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

3rd Day of August, 2011

A.A.R. No.976 of 2009

PRESENT

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

Name & address of the applicant	Foster Pty Ltd., BGC Ventre, 28 The Esplanade, Perth, Australia - 6000
Present for the applicant	Mr. G.C. Srivastava, Counsel Mr. Arijit Chakravarty, Sr. Manager, Advocate Mr. Manoneet Dalal, Advocate Mr. Atulan Saha, CA Mr. Nikhil Tailwal, CA Mr. Shailesh Kumar, CA Mr. Akhil Sambhar, CA
Present for the Department	Mr. Narender Kumar, Addl.DIT (International Taxation)-I, New Delhi

ORDER

The applicant is a company incorporated in Australia and is a tax resident of that country. The applicant entered into a contract with Ravva Oil Singapore (Singapore) Pte. Ltd., a company incorporated under the laws of Singapore for provision of services in connection with the business of oil and gas exploration and production. Ravva Oil Singapore alongwith others has in turn entered into a production sharing contract with the Government of India for the exploration, development and production of mineral oil and gas in the Ravva Oil and Gas Field.

2. The applicant submits that Ravva Oil Singapore was not deducting tax on payments made by it to the applicant under the belief that such payments were

not chargeable to tax in India. In this context, the applicant has approached this Authority with the present application seeking an advance ruling on the question whether the consideration received/receivable by the applicant under the terms of the agreement with Ravva Oil Singapore is liable to tax as royalty as defined in Article 12 of the Double Taxation Avoidance Agreement between India and Australia.

3. In its application, while narrating the facts in support of its application, the applicant has disclosed that the Revenue Authorities while completing the assessment on the tax return filed by Ravva Oil Singapore, disallowed the payments made by it to the applicant. It is alleged that this was on the ground that Ravva Oil Singapore had not withheld any tax on such payment and by invoking section 40(a)(i) of the Income-tax Act. Ravva Oil Singapore has filed an appeal against that order of assessment and the same was pending.

4. On receipt of notice of the application, the Revenue has come forward with a preliminary objection to the admissibility or allowing of the application under section 245R(2) of the Income-tax Act. It is submitted that the question as to whether the payments made by Ravva Oil Singapore on the basis of the agreement to the applicant is chargeable to tax, has been raised in various orders of assessment passed in the case of the payer, Ravva Oil Singapore and the decisions of the assessing officer have been challenged in appeals and the appeals were pending. Therefore, the raising of the same issue in the present application for advance ruling relating to the same payment was not permissible in terms of the proviso to section 245R(2) of the Income-tax Act. It is also submitted that the proviso to section 245R(2) of the Act, if any of the clauses therein applied, enjoins this Authority to reject the application. The application was hence not maintainable.

5. The matter was posted for hearing in terms of section 245R(2) of the Act and senior counsel for the applicant and the representative of the Revenue were heard in detail.

6. The proviso to section 245R(2) of the Act in so far as it is relevant for our present purpose reads:

> "Provided that the Authority shall not allow the application where the question raised in the application,
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> (i) is already pending before any Income-tax Authority or Appellate Tribunal [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N] or in any Court."

7. The history of the legislation shows that earlier, the bar to entertain the application for advance ruling under the concerned proviso was when the question raised in the application was already pending in the applicant's case before any Income-tax Authority, the Appellate Tribunal or any Court. This proviso was amended in the present form by the Finance Act 2000 with effect from 1.6.2000. The omission of the words "in the applicant's case" put the emphasis of the bar on the question raised in the application being pending before any Income-tax Authority or Appellate Tribunal or Court, not necessarily at the instance of the applicant. The question, therefore, is whether it can be said that the question raised in this application for ruling is pending before an Appellate Authority on the facts of this case.

