BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME-TAX) NEW DELHI

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P R E S E N T

Thursday, the 23rd Day of July, 2009

Mr. Justice P.V. Reddi (Chairman)

A.A.R. NO. 800/2009

Name & address of the applicant	Fujitsu Services Limited 22 Baker Street London W 1U 3BW
Commissioner concerned	Director of Income-tax (International Taxation) Mumbai
Present for the Applicant	Mr. P.J. Pardiwalla, Sr. Advocate Mr. Prakash Kumar, Advocate Mr. Radhakishan Rawal, Associate Director Mr. Amit Agarwal, Senior Manager Mr. Jesal Lakdawala, Manager
Present for the Department	None

R U L I N G

The applicant is a non-resident Company incorporated in United Kingdom. It is engaged in the business of information technology services. The applicant acquired the shares in Zensar Technologies Limited (for short 'Zensar'), an Indian company by making payments in foreign currency between 1963 and 1994, after obtaining RBI's approval. The applicant states that the shares held by it in the said company constituted 26.55% of the entire capital of Zensar and such shares were held for more than 12 months. These shares were listed on the Bombay Stock Exchange and the National Stock Exchange. On 4th July, 2007, the applicant sold its entire shareholding to an Indian company, namely, Jubilee Investments and Industries Limited (for short "Jubilee") and a

Cyprus company, namely, Pedriano Investments Ltd. (for short "Pedriano") for a consideration of Rs. 195/- per share. A copy of the Share Purchase Agreement dated 1.3.2007 has been annexed to the application.

2. It may be submitted at this juncture that the name of Pedriano has not figure in the Share Purchase Agreement. The applicant clarifies that the Pedriano is a wholly owned subsidiary of Petrochem International Limited (Petrochem). Petrochem a company incorporated in India is a wholly owned subsidiary of Jubilee which is one of the purchasers of shares and a party to the Share Purchase Agreement. As per the said agreement, the applicant had agreed to sell the shares of Zensar to the purchaser or to its affiliates. In view of the wide definition of "affiliate", the applicant submits that any entity that is controlled by the purchaser or under common control along with the purchaser will satisfy the definition and therefore Pedriano qualifies as an affiliate of Jubilee and became eligible to buy the shares.

The tax was deducted by Jubilee and Pedriano from the sale consideration @ 20%, though according to the applicant, the correct rate applicable to long term capital gain is 10%. The following questions are framed for seeking advance ruling from this Authority:

1. *Whether on the stated facts and in law, the rate of tax applicable on the long term capital gains arising on sale of shares of Zensar Technologies Limited will be 10% (plus applicable surcharge and education cess) as per the proviso to section 112(1) of the Act?*

2. *Whether the beneficial rate of 10% can be applied where the*

long term capital gain arisen to the Applicant on sale of shares of Zensar Technologies Limited are computed by applying Section 48 of the Income-tax Act read with first proviso to Section 48 and Rule 115A?

The questions are overlapping and they can be dealt with together.

3. The answer to the questions calls for interpretation of the first proviso to section 112(1) of the Income-tax Act, 1961 (Act). The contention of the applicant is that the income from capital gain arising from the transfer of shares answering the description of listed securities held for more than 12 months is liable to be taxed at 10% irrespective of the non-applicability of the second proviso to section 48 (which provides for the benefit of indexation). It is submitted that the proviso to section 112(1) applies to both residents and non-residents as the proviso does not make any distinction between these two categories of assessees. In other words, the non-resident foreign company is not disentitled to invoke the proviso to section 112(1) on the ground that it is not eligible to get the benefit of the second proviso to section 48. Further, it is the contention of the applicant that the lower rate of tax should be available despite the fact that the benefit of the first proviso to section 48 has been availed of by the foreign/non-resident company.

4. Section 112(1) sets out the rate at which the tax is payable on long term capital gains both in relation to residents and non-residents. The normal rate is 20%. However, the proviso to section 112(1) prescribes the lesser rate of 10% in the case of transfer of specified long term capital assets, namely listed Securities or Unit or Zero Coupon Bond. The relevant part of the section 112(1) is extracted hereunder:

"Tax on long-term capital gains.

