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

14th Day of August, 2012

A.A.R. No. 999 of 2010

PRESENT

Justice Mr. P.K.Balasubramanyan (Chairman)

Name & address of the applicant	:	Castleton Investment Limited, C/o DTO Ltd., 10th Floor, Raffles Tower, 19, Cybercity, Ebene, Mautitius
Commissioner concerned	:	Director of Income-tax (International Taxation-I) Mumbai
Present for the applicant	:	Mr. Rajan R. Vora, C.A. Mr. Rahul Kakkad, C.A.
Present for the Department	:	Mr. R.S. Rawal, CIT(DR) Mr. M.P. Ahuja, ADIT(IT) 1(2), Mumbai.

R U L I N G

The applicant is a company incorporated in the year 1993 under the laws of Mauritius. It claims to be a tax resident of Mauritius. The shares of the applicant are held by Wellcome Limited, U.K. The applicant is a part of Glaxo Smithkline group of companies (GSK group).

2. Glaxo Smithlkine Pharmaceuticals Limited (GSKPL) is a company incorporated in India. It is also a part of the GSK group. It is listed in the Bombay Stock Exchange and the National Stock Exchange. The applicant had acquired 600,000 shares in it in the year 1993. It also acquired 1,680,170 shares in Burroughs Wellcome (India) Limited in the

year 1996. GSKPL and Burroughs Wellcome (India) Limited merged. In the year 2004, the applicant received in lieu of the shares held by it in Burroughs Wellcome (India), shares in GSKPL. Thus, the holding of the applicant in GSKPL rose to 3,192,238 shares amounting to 3.77% of the paid up share capital in GSKPL.

3. The applicant had held the shares of GSKPL as investment so as to benefit from the profits accruing in the long term. It was shown as non-current assets in the books of accounts of the applicant and not as stock in trade. According to the applicant, it is a capital asset of the company.

4. Glaxo Smithlkine (Pte) Limited (GSK Pte) is a company incorporated in the Republic of Singapore. It is also a part of the GSK Group. It is the Asia Pacific regional office of the GSK group of companies. As a part of reorganization of the group structure, GSK and the applicant, the Mauritius Company, propose to transfer the shares of GSKPL to GSK Pte, the Singapore Company. The transfer of 3,192,328 shares in GSKPL by the applicant to GSK Pte, Singapore will be for cash consideration at fair market value. The transfer of shares is proposed off the market and not through a recognized stock exchange, without attracting securities transaction tax. The applicant has no office, employees or agents in India and hence there is no permanent establishment in India. The applicant being a foreign company, it is not obliged to maintain books of accounts in India as prescribed by the

Companies Act, 1956. It is on these allegations that the applicant filed this application under section 245Q of the Income-tax Act, seeking advance rulings on the chargeability to tax of the proposed transaction of sale of shares of GKPL, the Indian company, to CGK Pte. Singapore. After hearing both sides, this Authority allowed the application under section 245R(2) of the Act to render Rulings on the following questions:

1. Whether on the facts and circumstances of the case, the investment held by the applicant in equity shares of GlaxoSmithKline Pharmaceuticals Limited (hereinafter referred to as 'GSKPL) would be considered as 'capital asset' under section 2(14) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act')

2. Based on the facts and circumstances of the case, if question 1 is in the affirmative, whether capital gains arising from transfer of shares of GSKPL by the applicant to GlaxoSmithKline (Pte) Limited, Singapore (hereinafter referred to as 'GSK Pte) 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 sale of equity shares of GSKPL will be taxable in India in the absence of a Permanent Establishment of the applicant in India and in the 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. Based on the facts and circumstances of the case, if the transfer of shares by the applicant to GSK Pte is not taxable, whether the provisions of section 92 to section 92F of the Act relating to transfer pricing would be applicable.

5. Based on the facts and circumstances of the case, whether the sale consideration receivable by the applicant should suffer any withholding tax as per Section 195 of the Act?

6. Based on the facts and circumstances of the case, if the transfer of shares of GSKPL is not taxable in India, whether the applicant is required to file any return of income under section 139 of the Act?

