PESHORI CONSULTANTS
Financial and Tax Advisors

Indirect Transfer

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Capital Asset – S. 2(14)

- capital asset" means—
- (*a*) property of any kind held by an assessee, whether or not connected with his business or profession;
- (*b*) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);
- [5][(*c*) any unit linked insurance policy to which exemption under clause (*10D*) of section 10 does not apply on account of the applicability of the fourth and fifth provisos thereof,] - Where premium > Rs. 2.5 Lakhs
- but does not include—

(*i*) any stock-in-trade [other than the securities referred to in sub-clause (*b*)], consumable stores or raw materials held for the purposes of his business or profession ;

(*ii*) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes—

(*a*) jewellery;

(*b*) archaeological collections;

(*c*) drawings;

(*d*) paintings;

(*e*) sculptures; or

(*f*) any work of art.

(*iii*) rural agricultural land in India

Capital Asset – S. 2(14)

- *Explanation 1.*—For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever.

Capital Asset v. Stock in Trade – CBDT Circular

- "Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment."
- (i) Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the nature of transaction;
- (ii) the substantial nature of transactions, the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions;
- (iii) ordinarily the purchase and sale of shares with the motive of earning a profit, would result in the transaction being in the nature of trade/adventure in the nature of trade; but where the object of the investment in shares of a company is to derive income by way of dividend etc. then the profits accruing by change in such investment (by sale of shares) will yield capital gain and not revenue receipt

Capital Asset v. Stock in Trade

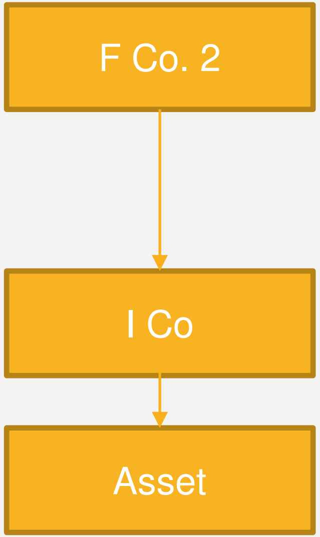
- Irrespective of the period of holding of listed shares and securities, where the taxpayer himself opts to treat them as ‘stock in trade’, the income arising from transfer of such shares/ securities would be treated as ‘business income’.
- In respect of listed shares and securities held for a period more than 12 months immediately preceding the date of transfer, if the taxpayer desires to treat the income arising from the transfer thereof as ‘capital gains’, the same shall not be put to dispute by the assessing officer. However, this stand, once taken by the taxpayer in a particular assessment year, shall remain applicable in subsequent assessment years also and the taxpayers shall not be allowed to adopt a different / contrary stand in this regard in subsequent years.
- In all other cases, the nature of transactions (i.e., whether the same is in the nature of ‘capital gains’ or ‘business income’) shall continue to be decided keeping in view the aforementioned Instruction and Circular of the CBDT.

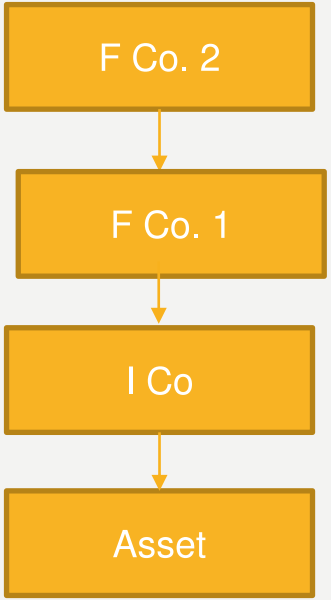
Transfer – S.2(47)

- "transfer", in relation to a capital asset, includes,—
- (*i*) the sale, exchange or relinquishment of the asset ; or
- (*ii*) the extinguishment of any rights therein ; or
- (*iii*) the compulsory acquisition thereof under any law ; or
- (*iv*) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
- (*iva*) the maturity or redemption of a zero coupon bond; or
- (*v*) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
- (*vi*) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.
- *Explanation 1*.—For the purposes of sub-clauses (*v*) and (*vi*), "immovable property" shall have the same meaning as in clause (*d*) of section 269UA.
- *Explanation 2*.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;

Indirect transfer provisions

- An indirect transfer of an asset takes place when an interest in an intermediate entity is transferred, effectively resulting in the transfer of control over an underlying asset situated in another jurisdiction (“Indirect Transfer”)
- For Indirect Transfer, the inherent issue is that contractually there is no transfer of the underlying asset. Hence there is no gain as such realised in the jurisdiction where the asset is situated (“Source Jurisdiction”).





