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

7th Day of June, 2012

PRESENT

Mr Justice P.K. Balasubramanyan (Chairman)

A.A.R. No. 1061 of 2011

Name & address of the applicant	:	Aramex International Logistics Private Limited, C/o S.R. Batlioi & Co. Authorised Representative, Chartered Accountants, Nariman Point, Mumbai-400 021
Commissioner Concerned	:	Director of Income-tax (International Taxation) Mumbai
Present for the applicant	:	Mr. P.J. Pardiwala, Sr. Advocate Mr. Ravi Praksh, Advocate Mr. Abhinav Ashwin, Advocate Ms. Karina Haum
Present for the Department		Mr. Shishir Srivastava, Addl.DIT(IT)

R U L I N G

The applicant is a company incorporated in Singapore in the year 2009. It is a tax resident of Singapore. It is a part of Aramex group of companies.

2. Aramex International Limited incorporated in Burmeda has a fully owned subsidiary in India named Aramex India Pvt. Ltd. (AIPL). Aramex International Burmeda had a business arrangement with the Indian subsidiary and the transactions between those parties were subject matters of assessment under the Income-tax Act. After formation of the Singapore entity, the applicant, the operations in India are looked after

by the applicant. The applicant entered into an agreement dated 1.4.2010 with AIPL for carrying on the business arrangement originally conducted through Aramex International, Bermuda.

3. The Aramex group is in the business of door-to-door express shipments by air and land and performing related transport services. It has expertise, experience and personnel and technical information and know-how required for the business. As per the business arrangement and now under the agreement between the applicant and AIPL, AIPL has to look after the movement of packages within India both outbound and in-bound. The applicant has entered into the agreement for the movement of packages within and outside India. According to the applicant, in terms of the agreement the applicant is responsible for transportation of packages throughout the world outside India and AIPL is responsible for transportation of packages in India. In the application, the applicant has classified broadly the international express business of AIPL in the following manner:

> ***Outbound consignments***
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> *In respect of outbound consignments, AIPL picks up the consignments from the respective consignors in India and gets them delivered to a destination outside India. On such consignments reaching the overseas destination, the applicant arranges to get them cleared and delivers them to the ultimate consignee.*
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> ***Inbound consignments***
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> *In respect of inbound consignments, the applicant picks up consignments from the consignors in various foreign countries, whether by itself or through affiliates, and tenders them either to international airlines or on board couriers for transportation. On such consignments reaching India, AIPL acting as an independent contractor, takes necessary steps for delivery to the consignee.*

4. According to the applicant, it has appointed AIPL as a non-exclusive service provider with respect to the international express business into India and from India and similarly AIPL has appointed the applicant as a non-exclusive service provider with respect to such business as per the agreement dated 1.4.2010. The key features of the agreement are that the applicant appointed APIL as a non-exclusive service provider and APIL undertakes the international express business of the applicant. The applicant has to assist AIPL in the delivery of the packages outside India. Correspondingly, AIPL has to assist the applicant in the delivery of the packages in India. The contract is entered into by the parties on principal to principal basis. The applicant conducts its international express business of its own account outside India and AIPL conducts its international business of its own account in India. AIPL is entitled to use specific transport and logistical service providers outside the Aramex group upon a request by the customer. AIPL can at its own discretion and expense open offices in India. Neither the applicant nor AIPL is liable to each other for negligence, mis-representation or otherwise for loss of profits or revenues in business, anticipated savings so on. AIPL is not otherwise to act on behalf of the applicant. AIPL cannot legally bind the applicant. AIPL is not authorized to make any agreement, warranty, covenant or other representation, nor to create any obligation on behalf of the applicant. Likewise, the applicant is not authorized to act for and on behalf of AIPL

other than within the scope of the agreement. The applicant charges fees to AIPL in connection with invoicing and payment functions performed by it. The applicant wants to know whether on account of the activities conducted outside India in connection with the international express business and the fees paid to the applicant by AIPL in connection with the invoicing and payment functions, the payments are chargeable to tax in India. It may be noted that the questions asked are only in respect of the activities conducted outside India by the applicant and the payment received by the applicant from AIPL for carrying out the obligations outside India.