7. Based on the facts and circumstances of the case, if the transfer of shares of GSKPL is taxable in India, when such transfer is not carried out through a recognized stock exchange, whether the applicant will be liable to pay tax on long term capital gains at 10% under the proviso to Section 112(1) of the Act?

8 Whether the provisions of Section 115JB of the Act shall be applicable to the applicant?

While allowing the application, this Authority reserved for consideration while hearing the application under section 245R(4) of the Act, the question whether the transaction is designed for avoidance of tax in India.

5. The Revenue made queries to the applicant as to the source for purchase of shares. The Revenue came up with the plea that this was a clear case of an attempt to avoid the payment of legitimate taxes in India that would be due on the transaction. It also controverted the claims of the applicant on section 92 to 92F and the other claims covered by the questions.

6. Before going into the other relevant facts and considering the other questions, it seems profitable to consider question no. 1 even at this stage. This question is whether the shares held by the applicant are capital assets within the meaning of section 2(14) of the Act or not. The answer to this question will also govern the approach to the other questions posed.

7. The Revenue has not really joined issue on this question. The shares were held by the applicant from the year 1993 in one and from the year 1996 in the other. The applicant has submitted that it had no intention to trade in those shares and they were held as investments. They had also not been dealt with till date. In this situation I am satisfied that it would be appropriate to rule on question no. 1 that the

shares held would be considered a capital asset. It is, therefore, ruled on question no. 1 that the concerned shares were held by the applicant as capital asset.

8. Once the asset is held to be a capital asset, its proposed sale will generate a gain that would qualify to be capital gains under the Act and under the India-Mauritius Double Taxation Avoidance Convention. According to the applicant, the transfer of shares of the Indian company by the applicant would be taxable under section 45 of the Act. But the applicant has claimed the benefit of the DTAC between India and Mauritius by invoking Section 90(2) of the Act and has claimed that the capital gains arising would not be taxable in India, in view of paragraph 4 of Article 13 of the DTAC. It is now understood that shares in a company of this nature would come within paragraph 4 of Article 13 of the DTAC. If so, it is taxable in Mauritius and not in India in terms of that provision.

9. The Revenue has sought to raise the contention that the whole scheme devised by the group is one for avoidance of capital gains in India by taking advantage of the India-Mauritius DTAC and that such an attempt should not be allowed to succeed. It is submitted that any scheme to avoid tax should be discountenanced by this Authority, or Court or the Income-tax authorities and in this case, there is round tripping as well as treaty shopping. In support of the first, it is contended that it has not been properly clarified as to from where the

funds proceeded for the acquisition of the shares by the applicant. In support of the second, it is submitted that the Mauritius Company, the applicant, has been brought into existence only for the purpose of taking advantage of the DTAC between India and Mauritius, since capital gains is not actually taxed or taxable in Mauritius.

10. As far as the first submission is concerned, it has to be seen that the investments in the shares were made in the years 1993 and 1996 and they had been held for all these years. Though the applicant is part of the GSK group and could be said to be under the vertical control of Wellcome Limited, U.K. the fact remains that it is a legal entity in the eye of law and there is no adequate material to rebut its ownership over the shares. On the materials, it is also not possible to hold that the beneficial owner of the shares is some other entity. The materials produced by the applicant pursuant to the request in that behalf by the Revenue cannot be said to have been discredited on the facts of this case. Even if one takes it that there was treaty-shopping, that has been held to be not taboo in UOI v Azadi Bachao Andolan, by the Supreme Court. Even if it is taken that the Vodafone decision of the Supreme Court has indicated that the presumption arising out of a Tax Residency Certificate is capable of being rebutted, it cannot be said that the presumption has been rebutted in this case. Thus, on the whole, on the facts, it cannot be said that the Revenue has established a case of an attempt at tax avoidance in this case.

