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

1st Day of February, 2010

A.A.R. No. 842 of 2009

Name & address of the applicant	Yongnam Engineering & Construction (Pte) Ltd 51, Tuas South Street5, Singapore 637644
Commissioner Concerned	Director of Income-tax (International Taxation)-I New Delhi.
Present for the Applicant	Mr. N.Venkataraman, Sr. Advocate Mr. Achin Goel, Advocate Mr. Satish Aggarwal, CA Mr. Akhil Samdhan, CA Mr. Pawan Khatter, CA Mr. Manan Agarwal, CA
Present for the Department	Mr. Sushil Kumar, Addl. DIT (IT), New Delhi

ORDER

The applicant is a company incorporated in Singapore engaged in the business of mechanical and civil engineering and fabrication and erection of steel structures. DIAL[1] appointed Larsen & Toubro (L&T) as a contractor for engineering, procurement and construction for setting up a new Passenger Terminal Building ('PTB') at IGI Airport, Delhi. L&T has sub-contracted the structural steel work of PTB to the applicant by means of a Sub-contract dated 27th February, 2008. In relation to the consideration

[1] Delhi International Airport (Private) Limited

received for offshore supplies covered by the said Sub-contract agreement, the applicant has sought advance ruling under section 245Q (1) of the Income-tax Act, 1961 on the following question:

> *On the facts and circumstances of the case, whether the amount received/receivable by the applicant from Larsen & Toubro Limited for offshore supply and delivery of overseas fabricated items are liable to tax in India under the provisions of the Income-tax Act, 1961and India-Singapore Double Taxation Avoidance Agreement ('Tax Treaty')?*

2. At the outset, it needs to be mentioned that this application is a repetition of the earlier application No.783/2008 filed by the same applicant in respect of the same transaction/contract and a similar question. The application was disposed of by this Authority on 17th June, 2009 with the observations made therein. This Authority could not decide the question raised in that application for the reason that the applicant, in spite of being given adequate opportunities, failed to respond and present the relevant facts, documents and clarifications. This Authority declined to answer the question as the factual details were lacking. However, the legal position in regard to the offshore supply of goods was noted by the Authority at paragraph 3. Then, it was observed:

> *"3.1. Though that is the legal position, the question can only be dealt with in the light of the actual facts in the applicant's case especially the modalities of the off-shore supply transactions.*

Therefore, the real question that arises for consideration is whether any part of the consideration relating to off-shore supplies of goods viz. items fabricated and procured abroad under the contract with L&T would constitute income that accrues or arises or is deemed to accrue or arise in India. This calls for examination of the material features and terms of the contract and the actual events in order to find out whether the case of the applicant falls within the ratio and reasoning of the Supreme Court in Ishikawajima case. As highlighted later, the applicant has not come forward with the details in this regard.

5. From the above clauses in App.5 and even from the main Agreement dated 22/7/2008, it is not clear as to who the exporter is and if the applicant is not exporter, what role it has played in the export of over-seas fabricated items. At what point of time the payment was made and the ownership of the goods passed and what are the precise modalities of the transaction are not clear. The difficulty in understanding the entire transaction in a proper perspective is heightened by the fact that App.5 to the Agreement contemplates high-seas purchase contract being executed by and between L&T and DIAL, the applicant not being a party to such contract. The basic averment of the applicant that it effected high-sea sale of the over-seas fabricated equipment and received the

payment in Singapore dollars thus remains unsubstantiated. We are at a loss to know as to what exactly happened in this case. No clarification has been given, no sequence of events have been set out and no documents relevant to the off shore supplies of goods have been furnished in spite of putting the applicant on notice. We have before us only the Sub-contract Agreement in a truncated form. As per App. 2-A 1.2, the sub-contractor assumes all the main contract responsibilities and liabilities for the Sub-contract works. The 'main contract' has not been filed to understand what are those responsibilities. Some other relevant documents such as performance bond and the conditions of Sub-contract, "being the "core clauses of the NEC Engineering and Construction Sub-contract" (referred to in para 2.5 of the Agreement) may have to be scrutinized, but they are not placed before us.

6. Then, as regards the permanent establishment also, this Authority wanted certain facts to be brought on record especially with regard to the activities undertaken by the applicant, apart from the import of goods. But, the applicant has not chosen to avail of the opportunity given by the Authority. At no point of time, the appellant's representative or the counsel was present and no written representation or clarification on facts has been furnished. In these circumstances, we are left with no option but to decline to answer the questions raised. The learned counsel for the Revenue has also expressed his inability to assist the Authority in the absence of necessary facts and documents.

7. The second question is inter-related to the first question. When we are not in a position to answer the first question for want of factual details, this question too defies an answer. …. Thus the question is riddled with ambiguity and contradiction. In view of the lack of response on the part of the applicant and in the absence of any clarification in the application, we are not in a position to give a ruling on this question also. "

In conclusion, the application was 'disposed of' recording the above observations.

