

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

11th Day of January, 2016

A.A.R. No 1123 of 2011

PRESENT

**Justice Mr V.S. Sirpurkar, Chairman
Mr. A.K. Tewary, Member (Revenue)
Mr. R.S. Shukla, Member (Law)**

Name & address of the applicant	Dow AgroSciences Agricultural Products Ltd. Suit 308. St.James Court St Denis Street, Port Louis Republic of Mauritius
Present for the applicant	Mr. Rajan Vora, SRBC & Assoc., CA Mr. Vijay Vaidya, SRBC & Asso.,CA
Present for the Department	Mrs. Sukhvinder Khanna, CIT-DR(AAR),ND Mr. S.S. Negi, JCIT, DR, AAR Mr. Sachin Dhanania, DCIT-DR(AAR), ND Mr. T. Roumuan Paite, Addl. CIT(IT) Mr. S.S.Iyengar, DCIT-IT(2)(1)(2)

RULING

(By Sirpurkar J)

Dow AgroSciences Agricultural Products Limited (hereinafter referred to as 'the Applicant'), is a company incorporated in Mauritius and having its registered office at Suite 308, St.James Court, St Denis Street, Port Louis, Republic of Mauritius and is a tax resident of Mauritius. The Applicant is a part of Dow group of companies (together, hereinafter referred to as 'Dow Group' or

'Group'). A copy of the Certificate issued by the Registrar of Companies in Mauritius and the Tax Residency Certificate of the Applicant has been enclosed as **Attachment 1 and Attachment 2** respectively.

2. Dow Agrosociences India Private Limited (hereinafter referred to as 'DAS India'), a company incorporated in India having its registered office at Unit No.1, Corporate Park, V N Purav Marg, Chembur, Mumbai-400071, is a part of Dow Group and is engaged in manufacturing and trading of pesticides and insecticides.

3. The Applicant had acquired 61,836,990 shares of Rs 10 each in DAS India for an amount of INR 618,369,900 as under:

Sr No	Date of acquisition	Cost of acquisition
1	6 September 1995	15,000,000
2	3 March 1997	134,999,100
3	October 1997	6,124,500
4	18 May 2001	312,247,200
5	27 January 2005	149,999,100
	TOTAL	618,369,900

The balance 200 shares of Rs 10 each have been acquired by DAS Agricultural Investment Holding Company Ltd. for an amount of INR 2,000.

4. It is further, pleaded that the applicant proposes to transfer these shares in favour of a Dow Group Entity Singapore and thus the Group entity Singapore hereinafter called SDA Singapore would be a transferee company.

5. This transfer is pleaded with an objective of the group re-organization. It is pleaded:

i) Dow Group is a large and complex group having presence in several countries across the world. In order to reduce complexities, improve efficiency and reduce costs in group companies worldwide, Dow Group is transforming its holding model. The group reorganization will change the business model of the group giving the capability to support more diverse, growing business that is also expected to be more profitable in the long-term.

ii) Prior to 2010, Dow group was divided in the following 5 areas depending on its geographical locations:

- North America
- South America
- Europe
- Asia Pacific
- Dow India, Middle East and Africa ('Dow IMEA group)

iii) In the beginning of year 2010, the IMEA group was dismantled and countries in IMEA group were realigned to other regions as per geographical convenience. The Asia Pacific region now consists of countries like India, China and other South East Asian countries. The Europe region, *inter alia*, consists of Mauritius, United Kingdom, Germany and other European countries.

iv) In order to achieve objective of operational excellence and administrative convenience, it became necessary for the Dow group to re-align the holding model of DAS India.

v) It is contemplated that the holding company of DAS India would be shifted from an entity which falls under the Europe region to an entity which falls in the Asia Pacific region, with a view to achieve better control. Singapore is one of the upcoming countries in the Asia Pacific region. Keeping in view the above facts,

Dow group is contemplating to shift the shareholding of DAS India from Mauritius to Singapore.

vi) The Group believes that such re-alignment would help the Group to focus on customer service including support for new product launches, strong compliance culture, commitment to health, safety and the environment, and commitment to developing people that deliver strong results for the Group even as the external environment has become more demanding.