11. It is true that if the proposed sale is through a recognized stock exchange, the sale would have suffered Securities Transaction Tax under the Act. The sale here proposed is outside the Stock Exchange and Securities Transaction Tax would not become payable. But then, it is not shown that a company holding shares in another company cannot sell the shares otherwise than through the Stock Exchange. Therefore, the argument that the proposed sale would involve avoidance of Securities Transaction Tax cannot be accepted. There is no obligation on the applicant to sell the shares through a stock exchange. I must also notice that this is not a case where a so-called gift of shares is proposed, but a sale.

12. The argument that unless the applicant is actually taxed in Mauritius or is liable to be actually taxed on the capital gains that would arise in Mauritius, the DTAC is attracted since a DTAC can apply only when there is actual taxation in two countries, through may sound attractive, cannot also be accepted.

13. The heading of Chapter IX of the Income-tax Act is "Double Taxation Relief." Does it not indicate that the chapter contemplates double taxation for the relief specified in that Chapter for it to be extended? Taxation means actual taxation and at best, the threat or possibility of actual taxation. When one of the convention countries does not tax a particular income at all, can it not be said that there is no question of double taxation? Would the Chapter be then attracted?

14. Section 90(1) says that the Central Government may enter into an agreement for granting of relief in respect of income on which tax have been paid both under the Act and in the other country. Here, the emphasis is on payment. Then it deals with income tax chargeable under the Act and under the corresponding law in the other country. If the income is not chargeable to tax in that other country, this provision may not have application. Then occurs the purpose of the section, namely, of avoidance of double taxation of income. If double taxation is given the meaning actual taxation or clear possibility of taxation then alone the provision may apply. Is the existence of a power to tax in one country sufficient to invoke the Double Taxation Avoidance Convention between that country and India that seeks to tax it under the Act? Similarly, merely because a person may qualify to be a resident of a convention state, being liable to taxation therein, can it be said that he can also take advantage of the DTAC when he is not taxed at all in one of the states?

15. Though the view was taken by this Authority in Cyril Eugene Pereira, In re (239 ITR 650) that unless there is real double taxation, the DTAC cannot be invoked, the said view was disapproved by the Supreme Court in UOI v. Azadi Bachao Andolan. This Authority is bound by this decision. If the Revenue wants to persist in this line of argument, it has to raise it in the Supreme Court and not here.

16. Thus, on question no. 2, I rule that the capital gains that would arise would not be chargeable to tax in India in view of paragraph 4 of Article 13 of the DTAC between India and Mauritius.

17. In view of the ruling on question no. 2, it has to be ruled on question no. 3 that the question does not arise. So, no ruling is given on that question.

18. Question no. 4 is whether the transfer pricing provisions, sections 92 to 92F would apply in the case on hand. According to the applicant, section 92 can be applied only to a transaction chargeable to tax under the Act. The applicant does not seriously dispute that the transaction in question is an international transaction within the meaning of section 92 of the Act. But, since the transaction in question is not chargeable to tax in India in view of paragraph 4 of Article 13 of the DTAC, Section 92 of the Act is not attracted. The applicant relies on the earlier Rulings of this Authority in M/s. Praxair Pacific Limited [326 ITR 276] and in Vanenburg Group BV v. CIT [289 ITR 464]. The Revenue seeks to contend that on the wording of section 92 of the Act, the provision will apply and in the earlier Rulings the aspect has not been properly considered. It is also submitted that the earlier Rulings were related to transactions involved in them and they cannot be treated as precedents to govern all cases.

19. It appears to me that the theory of precedents may not have strict application in proceedings before this Authority. This Authority is

bound only by the decisions of the Supreme Court. The decisions of High Courts have only persuasive value. This Authority is not subordinate to any High Court for even Article 227 of the Constitution to apply. Left to myself, I have grave doubts whether the jurisdiction under Article 226 will itself be attracted. Anyway, it is not necessary to pursue this aspect in this case.

20. As far as a prior Ruling of this Authority is concerned, no doubt this Authority should be slow in disagreeing with a proposition of law unrelated to facts, enunciated therein. But, I feel that when this Authority is convinced that a view already expressed may not be correct, it should not deter this Authority from expressing itself. If a view different from the one taken earlier is taken, the controversy can obviously be set at rest only by the Supreme Court stepping in and rendering a binding decision.

