

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

**25<sup>th</sup> Day of August, 2011**

**A.A.R. No.1009 of 2010**

**PRESENT**

Justice Mr. P.K.Balasubramanyan (Chairman)  
Mr. V.K. Shridhar (Member)

Name & addresses of the applicants	SEPCOIII Electric Power Construction Corporation No 201, Yuqing East Street, Weifang, Shandong-261031, China
Present for the applicant	Mr. N Venkatraman, Senior Advocate Mr. Satish Aggarwal, FCA Mr. Atul Awasthi, ACA
Present for the Department	Mr. Sanjay Kumar, DIT(IT), Kolkatta Ms. Dipi Agrawal, ADIT(IT), Bhuvneshwar

**ORDER**

This application filed by the applicant SEPCOIII Electric Power Construction Corporation under section 245Q(1) of Income-tax Act has come up for hearing under section 245R(2) of the Act in the light of the objection filed by the Revenue to the allowing of the application or admitting of the application for a ruling.

2. Both sides were heard.

3. The applicant entered into an offshore supply contract with M/s. Sterlite Energy Private Ltd. on 10<sup>th</sup> May, 2006. The applicant, concerning the financial year 2010-2011, made an application under section 197 of the Act before the appropriate authority on 11/3/2010. On 25.5.2010 an order was passed by the concerned officer. A revision under section 264 of the Act was filed on 7/6/2010.

On 30.6.2010 an order was passed in the revision remitting the matter to the assessing officer. On 9.9.2010 a fresh order was passed by the assessing officer. A notice was issued to the applicant under section 263 of the Act on 24.1.2011 and that revision is said to be pending.

4. Meanwhile, for the assessment year 2007-08, a notice under section 148 of the Act had been issued to the applicant on 20.7.2010. Regarding the assessment year 2008-09 a notice under section 143(2) of the Act was served on the applicant on 14.7.2010. Yet another notice dated 24.8.2010 under section 143(2) of the Act was served on the applicant concerning the assessment year 2009-10. Thus proceedings for assessment concerning the years 2007-08 to 2009-10 were pending before the concerned assessing officer.

5. At that stage on 18.11.2010, the applicant filed the present application under section 245Q of the Act seeking an advance ruling on the question whether

“On the facts and circumstances of the case, whether the amounts received/receivable by SEPCO III Electric Power Construction Corporation, China from Sterlite Energy Private Ltd. (SEPL) upon execution of Offshore Supply Contract No. SEPL/SEPCO-III/JSG-01 dated 10<sup>th</sup> May, 2006 are liable to tax in India under the provisions of Income Tax Act, 1961 and the Agreement for Avoidance of Double Taxation between India and China?”

6. The Revenue raised the objection to the entertaining of the application on the ground that proceedings under section 197 of the Act were already pending and the question sought to be raised was the subject matter of the revision under section 263 of the Act when the application was filed. Regular assessment proceedings had been commenced against the applicant concerning the years 2007-08 to 2009-10 even before the present application was filed and these proceedings created a bar to the consideration of the present application concerning the contract dated 10.05.2006.

7. The applicant filed a rejoinder contending that the pendency of the application under section 197 of the Act or under section 263 arising out of that proceedings could not create a bar to the entertaining of the application for advance ruling as has been repeatedly held by this authority. As regards the commencement of the assessment proceedings, it is contended that in the notice issued on 29.9.2010 subsequent to the filing of the application for advance ruling, the assessing officer has not made mention of the income from offshore supply and hence the issue cannot be said to be pending regarding the assessment year 2007-08 before the assessing officer. In regard to the assessment year 2008-09 it was submitted that in the questionnaire issued to the applicant, the questions were general in nature and did not specify the question sought to be raised in the present application and therefore it could not be said that the question was pending before the Income-tax authorities. As regards the assessment year 2009-10 no questionnaire has been issued and the matter was pending before the Transfer pricing officer upon a reference by the assessing officer and hence it could not be said that the question of taxability of income from offshore supply is pending on the day the present application was made.

8. As far as this authority is concerned, the position has been adopted that the mere pendency of a proceeding under section 195 or 197 of the Act or even a final order thereon does not stand in the way of an application for advance ruling being entertained. We do not feel it necessary to consider the question over again notwithstanding the arguments in that behalf on behalf of the Revenue. We go by the stand we have earlier adopted on this question and over-rule the objection of the Revenue that the order under section 197 or the pendency of the revision therefrom under section 263 of the Act on the day of the filing of this application would bar the jurisdiction of this authority to entertain the application and to give a ruling thereon.