6. It is then claimed in the application:

i) Dow group proposes to achieve the above objective through its entity in Singapore i.e. DAS Singapore. DAS Singapore will be a 100% subsidiary of DAS Mauritius.

ii) DAS Mauritius proposes to contribute shares held in Dow India as its capital in DAS Singapore. By virtue of this, DAS India would become 100% subsidiary of DAS Singapore.

iii) In view of above, the Applicant proposes to transfer the shareholding (i.e. 61,836,990 shares) of DAS India to DAS Singapore by way of contribution.

iv) The value of DAS Singapore's shares recorded in the books of DAS Mauritius would be considered as the sales consideration for transfer of shares of DAS India.

v). The cost at which DAS Mauritius has obtained the shares of DAS India would be the cost of acquisition.

vi). The Applicant also wishes to state that it does not have an office, or employee or agents in India and hence no permanent establishment in

India as per Article 5 of the India Mauritius Double Taxation Avoidance Agreement.

7. It is reiterated by the applicant that it is not required to maintain any books of accounts in India as prescribed in Section 211 of the Companies Act, 1956 and further it is not required to comply with the propositions of Section 594 of the Companies Act, 1956 relating to companies incorporated outside India provisions and establishing of places of business in India. On this background following 6 questions are proposed by the applicant:-

(1) Whether on the facts and circumstances of the case, the investment held by the Applicant in equity shares of Dow Agrosciences India Private Limited (hereinafter referred to as 'DAS India') would be considered as 'capital asset' under section 2(14) of the Act?

(2) Based on the facts and circumstances of the case, whether capital gains arising from the proposed transfer of shares of DAS India by the Applicant to DAS Singapore (a company proposed to be incorporated in Singapore), would be subject to tax in India?

(3) Based on the facts and circumstances of the case, if the answer to Question 1 is in the negative, whether the gains arising to the Applicant from the proposed transfer of equity shares of DAS India will be taxable in India in the absence of a Permanent Establishment of the Applicant in India and in light of the provisions of Article 7 read with Article 5 of the

India Mauritius Double Taxation Avoidance Agreement (hereinafter referred to as 'India Mauritius DTAA')?

(4) If the answer to Question 2 is negative, whether the Applicant would be liable to pay minimum alternate tax under the provisions of section 115JB of the Act?

(5) Based on the facts and circumstances of the case, if the proposed transfer of shares by the Applicant to DAS Singapore is not taxable, whether the provisions of section 92 to section 92F of the Act relating to transfer pricing would still be applicable?

(6) Based on the facts and circumstances of the case, if the proposed transfer of shares by the Applicant to Dow Singapore is not taxable, whether the sale consideration receivable by the Applicant should suffer any withholding tax as per section 195 of the Act?

(7) Based on the facts and circumstances of the case, if the proposed transfer of shares of DAS India is not taxable in India, whether the Applicant is required to file any return of income under section 139 of the Act?

8. Shortly stated the case of the applicant is that it is a non-resident Indian as it is not covered under the provisions of section 6(3) of the Income-tax Act, 1961. The applicant also relies on Section 226 and contends that it is not covered under any of the provisions thereof nor is it a company formed and registered as

per the provisions of Indian Companies Act. It is more particularly pleaded that the applicant is not covered under clauses (i), (ia), (ib) (ii) and (iii). It is, therefore, claimed on the basis of the certificates issued by the Mauritian authorities that the applicant is neither an Indian Company nor the control and management of its affairs is situated in India and as such its status is that of a non-resident for the purposes of the Income-tax Act, 1961.