Capital Gains – Charging provisions

- Definition of ‘income’ u/s. 2(24)(vi) includes ‘any capital gains chargeable u/s. 45
- S. 45 creates charge in respect of profits or gains arising from ‘transfer’ of a ‘capital asset’
- S. 2(14), *inter alia*, defines *“capital asset”* to mean property of any kind held by taxpayer, whether or not connected with its business or profession subject to certain exceptions (like stock in trade, personal effects)
  - Securities held by FIIs, even if held as SIT, are deemed to be capital assets
  - Explanation clarifies that ‘property’ includes rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever
- S.2(47) defines ‘transfer’ inclusively to mean sale, exchange, relinquishment of asset, extinguishment of any rights therein, etc

Capital Gains – Indirect transfer of shares

- Source rule under s. 9(1)(i) of ITA - *All income accruing or arising, whether directly or indirectly, …or through or from any asset or source of income in India,* ***or through the transfer of a capital asset situated in India*** – shall be deemed to accrue or arise in India
- Explanation 4 expands the meaning of 'through' to include 'by means of', 'in consequence of' or 'by reasons of'.
- Explanation 5 reads as follows:
- *"For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value* ***substantially*** *from the assets located in India"*
  - Exception carved out for NR investors in Category-I FPIs under 2019 SEBI regulations (as also erstwhile Cat-I/II FPIs under 2014 regulations)
- Explanation 6 prescribes when share or interest shall be deemed to derive substantial value from India-based assets (> 50%), de-minimis threshold of Rs. 10 Cr, how and which date value shall be computed
  - 'Specified date' – (a) end of accounting period preceding date of transfer or (b) date of transfer, if book value of assets on date of transfer exceeds book value on (a) by 15%
- Explanation 7 provides for small shareholder exemption (< 5%) and attribution principle

OIT implemented in other countries

- **Argentina**
  - If a non-resident entity has transferred at least 30% of value of the entity, represented by assets located in Argentina and provided the transferor owns at least 10% of the capital of such entity.
  - Such a tax is not applicable if the transfer is carried on intra-group
- **China**
  - If transfer of share of foreign company is undertaken lacking bona fide commercial purpose, it may be taxed in China
  - An ‘automatic deeming test’ was introduced which would treat an indirect transfer transaction as lacking reasonable business purpose if, among other black-list factors, more than 75% of the value and more than 90% of the income or assets of the offshore holding company are derived from or attributable to China

OIT implemented in other countries

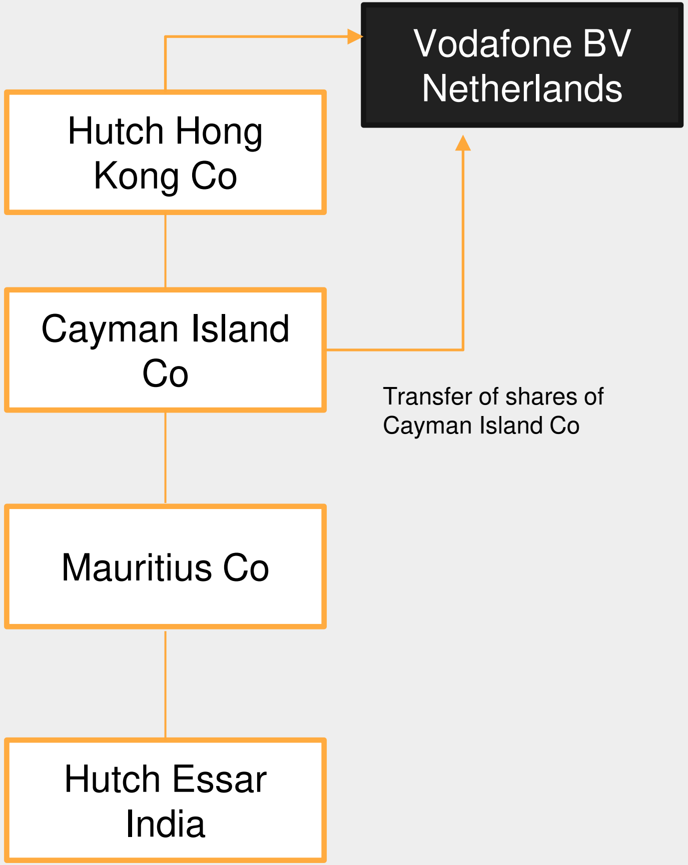
- **Chile**
  - Under the Chilean Income Tax Law, capital gains from transfer of shares of a company incorporated outside Chile, may attract tax under Chilean Income Tax Law if the foreign entity owns, either directly or indirectly, the following underlying assets in Chile:

  (i) shares or equity rights, quotas or any other title that gives right to participation, control or profits on a company, fund or entity incorporated in Chile;

  (ii) A branch or other kind of permanent establishment in Chile of a foreign company for which it will be considered as a separate entity from the parent company;

