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

7th Day of June, 2012

PRESENT

Mr Justice P.K. Balasubramanyan (Chairman)

A.A.R. No. 958 of 2010

Name & address of the applicant	:	Alstom Transport SA 48, rue Albert Dhalenne, 93482 Saint-Ouen Cedex, France
Commissioner Concerned	:	Director of Income-tax (International Taxation-I) Delhi
Present for the applicant	:	Mr. N. Venkatraman, Sr.Counsel Mr. Satish Aggarwal, FCA Mr. Akhil Sambhan, ACA Mr. Vinay Aggarwal, ACA Mr. Atul Awasthi, CA
Present for the Department	:	Mr. Bhupinderjit Kumar, ADIT (Int. Taxation)

R U L I N G

On 4.6.2009, the Bangalore Metro Rail Corporation Limited (hereinafter referred to as 'BMRC') floated a tender for "design, manufacture, supply, installation, testing & commissioning of signaling/ train control and communication systems". The applicant along with, Alstom Projects India Limited('APIL), Thales Security Solutions & Services, S.A, Portugal ('Thales') and Sumitomo Corporation, Japan ("Sumitomo') entered into a Consortium Agreement on 1.9.2009. The same was executed and registered in Bangalore in India. It is recited in the said Consortium

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Agreement that “the parties wish to cooperate on an exclusive basis in the submission of a joint tender to the employer for the project and if the tender is accepted, in the negotiation and performance of the ensuing contract”. The employer referred to therein is BMRC. The contract therein is defined to mean the contract awarded to the party by the employer. The agreement specified that the parties were coming together to prepare and submit a tender and to negotiate for securing the award of the contract. Nothing in addition to the contract was to be taken up by any of the parties in respect of the work for which the tender was floated. The parties were to be jointly and severally bound by the terms of the tender and were to be jointly and severally liable to the employer for the performance of all obligations under the contract. The bid submitted by the Consortium was accepted by BMRC. The contract between BMRC and the Consortium of four, was entered into on 16.9.2009. The consortium was jointly and severally responsible for the work tendered. The contract was “to implement the design, manufacture, supply, installation, testing and commissioning of signaling/ train-control and communication system” for BMRC project. The contractor, namely, the Consortium, agreed thereunder to perform efficiently and faithfully all of the work and to design, manufacture, supply, installation and testing & commissioning of signaling/ train-control and

communication system and to supply spares, O & M manuals and provide training of O &M personnel, supervision of maintenance and to supply or provide all equipment, materials, labour, and other facilities requisite for or incidental to successful completion of the works and in carrying out all duties and obligations imposed by the contract. BMRC agreed to pay for the total cost of the works, a portion to be paid in Indian rupees and another to be paid in EUROs. The contractor was to complete whole of the works within 178 weeks from the commencement date. The contract was enforceable and was to be construed under the applicable laws of the Republic of India.

2. The applicant approached this Authority for a Ruling on the basis that as one of the Consortium members, it was concerned with offshore supply of plant and materials including supply of spare parts and offshore designing and training of operating and maintenance personnel and asking whether the payments received for those activities would be taxable in India under the provisions of the Income-tax Act, 1961 and the Double Taxation Avoidance Convention between India and France and whether the amounts received by the applicant under the contract for offshore services are chargeable to tax in India under the Act and the Convention. Having overruled the objections of the Revenue to the allowing of the application under section 245R(2) of the Act, this Authority

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allowed the application for giving a ruling under section 245R(4) of the Act on the following two questions:

1. *"On the facts and circumstances of the case, whether the amounts received/receivable by ALSTOM Transport SA ('Applicant or 'ASTA'), under Contract No.2 S&T- DM vide Contract Agreement Document dated 16 September 2009 and Supplementary Contract Agreement Document dated 08 December awarded by Bangalore Metro Rail Corporation Limited ('BMRCL') to the consortium for design, manufacture, supply, installation, testing & commissioning of signaling/train control and communication system including supply of spares are chargeable to tax in India under the provisions of Income-tax Act, 1961 (the 'Act') and Double Taxation Avoidance Agreement between India and France ('India-France tax treaty')?*

2. *On the facts and circumstances of the case, whether the amounts received/receivable by ATSA under the BMRCL contract, for offshore services are chargeable to tax in India under the provisions of the Act and India-France tax treaty?*

3. On behalf of the applicant, it was contended that the design and supply of equipment by the applicant took place outside India and being an offshore transaction, income therefrom is not chargeable to tax in India. Title to the goods passed outside and payment was received outside India and no part of the income either arose in India or can be deemed to arise in India. Therefore, the questions have to be ruled on in favour of the applicant.

4. On behalf of the Revenue, it was contended that the contract was one and indivisible and could not be split up as sought to be done by the applicant. There was no contract for offshore supply of any equipment. The contract was one for design, manufacture,

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supply, installation, testing & commissioning of a system in India and the contract cannot be split up since it was a composite contract for the commissioning of a project. There was no occasion to deal with offshore supply, so called, separately. The representative for the Revenue also raised the contention that Members of the Consortium who came forward to bid, formed an Association of Persons within the meaning of section 2(31) of the Income-tax Act. There was clearly a common purpose in their coming together and common management. The coming together was with the intention to undertake an activity with a view to earn profits. They were acting in concert in furtherance of their respective businesses. Two of the consortium Members were also the subsidiaries of the applicant. Hence, the Consortium Members including the applicant are liable to be assessed as an Association of Persons and the income from the transaction was chargeable to tax in India.