9. The application contains the stand of the applicant on each question. As regards the first question, the applicant pleads that its investment in Dow Agrosciences India i.e. DAS India as a capital asset. In support of this proposition, the applicant relies on Instruction No. 181-1-89-IT (AI) dated 31.8.1989 or Instruction No.1827 and Supplementary Circular No.4/2007 dated 15.6.2007 issued by Central Board of Direct Taxes (CBDT). It is reiterated that considering the accounting test and intention test as also quantum test and further relying on G.Venkata Swami Naidu and Company vs. CIT [1959] (35 ITR 594)(SC) as also Raja Bahadur Kamakhya Narain Singh vs. CIT [1970] (77 ITR 253) (SC) as also the Ruling of this Authority in Praxair Pacific Ltd. AAR 855 of 2009. The equity shares held by it in DAS India should be considered as capital asset and not stock in trade.

10. As regards the 2nd question it is suggested that capital gains earned by the applicant would not be liable to tax in India by virtue of Article 34 of India-Mauritius DTAA read with section 90(2) of the Act since the assessee is a tax resident of Mauritius. In its submissions, the applicant has referred to the

provisions of section 9(1)(i), as also the provisions of DTAA between India and Mauritius and more particularly Article 13(4). It is also pointed out on the basis of reported decisions in :

(1) UOI vs. Azadi Bachao Andolan 2003 263 ITR 706 (SC)

(2) CIT vs. Paul Kulangal Chettiyar 2004 267 ITR 654 (SC)

as also the 2 other decisions by Hon'ble Andhra Pradesh High Court and Kolkata High Court that where the provisions of DTAA are more beneficial the applicant could be able to avail of the same. The applicant also pleads that the CBDT Circulars are binding on the Revenue Authorities and as per the case law referred to above and some other decisions by the Delhi ITAT, there would be no liability for the capital gains.

11. As regards the 4th question it is reiterated that section 115JB will not be applicable to the applicant.

12. As regards the 5th Question it is reiterated that there is no application of transfer pricing provisions namely sections 90(2) to section 90(2)(F).

13. As regards the last question, it is reiterated on the basis of some earlier rulings by this Authority that there shall be no liability of withholding tax under section 195.

14. Revenue has filed in all three reports in opposition to the application. This matter was admitted for final hearing by an Order dated 16.8.2012. In fact, the

Revenue has opposed the admission of this matter raising some objections under section 245R(2) of the Income-tax Act, 1961(hereinafter referred as 'Act'). However, those objections were ignored. However, it was mentioned in the Order dated 16.8.2012 that the question regarding a scheme for avoidance of payment of tax in India, as raised by the Revenue could be considered at the time of final hearing. Thereafter, the department has come out with 2 reports, firstly, the report dated 31.7.2015 and secondly the report dated 23.8.2015. The basic stand of the department appears to be more pronounced in its report dated 23.8.2015. In this reply again an effort seems to have been made to show that the applicant is a shell company in Mauritius though that contention was refuted in the Order passed by this Authority on 5th August, 2015. Some details have been supplied by the Revenue in para 5 of this reply dated 23.8.2015 wherein the factor of longevity of the applicant appears to be an admitted position. Reliance has been placed on the earlier decision of this Authority in M/s. WCT Mauritius, which decision is reported to be in challenge before the High Court. Be that as it may, we are not at all convinced that this company which has been operating for more than 10 years in Mauritius can be said to be a shell company.

15. It is then contended by the Revenue that nothing has been brought on record to suggest in support of the applicant's plea that it does not have a PE in India. It is contended that some information was sought from the applicant vide letter dated 31.8.2015. This is obviously a mistake as the report is dated 23.8.2015.

