AUTHORITY FOR ADVANCE RULINGS (INCOME TAX), NEW DELHI

Armstrong World Industries Mauritius Multiconsult Ltd., *In re*

JUSTICE P.K. BALASUBRAMANYAN, CHAIRMAN

A.A.R. NO. 1044 OF 2011

AUGUST 22, 2012

RULING

The applicant is a fully owned subsidiary of Armstrong World Industries Limited United Kingdom (Armstrong UK). Armstrong UK in turn is a fully owned subsidiary of Armstrong USA. The applicant was incorporated in Mauritius in the year 1999. It is a tax resident of Mauritius.

2. Armstrong World Industries India (Pvt.) Limited (Armstrong India) was incorporated in India in the year 1999 as a fully owned subsidiary of Inarco Ltd., an Indian company. Inarco Limited was engaged in the business of production of textile machine parts and floorings. Armstrong UK, through the applicant, was holding 50% of the share capital in Inarco Limited. Pursuant to a scheme of amalgamation, approved by the High Court of Bombay, the flooring business of Inarco Limited was transferred to Armstrong-India. In consideration of that transfer of business, Inarco Limited was allotted 3,60,000 shares of the value of Rs. 10/- each in Armstrong India. Subsequently, Inarco Limited's share capital was reduced by resorting to section 100 of the Companies Act, 1956 from Rs. 72,00,000 (divided into 72000 equity shares of the value of Rs. 100 each) to Rs. 36,00,000 (divided into 36000 equity shares of the value of Rs.100 each). This was by cancelling of 50% of its share capital by Inarco Limited. As consideration, Inarco Limited transferred to the applicant 36,00,000 shares of Rs. 10 each of Armstrong India. This constituted 99.97% of the share capital of Armstrong India. These arrangements were all made after getting the relevant statutory approvals.

3. As of now, the applicant is holding 99.97% of the shares in Armstrong India. The other 0.03% of the shares therein are held by Armstrong UK.

4. Armstrong India is now proposing to buy-back 90,025 shares from the applicant out of the 3,60,000 shares held by it, in terms of section 77A of the Companies Act. The proposed buyback is for commercial reasons and it was a justified step. By the proposed buy-back, capital gains would arise to the applicant which would be taxable under the Income-tax Act. But, the applicant by relying on Section 90(2) of the Act, is entitled to claim the benefit of the India Mauritius Double Taxation Avoidance Convention (DTAC) between India and Mauritius and going by paragraph 4 of Article 13 of the said DTAC, the capital gains can be taxed only in Mauritius. In this context the applicant approached this Authority with the present application seeking Advance Rulings originally on two questions (the intention was to seek rulings on three questions) and subsequently adding another question, but still omitting to raise one of the questions originally intended to be raised.

5. After hearing both sides the application was allowed under section 245R(2) of the Act, by this Authority to render Rulings on the following questions:

1. Whether on the facts and in the circumstances of the case, Armstrong World Industries Mauritius ('Armstrong Mauritius') or 'the applicant') would be liable to tax in India on the capital gains that may arise, from buy-back of shares by its Indian subsidiary, viz. Armstrong World Industries India Private Limited (Armstrong India) as per the provisions of the Income-tax Act, 1961 ('the Act') read with Double Taxation Avoidance Agreement (DTAA) between Republic of India and Government of Mauritius?

2. Whether on the facts and in the circumstances of the case, the transfer of shares of Armstrong World Industries India Pvt. Limited by the applicant to its wholly owned subsidiary Armstrong World Industries India Pvt. Limited in the course of proposed buyback of shares, would be exempt from tax in India in the hands of the applicant, in view of the provisions of section 47(iv) of the Income-tax Act, 1961?

3. On the facts and in the circumstances of the case, whether the proposed buyback of shares by 'Armstrong India' from the applicant attracts the transfer pricing provisions of sections 92 to 92F of the Act?

It may be noticed that the question based on the liability under section 195 of the Act, intended to be raised by the applicant, does not find a place here also. This Authority reserved for consideration the question whether a scheme for avoidance of tax was involved in the series of arrangements resorted to by the applicant and its principals.

6. The Revenue, in its objections sought to contend that the applicant had no other business, that it was a shell company created in Mauritius to acquire the shares in the Indian company, that the investment was made from USA or atleast from UK and hence the DTAC with one of those countries applied and hence the applicant could not claim the benefit of the India Mauritius DTAC merely relying on the Tax Residency Certificate. The whole scheme was one designed for non-payment of capital gains tax in India.

