

Note – Reg. retrospective amendments of sections 9 and 2(47) of the I.T.Act, 1961

– Judgement of AP High Court

The Hon. Andhra Pradesh (AP) High Court has rendered a very significant judgement, in the case of *Sanofi Pasteur Holding SA Vs Department of Revenue, Ministry of Finance [2013] 213 Taxman 504 (AP)*.

In this case, the Hon. AP High Court has, *inter alia*, held that the retrospective amendments to the Income-Tax Act, 1961 (the Act), vide the Finance Act, 2012, have no impact on the interpretation of the DTAA and the transaction in issue falls within Article 14(5) of the DTAA between India and France and the tax resulting there from is allocated exclusively to France.

The relevant facts of the case may be summarized as follows :

- (i) SBL was a company incorporated under the Companies Act, 1956, having its registered office in India.
- (ii) ShanH, a French company, held 80 per cent shares of SBL
- (iii) The shares of ShanH were held by two French companies namely MD and GIMD along with a person namely 'H'.
- (iv) A share purchase agreement (SPA) was entered into between MD / GIMD and Sanofi, a French company, in terms of which shares of ShanH were transferred to Sanofi.
- (v) MA and GIMD applied for advance ruling to AAR. The AAR ruled that the transaction involved in the SPA was only for acquisition of the control, management and business interests in SBL, the Indian company and was not a mere divestment of ShanH shares, a French company. As a result, capital assets in India were transferred and capital gains had accrued to MA / GIMD, in India. The transaction was held to be taxable in India since that right was allocated to India, under Article 14(5) of the India-France DTAA.
- (vi) Sanofi was also held assessee in default for non-deduction of tax at source under section 195 while making payments to MA and GIMD.
- (vii) The three companies i.e. MA, GIMD and Sanofi filed separate writ petitions challenging the order passed by the AAR.

On writs –

- (i) It was noticed that ShanH was a distinct entity of commercial substance, incorporated to serve as an investment vehicle of foreign direct investment in India, by way of participation in SBL
- (ii) It was also noted that subsequent to transaction in issue, ShanH continued to be in existence as a registered French resident corporate entity and as legal and beneficial owner of SBL shares
- (iii) It was thus, apparent that transaction in issue clearly and exclusively was one of transfer of entire shareholding in ShanH, by MA / GIMD in favour of Sanofi and transfer of SBL shares in favour of Sanofi, was neither the intent nor the effect of the transaction

On the basis of the aforesaid facts, it was held that –

1. As the transaction in issue involved a gain from alienation of ShanH shares (not SBL shares) by MA / GIMD to Sanofi, which were having a participation of more than 10 per cent in ShanH, alienation of shares fell within the provisions of Article 14(5) of Indo-France DTAA
2. As per the terms of Article 14(5) of the aforesaid DTAA, the resultant capital gain was taxable only in France and as a consequence, transaction, in question, was not chargeable to tax in India

It was further held that the retrospective amendments to the Income-Tax Act, 1961, vide the Finance Act, 2012, have no impact on the interpretation of the DTAA.

It was also held that the retrospective amendments made in *Explanation 2* to section 2(47) and *Explanations 4 and 5* to section 9, by the Finance Act, 2012, would not override the provisions of DTAA, because the aforesaid amendments were not fortified by a *non-obstante* clause expressed to override tax treaties.

Accordingly, the aforesaid writ petitions were allowed.

In this regard, please also refer to my earlier Note '*Impact of amendments of section 9 by the Finance Act, 2012, on DTAA's*', which was e-mailed to all my clients, on 1.10.2012.

The combined effect of the earlier and present Notes would be that the amendments brought about by the Finance Act, 2012, in sections 9(1)(i) and 9(1)(vi) of the Act, will not have any impact on the provisions of the DTAA entered into by India with a foreign country.

Place : Pune

(S.K.Tyagi)

Date : 9.4.2013