21. Even if Section 92 is taken as a machinery provision as posited by this Authority, the question is whether the provision would apply when an international transaction within the meaning of Section 92 is involved, Section 92, as I read it, is plain and clear. It says, "Any income arising from an international transaction shall be computed having regard to the "arms length price." There is nothing to show in the context that the expression 'income' has to be given a restricted meaning. 'Income' according to Concise Oxford English Dictionary, means 'money received, especially on a regular basis, for work or through investments.'

The definition in the Act also does not restrict its meaning. In fact, it expands it by including within it, the various receipts described therein. Section 2(24) only says, 'income includes'. An inclusive definition is normally a definition of expansion and not of restriction. Therefore, going by its general meaning and by its defined meaning under the Act, there is no warrant for restricting the scope of the expression 'income' occurring in Section 92 of the Act. Section 92(1) clearly speaks of computation of income from an international transaction. The Explanation to section 92(1) and sub-section (2) of section 92 do not restrict but only expand the concept of income under section 92(1). Section 92(3) only manifests the intention of not reducing the income as calculated under sub-sections 1 and 2. It cannot certainly be said to be restricting the scope of the expression 'income'. I also do not see anything in Section 92A to 92C warranting the restricting of the meaning of the expression 'income' in section 92 of the Act. The DTAC also does not define the expression 'income'.

22. In the Ruling in Canaro Reserves Ltd., In re (313 ITR 2), a complement of this Authority spoke on section 92 to 92F thus:

> "Sections 92-92F, on the other hand, provide for determination of fair and equitable profits and tax in India in relation to international transactions, regardless of their nature. The wordings used in those sections suggest that they apply to all kinds of international transactions entered into between a resident and a non-resident and between two non-residents. No particular type of international transaction has been kept out of its purview."

23. In Vanenburg Group BV, In re (289 ITR 464), in which at the hearing, 'none appeared for the department of Revenue', it was merely stated that "these provisions are aimed at preventing avoidance of tax by certain well known devises, determination of arms length price, 'computation of income in certain cases, etc., in relation to international transactions. These are again machinery provisions which would not apply in the absence of liability to pay tax". There was no reference to Canoro Ruling or an independent discussion on this question. There was no discussion of the aspect here arising.

24. With respect, taxability of a Capital gain is broadly determined based on the difference between the investment and the sale price. Even if section 92 to section 92F are machinery provisions, without resort to them, the capital gains from an international transaction cannot be determined. Only on determining whether capital gains have arisen, would the question arise whether the gain is chargeable to tax or not under the Act. Clearly, in cases governed by the Act alone, they would be chargeable to tax. In a case when an option is exercised to opt for benefits under a DTAC, then the question would arise whether the gain is taxable in this country and if yes, to what extent. The question of chargeability to tax would arise only at a later stage. The application of Section 92 cannot be kept at bay by jumping to the second stage straight away. I am therefore of the view that whether ultimately the gain or income is taxable in the country or not, Sections 92 to 92F would apply if

the transaction is one coming within those provisions. In cases, where there is no liability what would be the purpose of undertaking a transfer pricing exercise is not a question that would affect the operation or rigour of a statutory provision on its plain words.

25. In Dana Corporation In re (AAR 788 of 2008), it was stated that the expression 'income arising' postulates that the income has arisen under the substantive charging provisions of the Act. In other words, the income referred to in Section 92 is nothing but income captured by one or the other charging provisions of the Act. With respect, there is nothing in sections 92 to 92F enacted in a particular context, to suggest that the expression income arising, must not be understood in its plain and grammatical meaning, but the words should be understood as income arising under any of the charging provisions of the Act.

26. Praxiar Pacific Limited, In re (326 ITR 276) merely states that in the absence of liability to pay tax on the capital gains, the provisions of sections 92 to 92F are not attracted.

