BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)

NEW DELHI

14th Day of November, 2011

A.A.R. No.866 of 2010

PRESENT

Justice Mr. P.K.Balasubramanyan (Chairman)

Mr. V.K. Shridhar (Member)

Name & address of the applicant	Ardex Investments Mauritius Ltd., PricewaterhouseCoopers Pvt. Ltd. Pwc House, Plot 18/A, Guru Nanak Road (Station Road) Bandra (West), Mumbai – 400 050
Present for the applicant	Mr. Kanchun .Kaushal, FCA Mr. Raju Vakharia,FCA Mr. Amit G.Jain, FCA Mr. Ravi Sharma, Advocate
Present for the Department	Mr. Shishir Srivastava, Addl.DIT Mr. Satya Pal Kumar, DDIT

RULING

This is an application under section 245Q(1) of the Income-tax Act by the applicant, a company incorporated under the law of Mauritius. It was formerly known as Norcros Investments (Mauritius) and the name was changed subsequently into the present one, the change of name being recognized by the registrar of companies on 13.9.2004. The applicant is a non-resident under the provisions of the Income-tax Act and is a tax resident of Mauritius as contemplated by Article 4 of the India – Mauritius Tax Treaty. The applicant held equity shares constituting 50% of the equity share capital of Ardex Endura (India) Pvt. Ltd. Ardex India is an Indian company engaged in the business of manufacturing flooring adhesives. The applicant held 6,500,000 equity shares in Ardex Endura India and the amount of investment was Rs.65,000,000. The applicant proposes to sell its entire stake constituting 50% of the equity share capital of Ardex India, to another non-resident group company known as Ardex Beteiligungs – GmbH Germany at fair market value prevailing at the time of the proposed sale. The applicant wanted an advance ruling on the following questions.

1. "Whether on the stated facts and in law, the capital gains on the proposed sale of shares of Ardex Endura (India) Pvt. Limited by the Applicant to Ardex Beteiligungs-GmbH would be chargeable to Income-tax in India in the hands of the Applicant, having regard to the provisions of paragraph 4 of Article 13 of the India-Mauritius Tax Treaty?"

2. "Whether on the stated facts and in law, the Applicant would be entitled to receive the sale proceeds of shares of Ardex Endura (India) Pvt. Ltd., without deduction of income-tax at source?"

3. "Whether on the stated facts and in law, the Applicant would be required to file a return of income in India in respect of the proposed transfer of shares of Ardex Endura (India) Pvt. Ltd.?"

After the application was allowed under section 245R(2) of the Act, a report was forwarded by the Revenue to this Authority. In that report, the Revenue pointed out that on a perusal of the details, it is noticed that the applicant is a wholly owned subsidiary of Ardex Holdings U.K. Ltd. There was no income of any type for the year or the immediate previous year for the applicant company. The only asset was the investment in Indian company. *Prima-facie* it appeared that the sole purpose for which the applicant company was brought into existence was to hold the shares of the Indian company on behalf of the parent company, Ardex Holdings UK Ltd. The source of all the funds of the applicant was the holding company. It was further put forward that the decision for selling the shares of the Indian company held by the applicant, was taken by the holding company. The applicant as a subsidiary, was expected to follow that decision in full. Reason for the creation of the applicant was that the holding company wanted to take advantage of the Indo-Mauritius Treaty offering exemption to capital gains arising from the proposed transfer. The applicant was created as an entity for this very purpose. In the circumstances, the veil had to be pierced. On so piercing the veil, it was clear that it was Ardex UK that had invested funds in the purchase of the shares and hence the gain on the transfer of shares in question accrued to Ardex UK and was governed by the India-United Kingdom Treaty. Under Article 14 of that Treaty, the capital gain was to be taxed under the provisions of the domestic law.

In its response to the above, the applicant submitted that the applicant was created by Norcros (Holdings) Ltd., a company incorporated in the UK in the year 1998 and it was then known as Norcros Investments (Mauritius) Ltd. The company made

substantial investments in an Indian company, BAL Building Adhesives India Pvt. Ltd., now known as Ardex Endura (India) Pvt. Ltd. which is in the business of manufacturing and marketing of tile adhesives, grouts, flooring waterproofing and allied products. At that stage, the Ardex group was not involved. Hence the allegation that the applicant company was created by Ardex group was not correct and justified. Ardex group was in the business of manufacturing of construction material. In November, 2001, with a view to expand its business, a business decision was taken to acquire Norcros Investments (Mauritius) Ltd., the applicant company, which enabled the Ardex group to acquire the business of the products allied to construction materials. Ardex Holdings UK Ltd., never created the applicant company. The decision to transfer the shares held by the applicant company to the German Group company was taken by the Board of Directors of the applicant company. The allegation to the contrary was not correct. It was the applicant company that had made the investment in Ardex Endura (India) Pvt. Ltd and the investment was not made by the holding company. The applicant owns the shares of Ardex Endura (India) Pvt. Ltd., the applicant is the share holder therein. This was evident from the share certificates being produced. Investment in India was made legally and following the relevant procedure. The subsidiary was a separate legal entity and the beneficial ownership of the shares also vested in the subsidiary. There was therefore no justification in piercing the veil as contended by the Revenue. The tax treaty that had to be applied was the one between India and Mauritius and not the one between India and the United Kingdom. The capital gains that may arise in the hands of the applicant on the proposed sale of shares of Ardex Endura (India) to the German company was not chargeable to tax in India in view of Article 14.4. of the India-Mauritius Tax Treaty.