8. Two parties are involved in the transaction under which amounts are to be received by the applicant and are to be paid by another. The payer of the amount is Ravva Oil Singapore and the payee, the applicant. No doubt, the amount was basically the income of the applicant and was an expenditure of Ravva Oil Singapore. Ravva Oil Singapore did not approach this Authority for getting a ruling on the question of its liability to deduct tax in terms of section 195

of the Income-tax Act concerning this payment. It proceeded to file its return under the Act and during the assessment sought to claim that this was an allowable expenditure since it was an amount to be paid to the applicant herein for services rendered. Presumably, it had also raised the contention that the amount was not taxable in India under the Income-tax Act and consequently it had no obligation to deduct tax in terms of section 195 of the Act. The Assessing Officer over ruled the contention of Ravva Oil Singapore and included the payment in the taxable income of Ravva Oil Singapore. Ravva Oil Singapore filed an appeal challenging that assessment and it was while that appeal was pending, challenging the disallowance, that the applicant approached this Authority with this application.

9. The question raised before us by the applicant is about the nature of the payment received by it from Ravva Oil Singapore; whether it was taxable as royalty under Article 12 of the DTAA between India and Australia. As we see it, this is the question or one of the questions that is pending before the Appellate Authority, though at the instance of the payer. Certainly, it was and it is open to the payer to contend that the amount is not liable to be taxed in India and consequently it had no obligation to deduct tax in terms of section 195 of the Act and section 40 (a)(i) could not be applied against it for failure to make such a deduction. In other words, the question on which the ruling is sought for before us by the payee, on the identical payment, is the question that is pending before the Appellate Authority under the Act or at any rate might and ought to have been raised before the Assessing Officer and the Appellate Authority by the payer. Prima facie it is seen that the question raised in this application is pending before the Appellate Authority under the Act.

10. Learned counsel for the applicant argued that the order of assessment disallowing the expenditure of Ravva Oil Singapore was passed only in terms of section 40(a)(i) of the Act and that meant that it was only on a failure to comply with section 195 of the Act. He submitted that this Authority has consistently

taken the view that passing of an order under section 195 of the Act does not stand in the way of the entertaining of an application for advance ruling. He submitted that since the order of assessment only visited Ravva Oil Singapore with the consequence of non deduction under section 195 of the Act and by applying section 40(a)(i) of the Act, the bar to entertain the application at the instance of the applicant did not arise. The representative of the Revenue on the other hand submitted that the issue raised herein was the subject matter of the appeal before the Appellate Authority and the bar under the proviso was attracted.

11. Two earlier decisions of this Authority were brought to our notice. In the first of them, in Airport Authority of India [AAR No.753-754 of 2007], this Authority held that the question relating to tax deduction at source which is raised before the Authority was not the question which was pending for consideration by the Appellate Authority. That was a case where the payee was assessed to tax on the income received by it and the payer has approached this Authority for a ruling on its liability to deduct the tax. This Authority observed that it was true that in the process of deciding the legal obligation of the applicant in that case under section 195 of the Act, the liability of the non-resident to pay income tax on the said sum had to be decided, but, on that account, the question or the issue of tax deduction cannot be said to be pending before the Appellate Authority. It noticed that in the appeal of the payee in that case, its liability under the provisions of the Income-tax Act read with DTAA arose for consideration directly and that is the sole question to be decided in the appeal, and in the application before it, the question to be decided at the instance of the payer was about tax deduction at source. After noticing that the question may be inter-related or allied, it was stated that the question raised before the Authority could not be said to be identical nor can it said to be the very same question pending determination by the Appellate Authority. It was postulated that the embargo under the proviso to section 245R(2) should be strictly construed and the applicant should not be denied the remedy to have an early ruling in the matter. It was added that the

applicant in that case, the payer, need not be called upon to go on deducting and paying income tax unless and until the appeal of the payee was decided.

12. In the second decision, M/s. Microsoft Operations Pte Ltd. [AAR No.781/2008] the earlier decision was referred to and discussed. This authority held that it has a judicial discretion in permitting a question to be raised before it, even outside the bar specified in the proviso to section 245R(2) of the Act. It was held that after an assessee was assessed under the Act, an assignee from the assessee could not maintain an application for advance ruling. The earlier referred to ruling was explained with reference to the facts therein and it was stated that in view of those facts, it was considered just and proper to allow the applicant therein to raise the question of tax deduction at source to steer clear of the uncertainty visiting the applicant therein, on account of the decision taken by the Assessing Officer quite contrary to the ruling in the case of the applicant which had become final. The applicant therein had approached this authority at the earliest opportunity.

