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

23rd day of July 2010

P R E S E N T

Mr.Justice P.V. Reddi (Chairman)
Mr. V.K.Shridhar (Member)

AAR/855/2009

Name & address of the applicant	M/s. Praxair Pacific Limited Level-6, One Cathedral Square, Jules Koenig Street, Port Louis, Mauritius
Commissioner concerned	Director of Income Tax (International Taxation), Bangalore.
Present for the applicant	M/s.Rajan Vora, Manmeet Dalal, CAs from S.R.Batliboi & Co.
Present for the department	Ms. Meera Srivastava, Jt.CIT(International Taxation), Bangalore Mr.Pankaj Kumar Dy.DIT(International Taxation) Bangalore

RULING
(By Shri V.K.Shridhar)

This application for advance ruling has been filed by a non-resident company under section 245Q(1) of the Income-tax Act, 1961(hereinafter referred as Act). The following facts are stated in the application.

2. The applicant, Praxair Pacific Limited, is a company incorporated in Mauritius and is a tax resident of Mauritius. The applicant has a wholly owned subsidiary company in India, Praxair India Pvt. Ltd (Praxair India). The applicant is holding 237,286,500 equity shares representing 99.99% of the capital of Praxair India. The nominee of the applicant holds remaining 3 shares representing 0.01% of share capital. The applicant also holds

74% of the equity shares capital in Jindal Praxair Oxygen Company Private Limited (Jindal Praxair) and the balance 26% is held by JSW Steel Limited. The applicant is proposing to transfer 74% of the equity share capital in Jindal Praxair to its wholly owned subsidiary company, Praxair India. The consideration for the proposed transfer is stated to be determined on the basis of cost, unless a higher consideration is required under the pricing guidelines prescribed by the Reserve Bank of India as applicable for the transfer of shares.

3. On the facts stated above, the applicant desires to ascertain whether, based on the nature of the proposed transaction, it can be held to have earned any income taxable in India. It is the contention of the applicant that the shares of Jindal Praxair held by it are capital assets and the proposed transfer of these to Praxair India would not be 'transfer' for the purpose of computing capital gains under section 45 read with section 47 (iv) of the Act. It is its claim that even under Article 13 of India-Mauritius tax treaty, the capital gains arising from transfer of such capital asset is not taxable in India. The applicant further claims that the shares of Jindal Praxair held by it cannot be treated as trading stock. Even if these are to be held as such, any income arising from transfer thereof cannot be brought to tax in India, as the applicant does not have a Permanent Establishment in India. It is also its claim that the provisions of section 115JB dealing with minimum alternate tax (MAT) are not applicable to its case. Therefore, the applicant submits that there would neither be any requirement for withholding tax u/s.195 nor of filing of tax returns u/s.139 of the Act. The transfer pricing provisions u/s. 92 to 92F of the Act also will have no application with respect to the proposed transaction.

4. The applicant has framed following nine questions for seeking advance ruling from this Authority:

1) Whether on the facts and circumstances of the case, the investment held by Praxair Pacific Limited (hereinafter referred to as the "Applicant"), in equity shares of Jindal Praxair Oxygen Company Private Limited ("JPOCPL") would be considered as "capital asset" under section 2(14) of the Income-tax Act, 1961 ("the Act")?

2) If the answer to Query 1 is in the affirmative, based on the facts of the Applicant, would the transfer of equity shares of JPOCPL from the Applicant to its wholly owned subsidiary Praxair India Private Limited ("Praxair India"), be liable to tax in India in view of the exemption from capital gains and subject to conditions provided under section 47(iv) of the Act?

3) Whether, on the facts and circumstances of the case, the Applicant will be entitled to the benefits of the Agreement for avoidance of double taxation and prevention of fiscal evasion entered into between the Government of the Republic of India and the Government of Mauritius ("Treaty")?

4) If the answers to Query 1 and Query 3 are in the affirmative, on the facts and circumstances of the case, whether the gain arising to the Applicant, is liable to tax in India having regard to the provisions of Article 13 of the Treaty?

5) If the answer to Query 1 is in the negative, whether the gains arising to the Applicant from the sale of equity shares of JPOCPL will be taxable in India in the absence of Permanent Establishment of the Applicant in India and in light of the provisions of Article 7 read with Article 5 of the Treaty?