27. On an anxious consideration of the purpose for which sections 92 to 92F are enacted and on an interpretation of its provisions under the golden rule of construction, I am satisfied that the applicability of section 92 does not depend on the chargability under the Act. Literally in this case, the capital gains are chargeable to tax under the Act. They escape only in view of paragraph 4 of Article 13 of the DTAC and the

ratio of the decision in Azadi Bachao Andolan on the applicability of the DTAC even when there is actually no double taxation.

28. I, therefore, rule on question no. 4 that the provisions of section 92 to section 92F of the Act are applicable. The aspect that the exercise may not be fruitful in this case, cannot affect the applicability of the statutory provisions.

29. Question no. 5 relates to the obligation of the applicant to withhold taxes under section 195 of the Act on the transaction of sale. It has now been held in GE Technology Centre P. Ltd. v. CIT [327 ITR 456(SC)] by the Supreme Court that in cases where there is no chargeability to tax under the provisions of the Act, expressions used in the section itself (unlike section 92) there will be no obligation to withhold. Respectfully following that decision I rule that there is no obligation on the applicant to withhold tax in this case.

30. Whether the applicant is required to file its return of income under section 139 of the Act, in case, its capital gains is not chargeable to tax in India is question no.6 posed. It has been found that though the applicant would be chargeable to capital gains tax on the proposed sale of shares under the Act, it has been ruled that in view of the benefit available to the applicant by the invocation of section 90(2) of the Act and the DTAC between the two countries, the authorities under the Act cannot tax the income in view of paragraph 4 of Article 13 of the DTAC. Now the argument on the side of the applicant is that since the income is

not taxable in this country, under the Act, there is no obligation on the applicant to file a return of income under section 139 of the Act. The Revenue insists that whatever may be the position emerging out of the DTAC, the applicant is bound to file a return of income as mandated by section 139 of the Act.

31. Section 139 insists that every person, being a company, firm or a person other than, a company or firm if its or his total income exceeds the maximum amount which is not chargeable to income-tax has to file a return of income. That obviously would be chargeable to income-tax under the Act. A company which is entitled to claim the benefit of a DTAC might have an income exceeding the maximum amount which is not chargeable to tax under the Act. On the language of section 139, such a person is bound to file a return of income. When a person claims the benefit of a DTAC, that person is invoking section 90(2) of the Act to do so. In other words, a person earning an income that is chargeable to tax under the Act, has to make a claim by invoking section 92(2) of the Act for getting the benefit of a DTAC. So even if he would be entitled to seek relief under the DTAC, he has to seek it and that would be during the consideration of his return of income or at best while filing his return. If so, the obligation under section 139 of the Act cannot simply disappear merely because a person may be entitled to claim the benefit of a DTAC.

32. There is an argument that a Convention overrides the Act and it is not like an exemption to be claimed. Surely, in terms of section 90(2) of the Act, it has to be shown that the benefit of a DTAC is being claimed, that the claimant is eligible to make that claim and that DTAC is more beneficial to the concerned person. Obviously, that has to be shown before the assessing authority. This emphasizes the need for such a person to file a return of income to claim such a relief. I have, therefore, no hesitation in ruling that the applicant in this case will have the obligation to file a return of income in terms of section 139 of the Act.

33. The fact that this Authority is now giving an advance ruling will not bring about any difference in principle. The applicant may also have to appraise the assessing officer that an advance Ruling has been given on the transaction at the instance of the applicant and that it is binding on him.

34. I therefore rule on question no. 6 that the applicant will have an obligation to file a return of income based on the proposed transaction under section 139of the Act.

35. Question no. 7 relates to whether section 112(1) of the Act would be attracted when the proposed transfer or sale of shares is not through a recognized stock exchange.

