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

27th Day of August, 2012

A.A.R. No. 1029 of 2010

PRESENT

Justice Mr. P.K.Balasubramanyan (Chairman)

Name & address of the applicant	:	Schellenberg Wittmer alongwith Its partners, Attorneys at Law, Lowenstrasse 19, P.O. Box 1876, 8021 Zurich, Switzerland
Commissioner concerned	:	Director of Income-tax (International Taxation) Mumbai
Present for the applicant	:	Mr. Nishith Desai, Advocate Mr. Shreya Rao, Advocate
Present for the Department	:	Mr. R.S. Rawal, CIT(DR) Mr. Mahesh Shah, Addl.DIT(R-2) Mumbai.

R U L I N G

The applicants are a partnership and its partners. The partnership is said to be in terms of the Swiss Code of Obligations. The partnership claims to be a Switzerland based law firm and all its partners are residents of Switzerland. It is submitted that the partnership and all its partners are tax residents of Switzerland.

2. Siemens India Limited, a company incorporated in India and Shapoorji Pallonji & Co. Ltd., another company incorporated in India had a dispute which was referred for adjudication in terms of a consrtruction Agreement entered into by them and in terms thereof. Siemens India Limited is a subsidiary of Siemens AG Germany.

The construction Agreement provided that the Swiss law will govern the contract. The adjudication proceedings were initiated on 30.12.2009. A Swiss national was appointed as the adjudicator and the venue of adjudication was Lausanne, Switzerland. Siemens India Limited engaged the partnership on 15.2.2010 to represent it in the adjudication proceedings.

3. As per the terms of the agreement, the activities to be carried on by the partnership are to be carried on in Switzerland and /or Germany. Except a site visit and an adjudication hearing in Mumbai between 21st and 24th September, 2010, no other activity is carried on in India by the partnership. The total time spent in India was 6 days between 19th September and 24th September, 2010.

4. The partnership is engaged in the practice of law in Switzerland. It does not carry out its activities in any other country. It does not render any legal service in India. It has no presence in India.

5. The partnership has raised invoices against Siemens India for the services thus far rendered to Siemens India. The applicants want to ascertain whether the fees received by the firm for legal services rendered outside India would be chargeable to tax in India. It is in that context that they approached this Authority with the present application under section 245Q of the Income-tax

Act. By order dated 2.4.2012, this Authority allowed the application under section 245R(2) of the Act for giving rulings on the following questions:

1. *Whether, on the facts and circumstances of the case, the Swiss Partnership/Partners (as defined below) would be treated as a resident of Switzerland under the terms of the Agreement for the Double Taxation and Prevention of Fiscal Evasion with the Swiss Confederation ("Treaty" attached herewith as Attachment 2) and hence be entitled to treaty benefits?*

2. *Whether, on the facts and circumstances of the case, the legal fees earned by the Swiss Partnership/Partners ("Legal Fees") shall be taxable in India under the Treaty?*

3. *Whether, on the facts and circumstances of the case, the Swiss Partnership/Partners have a fixed base in India under the terms of Article 14 of the Treaty?*

4. *Whether, on the facts and circumstances of the case, if the Legal Fees earned by the Swiss Partnership/Partners is not taxable in India under the terms of the Treaty, would be payer be required to withhold any tax under section 195 of the Indian Income-tax Act, 1961 ("ITA") while making remittances?*

6. In support of its claim that the income of the firm and its partners is not chargeable to tax in India, the applicant claimed the benefit of India-Switzerland Double Taxation Avoidance Convention (DTAC). According to the applicant, the partnership is a person under Article 530 of the Swiss Code of Obligations. Under Swiss law, the partnership is not considered to be a separate entity vis-à-vis its partners. The income of the partnership is assessed only in the hands of the partners. In view of Article 1 of the DTAC, the applicants can claim the benefit of the DTAC. The partnership should be considered as a body of persons under Article 3(d) of the

DTAC. The applicants satisfy the requirements of Article 4 of the DTAC and the professional income derived by the applicants was not taxable in India in view of the Article 14 of the DTAC. Since no part of the income was chargeable to tax in India, no withholding of tax under Section 195 of the Act was called for.

