Advance Ruling Application can not be accepted if question raised in the application is already pending before any income-tax authority.

In Re Nuclear Power Corporation of India Ltd. (AAR) – Since the question whether the payment made under the transaction was chargeable to tax under the Act was pending before the authorities under the Act arising out of an assessment against ASE, before the applicant approached this Authority the allowing of this application under Section 245R(2) of the Act is barred. The bar is in entertaining an application where the question raised in the application is already pending before any income-tax authority. Since we have found that the question arising before us, the primary question, if not the only question, is whether the payment to be made by the applicant to ASE on the transaction(s) is chargeable under the Act is already pending in proceedings against the payee, ASE, entertainment of the present application is barred by clause (i) of the proviso to Section 245R(2) of the Act. We, therefore, reject the application.

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

21st December, 2011

A.A.R. No.1011 of 2010

Name & address of the applicant- **Nuclear Power Corporation of India Ltd.**

Commissioner concerned - **Commissioner of Income-tax, (Large Tax Payer Unit), Mumbai.**

O R D E R

1. The applicant before us is the Nuclear Power Corporation of India Limited (NPCIL). It is a company incorporated in India. It is a Public Sector Company. It has approached this Authority under section 245Q(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on the basis that it has entered into an offshore Services Contract with M/s. Atomstroy Export Russia, (ASE) for setting up a power plant in the State of Tamil Nadu. According to the applicant, the income from such contracts is taxable under section 44BBB of the Act. It had also entered into four Offshore Supply Contracts with ASE. As per those contracts, the equipments and materials

were to be sold outside India and the payments were also made outside India. No one connected with ASE who was present in India was involved in the activities associated with the offshore supply of such goods. The sales were on principal to principal basis. According to the applicant, the payments received by ASE under these supply contracts were not taxable in India. Under the Offshore Services and Offshore Supply Contracts, ASE is to make the payment of taxes in India and the applicant, the customer, was to reimburse the amounts to ASE.

2. The applicant has pleaded that ASE was assessed to tax for the years 2006-07 and 2007-08 pursuant to the directions of the Dispute Resolution Panel and it was held that payments received by ASE under Offshore Services Contracts are covered by Section 44BBB of the Act and payments received by ASE in respect of Offshore Supplies Contracts are also covered by Section 44BBB of the Act.

3. It was in that context that the applicant was approaching this Authority for a Ruling. Form No. 34D has been adopted for seeking the Ruling. Ruling is sought on the question "Whether ASE is chargeable to tax as per the Act or under the Double Taxation Avoidance Convention between India and Russia in respect of the payment made by NPCIL to ASE under the Offshore Supply Contracts."

4. In the context of the admission that ASE, the supplier and the other party to the transaction, was already assessed to tax, we raised a doubt when the application came up whether the application would not be barred by clause (1) of the proviso to Section 245R (2) of the Income-tax Act and whether it would be proper to allow the application under section 245R(2) of the Act for giving a Ruling. The application, on the request of the applicant, was then posted for hearing on that question.

5. In response to the doubt as above expressed, learned Senior Counsel appearing for the applicant, NPCIL, addressed elaborate arguments before us. First of all he submitted that, a second question, which was the primary question as far as the applicant was concerned, arose for Ruling. That question was whether the applicant was liable to withhold tax on the offshore Supply Contract; and f yesat what rates?" He submitted that the applicant being the payer and not the recipient, was concerned with the question of withholding of tax alone and hence that question was the primary question on which the Ruling is sought, or ought to have been sought and the question formulated in the application is only an incidental question that had to be decided to give a Ruling to the applicant on the existence or non-existence of a liability on the applicant to withhold tax.

6. In Foster Pty.Ltd (AAR No. 976 of 2009), we had taken the view that a proceeding for assessment pending against the payer, who has the liability to withhold tax under a transaction for the payment made thereunder, in terms of Section 195 of the Act, operated as a bar to entertaining an application for a Ruling Section 245R of the Act when the payee or the recipient approached this Authority subsequently for a Ruling. We ruled that clause (1) of the proviso to Section 245R(2) of the Act barred the application. Learned Sr. Counsel submitted that the conclusion as above was wrong and the question required to be reconsidered. He also pointed out the difference in this case in that the payer has approached this Authority after the payee has been assessed, whereas in the Foster Ruling, the payee had approached this Authority after the payer had been assessed. He submitted that, that distinction has also relevance in the context of Section 195 of the Act and the nature of the obligation arising therefrom.