112. *(1) Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of,—*

(a) to (b) xx xx xx xx xx xx xx xx xx

(c) in the case of a non-resident (not being a company) or a foreign company,—

(i) the amount of income-tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income ; and

(ii) the amount of income-tax calculated on such long-term capital gains at the rate of twenty per cent ;

(d) xx xx xx xx xx xx xx xx xx

*[**Provided** that where the tax payable in respect of any income arising from the transfer of a long-term capital asset, being listed securities or unit or zero coupon bond, exceeds ten per cent of the amount of capital gains before giving effect to the provisions of the second proviso to section 48, then, such excess shall be ignored for the purpose of computing the tax payable by the assessee.*

xx xx xx xx xx xx xx xx xx"

5. There is no doubt that the shares held by the applicant in Zensar answer the description of listed securities as defined by the Explanation to section 112(1) read with Securities Contracts (Regulations) Act. What needs to be considered therefore is whether the applicant could invoke the benefit of lesser rate of tax provided for by the proviso to section 112(1). This Authority has taken a consistent view that a non-resident company can also seek the benefit of the proviso to section 112(1) vide its rulings in *Timken France SAS, In Re*[1], *McLeod Russel Kolkata Ltd., In Re*[2] and *Burmah Castrol Plc., In Re*[3]. This Authority refuted the contention of the Department that the expression "*before giving effect to the second proviso to section 48"* pre-supposes the existence of a case where the computation of long term capital gains could be made in

[1] *294 ITR 513(AAR)*
[2] *(2008) 215 CTR 230)*
[3] *(2009) 221 CTR 63*

accordance with the formula contained in the second proviso to section 48. As the second proviso to section 48 is not applicable to the non-resident, the proviso to section 112(1) does not come into play according to the Revenue. These contentions on behalf of the Revenue were rejected and it was held that the benefit of lesser rate of tax conferred by the proviso to section 112(1) can as well be invoked by a non-resident, like the applicant. The words "*before giving effect to 2nd proviso to section 48"* only mean that the calculation under the 2nd proviso shall not enter into the computation of capital gain, wherever that proviso is applicable. The said expression cannot be construed as a condition precedent for invoking the proviso to section 112(1). The following passage from *Timken France* may be usefully quoted in this context:

> *"In plain and peremptory words, the proviso limits the rate of tax on the gains from the transfer of listed securities to 10 per cent, but, with an important rider that the quantum of capital gains should be arrived at without taking into account the formula laid down in the second proviso to section 48 based on the indexed cost of acquisition. In other words, while computing the capital gains on the listed securities held for more than 12 months, do not give effect to the calculation spelt out in the second proviso to section 48 wherever it is applicable, or to put it in a different language, let not the indexation formula enter into the computation process – that is the mandate of controversial phrase in the proviso to section 112(1). It does not say – deny the concessional rate of tax to the category of assesses who are not eligible to have the benefit of indexed cost of acquisition under the second proviso. In other words, the eligibility to avail the benefit of indexed cost of acquisition (under the second proviso to Section 48) is not a sine qua non for applying the reduced rate of 10 per cent prescribed by the proviso to section 112(1). The second proviso to section 48 is only a mode of computation of capital gains. The crucial words relied upon by the Revenue cannot be construed as the words of exclusion of a category of assesses i.e. non-residents who cannot avail of indexation benefit."*

It was also held that the availment of the protection of fluctuation in rupee value in terms of foreign currency in accordance with the first proviso to section 48, does not come in the way of a non-resident invoking the proviso to section 112(1). The Authority also referred to the decision of the Income-tax Appellate Tribunal. "H" Bench, Mumbai in ITA No. 2552 of 2005 (*BASF Aktiengesellschaft v. Deputy DIT (International taxation*)[4] and expressed disagreement with the view taken by the Tribunal. I am told by the learned counsel for the applicant that more than one Bench of ITAT took a different view subsequently. Be that it as may, the rulings cited *supra* fully cover the issue raised in this application.

6. The Revenue has not furnished any comments, probably, for the reason that the question raised is squarely covered by the previous rulings of this Authority.

7. In the result, both the questions are answered in the affirmative and it is held that the applicant is liable to pay tax at the lesser rate of 10% as per the proviso to section 112(1) of the Act apart from the surcharge and cess.

Accordingly the ruling is given and pronounced on 23rd July, 2009.

Sd/-
(P.V. Reddi)
Chairman

F.No. AAR/800/2009 Dated: 23/7/2009

This copy is certified to be a true copy of the order is sent to:-

1. The applicant.
2. The Director of Income-tax (International Taxation), Mumbai.

(Batsala Jha Yadav)
Addl. Commissioner of Income-tax

[4] *(2007) 293 ITR (AT) 1 (Mumbai)*