16. The Revenue then pleads about there has been a scheme to avoid the payment of income-tax in India. A reference then is made to the observations of the Hon'ble Supreme Court in Azadi Bachao Andolan case and Vodafone International Holdings BV case. It is again reiterated that the whole scheme of the transfer of shares in favour of Singapore, amounted to a scheme to avoid payment of taxes. We are not in agreement with the contention of Revenue. Firstly, because the first transaction of the shares was on 6th September,1995, the 2nd was on 3rd March, 1997 and 3rd was in October, 1997, 4th was on 18th May, 2001 and 5th on 27 January, 2005, the following chart will highlight the situation:-

Sr No	Date of acquisition	Cost of acquisition
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17. This is a transaction which began almost 20 years back, could not have been a scheme to avoid the payment of taxes. The shares were acquired 20 years or as the case may be 18 years, 14 years and 10 years back. For a substantial cost of about Rs.61 crores and if they are sought to be now transferred to a Singapore concern which is the own subsidiary of the applicant, it cannot amount to a design or a scheme to avoid payment of taxes in India. The applicant has relied on the details of the promoters of DAS India in their reply dated 28.9.2015. It is seen that DAS India was incorporated on 7th December,

1994. The investment made in the DAS India was with the prior approval of Department of Industrial Policy & Promotion (DIPP). The subsequent investment also were with the approval of RBI and hence it cannot be said the shares were acquired with a view to sell in future through the Mauritian company and thus to avoid the taxes on possible capital gains. We, therefore, reject the contention of the Revenue that this amounted to a scheme to avoid payment of taxes in India and hold accordingly.

18. As regards the contention raised by the Revenue that the applicant has a PE in India, the applicant has produced a Tax Residency Certificate and also a declaration in the AAR application itself that it has no PE. Nothing has been brought by the Revenue that there is a PE in India. We therefore, do not hold that the applicant has a PE in India in the absence of any inputs which could have been provided by the Revenue.

19. In this behalf we accept the reiteration by the applicant that the applicant does not have an office or employees or agents in India and has also made declaration to this effect. The applicant has also reiterated that unless it has a PE in India, profits arising to applicant from the sale of equity shares of DAS India would not be liable to tax in India particularly because of DTAA between India and Mauritius. It is further reiterated by the applicant that DAS LLC is assessed in India and the fact that DAS LLC does not have a PE in India, is accepted by the department for last several years. According to the applicant the last

assessment of DAS LLC was for assessment year 2011-12 and no issue about its being a PE in India was raised during the assessment proceedings.

20. We have also taken into consideration the fact that Dow IMEA Group was dismantled in 2010 and that is how the need for realignment of the group arose whereby DAS entity was to be shifted from an entity which falls under Europe region to an entity which would fall in the Asia-Pacific region. This was to be done with a view to achieve better control. Singapore is one of the upcoming countries in Asia-Pacific region in the opinion of the applicant and therefore, the Dow group contemplated to shift the share holding of DAS India from Mauritius to Singapore. All this exercise is also more than 5 years old from the date of the last acquisition of the shares. Thus, it cannot be said that the proposed transfer of shares was amounting to a scheme to avoid payment of taxes in India. It was clearly for the business considerations. We, therefore, reject the contention of the Revenue that this amounting to a scheme to avoid payment of taxes in India. We, therefore, accept the contention raised by the applicant about its not having a PE in India.

21. Department has raised as many as 8 contentions in support of their contention:-

- l) “huge royalty payment for technical license procured from the group”

- II) “huge service charges being paid in lieu of service agreement to DAS US and it’s subsidiaries”
- III) “DAS INDIA is more of a trading company (for product of DAS, USA). In FY 09-10 it’s trading purchases were Rs.111.5 crore against total purchases of 251.7 crore of finished goods/products of DAS USA.”
- IV) DAS INDIA purchases, both raw material as well as intermediates is basically from DAS, USA or its subsidiary for manufacturing finished product.
- V) Exports is basically on the behest of DAS, USA thus

DAS India is acting as *export hub* of DAS, USA (also highlighted by WEB of DAS USA)
- VI) None of the Director is appointed by Mauritian entity.
- VII) Employee Stock Option has been offered by DAS, USA to the employee of DAS, India implicitly treating them as its own employees.
- VIII) The transfer study suggest that control and guidance of the Indian operations are with DAS, USA and Indian entity is selling basically the end-products as registered, branded and marketed by DAS, USA. It is a fact that the product mix is completely USA based and

there is no Research and Development activity in Indian entity or by Mauritius entity.