36. Section 112(1) of the Act would be attracted when the income of an assessee includes income chargeable under the head capital gains under the Act. In the present case, the income of the applicant would

be capital gains. Once it is, Section 112 of the Act is attracted. If the income gets taxed under the Act, obviously, section 112(1) of the Act would also be attracted. That it may not get taxed under the Act in view of the DTAC is another question. The scope of section 48 read with section 112 of the Act has been dealt with in the Ruling in Crain, U.K. (AAR 950 of 2010). The principle of that Ruling will have application here. The ruling on question no. 7 is that section 112 of the Act will be attracted and operate as expounded in the Ruling in AAR No. 950 of 2010.

37. Question no. 8 is whether section 115JB of the Act is attracted, since the applicant is a foreign company (In the order allowing the application under section 245R(2) of the Act, there is an inadvertent omission of this question raised in the application but intended to be allowed for a ruling). The applicant has argued that section 115JB applies only to domestic companies. The Revenue presumably in the light of an earlier Ruling by this Authority has not specifically disputed the claim of the applicant. But, when the question of construction of a statute is involved, it cannot depend on the stand of the parties. The statute has to be construed by this Authority.

38. In the Ruling in AAR No. 1098 of 2010, I have discussed in detail, this question. It is not necessary to discuss the question all over again. This is what was stated therein:

"Section 115JB (1) of the Act reads:

"115JB(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2011, is less than [eighteen per cent] of its book profit, [such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of [eighteen per cent]."

On a reading of this sub-section, which is said to prevail over the other provisions of the Act, what emerges is that a company has to pay tax as provided for in this sub-section if the tax payable by it as otherwise determined under the Act, is less than the minimum prescribed herein. It also provides the rate at which the tax is to be paid. This section does not need any aid from tools of interpretation for its understanding. It is plain and clear.

Sub-section (2) of section 115JB which is sought to be shoved in to deprive sub-section (1) of its width actually reaffirms the independent operation of sub-section (1). It exhorts every company, for the purpose of sub-section (1) to prepare its profit and loss account as provided for therein. The operation of sub-section (1) does not depend on the applicability of sub-section (2). It is on the applicability of sub-section (1) that the obligation under sub-section (2) arises. It is a fallacy to think that unless sub-section (2) is independently attracted, sub-section (1) also cannot be operated. Sub-section (2) gets attracted when sub-section (1) operates *proprio vigorie*. It is for the purpose of the section that the account has to be prepared as detailed therein. The liability to tax under sub-section (1) does not depend on the accounting. It arises from chargeability to tax under the Act.

Section 115JB of the Act on its wording makes no distinction between a resident company and a non-resident company. Prima facie, it applies to all companies. The definition of a company in section 2(17) of the Act means an Indian company or any company incorporated by or under the laws of a country outside India. In other words, by definition, a company means a non-resident company as well. In an earlier Ruling in Timken In re (326 ITR 193), this Authority essentially relied on the requirements prescribed by sub-section 2 to Section 115JB, the notes on clauses explaining the provisions of the Finance Bill, 2002, a circular issued by CBDT and a statement in the speech of the Finance Minister that it is intended to cover domestic companies, to come to the conclusion that the operation of Section 115JB is limited to resident companies and consequently, the expression 'company' as defined in the Act, cannot be adopted in construing section 115JB of the Act. This Authority referred to the *non-obstante* clause contained in the definition section, "unless the context otherwise requires" to give a meaning to the expression company different from the definition in the Act. This interpretation was heavily based on the requirement of section 115JB (2) of the Act. With great respect, it appears to me that sub-section 2 of Section 115JB deals with the mode of calculation of the assessable profit in the context of sub-section (1) of Section 115JB. There is no lack of clarity or ambiguity in section 115JB to warrant the undertaking of an interpretative exercise, by referring to extraneous material to understand the meaning of the section. As repeatedly noticed, if the language is clear and explicit, the Court must give effect to it "for in that case the words of the Statute speak the intention of the legislature" and the intention of Parliament must be deduced from the language used, for, "it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law" and where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise [See Maxwell on the Interpretation of Status – 12th Edition – pages 1, 28 & 29]. In fact, in the ruling of this Authority reported in 234 ITR 335, it was held that the special provision under section 115JA of the Act would apply to foreign companies as well. Section 115JA is parallel to section 115JB, but, of course, this Ruling was sought to be distinguished in the ruling in Timken based on the existence of a Permanent Establishment in that case.