7. The Revenue submits that the income received by the partnership is taxable in India in terms of Sections 5 and 9 of the Act. The partnership, even if it is regarded as a Fiscally transparent entity cannot be regarded as an entity liable to tax under the relevant DTAC. The partnership would become a resident of Switzerland only if it is liable to taxation in that country. Since it is not liable to taxation in Switzerland, it cannot claim the benefit of the DTAC. The partnership has a business connection in India. As regards the partners, they had not entered into any transaction with Siemens India Limited. The transaction by Siemens was with the partnership only. The partners are only indirect beneficiaries of the payment. They, even if residents of Switzerland, cannot claim the benefit of the DTAC. It has to be income derived by the resident before benefit of DTAC can be claimed. Article 14 of the DTAC cannot be invoked by the partners. The payments are thus liable to be taxed in India and section 195 of the Act would be attracted.

8. Based on the submissions made before me, the first question to be considered is whether the partnership as distinct from the partners can claim the benefit of the DTAC between India and Switzerland. Even according to the applicants, a partnership is not a taxable entity or unit under the Swiss tax law. It is not considered to be a separate entity vis-à-vis its partners. Only the partners are taxed for the shares of income received by them from the partnership. Under the Indian law, a firm is a person under section 2(31)(iv) of the Act and is chargeable to tax on its income as such. According to the applicants since all the partners of the partnership are resident in Switzerland, the entire income of the Swiss Partnership is currently taxed in Switzerland.

9. It is argued on behalf of the applicant, that Article 1 of the DTAC read with Article 4 thereof would show that a Swiss Partnership is eligible to treaty benefits if it is considered to be a 'person' who is liable to taxation in Switzerland. It is argued that under Article 3(d) of the Convention, a 'person' is defined as "an individual, a company, a body of persons, or any other entity which is taxable under the laws in force" in the other contracting States. A partnership would fall, within the definition, either under the expression 'company' or under the expression 'body of persons'. Hence, it is argued that a Swiss partnership would qualify as a body of persons under the DTAC. It is further contended that the

requirement under Article 4 of the person being 'liable to tax' in Switzerland would also be satisfied since actual taxation in Switzerland is not necessary and it need only be shown that Switzerland has the right to tax the partnership. The fiscal domicile of the partnership lay in Switzerland. The much cited decision in *UOI v. Azadi Bachao Andolan (263 ITR 706)* is relied on in support. Here, the partnership should be considered to be a person liable to be taxed in Switzerland.

10. The Revenue meets this argument by submitting that since the partnership is neither taxed nor is liable to be taxed in Switzerland, it is not a resident within the meaning of Article 4 of the DTAC. If so, it cannot claim to rely on the DTAC to avoid payment of tax in India. The partners do not receive any income from Siemens India and hence though they may be taxed on their share of profits in Switzerland, the income in the present case cannot be said to be derived by them.

11. Two facts are clear. The first is that the income is received by the partnership for the professional services rendered by it. The second is that it is not a taxable entity under Swiss laws. That means that the receiver of the income and the person who is taxed on it, namely, the partners, are not the same unlike in India where the income is first taxed in the hands of the firm and the income of a partner from the firm is taxed in his hands.

12. Article 1 of the DTAC provides that the Convention shall apply to persons who are residents of one or both of the States. Here, the partnership is certainly not a resident of India. Then, the question is whether it can be found to be a resident of Switzerland. Article 4 provides that for the purposes of the Convention, resident of a contracting State means any person who under the laws of that State is liable to taxation in that State by reason of his domicile, i.e. residence, place of incorporation, place of management, or any other criteria of similar nature. The partnership can be said to be domiciled in Switzerland or having its place of residence in Switzerland. The inquiry then would be whether it is a 'person' within the meaning of the Convention. A person is defined in clause (d) of Article 3 of the DTAC. It is an inclusive definition. It reads "the term person includes an individual, a company, a body of persons or any other entity which is taxable under the laws in force in either Contracting State." On a reading of this definition it seems clear that the expressions, 'body of individuals or any other entity at least is qualified by the expression "which is taxable under the laws in force in either contracting State." In other words, if the body of individuals or any other entity is not a taxable entity in the concerned State, it will not be a person. The partnership is one formed in Switzerland. Under Swiss law, it is not a taxable entity. There is no a definition of person in Swiss law corresponding to

Section 2(31) of the Income-tax Act, which confers the status of a 'person' on a partnership. (There was no argument to the contrary before me.) If so, going by the inclusive definition in clause (d) of Article 3 of the DTAC, it cannot be held that the partnership is a taxable entity in Switzerland. I am, therefore, constrained to hold that the partnership which receives the income cannot claim the benefit of the DTAC between India and Switzerland. In that case, there would be no occasion to apply Article 14 of the DTAC on the basis that it is a professional income.