22. In our opinion all these contentions are irrelevant to the question of the applicant having a PE in India. Even during the oral arguments no serious arguments were addressed on this question by the department and pleaded on that basis that DAS India is fit to be treated as a subsidiary/fixed place/agency amounting to PE of DAS USA. We are afraid how would this be a PE of the applicant which is a tax resident of Mauritius and has been there for about 20 years. The learned representative of the applicant pointed out that the investment by applicant in DAS India was accepted by the Indian authorities which are clear from the certificate issued in its favour. The learned representative also pointed out that the applicant carried no activity in India. It is also pointed out that in their earlier replies to the departmental objections, it was pointed out that the applicant did not have a office or employees or agents in India and therefore, there was no question of there being a PE in India particularly because of the 8 submissions made. We do not see as to how the 8 submissions which we have pointed out above would create a PE of the applicant a Mauritian company. Even if all the 8 points are taken together, there is no scope to hold that the DAS India would amount to PE of the applicant. A strange contention is raised that the capital gain is arising to a USA based DAS USA and not to a Mauritian applicant. We are unable to agree with this contention. It is then submitted by the Revenue that Article 13(2) of the Treaty would come into effect if the applicant is held to have a

PE. That may be true but once a finding is given that there could be no PE there would be no question of Article 13(2) of the Treaty being attracted.

23. In their report dated 23.8.2015, the Revenue is again reiterating that this was nothing but a scheme to avoid the payment of tax. We have already held that in the factual circumstances of the investment having been commenced about 20 years back and completed about 10 years back and the business consideration for reorganization of the group, such finding cannot be given. The applicant has heavily relied on the reported decision in Vodafone International Holdings BV (341 ITR 1)(SC) wherein it is held that setting up of wholly owned subsidiary in Mauritius by principle/genuine substantial long term FDI in India from/through Mauritius, pursuant to DTAA and Circular 789 can never be considered to be set up for tax evasion.

24. The applicant has also relied upon the quoted decision of Azadi Bachao Andolan [2003] 263 ITR 706 wherein the Hon'ble Supreme Court declared that treaty shopping is not taboo. The applicant has also relied on the decision of AAR in E*Trade Mauritius Limited (324 ITR 1) – page number 344 to 369 which also reiterates the principles of treaty shopping. The other decisions relied upon by the applicant are M/s. Sanofi Pasteur Holding SA (354 ITR 316), Castleton Investment Ltd. (AAR No.999 of 2010) (252 CTR 131), Deere & Co.(337 ITR 277), Ardex Investments Mauritius Limited (AAR) (340 ITR 272), Armstrong World Industries Mauritius Multiconsult Limited (AAR) (349 ITR 303). In Ardex Investments Mauritius Limited it is clearly mentioned that mere investment

through a Mauritian company cannot be viewed or characterized as objectionable treaty shopping, when investments have been held for a period 10 years and the arrangement has not come all of a sudden. If setting-up Mauritius Company is with an eye on the DTAA, it by itself will not make it a tax avoidance arrangement.

25. We do not accept the contention of the department that DAS India has not declared and distributed dividends since 2004 and therefore, to the extent of accumulated profits, sale proceeds should have to be assessed in India. We ignore this contention as it is not relevant. Considering the other factors like investment function made 20 years back etc., we are of the clear opinion that there is no scheme for the tax avoidance. We also do not accept the contention of the Revenue that it is a colorable device.

