

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

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PRESENT

Hon'ble Mr. Justice. P.V. Reddi (Chairman)
Mr. A. Sinha (Member)
Mr. Rao Ranvijay Singh (Member)

A.A.R. NO. 750 OF 2007

Name and Address of Applicant

WorleyParsons Services Pty. Ltd.,
Level 7, 116 Miller Street, North Sydney NSW 2060 Australia

Commissioner concerned

Director of Income-tax(International Taxation)-II New Delhi.

Present for the Department

Mr. S.K. Ojha, DIT(IT)-II. Mr. Sanjeev Sharma,

Present for the Applicant

Mr. Pawan Kumar, FCAMr. Sandeep Puri, CA Mr. Ravi Sharma, Advocate

RULING

(By Hon'ble Chairman)

The applicant is a company incorporated in Australia and a 'tax resident' of Australia. The applicant which is in the business of providing professional services such as engineering, procurements and project management, entered into a contract with Gas Authority of India Limited (hereinafter to as 'GAIL') in July, 2003. Under the said Contract, the applicant had to monitor the project known as 'Dehej – Vijaipur Gas Pipeline Project' being undertaken by GAIL as project monitoring consultant. The applicant has to carry out the following responsibilities which are set out in Section 4 of the Tender document under the heading "Consultant's Scope of work".

- Monitoring of the detailed project schedule.
- Identification of critical activities of the pipelines project.
- Identification of all activities falling on the critical path of the project.
- Identification of all activities requiring close-coordination/synchronization
- Preparation of a look-ahead model/catch-up plan for the project from time to time.
- Generation of all project monitoring reports for the project drawing attention towards critical jobs, activities and functions.
- Identification of all activities/steps required for execution of project within approved cost.
- Identification of all activities/steps required for execution of the project within stipulated time.
- Highlight pitfalls, if any, caused by the Project consultant /any agency hindering efficient execution of project.
- Monitoring of contractor logistics for line pipe, manufacturing, coating and laying.
- Generation of MIS reports for the project including S-Curves.
- Providing all inputs/performing all project monitoring activities as desired by the GAIL Management/Project Group from time to time for timely completion of the project.
- Providing all necessary inputs/feedback related to accelerated completion of future pipeline projects.
- Participate in Top Level project Review Monthly Meetings at Noida/Delhi/Site.
- Monitor progress of project and provide fortnightly status reports to GAIL.
- Interact with contractors relating to the execution of the work.'
- Obtain timely status reports from the contractors, review the same and provide feed back to GAIL.

The rates/consideration payable is specified in the Agreement read with the tender document.

2. The applicant has sought advance ruling on the following questions formulated by it;
"Whether in terms of the contract between the applicant and GAIL and on the facts and circumstances of the

case,

- The receipts of applicant as consideration for activities performed under the contract with GAIL are not in nature of 'royalties' as defined in Article 12 of the DTAA between India and Australia?
- The applicant has a PE in India under the contract with GAIL?
- If answers to (a) and (b) above are in affirmative, only so much of receipts of the applicant, under the contract with GAIL, as are attributable to such PE in India are taxable in India as business profits?
- The balance receipts of the applicant under the contract with GAIL are not taxable in India?

The questions are recast as follows :-

- whether the receipts from the contract entered into with GAIL are in the nature of 'royalties' as defined in Article 12 of the DTAA between India and Australia.
- If the answer to the first question is in the negative, whether such receipts are to be treated as business profits under Article 7 of the DTAA liable to be taxed in India and if so, to what extent?

3. The applicant submits that most of the services relating to the work assigned to it was performed in India and the employees of the applicant were present in India for 165 days during the year 2003-2004. The learned Authorized Representative for the applicant has fairly stated in the course of hearing that nearly 90 to 95% of the work related to the contract was performed in India. The applicant submits that the applicant had and must be deemed to have a 'permanent establishment' within the meaning of article 5(2)(k) of the DTAA between India and Australia. The applicant contends that the payments received by it are not in the nature of 'Royalty' under article 12 of DTAA*. According to the applicant, the receipts attributable to the said PE are taxable in India as business profits in accordance with the Article 7 of the DTAA in the financial year 2003-04.