  (iii) any movable property or fixed property located in Chile and any rights in connection therewith where the owner is a foreign entity
- Countries like Australia, Japan, Canada, Uganda have provisions for taxation of indirect transfer of immovable/real estate properties

Vodafone International Holdings B.V. VS. Union Of India

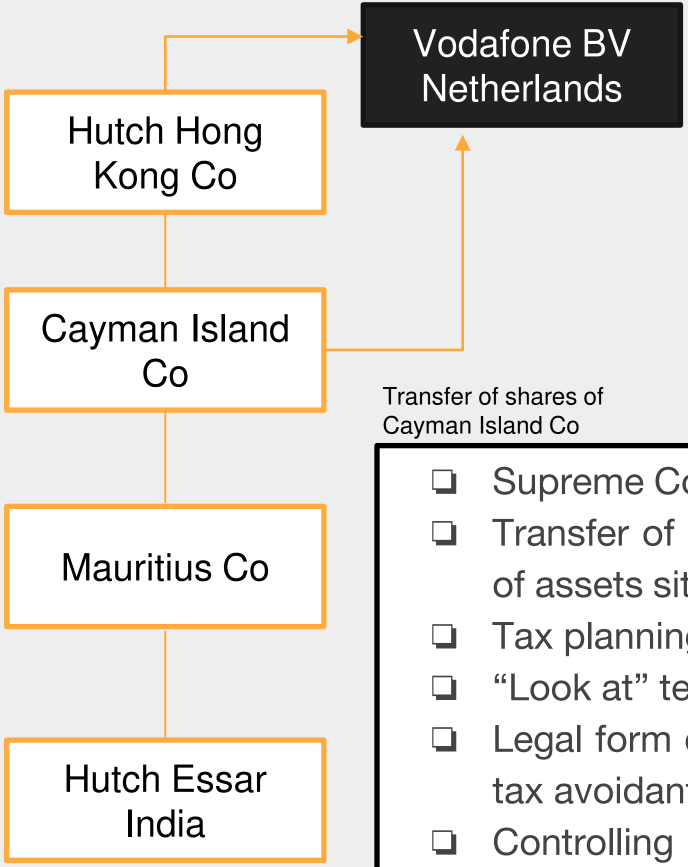


Facts

- Hutchison Telecom International Limited (Parent Company) formed a subsidiary company named Hutchison Essar Limited in India and had a 67% stake in Hutchison Essar Limited which was transferred and controlled by the holding company of Hutchison group named CGP investments holding Ltd which was situated in Cayman Island.

- Hutchison decided to exit the Indian market in the year 2007. During that period UK telecom giant named Vodafone International Ltd wanted to enter the Indian market. Therefore, both the companies entered into an agreement where CGP Investments Holdings Ltd would transfer 67% of the stake of Hutchison Essar Ltd to Vodafone International Holdings which is the holding company of Vodafone group situated in the Netherland. The Hutchison Company in return would receive 11.1 billion dollars.

Vodafone International Holdings B.V. VS. Union Of India



Revenue's arguments

- Transaction designed to avoid Indian taxes
- Lifting of corporate veil
- Transfer of foreign company's shares resulted into transfer of assets located in India
- Controlling interest is a separate asset situated in India whose transfer gives rise to Indian tax
- Tax withholding obligations extend to non residents

- Supreme Court:
- Transfer of shares in a foreign company does not lead to the transfer of assets situated in India
- Tax planning is legitimate if within the legal framework
- "Look at" test to be applied to determine true nature of transaction
- Legal form cannot be disregarded unless the transaction is a sham or tax avoidant
- Controlling interest is embedded in the shares and is not a separate assets

Vodafone International Holdings B.V. VS. Union Of India

Amendments through Finance Act 2012 to overrule Vodafone decision

- Definition of capital asset u/s 2(14) – Capital asset deemed to include any rights in or in relation to an Indian company, including rights of management or control or any rights whatsoever
- Definition of transfer u/s 2(47) – Transfer deemed to include disposing of or parting with an asset/interest or creating of any interest in any manner, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from transfer of a share or shares of a company registered or incorporated outside India.
- Amendment to Section 9 – Shares or interest in a foreign company deemed to be situated in India, if the share or interest derives value directly or indirectly, its value substantially from the assets located in India

Indirect Transfer of shares or interest in a foreign entity

Substantiality test - If the value of the Indian asset is

- Exceeding Rs. 10 Cr and
- Representing at least 50% of the value of all assets owned by the foreign entity
- Value of Indian assets includes value of assets/operations owned by the foreign entity
- Exemption for
  - Foreign amalgamation or demergers
  - No transfer of right of management or control/ voting power < 5% in Indian entity

Specified date –

- Last date of the accounting period of entity preceding the transfer; or
- Date of the transfer If the book value of assets has increased by 15% or more from the date of accounting period

