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Unit No. 344, Tower A, Spaze I-Tech Park, Sector-49,
Sohna Road, Gurgaon-122018, Haryana, (India)
T: +91 124 6647500 E: info@akmglobal.in

Indian Income-tax authorities withdraw petition before The Supreme Court of India (Sanofi Case)

Background

In the long-awaited case of Sanofi Pasteur Holding SA, France[1](the assessee, or Sanofi), the Income Tax Department withdrew its SLP in Supreme Court over taxability of indirect transfer of shares of Shantha Biotechnics Ltd. Further, the Revenue's order under section 201 holding Sanofi as an 'assessee in-default', was held to be not sustainable.

Facts of the Case

- Shanta Biotechnics Ltd, (SBL), an Indian company engaged in the business of research and development of technologies for pharmaceutical products, is a subsidiary of ShanH SAS, France (ShanH).

- ShanH is a joint venture of Merieux Alliance (MA) and Groupe Industriel Marcel Dassault (GIMD). Both MA and GIMD were French entities engaged in different lines of businesses

- A share purchase agreement (SPA) was entered into between MA/GIMD (the sellers) and Sanofi (the buyer) of ShanH shares on 10 July, 2009. Pursuant to the SPA, Sanofi had purchased 80.37% shares of ShanH from MA and balance 19.63% of ShanH shares from ShanH.

- MA and GIMD sought advance ruling on the taxability of sale of shares of ShanH to Sanofi in India. The AAR2 ruled that the transactions are part of a scheme for avoidance of tax and is accordingly taxable in India as per the Act and also in terms of Article 14(5) of the tax treaty.

- Aggrieved by the ruling of the AAR, the buyer as well as sellers filed a writ petition before the Andhra Pradesh High Court.

[1] Sanofi Pasteur Holding SA v. The Department of Revenue [TS-57-HC-2013 (AP)]

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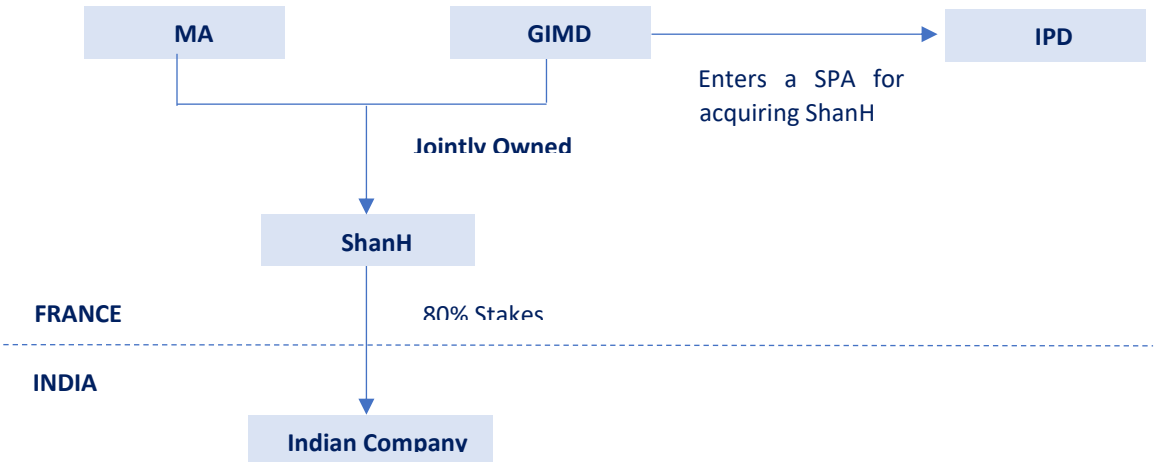

Issues before the Court

- **Issue 1:** Whether ShanH is a colourable device incorporated and pursued for the purpose of avoiding capital gains liability in India and if yes, whether the same is liable to tax in India based on the interpretations of provisions under the Act and tax treaty.
- **Issue 2:** Whether retrospective amendments to provisions of the Act alter the impact of provisions of tax treaty.

Key Conclusion of Andhra Pradesh High Court

ShanH an independent entity with commercial substance, not a mere nominee as alleged by Revenue; Lifting of corporate veil is not required.

- ShanH is an independent corporate entity, registered and resident in France. It has a commercial substance and a purpose (FDI in SBL); and is neither a mere nominee of MA (Merieux Alliance) and / or MA / GIMD, nor is a colourable device for tax avoidance;

- Since inception (in 2006) till date, ShanH (not MA or MA / GIMD) had acquired and continues to hold the SBL shares;

- There is no warrant for lifting the corporate veil of ShanH; and even on looking through the ShanH corporate persona there is no material to conclude that there is a design to avoid tax;

- The capital gain arising as a consequence of the transaction in this issue is chargeable to tax; and the resultant tax is allocated to France (not to India) under the India-France DTAA;

- The retrospective amendments to income tax Act, 1961 (vide the Finance Act 2012) have no impact on interpretation of the DTAA; the transaction in issue falls within Article 14(5) of the India-France DTAA; and the tax resulting therefrom is allocated exclusively to France;

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- The ruling dated 20-11-2011 of the Authority for Advance Rulings is unsustainable.

Conclusion

The decade-old retrospective tax controversy that put India on the global map is finally over with the tax department withdrawing its petition from the Supreme Court challenging a High Court ruling (supra) favouring Sanofi. The controversy around the indirect transfer of shares is now put to bed as the government withdrew its appeal in the Supreme Court. This will increase tax certainty in the eyes of foreign investors.