13. From these earlier decisions what emerges is that it is a matter of discretion as to whether an application for advance ruling is to be entertained in terms of section 245R(2) of the Act when there is pendency of a proceeding before the regular authorities under the Act. We are not quite sure that it is only a matter of discretion in so far as the specific bar created by one or more of the clauses to the proviso to section 245R(2) of the Act. It is debatable how far discretion can be exercised to admit an application for a ruling, when one of the conditions of the proviso is clearly attracted. The bar created by the proviso to section 245R(2) of the Act is a bar to the jurisdiction of this Authority to give a ruling on matters covered by the proviso. It could even be said that it touches on the jurisdiction or the competence of this Tribunal to give an advance ruling. The discretion referred to in Microsoft Operations Pte Ltd. is a discretion outside the bar created by the clauses in the proviso to section 245R(2) of the Act, like delay, latches, abuse of process and so on. That is not an ouster of jurisdiction as

distinct from the instance of one of conditions referred to in the proviso to section 245R(2) of the Act being attracted. They are part of the discretion that any authority can exercise by deciding to entertain an application or not to entertain it, not withstanding the fact that it may have jurisdiction to entertain it. Suffice it to say, that even while bearing in mind the principle that the jurisdiction conferred on a statutory tribunal has to be found within the four corners of the statutes, we have to see whether the pendency of the appeal at the instance of the payer of the amount would stand in the way of this application at the instance of the payee in respect of the same payment being admitted to ruling.

14. What learned counsel for the applicant strenuously attempted was to hang the whole case of disallowance of deduction, on the peg of section 195 of the Act and the invocation of section 40(a)(i) of the Act. With respect, we are not in a position to accept his contention that if a proceeding under section 195 of the Act does not stand in the way of an application for advance ruling being entertained, an order of assessment passed on the failure to make a deduction under section 195 of the Act cannot also stand in the way of entertaining the application, even if it is part of an order of regular assessment. In the regular assessment against the payer, it was open to the payer to contend that the amount it pays to the applicant herein was not taxable under the Income-tax Act or the DTAA in this country and consequently, the payer had no obligation to make a deduction under section 195 of the Act and hence no disallowance in terms of section 40(a)(i) of the Act could be made. That means, in the assessments, whether the amount paid by the payer to the payee is taxable in India, is directly and substantially in issue before the Assessing Officer and now before the Appellate Authority. It is not disputed that once the Assessing Officer finds that the amount is not taxable in India either under the Act or under the DTAA, there would be no obligation on the payer to make a deduction in terms of section195 of the Act. As observed in the Microsoft ruling earlier referred to, tax withholding issue can only be determined by recording a finding on the liability to pay income-tax in India in respect of the income derived. If the payer had not raised that question directly,

we can only say that he might and ought to have raised that question while asserting his claim in respect of the amount paid to the payee. What the payee seeks from this Tribunal is also a ruling on the question whether the amount received by it from the payer is taxable in this country. This according to us means that the question raised in this application is already pending before an Appellate Authority, though not at the instance of the applicant before us, but at the instance of a person who is immediately concerned with this payment, the other party to the contract under which the amount is paid to the applicant before us and what is involved is the nature of the payment in terms of the Income-tax Act. We are, therefore, satisfied that clause (i) of the proviso to section 245R(2) of the Act is attracted to the case on hand and it would be appropriate for us to decline jurisdiction to entertain this application, of course, without prejudice to the rights, if any, of the applicant to initiate appropriate proceedings to vindicate its claim.

For the reasons stated above, we reject this application.

(V.K.Shridhar)
Member

(P.K.Balasubramanyan)
Chairman