3. It is also relevant to extract the proceedings recorded by this Authority on 13th February, 2009 after the first hearing of the case:

"We *have gone through the contents of the application and the annexed documents. We find that the documents furnished are not in complete shape e.g. Appendix-3 & 8 which may have bearing on the case have not been furnished. Secondly, the chain of documents relating to off-shore supplies from the date of shipment upto the date of clearance from the port are not made available. Copies of the 'High-seas purchase contract', commercial invoice, bill of lading etc. referred to in the application have also not been filed. Presumably, the applicant by now would have imported the equipment from abroad in connection with the contract. Hence, the applicant should file all the documents taking two concrete instances of import of equipment/material so that we may have clear picture of the modus operandi of the transactions. An affidavit/supplementary statement of facts shall be filed explaining those documents."*

In spite of this order, there was no response from the applicant.

4. The applicant has now come forward with a fresh application furnishing more factual details and additional documents. It may be mentioned that the applicant had not even offered any explanation for its lack of response and failure to furnish the requisite details/clarifications. However, a week after the present application was heard, a letter has been sent by the authorized signatory, on 29th January, 2010 stating that the then General Manager (overseas) who received the notices from this Authority (apart from the authorized representative) "disappeared without trace from September 2008". Even if this vague averment is correct, there was sufficient time for the applicant to check on the progress of the case by contacting the authorized representative or by making alternative arrangements. We are therefore not satisfied with this belated explanation.

5. Section 245R of the Income-tax Act,1961 reads thus:

> ***"245R Procedure on receipt of application.***
>
> *(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner and, if necessary, call upon him to furnish the relevant records:*
>
> *Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible be returned to the Commissioner.*
>
> *(2) The authority may, after examining the application and the records called for, by order, either allow or reject the application:*

[Provided that the Authority shall not allow the application where the question raised in the application,

(i) is already pending before any income-tax authority or Appellate Tribunal [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N] or any court;

(ii) involves determination of fair market value of any property;

(iii) relates to a transaction or issue which is designed prima facie for the avoidance of income-tax [except in the case of a resident applicant falling in sub-clause(iii) of clause (b) of section 245N].:]

Provided further that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided also that where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the Commissioner.

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a question received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorized representative.

Explanation: For the purposes of this sub-section, "authorized representative" shall have the meaning assigned to it in sub-section(2) of section 288, as if the applicant were an assessee.

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6. The learned counsel for the applicant contends that there is no embargo under the Act to entertain the fresh application on the same set of facts and the issues when in the previous application questions were not specifically answered or decided for want of factual details. As there was no advance ruling on the question specified in the previous application as contemplated by sub-section (4) of section 245R, it is submitted that the present application may be treated as continuation of the previous application/proceedings and this Authority may exercise its discretion and proceed to rehear the application on merits on the basis of the additional facts/material now adduced and to give a ruling on merits. In other words, it is contended that in the absence of the question not having been decided either way, the proceedings must be deemed to be pending and this Authority is not powerless to look into the additional material now furnished and give a decision on merits in terms of section 245R(4) of the Income-tax Act, 1961.

7. Undoubtedly, this Authority has discretion either to admit this repetitive application and hear the same on merits or to reject it at this stage. The fact that none of the situations specified in the Proviso to section 245R(2) are present does not mean that the application should be automatically entertained and heard on merits. The learned Sr. Counsel for the applicant has fairly stated that the discretion of this Authority cannot be denied.

8. On the facts and circumstances of this case, we do not think that the proceedings in connection with the earlier application shall now be reopened and a decisive answer to the question should be given at this stage. The discretion cannot be exercised to go to the aid of an indiligent and indifferent applicant who maintained steadfast silence throughout the earlier proceedings. Otherwise, we will be placing a premium on the negligence and indifference of an applicant who did not care to appear before this Authority and refrained from furnishing necessary information and evidence. The applicant cannot seek adjudication on merits at any time he wants after having allowed the previous application to go by default. Further, it is not as if the applicant will be left without remedy to agitate the same issue before the Income-tax authorities or the Tribunal. The extreme argument that proceedings shall be deemed to be pending notwithstanding the disposal of earlier application cannot be accepted. In any case, it is not

at all a fit case to exercise our discretion to admit this second application and decide it on merits.

9. The application is therefore rejected under section 245R(2) of the Income-tax Act, 1961 without prejudice to the rights and remedies available to the applicant under the Act.

sd/-
(J. Khosla)
Member

sd/-
(P.V. Reddi)
Chairman

F.No. A.A.R. No. 842/2009 **Dated:02.02.2010**

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

1. The applicant
2. The Addl**.** DIT (International Taxation), New Delhi

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