6) If the answer to Query 4 or Query 5 is in the negative, whether the Applicant would be liable to tax under the provisions of section 115JB of the Act?

7) Where, on the facts and circumstances of the case, the gains arising to the Applicant on account of the proposed transfer is not taxable in India under the Act or the Treaty, whether Praxair India, the transferee company, is required to withhold tax in accordance with the provisions of section 195 of the Act?

8) On the facts and circumstances of the case, if the gains arising to the Applicant on account of the proposed transfer are not taxable in India, then, whether the Applicant is required to file any return of income under section 139 of the Act?

9) On the facts and circumstances of the case, whether the proposed transfer of equity shares by the Applicant to Praxair India attracts the transfer pricing provisions of section 92 to 92F of the Act?

5. The applicant submits that shares can be held either as stock-in-trade or as capital asset. The shares held by it in Jindal Praxair are not held as stock-in-trade but represent investments and thus should be classified as a capital asset. In support of its contention, the applicant has made reference to the Instruction No.1827, dated 31 August 1989 and the supplementary Circular No.4/2007 dated June 15, 2007 issued by the Central Board of Direct Taxes wherein tests have been laid to distinguish between shares held as stock-in-trade and those held as investments. The applicant draws attention to the decisions in the cases of G.Venkata Swami Naidu (35 ITR 594), Raja Bahadur Kamakhya Narain Singh (77 ITR 253) and the Authority for Advance Rulings in the case of Fidelity Northstar Fund (288 ITR 641). Applying the ratio of the above decisions and the circular of the CBDT, it submits that the shares held by it in Jindal Praxair should be considered as “capital asset” and not as stock-in-trade.

5.1 The applicant then submits that the income accruing or arising on the transfer of equity shares in Jindal Praxair would normally be taxable in its hands in India in view of the provisions of section 5 read with section 9 of the Act. Under section 45 of the Act, any profits or gains arising from the transfer of a capital asset, would be chargeable to income-tax under the head "Capital gains". However in relation to transfer of a capital asset by a holding company to its Indian subsidiary company, section 47(iv) of the Act provides that such a transfer of a capital asset by a holding company to its Indian subsidiary company shall not be regarded as transfer for the purpose of section 45 of the Act. As the applicant proposes to transfer its equity shareholding in Jindal Praxair to Praxair India, which is its wholly owned subsidiary in India, the key conditions under section 47(iv) of the Act are fulfilled. The gains, if any, on the transfer of equity shares in Jindal Praxair would not be taxable in India. In all fairness, the applicant states that in the event the provisions of section 47A of the Act is found to be attracted on the occurrence of any of the events stated therein, it will offer to tax any gains arising from the proposed transfer of equity shares in Jindal Praxair.

5.2 The applicant submits that the definition of 'company' under section 2 (17) of the Act brings within its ambit even a foreign company but the applicant would not be liable to tax under the provisions of section 115 JB of the Act as the provisions of section 115JB would be applicable only to domestic companies and not to foreign companies. In support it has placed reliance on the Notes on Clauses explaining the provisions of Finance Bill 2002, which provide for some amendments to section 115JB. The Notes explaining the provisions have accepted/clarified the law that section 115JB is a levy of minimum tax on domestic companies. The Legislature itself has recognized that section 115JB is not applicable to foreign companies. Without prejudice, the applicant submits that as the gains from the proposed transfer of shares

in Jindal Praxair by the Applicant would not be taxable in India in the light of Article 13 or Article 7 of the treaty read with section 90(2) of the Act, there would not be any liability under section 115JB of the Act.

5.3 Without prejudice to the above, the applicant states that in case the gains arising on account of the proposed transactions are not considered as capital gains then the same would be regarded as business income. In that case Article 7 of the Treaty would come into play which deals with the taxation of business income earned by an enterprise of the Contracting State in the other Contracting State. Such business income will be taxable in India only if the applicant has a PE in India. The applicant submits that it does not have an office or employees or agents in India. In the absence of a PE in India the profits arising to the applicant from the sale of equity shares of Jindal Praxair are not liable to income tax in India under the Treaty.

