

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

26th Day of July, 2011

A.A.R. Nos. 858-861 of 2009

PRESENT

Mr Justice. P.K. Balasubramanyan (Chairman)

Mr. V.K. Shridhar (Member)

Name & address of the applicant	LS Cable Limited, (12-16F) LS Tower, 1026-6, Hogue-dong Gyeonggi-do, 431-080 Korea
Commissioner Concerned	Director of Income-tax-I (International Taxation) New Delhi
Present for the Applicant	Mr.N.Venkataraman, Sr.Advocate Mr. Taranpreet Singh, FCA Mr.Satish Aggarwal, FCA Mr. Akil Sambhar, ACA Mr. Hitesh Jain, ACA Mr. Atul Awasthi, ACA
Present for the Department	Mr.Narender Kumar, ADIT (Intl. Taxn.), New Delhi.

Ruling
(By V.K.Shridhar)

Four applications are filed by the applicant, LS Cable Limited. The applicant is a company incorporated and located in Korea and is a tax resident of Korea. It is engaged in the business of manufacturing electric wire and cable for power distribution. The applicant was the successful bidder in the bids invited by the Delhi Transco Limited (DTL) for the supply, laying, jointing, testing and commissioning of the following projects:

- A.** 220 KV, D/C XLPE cable of 1 x 1200 sq.mm between Maharani Bagh GIS Sub-Station and Electric lane GIS Sub-Station at New Delhi,
- B.** 200 KV D/C U/G Cable between 400/200 K V Maharani Bagh GIS substation and 220 K V Trauma Centre (AIIMS) GIS Substation at New Delhi, India.
- C.** 220 KV XLPE Cable of 1000 Sq.mm between 220 KV GIS Ridge Valley Substation and 220 KV GIS TRAUMA Centre (AIIMS) Substation at New Delhi.
- D.** 220 KV double circuit overhead transmission line between Bernauli-Mehrauli for feeding proposed 220 KV GIS Substation at IGI Airport, New Delhi.

For the above four projects, applicant states that it entered into three separate contracts on 29th September 2009 with DTL. The scope of work of the applicant under the said contracts for all these projects include: (1) offshore supply contract involving supply of equipments and materials including mandatory spares on CIF basis, (2) onshore supply contract and (3) onshore service contract. The applicant refers to various clauses in the contract documents relating to offshore supply contract viz. transfer of title, insurance, payment mechanism etc. and submits that in connection with the said contract, the property in the goods to be supplied from Korea would pass outside India in favour of DTL and the sale would be concluded outside India and the payment would be received outside India in foreign currency. The applicant contends that no income accrues or arises in India and further no income will be received or deemed to be received in India.

2. In AAR No. 858/2009, the following question is formulated by the applicant for seeking advance ruling from this Authority:

On the facts and circumstances of the case, whether the amounts receivable by LS Cable Limited ('Applicant') from Delhi Transco Limited ('DTL') under Contract No. DTL/CA/PROJECT-II/09-10/MB to EL/I dated 29 September 2009 ('offshore supply contract') for offshore supply of equipments and materials including mandatory spares on CIF basis for 200 KV D/C U/G cable between 400/220 K V Maharani Bagh GIS substation and 220 K V Electric Lane GIS Substation at New Delhi, India are liable to tax in India under the provisions of the Income-tax Act, 1961 ('Act') and the Agreement for Avoidance of Double Taxation between India and Korea ('India-Korea tax treaty')?

In AAR No. 859/2009, the following question is formulated by the applicant for seeking advance ruling from this Authority:

On the facts and circumstances of the case, whether the amounts receivable by LS Cable Limited ('Applicant' or LSCL') from Delhi Transco Limited ('DTL') Contract No. DTL/CA/PROJECT-II/09-10/MB to TC/I dated 29 September 2009 ('offshore supply contract') for offshore supply of equipments and materials including mandatory spares on CIF basis for 200 KV D/C U/G Cable between 400/200 K V Maharani Bagh GIS substation and 220 K V Trauma Centre (AIIMS) GIS Substation at New Delhi, India are liable to tax in India under the provisions of the Income-tax Act, 1961 ('Act') and the Agreement for Avoidance of Double Taxation between India and Korea ('India-Korea tax treaty')?

In AAR No. 860/2009, the following question is formulated by the applicant for seeking advance ruling from this Authority:

On the facts and circumstances of the case, whether the amounts receivable by LS Cable Limited ('Applicant' LSCL') from Delhi Transco Limited ('DTL') for Proposed Supply Contract (Off-Shore Contract) for the package of Supply, Laying, Jointing, Testing and Commissioning of 220 KV XLPE Cable of 1000 Sq.mm between between 220 KV GIS Ridge Valley Substation and 220 KV gist RAUMA Centre (AIIMS) Substation at New Delhi (India for Tender No. DTL/DGM(PROJECT-IIA)/UGC/GT No.4/2009 are liable to tax in India under the provisions of the Income-tax Act, 1961 ('Act') and the Agreement for Avoidance of Double Taxation between India and Korea ('India-Korea tax treaty')?

In AAR No. 861/2009, the following question is formulated by the applicant for seeking advance ruling from this Authority:

On the facts and circumstances of the case, whether the amounts receivable by LS Cable Limited ('Applicant' or LSCL') from Delhi Transco Limited ('DTL') Contract No. DTL/CA/PROJECT-II/09-10/LILO-1 dated 6 July, 2009 ('offshore supply contract') for offshore supply of equipments and materials including mandatory spares on CIF basis in respect of Bernauli – Mehrauli 220 KV double circuit overhead transmission line for feeding proposed 220 KV GIS Substation at IGI Airport, New Delhi are liable to tax in India under the provisions of the Income-tax Act, 1961

(‘Act’) and the Agreement for Avoidance of Double Taxation between India and Korea (‘India-Korea tax treaty’)?