4. There is no serious debate on the point that the payments received by the applicant under the contract with GAIL does not constitute 'royalty' income. In the Indo-Australian Treaty (DTAA), royalties and fees for technical services are combined in one Article i.e. Article 12. The term 'royalty' as defined in Article 12.3 includes certain categories of services also. Article 12.3 defines 'royalties' as follows:

Article 12: Royalties

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- The term "royalties" in this article means payments or credits, whether periodical or not, and however, described or computed, to the extent to which they are made as consideration for:
 - the use of, or the right to use, any copy-right, patent, design or model, plan, secret formula or process, trade mark or other like property or right;
 - the use of, or the right to use, any industrial, commercial or scientific equipment;
 - the supply of scientific, technical, industrial or commercial knowledge of information;
 - the rendering of any technical or consultancy services (including those of technical or other personnel) which are ancillary and subsidiary to the application or enjoyment of any such

property or right as is mentioned in sub-paragraph (a), any such equipment as is mentioned in sub-paragraph (b) or any such knowledge or information as is mentioned in sub-paragraph (c);

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- the rendering of any services (including those of technical or other personnel) which make available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of a technical plan or design; but that term does not include payments or credit relating to services mentioned in sub-paragraphs (d) and (g) that are made;

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5. The relevant clause is clause (g). It has no application in the present case inasmuch as no technical knowledge, experience, skill or know-how is 'made available' to GAIL on account of rendering the services. Mere rendering of services is not sufficient to attract clause (g), but those services should result in technical knowledge, etc. being made available to the other contracting party. Monitoring and supervision of project work with a view to ensure its timely completion within the approved cost does not amount to making available to GAIL the technical knowledge, experience, etc. which can be made use of by GAIL subsequently on its own.

6. The Revenue, in its written comments, had taken the stand that the receipts from the contract in question is in the nature of fee for technical services (which is deemed to be income under s.9(1)(vii)(b) of the Income-tax Act 1961). Even then, it cannot be subjected to tax under the Act in derogation of the treaty provisions. As the income in question could be brought within the purview of Article 7 of DTAA which deals with business profits, that provision alone comes into play. In fact, the applicability of Article (7)(1) to the present case is admitted by the Revenue in reply to questions (b) & (c). In the course of arguments also the same stand is maintained. Article 7(1) is as follows :-

"Article 7 - Business Profits

- The profits of an enterprise of one of contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to :
 - that permanent establishment; or
 - sales within that other Contracting State of goods or merchandise of the same or a similar kind as those sold, or other business activities of the same or a similar kind as those carried on, through that permanent establishment".

7. Article 7(7) clarifies that where the profits include items of income which are dealt with separately in other articles of this Agreement, then the provisions of those articles shall not be affected by the provisions of this Article. We have already noticed that the fees or payment received by the applicant for carrying out the responsibilities under the contract does not fall within the scope of Article 12 as the services are not of such a nature as contemplated by Article 12(3)(g). There is no other Article in the DTAA which deals with the fees for technical services other than those coming within the purview of Article 12. If so, the payments received by the applicant in connection with the contract would be taxable as business profits and as the applicant admittedly carried-on on its business through a permanent establishment, so much of the profits of the enterprise attributable to the permanent establishment are liable to be taxed in India in terms of Article 7. As already noted the applicant itself stated that very little work was done outside India and about 90 per cent or more of the activities were carried out in India by setting up a permanent establishment.

8. As regards the existence of Permanent Establishment, as rightly pointed out by the applicant the

specific clause (k) of Article 5.2 governs the applicant's case. Article 5.2 of the DTAA contains the inclusive definition of the term 'permanent establishment'.

ARTICLE 5 – Permanent Establishment

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(k) *a building site or construction, installation or assembly project, or supervisory activities in connection with such a site or project, where that site or project exists or those activities are carried on (whether separately or together with other sites, projects or activities) for more than six months.*

In view of the averment made by the applicant at page 9 para (b) of the application, the criteria laid down in clause (k) is satisfied. The applicant stated that "the activities under the GAIL contract were predominantly carried on in India for more than six months during the financial year 2003-04. The employees of the applicant were also present in India for 165 days. The details of visits and stay of the employees in connection with this contract are also furnished by the applicant. Hence, the applicant's un rebutted case that it had permanent establishment for the purpose of carrying out the contractual obligations has to be accepted. There was some debate on the point whether the applicant's PE is also covered by clause(c) of article 5.3. There is no need to delve into that aspect.

9. In the light of above discussion, the questions are answered as follows :-

- The receipts under the contract with GAIL are not in the nature of royalties as defined in Article 12 of the DTAA between India and Australia.
- The income from such receipts are liable to be taxed as business profits in India in view of Article 7 of DTAA and only the profits attributable to the permanent establishment in India are liable to be taxed as per the provisions of Income Tax Act, 1961.

Accordingly, the Ruling is given.

Sd/-

(A. Sinha)
Member

Sd/-

(P.V. Reddi)
Chairman

Sd/-

(Rao Ranvijay Singh)
Member

F.No. AAR/750/2007

Dated.....

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

- The applicant
- The Director of Income-tax (International Taxation)-II, New Delhi.
- The Joint Secretary (FT&TR-I, II), CBDT, New Delhi.
- Guard file.

(Batsala Jha Yadav)
Addl. Commissioner of Income-tax(AAR)

* Agreement between the Govt. of Republic India and the Govt. of Australia for the Avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income.