9. But we are not in a position to accept the submission on behalf of the applicant that the pendency of the proceedings for regular assessment regarding the relevant assessment years cannot stand in the way of the entertaining of the

present application. Admittedly as on the date of the application before this authority, notices had been issued under section 147 and under section 143 of the Act.

10. When a Return of income is filed under section 139 of the Act either voluntarily or on being called upon to do so by a notice under Section 142(1) of the Act, all the claims raised by the person who furnishes the return relating to the assessment are before the Assessing Officer for consideration and decision. Section 143(2)(ii) enables the Assessing Officer to require the person to attend his office to establish his claims. Under Section 143(3)(ii) the Assessing Officer has to pass an order making an assessment of the total income or loss of the person and determining the tax payable or the refund if any due to him as the case may be on the basis of the assessment.

11. When the applicant was called upon to file a return of income and it filed one, it is subject to the enquiry as contemplated by the Act. There is no restriction on the enquiry. It is one into all claims. Even if during the course of it, a questionnaire is served on it asking some questions, that does not restrict the scope of the enquiry to be made under section 143(2)(ii) of the Act or the order of assessment to be passed under section 143(3)(ii) of the Act. The assessing officer has still to deal with all the claims of the person furnishing the return arising out of the return.

12. In that context, can it be said, where a Return of income is furnished and the proceedings for assessment are giving on, that a claim by the person that the income returned by him or one of the items of income returned by him is not

taxable in this country has not arisen for consideration by the assessing officer or that it is not pending before him? On principle, it appears that it cannot be said so. The question raised in the application before the authority under section 245Q of the Act is whether the amounts received by the applicant are liable to tax in India under the provisions of the Income-tax Act? It appears to us that this is the very question, or the basic question pending adjudication before the Assessing Officer, so far as that particular income is concerned.

13. The significance of filing a return of income and the pendency of assessment proceedings in the context of clause (a) of the proviso to Section 245R (2) of the Act has been considered on earlier occasions by this Authority. The position that on application seeking an advance ruling has to be filed before the filing of a return was accepted in *Mustaq Ahmed (2007) 239 ITR 530*. Even where an issue was not specifically raised, but had to be decided in the course of the assessment proceedings before the Tax-Authorities, a preliminary objection under clause (a) of the proviso raised by the Revenue was held to have substance in *Application No. P 16 of 1998 (1999) 236 ITR 103*. The importance of the filing of a return and the pendency of a claim was emphasized when this Authority ruled that where no return of income was filed or no claim was pending before the Tax-Authorities, an application could not be rejected under section 245R(2)(a)(i) of the Act. [*Monte Harris (1996) 218 ITR 413*].

14. The bar created by the proviso to Section 245R(2) of the Act to admitting an application under section 245Q of the Act for Advance Ruling, is a bar to this Authority to pronounce a Ruling in terms of section 245R(4) of the Act. One view

is that it is a threshold bar. Another possible view is that it is only a restriction on the jurisdiction of this Authority enabling it to refuse to pronounce a ruling at its discretion when one of the conditions of the proviso to section 245R(2) is satisfied. The latter view, if adopted, might render the bar created by the proviso to section 245R(2) of the Act if not otios at least inconsistent and dependent on a discretion that may vary with the Chancellor's foot.

15. It may be proper to understand the proviso to section 245R(2) of the Act as creating a bar to the jurisdiction of this Authority once it is found that any one of the prescriptions therein is satisfied. The power of this Authority to exercise a discretion in deciding not to give a ruling even when one of the conditions of the proviso is not satisfied, is part of the general discretion that is vested with any such authority as recognized by this Authority, in the Microsoft case (AAR/781/2008). But, once one of the bars is found to exist, this Authority is enjoined by the very statute that created it, to decline jurisdiction to give a ruling.

16. We, therefore, find that as on the date of filing of the present application before us relating to the rights and obligations arising out of the contract dated 10.5.2006 entered into by the applicant, in so far as it relates to the question posed in this application, was pending before the concerned assessing officer. We re-emphasize that merely because a questionnaire in general terms is served or a questionnaire raising specific issues is served as a further step towards completing the assessment, cannot lead to the position that the question sought to be raised before us is not pending before the assessing officer when the return of income is filed. We are, therefore, satisfied that the allowing of this application

under section 245 R(2) of the Act for giving a ruling under section 245R(4) of the Act is barred by virtue of the proviso to section 245R (2) of the Act. The application is, therefore, rejected.

**(P.K.Balasubramanyan)**  
**Chairman**

**(V.K.Shridhar)**  
**Member**