Valuation

- Valuation to be determined by Merchant Banker or a CA
- Proportionate gain taxable in India

Reporting

Indian entity to file Form 49D reporting indirect transfer

Penalty on Indian entity –

2% of the fair value of overseas transfer

INR 0.5 Mn

Rule 11 UB and 11 UC

- **Rule 11UC - Income attributable to assets in India**
- Gains attributable to assets located in India = A*(B/C)

A = • Capital Gain from transfer of shares of foreign entity computed in accordance with Indian laws, as if such share/ interest is located in India

B = Fair Market Value (‘FMV’) of assets located in India (as on specified date)

C = FMV - Assets of the foreign company (as on specified date)

- **Rule 11UB - Fair Market Value – Assets located in India**
  - Listed Shares – Observable price of such share on recognized stock exchange (Higher of average of weekly high and low closing prices for 6 months preceding specified date or 2 weeks preceding specified date)
  - Listed company shares with management or control right - (A + B) / C A = Market capitalization (basis observable price on stock exchange); B = BV of liabilities; C = Number of outstanding shares
  - Unlisted shares - FMV determined by a merchant banker or accountant as per internationally accepted pricing methodology + Liability, if any, considered in such valuation
  - Interest in partnership firm - FMV of partner’s share = (Value determined by a merchant banker or accountant as per internationally accepted valuation methodology + Liability, if any, considered for such valuation) apportioned to the partners in capital ratio till the extent of total capital, and then in asset distribution ratio or profit sharing ratio
  - Other assets - Expected price it can fetch in the open market (determined by merchant banker/ accountant) + Liability, if any, considered in such determination

Rule 11 UB and 11 UC

- **Rule 11UB - Fair Market Value – Assets of Foreign Company**
  - Transfer between non connected persons - FMV of all assets = A + B
    - A = Market Capitalization of the foreign company or entity computed on the basis of the full value of consideration for transfer
    - B = Book value of liabilities as on specified date, as certified by a merchant banker or an accountant
  - Other cases - Share of foreign company – listed on specified date
    - FMV = A + B
    - A = Market capitalization of foreign company (based on observable price on stock exchange where it is listed on a stock exchange)
    - B = Book value of liabilities as on specified date
  - FMV = A + B
    - A = FMV of foreign company / entity & its subsidiaries (on a consolidated basis) computed by merchant banker or accountant as per internationally accepted valuation methodology
    - B = Book value of liabilities as on specified date

Exclusion to Indirect transfer provisions

- Small Shareholder exemption
  - No transfer of right of management or
  - control/ voting power < 5% in Indian entity

- Category 1 FPI
- Dividend on shares deriving value from Indian assets
- Redemption or buyback of shares in specified funds in consequence of the transfer of shares or securities held in India by the specified fund
- Exemptions in the hands of the amalgamating company / demerged company
  - At least 25% of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company.
  - Such transfer does not attract capital gains tax in the amalgamating company’s country of incorporation
  - The transfer of a capital being shares of a foreign amalgamating company which derive their value from assets situated in India in pursuance of the scheme of amalgamation could be liable to tax in India in the hands of the shareholder of the amalgamating company in absence of a specific exemption.

Tax treaty provisions

- As a general rule capital gains arising out of the sale of shares is taxable only where the alienator is resident
- Where share derives its value from immovable property situated in another contracting state, such state also has the right to tax gains on alienation of shares
- UN Model Tax Convention (“MTC”) also provides the source state the right to tax gains on the alienation of shares of a company (which does not derive its value from the immovable property) resident in that State, subject to certain ownership threshold 35 to be satisfied by alienator at any time during 365 days preceding such alienation
    - the company whose share is transferred should be a resident of the source country, which is generally not the case in a typical Indirect Transfer structure.
    - In an Indirect Transfer structure, the company whose share is transferred is resident in A jurisdiction, the alienator may be resident in B jurisdiction and the underlying asset (or share) be situated in C jurisdiction.
    - Hence the situation may fall under Article 13(6), which a residuary clause, giving the sole right to the contracting state where the alienator is resident.
    - Hence instead of jurisdiction C, jurisdiction B may get the right to tax such gains in the absence of a specific ‘look through’ approach qua residency in article 13(5) of the UN MTC.

MLI effect

- Article 9 of the MLI deals with Capital Gains on alienation of shares or interests of entities deriving their value principally from immovable property
- Treaties provide a threshold of 50% to determine whether the shares derive the value substantially from the immovable property.
- The taxpayers were trying to abuse the provisions of Article 13(4) of OECD Model by diluting the proportion of the value of entity that is derived from immovable property by contributing other assets to an entity shortly before the alienation of shares/comparable interests.
- Article 9(4) provides for minimum threshold of 50% to determine whether the shares derive the value substantially from the immovable property at any time during 365-day period.
- India has opted for Article 9(4) an optional provision under MLI to be applied to its Covered Tax Agreements.