It is thus seen that the main stand of the Revenue is that the applicant or its predecessor in Mauritius, was simply created as a facade to made investment in India by a company in the UK and this was with the obvious intention of avoiding the liability to be taxed under the India United Kingdom Treaty and to take advantage of the India Mauritius Treaty. The funds for purchase having proceeded from the principal in the UK, the beneficial ownership of the shares vested with the company in the UK and that the shares are sought to be sold to a subsidiary in Germany, by the principal in UK and that the treaty that governed was the one between India and the UK.

On behalf of the applicant, it is contended that the applicant was a tax resident of Mauritius and the Tax Residency Certificate produced in this behalf has to be accepted view of the decision in Azadi Bachao Andolan (263 ITR 706). The applicant, a company incorporated in Mauritius, was dealing with the shares it held in an Indian company and selling them to another company in Germany. Article 13 of the Treaty between India and Mauritius applied. According to paragraph 4 of the treaty, the capital gains derived by a resident of Mauritius from the alienation of shares would be taxable only in Mauritius and not in India in the absence of the applicant having a Permanent Establishment in India. The applicant had no place of business or an activity in India. Therefore, the gains that may arise to the applicant, was liable to be taxed in Mauritius and not in India. The ruling in E-trade Mauritius Ltd. (324 ITR 1) rendered by this authority is relied on.

It is true that the funds for acquisition of shares in the Indian company was provided by the principal, a company incorporated in the United Kingdom. The shares in the Indian company were first acquired in the year 2000. Subsequently further shares were acquired in the years 2001, 2002 & 2009. These shares are sought to be transferred by the applicant company to another subsidiary of the group, incorporated in

Germany. It is not clear how far the theory of beneficial ownership could be invoked to come to a conclusion that the holder of the shares in the Indian company in this case would be the company in UK. The first shares were purchased almost 10 years before the application and the shareholding was steadily increased. This is not an arrangement come to all of a sudden. May be, the formation of this subsidiary in Mauritius was with an eye on the India-Mauritius Treaty. At worst it might be an attempt to take an advantage of a Treaty. But, that by itself cannot be viewed or characterized as objectionable treaty-shopping. Based on that theory, canvassed for by the Revenue, it would be difficult to come to the conclusion that the proposed transaction would be governed by the India-UK Treaty. The decision in Azadi Bachao Andolan has even gone to the extent of holding that treaty-shopping itself is not taboo. This decision would stand in the way of our further probing the question. We may incidentally, notice that the decision in McDowell (154 ITR 148) did not deal with treaty shopping and the only guidance is provided by the decision in Azadi Bachao Andolan. It is true that this authority may have a little leeway in considering the question whether the transaction is designed for the avoidance of income-tax. But then, the transaction concerned would be the proposed transaction of sale of shares by the applicant to the German entity. We may be in a position to take note of the steps taken to bring about the present transaction to ascertain whether there was a scheme devised for avoidance of tax. But in a case of this nature, where the shares were held for a considerable length of time, before they are sought to be sold by way of a regular commercial transaction, it may not be possible to go into an enquiry on who made the original investment for the acquisition of the shares and the consequences arising there from. As we have stated, the contention of the Revenue is that it would be the treaty between the India and the UK that would apply and not the treaty between India and Mauritius in view of the beneficial ownership of the shares vesting in the company in the UK. At worst it could be said to

be the case of the treaty shopping. Even then, in the light of the decision of the Supreme Court in Azadi Bachao Andolan, no further enquiry on the question is warranted or justified. We may also notice that this is not a case of so called gift or transfer without consideration of shares that is contemplated, but a sale at market rate.

We, therefore, rule on Question No.1 that the capital gains on the proposed sale of shares by the applicant to Ardex Beteligungs-GmbH is not chargeable to tax on capital gains in India in view of Article 13.4 of the India-Mauritius Tax Treaty. On question No.2 we rule that the applicant would be entitled to receive the sale proceeds without the deduction of tax at source.

Question no. 3 relates to whether the applicant would be required to file a return of income in India in respect of the proposed transfer of shares of Ardex Endura (India) Pvt. Ltd. Since the shares to be transferred are the shares of an Indian company which would otherwise have been taxable under the provisions of the Income-tax Act, we rule that the applicant is bound to file a return of income in India in respect of the income from the proposed transfer of the shares. We may notice that at the hearing the applicant relied on the ruling in Vanenburg Group BV (218 ITR 464) in support of the contention that filing of a return was not called for. But in the light of the view taken by us in VNU International BV, AAR 871of 2010, and subsequent rulings, which we prefer to follow, we rule that the applicant is bound to file a return of income on the proposed transaction.

Sd/-
(V.K. Shridhar)
Member

Sd/-
(P.K. Balasubramanyan)
Chairman

F. No. AAR/866/2010 **Dated: 14.11.2011**

This copy is certified to be a true copy of the Ruling and is sent to:

1. The applicant.
2. The Director of Income-tax (International Taxation), Mumbai
3. The Joint Secretary, (FT&TR-I/II), CBDT, New Delhi.
4. The Guard File.

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

(V.K.Shridhar) **(P.K.Balasubramanyan)**

Member **Chairman**