5. After hearing both sides this Authority allowed the application under section 245R(2) of the Act to give a ruling on the following questions:

1. *On the facts and circumstances of the case, amongst others, where the applicant has no office, equipment, employee or agent in India and no operations are carried out by the applicant in India, whether there exists (i) a permanent establishment (PE) of the applicant in India in connection with the international express business under the "agreement between the Government of Singapore and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income. ('the India-Singapore tax treaty)" or (ii) any other basis to attribute or allocate income taxable in India to the applicant?*

2. *In the case the answer to question (1) is in the affirmative, whether the receipts by the applicant from outbound and inbound consignments are attributable to the PE of the applicant in India?*

3. *Without prejudice to the answers to questions (1) and (2), if the transactions between the applicant and Aramex India Limited (AIPL) are on the arm's length basis, whether any income can still be attributed to a PE of the applicant in India?*

4. *In case it is held that the applicant has no PE in India, whether the fees received by the applicant for support functions of invoicing and payment performed by the applicant are in the nature of 'fees for technical services' under the India-Singapore tax treaty?*

5. *Based on the answers to question (1) to (4) above, would the receipts by the applicant from AIPL be subject to withholding tax under section 195 of the Income-tax Act, 1961 ('the Act')?*

6. While making that order, this Authority also reserved for consideration the question whether the transaction is designed for avoidance of tax in India, while considering the application under section 245R(4) of the Act.

7. According to the Revenue, the agreement put forward by the applicant is a mere camouflage and the questions now raised are really involved in the assessment proceedings which are already pending. Mere inclusion of some services in the agreement dated 1.4.2010 cannot hide the real picture. Aramex group is defined in the agreement as meaning, Aramex PJSC, a public joint stock company duly incorporated and in existence under the laws of United Arab Emirates (UAE). The business of the group is door-to-door delivery of express shipments by air and land and related transport services. India is one of the countries where such business is carried on by the Aramex group. The Indian side of the business is carried on through the Indian subsidiary AIPL. The income earned by the applicant through AIPL is the income from the business in India. As regards inbound activities, the group delivers the articles gathered world wide to the destination from where it is cleared by

AIPL and delivered to the addressees in various parts of India. As regards the outbound articles, AIPL collects the packages or consignments from various parties and delivers them at a destination for further transportation by the group entities for delivery to the addressees abroad. AIPL is in reality the permanent establishment of the Aramex group in India. All profits arising from the business in India through AIPL must be taxed in India on that basis. The structure adopted by the Aramex group is with the deliberate intention of trying to avoid payment of legitimate tax due on the income earned by the group from its business in India and such attempt at avoidance, should not be countenanced. The applicant has created the Singapore entity just to seek the benefit of the Singapore-India Double Taxation Avoidance Convention. This Authority ought to rule that a part of the income earned by the applicant from the activities referred to in the application, viz. outbound activities, is liable to be taxed in India.

8. I may straight away say that in terms of the agreement dated 1.4.2010, the application before this Authority has been filed before any return of income relating to the relevant assessment year had been filed before the income-tax authorities and the objection that the question is already pending before the income-tax authorities cannot be accepted. It may be true that the transaction(s) prior to 1.4.2010 were on the same or even identical lines with the Aramex entity in Bermuda. But then, in view of the fact that a fresh transaction has come into existence and the

Ruling is sought based on it, clause (i) of the second proviso to section 245R(2) of the Act cannot be said to be attracted. I overrule that contention on behalf of the Revenue sought to be raised at the hearing. Similarly, the order under section 195 of the Act made on 31.5.2011 also cannot stand in the way of a ruling being given in the present application as has been consistently held by this Authority.

9. Learned Senior counsel for the applicant contended that AIPL was doing business on its own and also does domestic business in India, AIPL gets income from such domestic business. For that business, the network of Aramex is not used. There were separate agreements covering the payment of 'royalty' and payment of 'fees for technical services' for using the same system. Those aspects are not involved in this case. The dispute here is only regarding the amount payable to the applicant by AIPL on the basis of the agreement dated 1.4.2010. It can be seen that the income of AIPL from the business covered by the agreement dated 1.4.2010 is only about one-third of the total income of AIPL. The transaction in question is between independent entities and AIPL is not the exclusive agent of the applicant confined to the business of the network. The income from the business was 'business income' within the meaning of Article 7 of the India-Singapore DTAC and under paragraph 1 thereto, it was not chargeable to tax in India, unless the applicant has a permanent establishment in India. The applicant has no PE in India since it has no fixed place of business in India. It has also

no agent in India within Article 5(2) of DTAC. Neither clause (8) nor clause (9) of Article 5(2) is attracted. AIPL was incorporated in the year 1966 and it was in business from then onwards. For the purpose of this application, this Authority has to proceed on the basis that what is paid by AIPL to the applicant is arms-length price. On that assumption, if the applicant has no permanent establishment in India, there is no question of taxing the income in question in India. If there was a PE, then of course, transfer pricing has to be verified. What is paid by AIPL to the applicant is also not 'fees for technical services'.