Offshore Indirect Transfer Toolkit

- Platform for Collaboration on Tax (PCT) - joint initiative of the IMF, OECD, UN and World Bank Group.
- OIT toolkit provides 2 models for the taxability of the offshore indirect transfer
- Model 1 (taxation of a deemed direct sale by a resident)
    - This model seeks to tax the local entity that directly owns the asset in question,
    - by treating that entity as disposing of, and reacquiring, its assets
    - At fair market value
    - where a change of control occurs
- Model 2 (taxation of the non-resident seller)
    - This model seeks to tax the non-resident seller of the relevant shares or comparable interests.
    - Model 2 must be supported directly or implicitly by a source of income rule, which provides that a gain is sourced in the location country when the value of the interest disposed of is derived, directly or indirectly, principally from immovable property located in that country.
    - A source rule relating to gains from the disposal of other assets may also be considered, including substantial shareholdings in resident companies.

Tax treaty provisions – OECD v. UN Model

- **OECD Model**

4. Gains derived by a resident of a Contracting State from the ***alienation of shares or comparable interests***, such as interests in a partnership or trust, ***may be taxed in the other Contracting State*** if, at any time during the 365 days preceding the alienation, these ***shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property***, as defined in Article 6, situated in that other State.

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

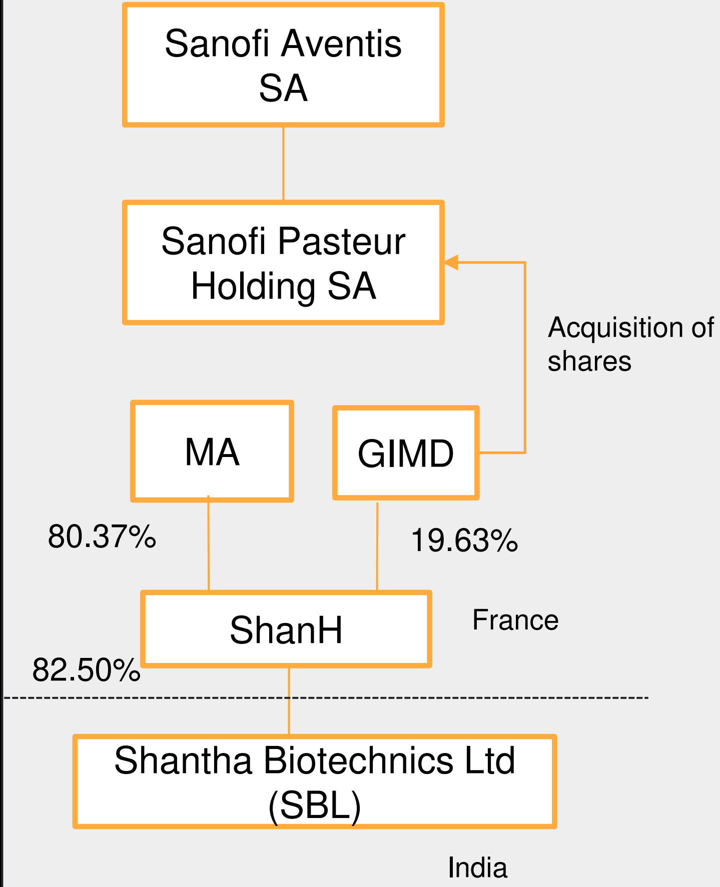
- **UN Model**

4. Gains derived by a resident of a Contracting State from the ***alienation of shares*** or comparable interests, such as interests in a partnership or trust, ***may be taxed in the other Contracting State*** if, at any time during the 365 days preceding the alienation, ***these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property***, as defined in Article 6, situated in that other State.

5. Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the ***alienation of shares*** of a company, or comparable interests, such as interests in a partnership or trust, ***which is a resident of the other Contracting State***, ***may be taxed in that other State*** if the alienator, at any time during the 365 days preceding such alienation, held directly or indirectly at least ___ per cent (the percentage is to be established through bilateral negotiations) of the capital of that company or entity.