In the Ruling reported in 234 ITR 335 this Authority dealing with the argument that section115JA of the Act is confined in its operation to Indian companies, after a discussion stated *"a large number of decisions were cited, relating to well-known rules of construction of a taxing Statute. What is important to bear in mind is the object of introduction of section 115JA. A* *number of companies with huge profits were avoiding payment of tax by adjusting their profits against various allowances which are permitted under the Income-tax Act. To circumvent this strategy, section 115JA was inserted. The simple method adopted by section 115JA is to find out whether the total income of a company after all the deductions and allowances was less than 30 per cent of its book profit. In such a situation, the total chargeable to tax is deemed to be 30 per cent of such book profit. There is no reason to confine this section to Indian companies alone. If a foreign company is avoiding tax lawfully by similar devices, this section will be applicable also to such companies. This section has been made applicable to companies generally and not to Indian companies or domestic companies only."* This Authority noticed that the Act contained provisions which are made applicable to Indian companies or the domestic companies only and there was no such confinement of operation in section 115JA of the Act. In the ruling in Timken (326 ITR 193), the above ruling was distinguished stating that the foreign company involved therein and a permanent establishment in India. With respect, it is difficult to agree with this approach to distinguish the ruling reported in 234 ITR 335. On facts that might have been a case where there was a permanent establishment of the company in India, but the reasoning and the conclusion clearly appear to be that section 115JA has application both to foreign and domestic companies. The passage from that ruling quoted above, also reaffirms this. The Ruling reported in 234 ITR 335, was followed in the ruling in Niko Resources Ltd. vs. CIT [234 ITR828].

The passage quoted from Kanga and Palkhiwala commenting on Section 115J of the Act, "This section which was inserted by the Finance Act, 1987 with effect from the assessment year 1988-89 and replaces section 80VVA applies to all companies except to electricity companies" does not support the argument that the section does not apply to foreign companies. The subsequent comments deal with the newly introduced section not having retrospective operation.

I may notice here that when section 115JB was inserted by clause (49) of the Finance Act, 2000, the notes on the clauses explaining the Finance Bill 2000, did not indicate that section 115JB proposed to be introduced with effect from 1.4.2001, was confined in its operation to domestic companies only. Amendments were made to section 115JB of the Act by the Finance Act of 2006 which came into effect from 1.4.2007. Additions and reductions of amounts to and from 'book profit' as explained in Explanation I were made. Dealing with deductions, in the proviso, clause (ii) was modified by showing the amount of income to which any of the provisions of "section 10 (other than the provisions contained in clause 38 thereof)" were introduced, thus, taking out income from long term capital assets from the reckoning. Simultaneously, the proviso to section 10(38) of the Act was also inserted bringing income from long term capital gains in for the purpose of section 115JB of the Act while calculating the book profit. If the notes to the Finance Bill of 2002 or in his speech the Minister mentioned domestic companies, can it be taken to indicate that the operation of section 115JB is confined to domestic companies? With respect, it appears to me that the relevant aspects require further consideration. After all, when a Statute defines an expression and uses that expression generally without confining it to Indian companies (like the provisions in section 88HH series; for example), can one so easily discard the defined meaning of the expression when construing a section in the Act using that expression?

Generally, when a word has been defined in the interpretation clause, prima facie, that definition governs whenever that word is used in the body of the Statute. (See, AIR 1920 P.C. 114, and AIR 1960 SC 971). In any event as observed in (1990) 2AC 357 (HL). "If Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorized or done under or by reference to that enactment". Is a clear indication to the contrary available in this case?