5.4 Referring to the India Mauritius Treaty, the applicant submits that the transfer of equity shares in Jindal Praxair would not be taxable in India and would be taxable only in Mauritius by virtue of Article 13 (4) of the Treaty. The CBDT circular No.682, dated March 30, 1994, has clarified that capital gains arising to a resident of Mauritius from the alienation of shares of Indian companies will be liable to capital gains tax only in Mauritius as per Mauritius tax law and there will be no capital gains tax in India. Then the CBDT in circular No.789, dated April 13, 2000, has also clarified that "wherever a certificate of residence is issued by the Mauritius tax authorities, such certificate would constitute sufficient evidence for accepting the status of residence, as well as beneficial ownership, for applying the provisions of the DTAC accordingly". In the case of DLJMB Mauritius Investment Company (228 ITR 268) this Authority had ruled that the applicant being a resident in Mauritius was entitled to the benefits that flow under the treaty, including the benefits relating to capital gains. The applicant submits

that by virtue of being a tax resident of Mauritius, section 90 of the Act also entitles the applicant to the provisions of the treaty to the extent they are more beneficial than the provisions of the Act.

5.5 To sum up, the applicant contends that :

- transfer of shares to the holding company is not exigible to tax by virtue of section 47(iv) read with section 45 of the Act.
- provision of section 115JB are not attracted as the applicant, a foreign company, has no place of business or PE in India.
- by virtue of being a resident of Mauritius and having no PE in India, it is eligible to the benefits of India-Mauritius DTAA and thereby may not be subjected to tax in India on the capital gain which may arise on transfer of the impugned shares in Jindal Praxair.

5.6 The department on the other hand has left the questions raised in the application to be answered on merits.

6. It seems to us that whether we consider the transaction under the Act or under the India Mauritius DTAA, in our view, the applicant is not liable to be taxed in India on proposed transfer of its shares in Jindal Praxair to its wholly owned subsidiary company, Praxair India. Let us begin by examining the issue under the Act and start with the definition of capital asset under the Act. The capital asset is defined in section 2(14) as under:

> ***2. In this Act, unless the context otherwise requires***,-
>
> (14) "capital asset" means *property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-*

(i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession.

xxxxx

xxxxxx ”

A look at the audited financial statements for the period ending March 2008 shows that the principal activity of the applicant is that of an investment company. The shares in Jindal Praxair have been classified in the books of account under the head, “Non-current assets – investment in subsidiaries”. These shares are held since 1995 and were never a subject matter of any transaction till date. The intention of the applicant was clear: to hold these shares as investment and not to trade with it. It is for the first time that these are proposed to be transferred by way of a solitary transaction. In this regard it may be useful to refer the case of Raja Bahadur Kamakhya Narain Singh reported in [1970] 77 ITR 253 (SC), wherein it was held that:

“…….The surplus realized on the sale of shares, for instance, would be capital, if the assessee is an ordinary investor realizing his holding ; but it would be revenue, if he deals with them as an adventure in the nature of trade. The fact that the original purchase was made with the intention to resell if an enhanced price could be obtained is by itself not enough but in conjunction with the conduct of the assessee and other circumstances, it may point to the trading character of the transaction. For instance, an assessee may invest his capital in shares with the intention to resell them if in future their sale may bring in higher price. Such an investment, though motivated by a possibility of enhanced value, does not render the investment a transaction in the nature of trade. The test often applied is,

has the assessee made his shares and securities the stock-in-trade of a business."

As the shares were not held as stock in trade, the nature of the investment in these shares is held to be a capital asset as defined in section 2(14) of the Act. This brings us to the issue whether the transaction of transfer of these shares is to be regarded as transfer within the meaning of section 45 read with section 47(iv) of the Act? Section 47(iv) reads as under:

47(iv).

*"**Transactions not regarded as transfer.***

(i) to (iii) xxx xxx xxx

(iv) Any transfer of a capital asset by a company to its subsidiary company, if

(a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and

(b) the subsidiary company is an Indian company;"

Under this section any transfer of a capital asset by a parent company to its subsidiary company shall not be regarded as transfer if the following conditions are satisfied:

i) The parent company or its nominees hold the whole of the share capital of the subsidiary company, and

ii) The subsidiary company is an Indian company.

As the applicant proposes to transfer its equity share holding in Jindal Praxair to Praxair India which is its wholly owned subsidiary in India, the conditions under section 47(iv) of the Act are fulfilled. The transfer of equity shares in Jindal Praxair would not be

regarded as transfer within the meaning of section 45 read with section 47(iv) of the Act and hence the gains if any arising on transfer would not be taxable in India.