7. At the hearing, learned counsel for the applicant submitted that the series of transactions were commercially dictated and the original scheme had even been approved by the High Court of Bombay. The shares had been held bona fide as investment. The buyback of shares proposed was based on sound commercial considerations and was a bona fide transaction. Even if the original capital might have flowed from USA or UK, the coming into existence of the applicant as an investor in the year 1999 cannot be ignored. Alternatively, it was submitted that the buyback was not a transfer for the purpose of section 45 of the Act since it was excluded from the operation of section 45 of the Act by section 47 (iv) of the Act. Sections 92 to 92F of the Act had no application, since there was no chargeable income arising under the Act.

8. On behalf of the Revenue, it was argued that what was involved was a scheme for avoidance of tax and hence it should be discountenanced by this Authority. Even now the applicant has not disclosed all the facts and an investigation into the facts was necessary. It was pleaded that section 47(iv) of the Act was not attracted to this case. The conditions specified were not

fulfilled. Since admittedly income arose to the applicant and the transaction was one coming under sections 92 to 92F of the Act, the said provisions had operation.

9. On an anxious consideration of the rival submissions, I am not satisfied that any adequate material has been disclosed to justify a finding that the applicant or its principal has resorted to the devising of a scheme for avoidance of tax. It may be true that the applicant was incorporated in Mauritius and the investment made through it for acquiring shares of the Indian company to take advantage of the Indian Mauritius DTAC. But that by itself is no ground to discard the claim of the applicant for benefit under the India Mauritius DTAC as laid down by the Supreme Court in *UOI* v. *Azadi Bachao Andolan.* On the facts made available in this case, I am not satisfied that the applicant can be denied the benefit claimed under the India Mauritius DTAC.

10. Once it is held that the applicant is entitled to invoke the India Mauritius DTAC, then it is clear that Article 13 of the said DTAC is attracted. Since paragraphs 1 to 3 of Article 13 are not attracted, paragraph 4 of Article 13 has application. Then, the capital gains could be taxed in Mauritius alone. The argument that it is not actually taxed in Mauritius and hence the DTAC cannot have application, cannot also be accepted in the face of the decision in *UOI* v. *Azadi Bachao Andolan*, whatever may be its merit.

11. Hence on question no. 1 formulated for Ruling, it has to be ruled that the capital gains arising out of the proposed buyback of shares is not taxable in India in view of paragraph 4 of Artricle 13 of the DTAC between India and Mauritus.

12. Question No. 2 is whether even otherwise the transaction will stand outside section 45 of the Act in view of the section 47 (iv) of the Act. In the light of the Ruling on question No. 1, this question may have no efficacy. Counsel argued that an earlier Ruling rendered by this Authority *In re* RST (AAR No. 1067 of 2011) requires reconsideration. He argued that the interpretation placed on section 47(iv) of the Act, therein is not in consonance with the legislative intent and section 47(iv) has to be read as conferring benefit in three situations, one, when the parent company holds the whole of the share capital of the subsidiary, two, when the nominees of the principal hold the whole of the share capital of the subsidiary and three, when the principal and the nominee together hold the whole of the share capital of the subsidiary. The wording in the provision is "the parent company or its nominee". There appears to be no justification in reading 'or' as 'and' to hold that when a principal and its nominee hold the whole of the share capital, that case will also come within the ambit of the provision. If there is any lacuna in the provision, it is for the legislature to deal with that situation, assuming that there is a lacuna as contended by Counsel for the applicant. In interpreting a taxing statute, it is not for the Court to supply an omission, even if there be one. To borrow the language of Rowlatt J. in *Cape Brandy Syndicate* v. *IRC* [(1921) 1 KB 64]. "In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment." Nothing is to be read in, nothing is to be omitted.

13. Following the ratio of the Ruling in *In re RST* (AAR 1067 of 2011), I rule on question No. 2 that the proposed transaction is not exempt by virtue of section 47(iv) of the Act.

14. Question No. 3 is whether sections 92 to 92F of the Act apply to the transaction in question. I have ruled in AAR No. 999 of 2010 that sections 92 to 92F will be attracted. I adopt the

reasoning therein. Admittedly, the present is an international transaction between related parties. Income arises out of it. Hence, sections 92 to 92F of the Act are attracted. So, on question No. 3, I rule that sections 92 to 92F are attracted.