Both section 10(38) and section 115JB refer to a company. Company as per definition in the Act, takes in an Indian company and a foreign company. As far as a company is concerned, the proviso exhorts that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section115JB of the Act. Section 115JB by its wording, overrides section 10(38) and Section 115JB(1) of the Act, leads to the position that as far as a company is concerned, its total income has to be computed based on its book profit in juxtaposition to the prescription in section 115JB of the Act. Thus, as far as a company is concerned, section 10(38) and section 115JB of the Act are to some extent interlinked, though section 115JB would override section 10(38) itself. If by an interpretative process one were to come to the conclusion that section115JB of the Act is confined in its operation to resident companies, one has also logically to say that section 10(38) will also operate only in respect of a resident company.

Surely, there is no need to restrict or warrant for restricting the operation of these two sections in the Act in the absence of any compelling circumstance. In this context, with great respect, it appears to me that the reasoning in the Ruling in 234 ITR 335 is impressive. I am respectfully inclined to follow that reasoning. The circumstances highlighted in Timken Ruling have been dealt with and explained in 234 ITR 335, followed in Niko Resources Ruling (234 ITR 828).

On a reading of the Section 115JB it can be seen that sub-section (1) thereof imposes the liability to be taxed and sub-section (2) only charts out the procedure for calculating the taxable profit. In fact sub-section (2) casts an obligation on a company to which section 115JB (1) is attracted to prepare an account in terms of the Companies Act, 1956. It is not as if the liability to be taxed depends on the obligation to prepare an account in terms of the Companies Act, 1956. The liability to tax depends on the profit earned or deemed to be earned. The deemed profit is specified in sub-section (1) and the rate of tax is also specified. Only the mode of determining the book profit is left to sub-section (2) and a duty is cast on the assessee to determine the book profit as set out in sub-section (2). Taking note of the inconvenience that may be caused by this mandate to some of the companies coming under the proviso to section 211(2) of the Companies Act, the requirement to comply with the mandate has been done away with by the Finance Act, 2012, leaving

> untouched the liability under sub-section (1) of that section. This also would support the soundness of the reasoning in 234 ITR 335 and would indicate that section 115JB (1) of the Act always subjected even the companies coming under the proviso to section 211(2) of the Companies Act.
>
> Section 115JB is the overriding provision. It overrides all the other provisions in the Act. It is the overriding charging provision. It is clear. It provides for payment of income-tax by an assessee, which is a company. That company normally, is a company of whatsoever hue, or in the alternative, a company as defined in the Income-tax Act. There is no warrant for borrowing the definition of a company from section 3 of the companies Act, 1956. Merely because sub-section (2) of section115JB refers to the Companies Act, it does not mean that the definition from therein has to be borrowed. There may be practical difficulties for foreign companies to prepare an account in terms of Schedule VI of the Companies Act, but that is no reason to whittle down the scope of section 115JB of the Act. The difficulties are for the legislature to consider and remove and not for this Authority. In fact, the difficulties in respect of some of them are now sought to be removed by the amendment made by the Finance Act, 2012."

Section 115JB of the Act overrides section 34 to 48 of the Act. So by reading section 115JB as confined in its operation to domestic companies alone, one may be doing violence to the special scheme of taxation adopted for taxing certain companies. Unless there are compelling reasons no such interpretation is justified. There is no compelling reason to jettison the scheme of taxation adopted by the Act by reading down section 115JB as confined in its application to domestic companies alone.

39. I, therefore, rule that section 115JB(1) of the Act would equally apply to a foreign company. That would mean that it would apply to the

applicant in this case. The ruling on question no. 8 is that section 115JB applies to the applicant.

40. Accordingly, the ruling is pronounced on this, the 14th day of August, 2012.

Sd/-
(Justice P.K. Balasubramanyan)
Chairman

F.No. AAR/999/2010/ *Dated: 14.08.2012*

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

1. *The Applicant.*
2. *The DIT (International Taxation), Mumbai*
3. *The Joint Secretary (FT &TR-I), M/o Finance, CBDT, Bhikaji Cama Place, New Delhi*
4. *The Joint Secretary (FT &TR-II), M/o Finance, CBDT, Bhikaji Cama Place, New Delhi*
5. *Guard File.*

(Munesh Kumar)
Addl. Commissioner of Income-tax (AAR)