6. Gains from the ***alienation of any property other than*** that referred to in paragraphs 1, 2, 3, 4 and 5 shall be ***taxable only in the Contracting State of which the alienator is a resident.***

Sanofi Case



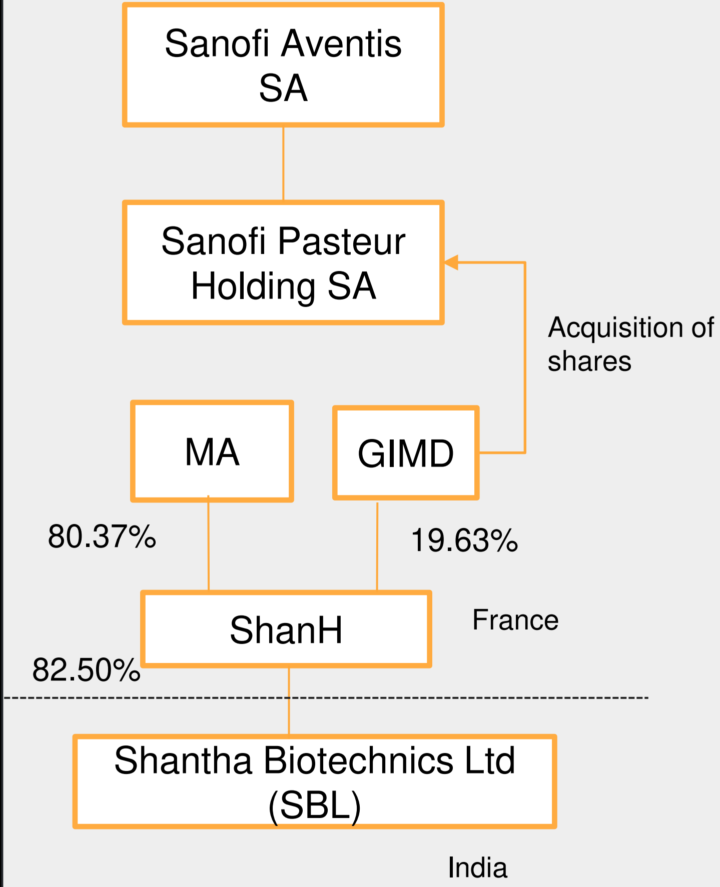
Facts

- ShanH, a French Company, held 80 per cent shares of SBL (a co incorporated in India)
- Shares of ShanH were held by two French Companies namely MD and GIMA
- A share purchase agreement (SPA) was entered into between MD/GIMA and Sanofi, a French company, in terms of which shares of ShanH were transferred to Sanofi

Revenue's arguments

- Transaction designed to acquire control, management and business interest of SBL
- MA and GIMD are the beneficial owner and ShanH is merely a nominee of MA
- Alienation of shares under Article 14(5) means direct and indirect alienation
- Alienation not defined under the Treaty, - to be imported from the IT Act • Mode of disposal is immaterial – whether direct or indirect or deemed disposal

Sanofi Case



India- France DTAA – Article 14

- 4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that Contracting State. For the purposes of this provision, immovable property pertaining to the industrial or commercial operation of such company shall not be taken into account.

- 5. Gains from the alienation of shares other than those mentioned in paragraph 4 representing a participation of at least 10 per cent in a company which is a resident of a Contracting State may be taxed in that Contracting State.to Sanofi

- High Court judgement:
- ShanH is not a sham or conceived only for Indian tax avoidance, thereby no case of piercing corporate veil
- Retrospective amendments do not override the Tax Treaty
- It was observed that Article 14(4) adopts the “see through” approach
- However, with respect to Article 14(5) it was observed that where shares of a company which is a resident of France are transferred (representing a participation of more than 10% in such entity) the resultant capital gain is taxable only in France.

Treaty cases

India- Germany DTAA – Article 13

4. Gains from the alienation of shares in a company which is a resident of a Contracting State may be taxed in that State.

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

- In re, GEA Refrigeration Technologies GmbH AAR, New Delhi AAR No. 1232 of 2012
  - In the present case the gains arose out of alienation of shares of a German resident company (which held certain Indian assets), by German shareholders. Hence the transaction was held to be taxable in Germany only

India- Belgium DTAA – Article 13

5. Gains from the alienation of shares other than those mentioned in paragraph 4, forming part of a participation of at least 10 per cent of the capital stock of a company which is a resident of a Contracting State may be taxed in that State.

6. Gains from the alienation of any property other than that mentioned in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident.

- Sofina S.A. v. Assistant Commissioner of Income-tax ITAT, Mumbai IT Appeal No. 7241 of 2018
- The transfer in the present case was of shares of a company resident in Singapore, hence it did not meet the essential requirement of Article 13(5) and accordingly the transaction was held to be covered under Article 13(6) and taxable in laws of Belgium where the alienator was resident.

