act 1961.

<sup>45</sup> Section 99, The Income Tax Act,1961.

structure, incorporated solely for availing the benefits under the Themistea - Mauritius Double Taxation Avoidance Agreement that provides for tax exemption.

**UN Model Commentary on Article 1** as under-

*"A guiding principle is that the benefits of a double taxation convention should not be available where main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions. That principle applies independently from the provisions of article 29, paragraph 9, which merely confirm it."*

The arrangement falls within the scope and meaning of treaty shopping as seen from the following definition of 'treaty shopping' in UN Model Commentary on Article 1- "Treaty shopping" is a form of improper use of tax treaties that refers to arrangements through which persons who are not entitled to the benefits of a tax treaty use Other persons who are entitled to such benefits in order to indirectly access these benefits. Mauritius SPVs that is a resident of the treaty country acts as a conduit for channelling income that would economically accrue to a person that is not a resident of that country (Ares Hydro Renewables Ltd) so as to improperly access the benefits provided by the Mauritius - Indian tax treaty.<sup>46</sup>

Had there been no such SPV interposed between, then the situation would have been that the Ares Hydro Renewables International Ltd (Cayman Based company) transferred the shares of AHI Ltd (Themistean company) to Olympus Holdings (Spain based). In such a situation, the Income Tax Authorities of Themistea would have had the right to tax such transfer under **Section 9** of the Income Tax Act.

**Section 99 (iii)** and **(iv)** provides the right to disregard such an accommodating party and such an arrangement may be looked through by disregarding any corporate structure. This means that this section provides for the right to lift the corporate veil in such situations to identify the real economic transaction under the veil.

**ii. THE TAINTED ELEMENT TEST:-**

The tainted element test requires that the arrangement should have one or more specified tainted elements mentioned at clauses **(a)** to **(d)**.

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<sup>46</sup> Superb Mind Holding Ltd., New Delhi v. Acit Circle Int Tax 3(1)(2), New Delhi, Case No. ITA No. 1832/DEL/2023.

The tainted element explained in **Clause (c)** is that of when a transaction lacks commercial substance or is deemed to lack commercial substance under **section 97**, in whole or in part; Under **section 97**, certain arrangements have been deemed to lack commercial substance as under

(a) the substance or effect of the arrangement as a whole, is inconsistent with, or differs significantly from, the form of its individual steps or a part.

Clause (a) is the codification of substance over form doctrine. It implies that where the substance of an arrangement is different from what is intended to be shown by the form of the arrangement, then tax consequences of a particular arrangement should be assessed based on the substance of what took place. It reflects the inherent ability of the law to remove the corporate veil and look beyond form.<sup>47</sup>

OECD defines this principle as, *“the prevalence of social and economic reality over the literal wordings of the legal provision.”*<sup>48</sup>

In *CIT v. Lotus India Ltd.*<sup>49</sup>, the Court held,

*“Tax authorities can disregard the artificiality of the corporate structure if it is found to be created solely to avoid tax obligations in a jurisdiction with taxing rights.”*

Similarly, *McDonald’s Corporation v. U.S. Treasury*<sup>50</sup>, emphasized:

*“The tax courts are empowered to disregard artificial structures that serve no purpose other than to avoid the payment of legitimate taxes in the jurisdiction with a taxing right over the assets.”*

Thus, Olympus’s use of Mauritius SPVs can be considered an abuse of legal form for tax avoidance purposes, warranting disregard by Themistea's tax authorities.

Tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be a part of tax planning.<sup>51</sup>

If an actual controlling **Non-Resident Enterprise (NRE)** makes an indirect transfer through abuse of organisation form/legal form and without reasonable business purpose which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of Non-Resident Holding Company, re-

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<sup>47</sup> Shome committee report, Expert committee report on the General Anti Avoidance rule.

<sup>48</sup> OECD, International Tax Avoidance and Evasion, Double Taxation Conventions and the Use of Base Companies, Issues in International Taxation, No. 1, OECD, Paris, 1987.

<sup>49</sup> CIT v. Lotus India Ltd., (2014) 52 Taxman 501 (SC).

<sup>50</sup> McDonald’s Corporation v. U.S. Treasury, (2015) 4 N.Y.S.3d 778.

<sup>51</sup> McDowell and Co. Ltd. vs. CTO, (1985) 3 SCC 230.

characterize the equity transfer according to its economic substance and impose the tax on the actual controlling Non-Resident Enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. In such cases as mentioned the principle of lifting the corporate veil, the doctrine of substance over form, the concept of beneficial ownership or the concept of alter ego arises. 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 establish on the basis of the facts and circumstances surrounding the transaction that the impugned transaction is a sham or tax avoidance.<sup>52</sup>

In a case where the Revenue finds that in a Holding Structure, an entity which has no commercial/business substance has been interposed only to avoid tax then in such cases applying the test of fiscal nullity it would be open to the Revenue to discard such interpositioning of that entity. Once the transaction is shown to be fraudulent, sham, circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the Court can always lift the corporate veil and examine the substance of the transaction. Needless to say, if the arrangement is to be effective, it is essential that the transaction has some economic or commercial substance.<sup>53</sup>

In the present situation, analysing the share transfer structure, the three subsidiaries of Prometheus Investments (Holdings) Limited, based in Mauritius namely - **Prometheus Energy Holding Ltd, Prometheus Power Instructure Ltd, and Prometheus Renewable Ltd** – collectively called “**Mauritius SPVs**”. As reiterated in the facts of the present case, Mauritius SPVs’ sole business activity was holding shares in AHI ltd, with no other substantial business operations. These subsidiaries are termed a **Special Purpose Vehicle**.