10. On behalf of the Revenue, it is submitted that the basis of the order made under section 195 (2) of the Act was sound, that there was no commercial reason established for creating a Singapore entity, the applicant, and for entering into the agreement dated 1.4.2010. Aramex group has business all over the world and the income from India to it must be held to be taxable in India. AIPL is not even free to engage any other service provider for rendering services to customers for delivery of articles outside the country and could do so only if the Aramex group has no representative in that particular country. This provision in the agreement clearly showed that there was no independent existence for AIPL. The whole scheme adopted is an attempt to avoid payment of legitimate taxes due on the income arising from India.

11. AIPL is a 100% subsidiary of Aramex International Bermuda. Aramex group has admittedly business in various countries all over the

world including India. Its business in India is conducted by it through AIPL. No doubt, AIPL has been formed as a subsidiary and has an identity under the Companies Act, 1956. The fact remains that the business is that of Aramex group and the reputation and appealability is that of the Aramex group.

12. When actually taking up the work in India, Aramex group enters into agreements with customers for the purpose of acceptance of articles and for their deliveries at various destinations around the world. It has to arrange, for picking up the articles from the customers collecting them at a convenient place for transportation to various destinations around the world. This is the position regarding the outbound services undertaken by Aramex group. As far as 'inward business' is concerned, Aramex group companies in various parts of the world contact the customers, take delivery of the articles to be delivered to various cities and towns in India and deliver them at a chosen destination. The business is completed by delivery of the consignments to the concerned addressees in India. For that, the Aramex group has created a subsidiary, in India, AIPL. Without the association of AIPL, the business of Aramex group as regards the articles sent to India, cannot be performed. It is the case of the applicant that the goods are brought to a common destination and delivered to AIPL and AIPL ensures that the articles are delivered to the concerned parties in various parts of India.

13. Aramex group thus cannot successfully conduct its business of transporting and delivering articles from and in India without AIPL performing its role in India. Does AIPL became a permanent establishment of the applicant because of this, is the question.

14. What is a permanent establishment? Is it not something which enables a non-resident company to carry on a part of its whole business in a particular country? Without this entity AIPL, Aramex group cannot complete its business or fulfill its obligations to its clients or customers around the world. The Aramex group could have done this through any entity in India by entering into the necessary agreement in that behalf. But then if that entity engaged, is an entity which has no business connection with the Aramex group or which is not a part of the Aramex group, then the question will be whether that entity is constituted an agent exclusively for the business of Aramex or almost exclusively for the business of Aramex. But when that business is got done, not through such an agent, but through a subsidiary created, a wholly owned subsidiary at that, is it not possible, to postulate that the subsidiary entity would be a permanent establishment of the group'? Common sense says, that it would be. After all, a permanent establishment is defined to be a permanent place of business. Which is the permanent establishment of Aramex group in India in this case? It is clearly the location of its subsidiary in India.

15. When a business cannot be carried on exclusively in so far as it relates to customers in India like in the present case, without intervention of another entity, a subsidiary, normally that entity must be deemed to be the establishment of the group in that particular country. The position may be different when the entity is an independent entity uncontrolled by the group unless it satisfies the other requirements mentioned in Article 5(2) of the DTAC. But in a case where a 100% subsidiary is created for the purpose of attending to the business of the group in a particular country, here, in India, I am of the view that the Indian subsidiary must be taken to be a permanent establishment of the group in India. It is not pretended that the without its part being played by the Indian entity, AIPL, the business of the applicant could be successfully transacted. Thus, AIPL is an essential part of the business of the group now routed through the applicant in India. No doubt, AIPL may have an independent existence as a subsidiary. Clearly, the authority over it of the principal, vertical or persuasive, cannot be in doubt. I am, therefore, satisfied that in a case like the present, the subsidiary must be considered to be a permanent establishment of the group in the concerned country, here, India.

16. The question has to be examined whether under Article 5 of the DTAC between India and Singapore, the subsidiary in India, AIPL, would be considered to be a permanent establishment of the applicant in India. Paragraph 1 of Article 5 provides that for the purpose of the DTAC, the

term ‘permanent establishment’ means a fixed place of business through which the business of an enterprise is wholly or partly carried out. Clearly, AIPL has a fixed place of business and branches. The business of the applicant Aramex group in India is only carried on by AIPL. APIL obtains orders, collects articles, transports them to a specified destination so as to be taken over by the group and then delivered to the addressees in various countries through its entities in those countries. Therefore, it would not be incorrect to say that AIPL is a permanent establishment of Aramex group in India.