6.1 Let us now address the issue under the India Mauritius DTAA and the related issue.

The taxability of Capital Gains under provision of DTAA with Mauritius is governed by Article 13 of the tax treaty. Article 13 reads as under:

"Article 13 – Capital Gains:

1. *Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.*
2. *Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.*
3. *Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*
4. *Gains derived by a resident of a Contract State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State".*

Paragraph 4 of Article 13 confers the power of taxation of the gains derived by a resident of a contracting state from the alienation of the specified property only in the state of residence i.e. Mauritius. The fact that capital asset is located in India is of no consequence. Under section 90of the Act the taxpayer is entitled in law to seek the benefits under the DTAA if the provision therein is more beneficial than the corresponding provision in the domestic law. This well settled principle has been re-stated by the Supreme Court in the case of Azadi Bachao Andolan in the following words:

> *"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect of cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the Legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.*

3.1 The contention of the respondents which weighed with the High Court, viz., that the impugned Circular No.789 (see [2000] 243 ITR (St.)57) is inconsistent with the provisions of the Act, is a total non sequitur. As we have pointed out, Circular No.789 is a circular within the meaning of section 90; therefore, it must have the legal consequences contemplated by sub-section (2) of section 90. In other words, the circular shall prevail even if inconsistent with the provisions of the Income-tax Act, 1961, in so far as assessees covered by the provisions of the DTAC are concerned."

Applying the above dicta to the case in hand, as the applicant is tax resident of Mauritius and has been issued Tax Residency Certificate by the Mauritius Revenue Authority, it would not be subjected to tax in India on the capital gains arising from the proposed transaction in India.

6.2 We have held that the transaction of sale of shares in Jindal Praxair by the applicant would not attract capital gain. Unlike section 10(38) of the Act where the income by way of long term capital gain of a company is to be taken into account in computing the book profit and income tax payable thereon under section 115JB, there is no provision to include or exclude or to increase or decrease such income in the Act while determining the book profit. However, we are not going into this issue and instead address a larger question based on the facts of the applicant whether section 115JB would apply to a foreign company who has no place of business or PE in India. We may state that the same issue had arisen before this Authority in AAR 836 of 2009 in the case of Timken Company, USA, wherein it was held that under section 591 of the Companies Act only such foreign companies who have established a place of business within India are required to make out a balance sheet and P&L account as required under section 594 of the Companies Act. The annual accounts can not be prepared as per the first proviso to

section 115JB(2) in respect of the world income and laid before the company at its AGM in accordance with the provision of Section 210 of the Companies Act. It was held that section 115JB is not designed to be applicable to a foreign company who has no presence or PE in India. Moreover, in the case in hand where there would be a solitary transaction, the purport of maintenance of accounts does not appeal to any logic. We are therefore of the view that the provision of section 115JB of the Act is not attracted in the case of the applicant.

7. On the facts presented by the applicant and in the light of legal position discussed, the applicant has no liability to pay capital gains tax under section 45 and minimum alternate tax under section 115JB of the Act. Question nos. 1 to 7 are therefore answered in favour of the applicant. Regarding answer to Question no.9, the proposed transfer of equity shares by the applicant to Praxair India would not attract the transfer pricing provisions of section 92 to 92F of the Act in the absence of liability to pay tax on the capital gain. Ques. No.8 need not be answered, as stated by the learned Authorized Representative in the course of arguments.

Accordingly, the ruling is given and pronounced on this the 23rd day of July 2010.

Sd/-	Sd/-
(P.V. Reddi)	(V.K.Shridhar)
Chairman	Member

F.No. AAR/855/2009 Dated 23.7.2010

(A) This copy is certified to be a true copy of the advance ruling and is sent to:

1. The applicant.
2. The Director of Income-tax (International Taxation), Bangalore.
3. The Joint Secretary (FT&TR-I), M/Finance, CBDT,Bhikaji Cama Place, New Delhi.
4. The Joint Secretary (FT&TR-II), M/Finance, CBDT,Bhikaji Cama Place, New Delhi
5. Guard file.

(B) In view of the provisions contained in Section 245S of the Act, this ruling should not be given for publication without obtaining prior permission of the Authority.

(Nidhi Srivastava)
Addl. Commissioner of Income-tax(AAR-IT)