Generally, SPVs 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 entities<sup>54</sup>. The temporary objective of Mauritius SPVs’ was to hold the 65% shares of AHI Ltd (incorporated in Themistea).

The holding structure coupled with prima facie management and control of the holding structure, including the management and control of the applicants, would be relevant factors

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<sup>52</sup> Vodafone International Holdings B.V vs Union of India & Anr, (2012) 6 SCC 613.

<sup>53</sup> Vodafone International Holdings B.V vs Union of India & Anr, (2012) 6 SCC 613.

<sup>54</sup> UNECE special purpose entities.

for determining the design for avoidance of tax<sup>55</sup>. In the instant case, the controlling stake in Prometheus Investments (Holdings) Limited that held the Mauritius SPVs was ultimately held by Ares Hydro Renewables International Ltd which is a company domiciled and based out of the Cayman Islands.

From this structure, the Mauritius SPVs which is prima facie under the control of Ares Hydro Renewables International Limited. From this we may say that Ares, which proves that the inter-positioning of Mauritius SPVs was aimed at tax avoidance. Ares Hydra Renewables International Ltd may be termed as a holding company of Mauritius SPV which is a subsidiary under the control of this holding company. The Mauritius SPVs is not acting "INDEPENDENTLY" but as a conduit for the real beneficial owners based out of Cayman Islands. The inter-positioning of the Mauritius SPVs was done with the sole motive of availing the Tax benefits provided under the **Themistea - Mauritius Double Taxation Avoidance Agreement** under **Article 13(4)** of the Agreement.

*3A. Gains from the alienation of shares acquired on or after 1st April 2017 in a company which is resident of a Contracting State may be taxed in that State.*

*4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 3A shall be taxable only in the Contracting State of which the alienator is a resident.*

On the basis of the above analysis, it is humbly submitted before this Hon'ble Supreme court that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance and thereby discard the device and take into consideration the real transaction between the parties, and the transaction may be subjected to tax. If the fraud is detected by the court of law, it can pierce the corporate structure since fraud unravels everything, even a statutory provision, if it is a stumbling block, because the legislature never intends to guard fraud.

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<sup>55</sup> Tiger Global International III vs The Authority for Advance Rulings, (2024) 165 taxmann.com 850 (Delhi).

**3.4. Where associated companies are inextricably connected as to be, in reality, part of one concern – Corporate veil can be lifted**

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In *Life Insurance Corporation of India v. Escorts Ltd*<sup>56</sup>, it was held that corporate veil may be lifted where associated companies are inextricably connected as to be in reality, part of one concern. This is called the **Single Economic Entity Doctrine**. In Themistea, the concept of Single Economic Entity is reflected through the definition of 'enterprise' under **section 2(h)** of the **Competition Act, 2002**. As per this definition, an "*enterprise means a person or a department of the Government which is engaged in any activity, either directly or through one or more of its units or divisions or subsidiaries.*"<sup>57</sup> This definition of 'enterprise' goes beyond the '**separate legal personality**' concept of a company and recognises that different juristic persons may, in certain cases, be acting and behaving as one. *To look at the realities of the situation and to know the real state of affairs behind the facade of the principle of the corporate personality, the courts have pierced the veil of incorporation.*<sup>58</sup>

According to the OECD, Multinational enterprises frequently have recourse to SPEs for their inward and outward direct investments, including the large amounts of capital in transit, passing through entities in jurisdictions which may offer advantages, e.g. for tax purposes. Even though transactions/positions with SPEs are included in assets and liabilities of direct investment enterprise, they are no longer included in FDI statistics by partner country or by industry classification. In other words, detailed FDI statistics exclude resident SPEs and look through non-resident SPEs in the analysis of source/destination of FDI. The purpose of looking-through SPEs is to reduce the overstatement of FDI statistics and to provide more realistic analysis and hence estimates of real source/destination of FDI.<sup>59</sup>

Therefore, in the light of the above analysis, it is humbly submitted before this Hon'ble Supreme Court that this case satisfies the grounds required for lifting the corporate veil.

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<sup>56</sup> Life Insurance Corporation of India v. Escorts Ltd, (1986) 1 SCC 264

<sup>57</sup> Section 2(h), The Competition Act, 2002.

<sup>58</sup> Subhra Mukherjee & Anr. v. Bharat Coking Coal Ltd. & Ors., (2000) 3 SCC 312.

<sup>59</sup> OECD BENCHMARK, www.oecd.org.

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**PRAYER**

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Wherefore in the light of the issues raised, arguments advanced, and authorities cited, the Respondent 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 NOT MAINTAINABLE UNDER ARTICLE 136 OF THE CONSTITUTION OF THEMISTEA.**
  
- II. THE THEMISTEAN 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.**
  
- III. THE THRESHOLD REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE OF "LIFTING OF CORPORATE VEIL" ARE SATISFIED IN THE PRESENT CASE, AND 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.**

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 Respondent shall in duty bound for ever pray.

Date:

Place:

Counsels for Respondent