7. The applicant, though a Public Sector Undertaking, has approached this Authority on the strength of Section 245N(a)(ii) read with Section 245N(b)(ii) of the Act. The procedure on receiving an application under section 245Q(1) of the Act by this Authority is prescribed by Section 245R of the Act. That section contemplates the hearing of an application in two stages. The first stage is the one contemplated by Section245R(2) of the Act. The Authority is given the discretionary authority either to allow the application or to reject the application. The allowing contemplated is, of course, admitting the application for rendering an actual Ruling under section 245R(4) of the Act. The proviso to Section 245R(2) of the Act mandates that this Authority shall not allow the application, inter alia, where the question raised in the applicat on “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.” The exclusion is in respect of an issue relating to computation of the total income which is pending before any income-tax authority or Appellate Tribunal. The applicant has sought a Ruling in terms of Section 245N(a)(ii) of the Act and the question raised by it relates not to the computation of its total income but its obligation in relation to the tax liability of a non-resident, ASE, in respect of a transaction, it has undertaken as a resident. The obligation of the applicant under section 195 of the Act, arises out of the obligation of the non-resident party to the transaction to be taxed under the Act. As we have noticed, the application has also been made in Form No. 34D prescribed by the Rules and not under Form No. 34E. Rule 44E of the Income-tax Rules prescribes three different forms for an application under section 245Q of the Act. Form No. 34C is the form to be used by a non-resident seeking a Ruling in terms of Section245N(a)(i) of the Act, Form No. 34D by a resident seeking a Ruling in relation to a transaction with a non-resident in terms of Section 245N(a)(ii) of the Act and Form No. 34D by a resident notified as competent

to apply by the Central Government in exercise of power under Section 245N(b)(iii) of the Act. Though the use of a form may not be conclusive, the Ruling sought in this case is also an Advance Ruling coming under Section 245N(a)(ii) of the Act. The applicant cannot, therefore, be heard to contend that pending of a proceeding before an Income-tax Authority is the backing for its approaching this Tribunal. The applicant has, therefore, to show that the bar enacted by clause (i) of the proviso to Section 245R(2) of the Act cannot have application in this case.

8. Learned Sr. Counsel emphasizes that a Ruling rendered on the scheme of Section 245N to 245V of the Act, is a Ruling concerning an applicant and it has nothing to do with any other person. He refers to the definitions and specifically to Section 245S of the Act which specifies that a Ruling pronounced by this Authority is binding only on the applicant who had sought it and on the Commissioner and the income-tax authorities subordinate to him. He also relies on the additions made to the form of verification even while amending clause (i) of the proviso to Section 245R(2) of the Act. The present clause (i) of the proviso to Section 245R(2) of the Act prior to 1.6.2000 was clause (a) of the proviso to Section 245R(2) of the Act. That clause read:

"(a) is already pending in the applicant's case before any income tax authority, the Appellate Tribunal or any Court."

It was amended to read:

"(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 Section245N) or any Court."

9. The form of verification in the form was also simultaneously modified. The following assertion was added in the verification with effect from 3.8.2000.

"I also declare that the question(s) on which the advance ruling is sought is/are not pending in my case before any income-tax authority, the Appellate Tribunal or any Court."

10. Learned Sr. Counsel submits that even though "in the applicants case", in the clause creating the bar was deleted the same finds a place in the verification and the verification is only on the non-pendency of a proceeding in the case of the applicant. He also submitted that if one were to look at the changes brought about in the relevant provisions from its inception in the year 1993, it could be seen that the scope for giving a Ruling has only been

increased and not restricted. Hence, there was no reason to restrict the scope of situations in which a Ruling can be given or to restrictively understand the spread of jurisdiction of this Authority. Taking note of the object sought to be achieved by rendering an Advance Ruling, there was no justification in restricting the scope of the provisions or for restricting the jurisdiction of this Authority.

11. The defnition of advance ruling" in Section 245N(a) of the Act shows that a Ruling is a determination by this Authority in relation to a transaction in so far as it relates to a non-resident applicant and a resident applicant undertaking a transaction with a non-resident. A ruling, therefore, cannot be divorced from a transaction. An applicant applies for a Ruling with reference to a transaction. It is based on the transaction. In fact, Section 245S emphasized by Sr. Counsel itself spec fies that a Ruling is binding on the applicant who had sought it. in respect of the transaction in relation to which the ruling had been sought. S o, the Ruling would be binding on the applicant in respect of the transaction put in question.

12. A transaction normally involves more than one party. It must have atleast two parties. In the context of the Act, a liability to tax under the Act would arise only if one party earns an income in a transaction with another. In the context of Section 195 of the Act, only a bilateral transaction can lead to an obligation to pay a sum of money to another, leading to an obligation to withhold a part of it towards the income-tax that may found to be payable. It is, therefore, not possible to separate an applicant from a transaction while he is seeking a Ruling, since the Ruling relates to a transaction undertaken by him or to be undertaken by him.