13. The OECD commentary on Article 3 is relied on to contend that partnerships will also be considered to be persons either because they fall within the definition of 'company' or where this is not the case, because they constitute other body of persons. As pointed out by the Revenue, India has not accepted this part of the OECD view and not being a member of the OECD has expressed its reservation. That apart, it appears to me that it is also necessary to enquire whether that body of individuals is taxable in Switzerland. I have found that it is not taxable in Switzerland. If so, it cannot be said that the partnership can be deemed to be a person in this case. The argument that an entity need not actually be taxed but need only be liable to taxation for claiming the benefit of DTAC cannot come to the rescue of the partnership in this case.

The partnership is not shown to be a person liable to taxation in Switzerland.

14. As far as the partners are concerned, they are not the recipients of the income. Their right is only to share the profits of the partnership. Since they cannot be said to receive any income from Siemens India Limited on the basis of the agreement relied on, it cannot be said that they being residents of Switzerland could invoke the DTAC to be taxed in terms of Article 14 of the DTAC regarding the particular income.

15. It is argued relying on OECD report on the 'The application of OECD Model Conventions to partnership that the partners would be entitled to the benefit of the Convention. The following passage which is part of paragraph 8.7 of the Commentary on Article 4 is relied on.

> "…….. Where however, a partnership is treated as fiscally transparent in a State, the partnership is not liable to tax in that State. ……. In such a case the application of the convention to the partnership as such would be refused. ….. Where the application of the convention is so refused, the partners should be entitled, with respect to their share of the income of the partnership, to the benefits provided by the Conventions."

Admittedly, India not a member of the OECD countries has not agreed to this and has adopted the position that it can be so, only if provisions to that effect are included in the Convention entered into with the State where the partnership is situated. Clearly, there is no such provision in the present DTAC. The argument that the partners are residents of Switzerland and their incomes from the partnership are taxable in Switzerland is of no avail since what is involved is not the income, the partners receive from the partnership but the income derived by the firm from an Indian entity.

16. Then the question is whether the income derived by the partnership from Siemens India Limited can be said to be income arising in India or income deemed to arise in India. The amount is the professional charges paid to a partnership of lawyers. The professional service is rendered to an Indian company. It is in connection with Adjudication of disputes arising out of the construction of a project in India between two Indian contracting parties. But since the agreed venue of Adjudication is outside India, the actual Adjudication takes place outside India. A team from the partnership of professionals undertook site visit in India and spent 6 days in India, as the site visit was at was followed by an adjudication hearing in Mumbai as admitted in paragraph 7 of Annexure 11 to the application.

17. When the dispute is between two residents and it arises out of a contract between two Indian residents and it relates to disputes arising out of that contract for construction of a structure or project in India and the payments are made by an Indian company for representing it in an adjudication proceeding regarding that dispute, can it be said that the income does not arise in India or cannot be deemed to arise in India merely because, as per the agreement, the site of adjudication is outside India? In addition are the facts that there was a site visit and adjudication hearing within India? It appears to me that merely because the Adjudication proceedings are held outside India, India does not lose its nexus with the professional charges paid.

18. I am, therefore, satisfied that the source of the income received for rendering professional services by the partnership to the Indian company on the facts noticed above, is in India and not elsewhere. The partnership sends its invoices to the Indian company, its client and the payment is remitted from India. The fact that the major part of the services are rendered outside India in respect of a dispute arising in India cannot alter the source of income. On the facts of this case, I conclude that the source of income is in India.

19. In view of this, I am not going into the question whether the services rendered are technical services within the meaning of Section 9(1)(vii) of the Act.

20. On the basis of the above reasoning, I rule on question no. 1 that the Swiss Partnership will not be treated as a resident under the India Switzerland DTAC. On question no. 2, I rule that the legal fees received by the Swiss Partnership will be taxable in India. On question no. 3, I rule that since the partners have received no income from this transaction by itself, this question does not arise. On question no. 4, I rule that this question also does not arise on the findings now arrived at.

21. Accordingly, the ruling is pronounced on this, the 27th day of August, 2012.

(Justice P.K. Balasubramanyan)
Chairman