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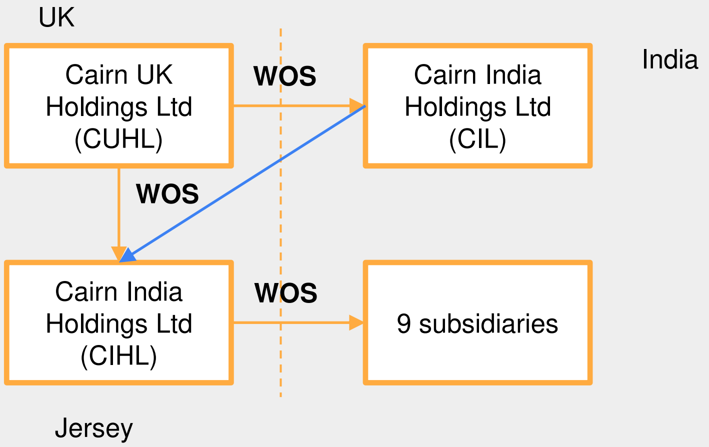
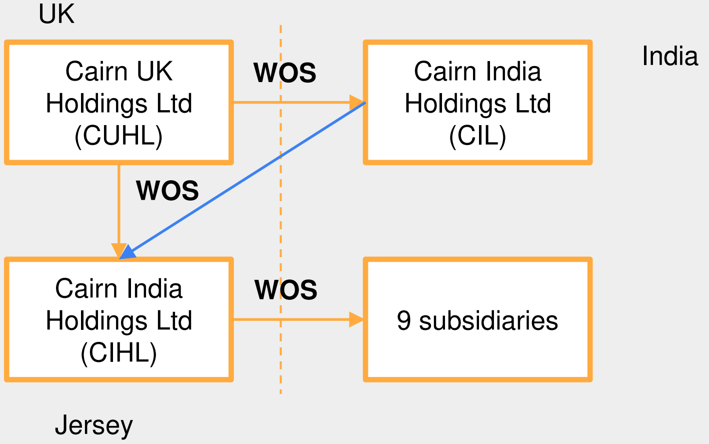
Cairn UK Holdings Limited v. DCIT



Facts

- ❑ Cairn India Holdings Limited ("CIHL") was incorporated in Jersey as a WOS of Cairn UK Holdings Limited ("CUHL"), a holding company incorporated in the UK
- ❑ Under a share exchange agreement between CUHL and CIHL, the former transferred shares constituting the entire issued share capital of nine subsidiaries of the Cairn group, held directly and indirectly by CUHL
- ❑ In the year 2006, Cairn UK transferred its entire shareholding of Cairn Jersey to Cairn India. Subsequently, Cairn India acquired the entire business of the Cairn group in India.
- ❑ CIL was using the proceeds from share capital of CUHL and IPO to purchase shares in CIHL.
- ❑ Revenue was of the view that the transfer of shareholding in Cairn Jersey had the effect of transferring the business in India

Cairn UK Holdings Limited v. DCIT



On 22 December 2015, CUHL filed a Notice of Arbitration under the India-UK BIT and the UNCITRAL Arbitration Rules, 1976.

- Taxation and Enforcement measures taken by the Income-tax authorities
- In January 2014 the Income-tax authorities initiated a survey of CIL, following which the Income-tax authorities issued a notice to CUHL under Sec. 148.
- On 22 January 2014, a Sec. 281B order was issued provisionally freezing CUHL's remaining shareholding in CIL, as well as dividends payable, on the grounds that CUHL had failed to disclose a short-term capital gain of USD 3.6 Bn on its 2006 transfer of CIHL shares to CIL.
- ITAT in its order upheld the tax demand under Sec. 9(1)(i) but quashed the interest amounts under Sec. 234A and Sec. 234B on the basis that CUHL "could not have visualised its ability for payment of advance in the year of transaction.
- On 29 September 2017 lump sum Penalty Order for approximately USD 1.6 Billion was issued against CUHL. Subsequently, CUHL's shares were sold by the Income-tax authorities.

CERTAIN UNRESOLVED AMBIGUITIES IN INDIRECT TRANSFER PROVISIONS

- Operation of tax treaties
- Corporate reorganizations - Circular 41, has clarified that the relevant sub-clauses in section 47 of the ITA which provide exemptions from the applicability of indirect transfer provisions in the case of amalgamations or demergers (as the case may be), do not extend to the shareholders of the entities undergoing the relevant corporate reorganization.
- Applicability of Section 56(2)(x)
- Fragmentation of holdings

Cairn's arbitration proceedings

- The Cairn Claimants' theory of the case:
  - In 2006, the Indian Government approved the 2006 Transactions (including the CIHL Acquisition) without hinting at any hidden taxation.
  - The 2012 Amendments were not a mere clarification but imposed a new tax burden that did not previously exist
  - The Income-tax authorities attached CUHL's shareholding in CIL and forcibly sold approximately 99% of these shares. CIL was also barred from distributing dividends to CUHL.
  - Failure to encourage and create favourable conditions for the Claimants' investments in violation of Art. 3(1) of the BIT
  - Failure to accord the Claimants' investments fair and equitable treatment in violation of Art. 3(2) of the BIT. The assessment order was exclusively based on the 2012 Amendments and, therefore, breached the principles of legal stability, predictability and legitimate expectations which are components of the FET standard.
  - Unlawful expropriation of the Claimants' investments or subjected them to measures having the effect equivalent to expropriation, in violation of Art. 5(1) of the BIT.
  - Breach of the Claimants' right to the unrestricted transfer of their investments or returns in violation of Art. 7.