17. Paragraph 10 of Article 5 of the DTAC says that the fact that a company which is a resident of a contracting State controls or is controlled by a company which is a resident of the other contracting State or which carries on business in that other contracting State, shall not of itself constitute either company a permanent establishment of the other. In other words, the fact that the applicant, on behalf of the Aramex group, controls AIPL or that AIPL carries on its business in India, shall not of itself constitute AIPL a permanent establishment of the applicant. When the whole business in India of a multi-national company is carried on within the geographical contours of India, by a subsidiary like AIPL in this case, can it be said that it is only a case of AIPL carrying on its business in India? It is really a case of a group carrying on its business in India or that part of the business relatable to India through a fully owned subsidiary involving all its business activities.

Does it not take the subsidiary, out of the confines of paragraph 10 of Article 5? Merely entering into an agreement describing the subsidiary controlled legally or persuasively by the principal as an independent entity or a non-exclusive agent, would not bring the case of a subsidiary like AIPL within the ambit of paragraph 10 to Article 5 of the DTAC. I find considerable force in the argument on behalf of the Revenue that the agreement put forward by the applicant relating to its business with AIPL is a mere camouflage to screen the fact that AIPL is really a permanent establishment of the applicant's group in India. I am, therefore, of the view that AIPL should be considered as a permanent establishment of the applicant, on the facts and in the circumstances of the case.

18. Paragraph 8 of Article 5 of the DTAC provides that where an agent of an independent status to whom paragraph 9 does not apply, is acting in a Contracting State on behalf of an enterprise of the other contracting state, that enterprise shall be deemed to have a permanent establishment, notwithstanding paragraphs 1 and 2 of Article 5, if it habitually exercise in that state an authority to conclude contracts on behalf of the enterprise or habitually secures orders in the first mentioned stage wholly or almost wholly for the enterprise itself or for the enterprise under the same common control. Here, AIPL secures orders in India wholly for the Aramex group. It also has the right to conclude and concludes contracts for the group for its Express shipment

business. On facts it appears to me that AIPL has to be deemed to be a permanent establishment of Aramex group and the applicant in India. It is not a case of AIPL undertaking purchase of goods or merchandise to take it out of the deeming provision in paragraph 8.

19. In a Ruling in AAR No.542 of 2001, (274 ITR 501) in a similar situation, this Authority ruled that an independent agent of an American principal would be a permanent establishment of the American company in terms of paragraph 1 of Article 5 of the DTAC between India and USA. I am in respectful agreement with the reasoning and conclusion on this question. The following passage in paragraph 7 of the OECD commentary on Article 5, "For a place of business to constitute a permanent establishment, the enterprise using it must carry on its business wholly or partly through it" and the following passage in paragraph 41 that *"However, a subsidiary company will constitute a permanent establishment for its parent company under the same conditions stipulated in paragraph 5 as are valid for any other unrelated company, i.e. if it cannot be regarded as an independent agent in the meaning of paragraph 6, and if it has and habitually exercises an authority to conclude contracts in the name of the parent company. And the effects would be the same as for any other unrelated company to which paragraph 5 applies"* and the statement in paragraph 42 *"The same rules should apply to activities which one subsidiary carrys on for any other subsidiary of the same company"* also indicate that AIPL would emerge as a permanent establishment of the applicant in

India. Here, the applicant gets done its entire business related to India through AIPL.

20. Thus, I find that AIPL is a Permanent Establishment of the applicant in India within the meaning of Article 5 of the DTAC between India and Singapore.

21. In the light of the above finding, on question no.1, I rule that there exists a permanent establishment of the applicant in India in connection with its international express business under the DTAC between India and Singapore. On question no.2, I rule that the receipts by the applicant from outbound and inbound consignments attributable to the permanent establishment in India is taxable in India. On question no. 3 I rule that the question whether the transaction between the applicant and AIPL as per agreement dated 1.4.2010 is on arms-length basis has to be verified to determine whether any income can still be attributed to the permanent establishment in India. In view of my rulings on question no. 1 to 3, I decline to rule on question no. 4 formulated. On question no. 5 I rule that the receipts by the applicant from AIPL would be subject to withholding tax under Section 195 of the Income-tax Act.

(P.K. Balasubramanyan)
Chairman