13. We held in Foster (AAR No. 975 of 2009) that if a proceeding in respect of a transaction to which the applicant is one of the parties, is pending before the income-tax authority, though as against the other party to the transaction, the approach of the applicant to this Authority for an Advance Ruling would be barred by clause (i) of the proviso to Section 245R(2) of the Act. We reasoned that the question posed before the income-tax authority and before us, both would be whether the payment made by one thereunder to the other, would be taxable under the Act or the Double taxation Avoidance Convention and clause (i) of the proviso to Section 245R(2) of the Act stood in the way of our assuming jurisdiction to give a Ruling on that question. If one cannot separate an applicant from a transaction for the purpose of enabling him to get an advance ruling, the position we adopted therein appears to be correct. In the case on hand, the income-tax authority has held that the gains arising out of the transaction(s) relied on before us, are taxable in terms of Section 44BBB of the Act. An appeal has also been filed against it by the other party to the transaction, though subsequent to

the filing of the application before us, but the order of assessment preceded the present application. The question raised in the application is whether the said payment is taxable in terms of the Act or the DTAC. Can it be said that the said question is not pending before the income-tax authority, though at the instance of the other party to the transaction? We think not. As we see it, the question of taxability of the amount paid or to be paid by the applicant to ASE was already pending before the income-tax authority when the application was filed and is now pending before the Appellate Tribunal.

14. Learned Counsel contended that in Foster, it was the payee who had approached this Authority when he payer had already been assessed, whereas, here the payer had come for a Ruling through after the payee had been assessed and that would make a difference. He emphasized that the liability of the payer was limited to withholding a portion of the tax in terms of Section 195 of the Act and he was not the assessee in respect of the payment. The obligation of the payer for withholding tax was a tentative one, something different from that of the payee or the receiver of the income.

15. As a corollary, he argued that the applicant was only seeking a Ruling on his obligation to withhold tax and the question posed in the application as filed, was only a question incidental to it. He sought support for the argument that the question of the liability to be taxed of the payee is only an incidental question by relying on the Ruling of this Authority in Airports Authority of India In re [2008] 168 Taxman 158.

16. That was a case where at the time of allowing of the application under section 245R(2) of the Act, the objection based on clause (i) of the proviso was not raised. But at the time of hearing under section 245R(4) of the Act, the question was raised. Against the payee an order of assessment had been passed finding it liable to pay tax on the payment involved in the transaction between it and the Airports Authority of India, the applicant and an appeal against that order of assessment had also been filed by the payee, before the payer, the applicant approached this Authority for a Ruling. Two arguments were raised on behalf of the applicant in that case on that objection of the Revenue. The first was that the question relating to the payees liability to pay income-tax was pending before the Appellate Authority, not in the case of the applicant and the second was that the reframed question in the application for advance ruling was in regard to the liability of the applicant to deduct tax at source and that was not the question pending before the Appellate Authority. This Authority stated:

“Section 195(1) pre-supposes that the sum payable to the nonresident/foreign company must be chargeable to tax under the

provisions of the Income-tax Act. That means the question of tax deduction is linked up with the tax liability of the non-resident/foreign company to whom the payment has to be made by the applicant under the transaction entered into with the non-resident. The applicant, therefore, seeks determination that the foreign company –Raytheon is not liable to pay income-tax in India on the amounts received by it from the applicant and, therefore, the applicant is under no obligation to deduct tax under section 195(1). It is true that in the process of deciding the applicant's legal obligation under section 195(1), the non-resident's liability to pay income tax on the said sum has to be decided, but, on that account the question or issue about tax deduction cannot be said to be pending before the income-tax appellate authority. In the case of appeal of Raytheon, its liability under the provisions of Income-tax Act, read with DTAA arises for consideration directly and that is the sole question to be decided in appeal but in the present application the question to be decided at the instance of the applicant is about tax deduction at source. No doubt, Raytheon's liability to pay income-tax looms large in the proceedings before this Authority also but the decision on this question is incidental to the determination of the applicant's obligation to deduct tax at source. They may be inter-related or allied issues but the question raised before this Authority cannot be said to be identical nor can it be said to be the very same question pending determination by the appellate authority. This distinction, though appears to be subtle, is real. "

17. With very great respect, we cannot agree that the liability of the payee to pay income-tax on the payment received is a question that is incidental to the question whether the payer is bound to deduct tax at source in terms of Section 195 (1) of the Act. According to us, while considering the question of liability to deduct tax at source, the primary and the only question is whether the payment made is liable to be taxed under the Act. Without a finding on that question, no conclusion as to whether tax is deductible under Section 195(1) of the Act can be taken. In fact, the question whether tax ought to be deducted merely follows the finding on the liability of the assessee to be taxed. The question whether tax has to be deducted can never said to be the incidental question in such a situation.