26. In their report dated 23.8.2015, the department have accepted that shares held by the investment company are of the actual holding parent company. The department has however, taken an exception in case of the present application on the ground that the applicant has no substantive real and independent identity not even restricted one either at the time of investment or during proposed disposal. If the department submits that it is parent company which could be considered owner of the capital asset being the shares or the business unit i.e. B.E. It is, therefore, pleaded that in this situation, capital gain will be computed in the hand of DAS USA. It is the alternate submission that in case it is submitted that DAS Mauritius, the applicant herein earn capital gains by sale of shares then

the gain related to accumulated profit should be treated as dividend under the Income-tax Act, 1961 and India-Mauritius DTAA and applicant should be directed to pay the tax under this provision. In our opinion this stand of the department has no basis. There can be no dispute about the fact that the shares by the applicant company remained for good long 10 to 20 years and there was no trading of the shares by the applicant. The applicant has pointed out in the application as well as during the arguments that the equity shares held by the applicant in India are held as investment and therefore, should be classified as capital asset. The applicant has also relied on the instructions issued by CBDT No.181-1-89-IT(AI) dated 31.8.1989 and Supplementary Circular No.2/2007 dated 15th June, 2007. Relying on the tests in these Circulars for distinguishing shares held as stock in shares and those held as investments, the applicant has contended that applying the key tests (1) accounting test, (2) intention test and (3) quantum test the shares held in DAS India would be clearly in the nature of the capital asset. The applicant has relied on G.Venkata Swamy Naidu and Company vs. CIT 1959 35 ITR 594 where the Hon'ble Supreme Court has declared the law on the nature of the assets. The applicant has also relied on Raja Bahadur Kamakhya Narain Singh vs. CIT [1970] (77 ITR 253) (SC) as also the law declared by this Authority in Praxair Pacific Ltd. AAR No.855 of 2009. In their application and during the debate the applicant has pointed out that these shares could not be held to be stock in trade. It is pointed out that in so far the intention test is concerned, the objection was not to trade the shares which the applicant had in DAS India. It is also pointed out that the acquisition is from 1994

and obviously the intention was to hold these shares as investment. It is also pointed out that there have been no transaction in relation to the sale of these shares and the proposed transaction is the only transaction. Considering the whole long subject, we are of the opinion that these shares have to be held as capital asset. This takes us to the 2nd question.

27. As regards this question, the Revenue had firstly claimed in its report dated 24.5.2013 that in case the shares in DAS India are found to be business assets, then the gains shall be characterized as business income. Now this contention is completely incorrect. In view of our finding that the shares in DAS India held by the applicant have to be treated as capital asset as defined under Section 2(14) of the Act. These shares therefore cannot be treated as a business income. We have given reasons for holding as to why the said shares should be held as capital assets, while answering the question No.1, taking into consideration the 3 tests which we have referred to in the earlier paragraphs.

28. The further contention again raised by the Revenue in the Report dated 24.5.2013 that if these shares are not found to be business assets, then the gains from the sale thereof should be treated as capital gains. In answer to this the applicant submits that ordinarily the transfer of these shares would be taxable in India as per the provisions of Section 45. However, the applicant pleads and said by way of defence Article 13 of the Indo-Mauritius DTAA which deals with the taxation of capital gains arising to the resident of contracting state. The said Article is as follows:-

“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 other 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 Contracting 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.
5. For the purposes of this article, the term “alienation” means the sale, exchange, transfer, or relinquishment of the property or the

extinguishment of any right therein or the compulsory acquisition thereof under any law in force in the respective Contracting States.”

29. A glance at the provision of Article 13 would suggest that clause 1 and 3 are not applicable in the present case. Considering the nature of the assets (equity shares in an Indian Company) being transferred, even clause 2 will not be applicable for the simple reason that the applicant does not have a PE in India. There is no material on record brought forth by the Revenue that the applicant has a PE in India. It was haltingly suggested that the presence of DAS India itself should be taken to be PE. We do not think that such a broad proposition can be pressed in service for the finding that the applicant has PE in India. No material has been brought before us to that effect.