3. The learned Additional DIT present on behalf of the revenue has responded by raising the question relating to admission of application under section 245R(2) vide order dated 4.6.2010. Initially, the revenue’s view was that similar transaction involving taxation of offshore supplies is already pending before the Hon’ble High Court. Now it has taken the plea that as the Hon’ble Delhi High court has decided the issue against the revenue in its order dated 24.10.2010 and as the decision has not been accepted and a Petition for Special Leave to Appeal has been filed before the Hon’ble Supreme Court, the hearing on merits of the case may be deferred till the decision of the Hon’ble Supreme Court. We are satisfied that the mere filing of a Petition for Special Leave to Appeal cannot lead to keeping these applications pending indefinitely especially when the contention on behalf of the applicant is that the question stands concluded by an earlier decision of the Hon’ble Supreme Court.

4. The revenue submits that on perusal of the various documents submitted by the applicant, it is noticed that though the contracts were awarded separately, any breach under one contract was deemed breach of the other contracts and a right was conferred on the employer to terminate the other contracts at the risk and cost of the applicant. The award of separate contracts does not in any way dilute the responsibility of the applicant for successful completion of the facility as per the specifications. The three contracts are composite contracts and one cannot exist without the other. It then submits that the offshore supplies were on CIF basis and the contracts for offshore supply and onshore contracts were signed on the same date. The offshore supplies were made by the applicant and the onshore supplies of the services were also made by the applicant. The insurance requirement of the offshore supplies contract require that the applicant will take out and maintain insurance of cargo, installation, worker compensation, etc.

5. The revenue submits that in view of the above, the applicant’s case is not a case of a sale simpliciter. The contract is for full package involving onshore services. It could not have made a difference had the contract been one instead of three divisible contracts. Same function would have been performed by entering into a single contract for the composite work which includes not only design, fabrication, testing and supply but also upto the stage of jointing, testing and commissioning.

6. The learned Additional DIT submits that the delivery would not be complete till the equipments are commissioned on site. The full payments against the supply can be made only after satisfactory demonstration of the equipments. Under these circumstances, the passing of title outside India is of little significance as far as the issue of taxability of income earned in the transaction is concerned. It cannot, therefore, be accepted that the offshore and onshore contracts are totally isolated and independent of each other. It has rather entered into a turnkey contract and has a PE in India. The revenue placed reliance on the case of Ansaldo Energia SPA, 310 ITR 237.

7. Income of similar nature earned by a non-resident was held to be not taxable in India by this authority in the case of Hyosung Corporation, 314 ITR 343, where all these issues were considered at length following the binding decision of the Hon’ble Supreme Court in Ishikwajima Harima Heavy Industries, 288 ITR 410. At the outset it may be stated that this authority is not free to disregard the law laid down by the Supreme Court and to have a fresh look into the matter. The clauses in the offshore supply contract agreement regarding the transfer of ownership, the payment mechanism in the form of letter of credit which ensures the credit of the amount in foreign currency to the applicant’s foreign bank account on receipt of shipment advice and insurance clause, would go to establish that the transaction of sale and the title took place outside Indian Territory. The ownership and property in goods passed outside India. The transit risk borne by the applicant till the goods reach the site in India is not necessarily inconsistent with the sale of goods taking place outside India. The parties may decide between them as to when the title of the goods should pass. As the consideration for the sale portion is separately specified, it can well be separated from the whole as is held in the case of Ishikwajima. In the case of Ansaldo

Energia SPA relied on by the revenue, the contract for offshore supply awarded to the assessee was held to be a composite contract together with onshore supply contract etc. awarded to another. The turnkey project as a whole was awarded to the applicant who was not a single bidder. Thereafter the contract was split up. In that case the Tribunal found that there was a façade created for the purpose of avoiding tax and that there was price imbalance in the contracts and that it was skewed in favour of the offshore supply contract in order to minimize the tax liability. There is no such case before us. Therefore, the facts are different from the facts of the present case. Nothing in law prevents the parties to enter into a contract which provides for sale of material for a specified consideration, although they were meant to be utilized in the fabrication and installation of a complete plant. Regarding the revenue's plea that as the applicant has a PE in India, the income arising should be taxed in India, it stated that the existence of PE would be for the purpose of carrying out the contract for onshore supplies and services etc. but such a PE would have no role to play in offshore supplies. Even if a PE is involved in carrying on some incidental activities such as clearance from the port and transportation, it cannot be said that the PE is in connection with the offshore supplies. We accordingly hold that the applicant is not liable to tax in respect of offshore supplies as per the Act.

The question in each of the applications is answered in the negative, in favour of the applicant.

The ruling is given and pronounced on this 26th day of July, 2011.

Sd/-
(P.K. Balasubramanyan)
Chairman

F.No. A.A.R. No. 858-861 of 2009

Sd/-
(V.K.Shridhar)
Member

Dated

(A) This copy is certified to be a true copy of the advance ruling and is sent to:

1. The applicant.
2. The Director of Income-tax-I(International Taxation), New Delhi.
3. The Joint Secretary (FT&TR-I), M/Finance, CBDT, Bhikaji Cama Place, New Delhi.
4. The Joint Secretary (FT&TR-II), M/Finance, CBDT, Bhikaji Cama Place, New Delhi
5. Guard file.

(B) In view of the provisions contained in Section 245S of the Act, this ruling should not be given for publication without obtaining prior permission of the Authority.

(Nidhi Srivastava)
Addl. Commissioner of Income-tax(AAR-IT)