Cairn’s arbitration proceedings

- Tax issues are not excluded - Tribunal distinguished between tax disputes and tax-related investment disputes. The objective and purpose of the BIT is “to create conditions favourable for fostering greater investment” and fairness in the taxation regime of the host State is in consonance with the objective of encouraging more foreign investment. Therefore, exclusion of tax-related measures without express language for the same would be in conflict with the BIT’s object and purpose
- The DTAA has no relevance in interpreting the provisions of the BIT since it is neither an agreement subsequent to the BIT, nor is it a subsequent practice in the application of the BIT.
- Arbitral Tribunal rules that India “failed to uphold its obligation under the UK-India BIT and international law, and in particular, that it has failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2) of the Treaty

Vodafone Arbitral Award

- Vodafone wins international arbitration case pertaining to 'indirect transfer' tax dispute under India-Netherlands BIPA;
- Arbitral Tribunal rules that India's conduct 'in respect of the imposition on the Claimant of an asserted liability to tax notwithstanding the Supreme Court judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4(1) of the Agreement, as is the imposition of interest on the sums in question
- Arbitral Tribunal holds that the Claimant is entitled, in respect of its investments in mobile telecommunications in India, to the protection of the guarantee of fair and equitable treatment laid down in Article 4(1) of the Agreement and that 'the breach of the same entails the obligation on respondent [I.e. India] to cease the conduct in question, any failure to comply with which will engage its international responsibility';
- Directs India to reimburse to the claimant legal representation and assistance cost.

Fair and Equitable treatment under BIT

- The FET standard comprises the following principles:
- Protection of Legitimate Expectations
- Legal Stability
- Predictability
- Non-discrimination
- Non-arbitrariness
- Consistency
- Transparency
- Substantive propriety
- Procedural impropriety

After Math of Tribunal Award

Cairn Energy freezes 20 Indian state-owned properties in Paris: Reports

Scottish oil producer's action is its latest attempt to force India to pay $1.7bn awarded by an international tribunal over a tax dispute.

India to take legal recourse over Cairn Energy's confiscation of Paris assets worth Rs 180 cr

Cairn dispute: French court orders freeze on Indian assets in Paris; government says open to finding solution

NOW PLAYING

India asks US court to reject Cairn Energy's $1.2 billion suit

The Indian government has asked a federal court in Washington to dismiss Britain's Cairn Energy suit seeking enforcement of a $1.2 billion arbitral award, saying it had sovereign immunity under US law

Revoking Retrospective Provisions- Taxation (Amendment) Act, 2021

- Pursuant to introduction of the indirect transfer provisions, tax demand has been raised in 17 cases.
- The demands raised under the indirect transfer tax provisions also spurred investment treaty arbitration cases against India – among which are Vodafone International Holdings BV v. The Republic of India (“Vodafone arbitration”); and Cairn Energy Plc and Cairn UK Holdings Limited v The Republic of India (“Cairn arbitration”).
- In both the above cases, the arbitral tribunals have ruled in favour of foreign investors.
- In the above background, the government introduced the Taxation (Amendment) Act, 2021, revoking the retroactive applicability of indirect transfer provisions

Revoking Retrospective Provisions- Taxation (Amendment) Act, 2021

- Taxation (Amendment) Act, 2021
- An embargo on future tax demands: the indirect transfer tax provisions would not apply to income accruing or arising as a result of an indirect transfer undertaken prior to May 28, 2012.
- Nullification of tax demands raised: demands raised for indirect transfers of Indian assets made prior to May 28, 2012 shall be nullified, subject to following:

1.Withdrawal or an undertaking for withdrawal of appeal filed before an appellate forum or a writ petition filed before a High Court or the Supreme Court of India;

2.Withdrawal or an undertaking for withdrawal of any proceedings for arbitration, conciliation or mediation initiated by such person such as under a bilateral investment treaty; and

3.Furnishing of an undertaking waiving their rights to seek or pursue any remedy or any claim in relation to such income whether in India or outside India.

4. Refund of amounts paid: The Government shall refund the taxes paid in cases where the application of indirect transfer tax provisions is being withdrawn but no interest shall be paid by the Government on such refund of taxes.

Aftermath of Amendment

ITAT: Allows Vedanta to withdraw appeal consequent to nullification of retro tax on indirect transfer

Retrospective tax: Cairn drops suits against Air India, Centre in US

Cairn Energy withdraws all litigations in retrospective tax case

India refunds Rs 7,900 cr to Cairn to settle retro tax dispute

Thanks !

THANKS !

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