30. All that the department raised in its report dated 23.8.2015 was that DAS India and the 2nd generation wholly owned subsidiary is fit to be treated as a subsidiary/fixed place/ agency of DAS USA. The department has tried to plead before us that the capital gain in this transfer is arising to USA based DAS USA and not to Mauritian applicant and in case the Mauritian applicant is treated as a transferor then the transfer of capital asset fall under Article 13(2) of the Indo-Mauritius DTAA. We do not think that it is possible for us to accept the broad proposition that the applicant has a PE. The applicant has already pointed out that the applicant company is 100% subsidiary of the parent company and DAS Singapore has been incorporated 100% subsidiary of the appellant and this has been done to achieve the objective of proposed restructuring. The applicant proposes to contribute shares in DAS India as its capital in DAS Singapore.

However, the shares of DAS India are held by the applicant and after the proposed transfer they will be held by DAS Singapore in its own capacity and as a representative of DAS LLC. The applicant, therefore, plead that DAS LLC cannot be regarded as a beneficiary of transfer of shares.

31. However, we are of the clear opinion that there is no material before us to hold that the applicant has a PE in India and therefore, the income arising out of the transfer of shares should be treated as business income. We are unable to accept the claim of the Revenue regarding the PE. Once that objection is rejected, then the only relevant clause which remains for our consideration is Article 13(4) which is clear in itself.

32. We must point out here that we have taken a view that such company which is a Mauritian company would be fully entitled to the benefit of Article 13(4) in our Ruling dated 10.10.2015 in AAR No.995 of 2010 in the case of JSH Mauritius Ltd. The factual circumstances were almost extremely similar if not identical. There also it was a Mauritian company which was gaining by the transfer of shares of the Indian company. We have discussed in paragraphs 22 to 24 of that Ruling and we rely on the same for the purposes of this Ruling also and hold that there would be no question of any taxation of Indian Law on the capital gains arising from the proposed transfer of shares of DAS India by the applicant to the DAS Singapore.

33. In view of our answer to Question No.1 it will not be necessary for us to consider question No.3. However, we make it clear that we have already given the finding that there is no PE of the applicant in India. We accordingly hold that

in view of our answers to the question No. 1: There would be no necessity to go into this question. We have already recorded a finding on the PE that the applicant does not have any office, employees or agents in India nor does it have a permanent place from where it operates from India. These assertions of the fact have not been traversed by the Revenue even at the cost of repetition that there is no material before us to hold that the applicant has any PE in India. In that view even if the gains that the applicant makes from the proposed transfer are treated as business income, even then there will be no question of taxation on those gains.

34. This brings us to Question No. 4, which is regarding the application of Section 115JB of the Act. The said question had arisen even in the case of our earlier judgment of AAR 1123. The question of applicability of section 115JB had arisen earlier before this Authority in case of Castleton Investment Ltd. AAR No 999 of 2010. where this Authority had held that the sub-section applies to all the foreign companies/firms. However, that judgment was appealed against before the Hon'ble Supreme Court by way of Civil Appeal No.445 of 2013. The said appeal is stated to have been disposed of by the Hon'ble Apex Court by its Order dated 30.9.2015 in favour of the appellant therein on the basis of a statement made before the Hon'ble Court to the effect that government did not press to apply section 115JB to FII and FPIs for the period prior to 1.4.2015. It was pointed out that a Circular dated 2.9.2015 was issued by Govt. of India and the same was filed before the Hon'ble Supreme Court and a statement was made by the Attorney General for India that the said Circular would be followed. The said

Circular clearly mentions that the FIIs/FPIs having no PE/place of business in India would not be covered by section 115JB. In fact, a press release dated 24.9.2015 was also pressed in service. In the press release, it was clarified that with effect from 1.4.2015, the provisions of section 115JB would not be applicable to foreign company if the foreign company is a resident of a country having DTAA with India and such foreign company does not have a PE within the definition of the term in relevant DTAA or to the foreign company which is a resident of a country which does not have a DTAA with India and such foreign company is not required to seek registration under section 592 of the Companies Act, 1956 or section 380 of the Companies Act, 1956. It is clear that the present applicant is clearly covered as it is a company in Mauritius, which country has DTAA or as the case may be DTAC with India. Again we have already given a finding that the applicant does not have a PE in India. As such we answer this question in favour of the applicant holding that there will be no applicability of section 115JB to the applicant.