18. Section 195(1) of the Act speaks of an obligation to deduct tax by a person responsible for paying to a non-resident any sum chargeable under the provision of the Income-tax Act. That means, the obligation exists only when the payment is chargeable to tax under the Act. Hence, on a question being asked whether a deduction at source has to be made this Authority has to consider first and foremost whether the payment is chargeable to tax under the Act under any of the heads and on that finding and on that finding alone, rests the obligation to deduct or not to deduct tax under Section195

(1) of the Act. According to us, with great respect, such a question cannot be said to be an incidental question arising in a question whether tax is deductible at source. With respect, we are inclined to think that it is the primary question.

19. "Incidental", according to the Dictionary, means "occurring as a minor accompaniment, occurring by chance in connection with something else". We are not able to see the question of chargeability to tax of the payment as an incidental question while ruling on the question whether there is a liability to deduct to tax under section 195(1) of the Act.

20. In the recent decision in GE India Technology Centre Pvt. Ltd. v. CIT [2010] 327 ITR 456, the Supreme Court while explaining the scope of Section 195 of the Act has stated:

"The most important expression in Section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Income-tax Act."

21. This means that the whole obligation to withhold tax under section 195(1) of the Act, depends on the chargeability of the amount to tax under the Income-tax Act. The Supreme Court went on to lay down that Section 195(1) of the Act "…… in clear terms lay down that tax at source is deductible only from "sums chargeable under the provisions of the Income-tax Act, i.e. chargeable under Sections 4, 5 and 9 of the Income-tax Act."

22. This, in our view, leads to the position that the main question to be decided or the primary question to be decided when the question of liability for the withholding of tax under Section 195 of the Act is brought before us, is the question whether the payment is chargeable to tax under the Income-tax Act. The decision on that question cannot be said to be only a decision on an incidental question. In view of what the Supreme Court has held in the above decision, we find it difficult to adopt the line of reasoning in Airport Authority Ruling relied on by Senior Counsel for the applicant.

23. A Ruling, according to us, is not only applicant specific, but is also transaction specific. It is on a transaction entered into or undertaken by the applicant. That is why Section 245S specifies that a Ruling is binding on the applicant, the transaction and the Commissioner of Income-tax and those subordinate to him. Therefore, with respect to the learned Senior Counsel, we are not able to accept his argument that a Ruling is binding only on the applicant. According to us, it is also binding on the transaction based on which the applicant has sought a Ruling in advance.

24. What is barred by the proviso to Section 245R(2) of the Act in the context of clause (1) thereof is the allowing of an application under section 245R(2) of the Act where "the question raised in the application is already pending before any income-tax authority, or Appellate Tribunal or any Court." It is not necessary that when the question is sought to be raised by the applicant, the proceeding already pending must be against him. The significance of the dropping of the words, "in the applicant s case cannot be wholly ignored. That apart the question raised, arises out of a transaction and the question can arise at the instance of either party to the transaction, the payer or the payee in the context of the obligation imposed respectively on them by the Act. The decision in Narayan Rais case [64 ITR 67 (SC) relied on, was one where it was found that he section *proprio vigore* did not have application and the proviso which was originally enacted but which was subsequently deleted, can make no difference in understanding the sense of the section or in widening or restricting it. Since we are not resting our decision on the omission of the words "in the applicant's case "it is not necessary to pursue this aspect further. We need only notice that there is no change brought about in Section 245S of the Act. Suffice it to say that the emphasis is on the pendency of the question. The question in this case is whether the payment to be made by the applicant to ASE is chargeable to tax under the Act.

25. Since the question whether the payment made under the transaction was chargeable to tax under the Act was pending before the authorities under the Act arising out of an assessment against ASE, before the applicant approached this Authority the allowing of this application under Section 245R(2) of the Act is barred. The bar is in entertaining an application where the question raised in the application is already pending before any income-tax authority. Since we have found that the question arising before us, the primary question, if not the only question, is whether the payment to be made by the applicant to ASE on the transaction(s) is chargeable under the Act is already pending in proceedings against the payee, ASE, entertainment of the present application is barred by clause (i) of the proviso to Section 245R(2) of the Act. We, therefore, reject the application.

26. Accordingly, the order is pronounced on this 21st day of December, 2011.

(V.K. Shridhar)
Member

(P.K.Balasubramanyan)
Chairman