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

31st Day of January, 2012

Application No.1 of 2011

In

A.A.R. No.1008 of 2010

PRESENT

Justice Mr. P.K. Balasubramanyan (Chairman)

Mr. V.K. Shridhar (Member)

Name & address of the applicant	SEPCO III Electric Power Construction Corporation No 201, Yuqing East Street, Weifang, Shandong-261031, China
Present for the applicant	Mr. N. Venkataraman, Sr. Advocate Mr. Satish Aggarwal, FCA Mr. Akil Sambhar, FCA Mr. Nageswar Rao, Advocate Mr. Atul Awasthi, ACA
Present for the Department	Mr. Vivek Kumar Upadhyay, ADIT(IT)-2(2), Mumbai

RULING

The applicant is a company incorporated under the laws of China on 26.3.2009. The applicant, among other things, is a supplier of equipments for Electric Power Projects. On 26.3.2009, the applicant entered into a contract with M/s Jhajjar Power Limited, for supplying of equipments for the Haryana Power Project. That contract was amended and restated on 1.6.2009. According to the applicant, it is an off-shore supply contract requiring the applicant to carryout design, engineering, procuring and transportation to the port of loading of the equipment for a coal fire power station built for the Indian company. According to the applicant, the payment received by it for the equipment supplied under the contract are not taxable in India under the Income-tax Act since the supply of material was outside the territory of India. It has also claimed that

under the India-China Double Taxation Avoidance Convention no tax can be levied on it in India. It is in that context that the applicant came up with this application for an Advance ruling on the taxability or otherwise of the payment received by it under the contract.

The Revenue raised an objection that proceedings for the assessment of the applicant were pending before the concerned Income-tax Officer even before the applicant approached this authority for an advance ruling. By our order dated 25.08.2011 we over-ruled that objection and found that there is no impediment under section 245R(2) of the Act in considering the application for a ruling under section 245R(4) of the Act. We, therefore, allowed the application and framed the following question for a ruling,

> *On the facts and circumstances of the case, whether the amounts received/receivable by SEPCO III, China from JPL India for Offshore supply of Equipments, under Offshore Supply contract No.JHA/SEP/F/15/0027 dated 1st June, 2009, are liable to tax in India under the provisions of the Income-tax Act, 1961 ('Act')?*

On behalf of the applicant, the terms of the contract were elaborately referred to. It is pointed out that the Indian company, was defined as the 'owner' in the contract and the applicant was defined as the 'contracting counter-party'. With reference to Clause 27 of the contract, it was pointed out that the parties had stipulated for the passing of the title to the equipment outside the country. The title passed at the port of loading. Port of loading itself was defined to show that it was outside the country. The technical requirements were that of the owner. The payment was to be made in terms of Clause 5 of the agreement read with the schedule, in Euros and Dollars. Clause 6 setting out the terms of payment also showed that unless otherwise agreed to by the parties in writing, all payments made by the owner to the applicant will be by Electric Funds Transfer to bank accounts in the Peoples Republic of China, notified in writing by the applicant to the owner. Bill of Lading and the Bill of Entry were also produced in support, to show that the owner, namely, the Indian company, was shown as the owner

of the equipment. Transit insurance was also taken in the name of the owner. The port of loading was Shanghai. According to the applicant, all these clearly indicated that the title to the goods passed outside the territorial waters of India.

Learned Sr. Counsel for the applicant cited the decision of the Supreme Court in Ishikawazima-Harima Heavy Industries Ltd. vs. Director of Income-tax Mumbai [(2007) 288 ITR 408], in support of his contention. He referred to the relevant portions of the said Supreme Court decision in comparison to the stipulations contained in the present contract and submitted that the said decision of the Supreme Court squarely applied to the facts of this case. He also referred to the ruling of this Authority in LS Cable Limited (AAR Nos.858-861 of 2009).

On behalf of the Revenue it is contented that the transaction was not merely a supply contract and that the relevant clauses of the contract indicate that the applicant has to conduct the testing of equipments in India during commissioning of the units and that the equipments will not be accepted by the Indian company which could reject them if they do not pass the "Factory Acceptance Tests." A substantial part of the contract amount was allocated for civil and erection purposes and the applicant had to coordinate with relevant contractors relating to pre-commissioning activities. The applicant was to coordinate with relevant contractors for issuing notices to the Indian company regarding commissioning activities. The Indian company had to issue a certificate of completion indicating defects or deficiencies, if any, that prevent provisional completion. The applicant had to coordinate with the relevant contractors to issue the notice to the Indian company that each unit is ready for the provisional completion test. The Indian company had to issue certificate of provisional completion after the removal of defects or deficiencies. The applicant was to provide all necessary assistance and support to relevant contractors at anytime during the period of 90 days after provisional completion of a unit. Revenue, thus submits that a considerable portion of the work relating to the supply is being done in India. Moreover, the applicant has to have continued presence in India by coordinating with the concerned contractors for the pre-commissioning and commissioning activities. The support has to be provided for 90 days, and such support cannot be provided

without a presence in India. The applicant, therefore, had a permanent establishment in India. Thus the payment was liable to be fixed in India.

Whatever may be our reaction to the weight of circumstances pointed out on behalf of the Revenue and the submission that such contracts are indivisible, we are afraid that we are bound by the decision of the Supreme Court relied on, on behalf of the applicant and we are not free to travel outside it. We may also notice that the question raised is only on offshore supply of equipments and not on other activities.

We find on a perusal of the terms of the contract and the conduct disclosed by the Bill of Lading, the Bill of Entry and the taking of transit insurance that this would be an offshore sale in the light of the decision of the Supreme Court in Ishikawajima-Harima Heavy Industries Ltd. referred to earlier. The argument of the Revenue that the transaction must be taken as one and indivisible and the liability to tax should be determined on that basis, cannot be accepted in the light of the decision of the Supreme Court. The effect of the above decision of the Supreme Court is that the Income-tax Authorities under the Act have no jurisdiction to tax the payment made outside for these supplies taking place outside the country. Relying on the decision of the Supreme Court, we overrule the objection raised on behalf of the Revenue.

We therefore rule on the question posed, that the amounts received/receivable by the applicant from M/s Jhajjar Power Ltd. for off-shore supply of equipments in terms of the contract dated 1.6.2009 is not liable to tax in India under the provisions of the Income-tax Act, 1961, in view of the decision of the Supreme Court in Ishika Wajima Harima Heavy Industries Ltd [2007] 228ITR408. We clarify that the ruling relates only to off-shore supplies.

Accordingly the ruling is pronounced on this 31st day of January, 2012.

Sd/-	**Sd/-**
(V.K. Shridhar)	**(P. K. Balasubramanyan)**
Member	**Chairman**