35. Question No.5 is about the applicability of the provisions of Section 92 to 92F which has not been addressed before us. However, it has to be borne in mind that unless the transaction is taxable in India, there would be no application of Sections 92 to 95. Section 92 is not an independent charging section and would be applicable only if there is any chargeable income arising from the international transaction. In the present case even though the proposed transfer of shares could result in income/capital gain from the international transaction since this income is not chargeable to tax in India in accordance with Article 13,

there will be no question of the applicability of section 92 to 92F. The applicant rightly relies on the 3 Rulings: Dana Corporation [2010] (227 CTR 441) (AAR), M/s. Praxair Pacific Limited (326 ITR 276) and Vanenburg Group B.V. vs. CIT (289 ITR 464). We answer the question accordingly.

36. This puts us to the question No. 6. The answer in view of our conclusion that the capital gains earned out of proposed transaction are not taxable there will be no question of the applicability of section 195 of the Act. As per the Ruling of the Hon'ble Supreme Court in Transmission Corporation of AP Ltd. vs. CIT 239 ITR 587. We answer the question accordingly.

37. This takes us to the last question about the requirement to file return of income under section 139 of the Act. In their report dated 23.8.2015, it is argued by the Revenue mainly relying upon the Ruling in Castelton Investment Ltd and more particularly paragraphs 31,32,33 & 34 of that Ruling, that the applicant would be liable to file return under section 139. In the decision of Castleton Investment Ltd. the view was taken that when any person claims the benefit of DTAC, that person is invoking section 90 sub-section (2) of the Act to do so. A view was, therefore, taken that a person earning the income that is chargeable to be taxed under the Act, had to claim by invoking 90(2) for getting the benefit of DTAC. It was, therefore, concluded by this Authority that even if a person is entitled to take relief under DTAC, he had to seek the same and that could be done only during the consideration of his return of income or at least or at best while filing his return. The Authority took the view that the obligation on the

applicant to file a return of income under section 139 of the Act cannot simply disappear merely because a person may be entitled to claim the benefit of DTAC. The applicant however, meets this argument by relying on the Rulings of this Authority in FactSet Research Systems Inc. reported in (317 ITR 169) and Vanenburg Group B.V. vs. CIT AAR No.727 of 2006. The applicant relied on the following paragraph in the last mentioned Ruling AAR No.727 of 2006:

“So far as filing of Income-tax return is concerned, it may be mentioned that the liability to pay tax is founded upon section 4 and 5 of the Act, which are the charging sections. Section 139 and other sections are merely machinery to determine the amount of tax. There would be no occasion to call machinery sections in aid where there is no liability at all. Reference to this connection may be made to Chatturam vs. CIT [1947] 15 ITR 302 (FC). We are, therefore, of the view that the applicant will not be required in this case to furnish any tax return.”

38. We must at this juncture point out that the law laid down in the judgments of Factset Research Systems Inc. and Vanenburg Group BV vs. CIT was not considered in the Castleton judgment so also the judgment of the Federal Court in Chatturam vs. CIT was also not considered in Castleton judgment, we, therefore respectfully disagree with the Castleton judgment in so far the applicability of section 139(1) of the Act to the present applicant and answer the question in negative. In their application itself, the applicants have quoted both

these decisions as also to Chaturam decision of Federal Court. In view of the binding precedent in Chaturam case, we answer the question in negative.

39. We have already answered various questions at the appropriate places in this judgment. The application is disposed of in the light of those answers.

Accordingly, the ruling is given and pronounced on this 11th day of January, 2016.

(A.K. Tewary)
Member (R)

(V.S. Sirpurkar)
Chairman

(R.S. Shukla)
Member (L)