5. Since the question of Consortium Members being an AOP was agitated by the Revenue only at the time of hearing under section 245R(4) of the Act, at the request of the counsel for the applicant time was given to him for argument on this question and the application was further heard on that question. Before the ruling which was reserved could be given, Member (Revenue) who was part of the Authority at the time of hearing, retired and in view

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of that, the hearing was re-opened and the application was posted again for a fresh hearing so as to ensure that the ruling was given by the very Authority which finally heard the application. The ruling is being delivered thereafter, after hearing both sides afresh. A detailed written submission has also been made.

6. The tender floated by BMRC was a composite tender. The bid submitted by the Consortium of which the applicant is the leader was for the work tendered. Subsequently, the contract that was entered into by the consortium with BMRC, is a contract for design, manufacture, supply, installation, testing & Commissioning of signaling/ train control and communication system. The object of the contract and the purpose of the contract were the installation and commissioning of a signaling and communication system. The contract provided for the payment for the work in lump and it cast a joint and several liability on the consortium for carrying out the work. A contract has to be read as a whole in the context of the purpose for which it is entered into. A contract for the installation and commissioning of a project like the present one, cannot be split up into separate parts as consisting of independent supply or sale of goods and for installation at the work site, leading to the commissioning and so on. In the case on hand, on a true construction of the contract between the parties, I am clearly of the view that this is a contract, the main purpose, if not the sole

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purpose of which is installation and commissioning of a signaling and communication system and its delivery to BMRC. In recent rulings in AAR/962/2010 and in AAR/979/2010, this Authority has discussed this aspect and has taken the view that such contracts should be read as a whole in the context of the object sought to be achieved and they cannot be split up into different parts for the purpose of taxation.

7. In this context, great reliance was placed by learned Senior counsel for the applicant on the decisions of the Supreme Court in [1]*Ishikawajima – Harima Heavy Industries Limited vs. DIT*; [2]*CIT vs. Hyundai Heavy Industries Co. Limited,* and on a Ruling of this Authority in Hyosung Corporation v. DIT [AAR/773/2008]. I must take note of the fact that the two decisions and the Ruling relied on were rendered prior to the pronouncement of Supreme Court decision in [3]*Vodafone International Holdings BV v. UOI & another*. In *Ishikawajima – Harima Heavy Industries Limited vs. DIT,* a two Judge Bench of the Supreme Court held that a contract of this nature was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of deciding whether income from the performance of that part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction

[1] 288 ITR 408
[2] 291 ITR 482
[3] 341 ITR 1

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cannot be taxed in India. In the Vodefone judgement rendered by three-Judge bench of the Supreme Court it is clearly laid down that "it is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the transaction as a whole and not to adopt a dissecting approach." Thus, the approach adopted in *Ishikawajima – Harima Heavy Industries Limited vs. DIT* now stands disapproved or overruled, if not expressly, definitely by clear implication. In fact, with great respect, the basic principle in interpretation of a contract is to read it as a whole and to construe all its terms in the context of the object sought to be achieved and the purpose sought to be attained by the implementation of the contract. Reading parts of the contract as imposing distinct obligations may not be the proper way to understand a composite contract especially for installation and commissioning and delivery of a project or a system.

8. What was the purpose for which the tender was invited by BMRC cannot be in doubt in this case. It was for installing the signaling and communication system for the metro rail. It was not for supply of offshore equipments independently of the installation and commissioning. Nor was it for independent installation and commissioning, divorced from the design and supply of the equipments necessary. Such a contract has necessarily to be read as a whole and is not capable of being split up. On reading

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the contract in the context of the tender floated and the purpose sought to be achieved, in the light of the arguments raised by learned Senior counsel for the applicant, I am satisfied that the contract involved herein is a composite contract and it cannot be dissected into parts even if a dissecting approach is permissible after the Vodefone decision. Thus, looking at and reading the contract as a whole, I overrule the claim of the applicant that a part of the transaction sould be treated as a contract for offshore supply not liable to be taxed in India. I find that for the purpose of taxation, the contract must be taken as one, for installation and commissioning of a project in India.

9. I also find considerable force in the argument on behalf of the Revenue that the applicant alongwith other members of the Consortium are liable to be taxed as an AOP. In the Ruling in AAR/962/2010, this aspect has been considered in detail. The relevant decisions starting from that of the Calcutta High Court in B.N. Elias & others, In re [3 ITR 408] have been considered. It is to be noted that what emerges from the decisions is that the question whether an AOP is formed, has to be decided on the facts of a given case.

10. I have already indicated that the applicant and the others came together for bidding for the work tendered, after jointly preparing the bid. They came together for executing the project if

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their tender were to be accepted. The contract was for performing the entire work at the joint responsibility of the four Members of the Consortium who came together to perform the contract. The Members of the Consortium were all in business and they came together in pursuance of an intention to promote their businesses. The common object was to perform the contract and earn income thereform. Thus, there was a common object in the coming together. There was a common purpose and there was concerted action. Here is a combination of persons formed for the promotion of a joint enterprise banded together, to borrow the language of the decision in B.N. Elias. It does not appear to be necessary to repeat the reasons given in the ruling in AAR/962/2010 of this Authority on this aspect. Suffice it to say that, on the facts of this case, there is no difficulty in holding that the applicant, alongwith the other members of the Consortium, formed an Association of Persons liable to be taxed as such.

11. Learned Senior counsel for the applicant contended that the observations in the decision in Vodafone should be understood in the context in which they were made and they cannot be relied on in construing a contract like the present one especially in the face of the decision in *Ishikawajima – Harima Heavy Industries Limited.* It is true that the observations in Vodafone were made in the context of that case. But, what the Court has laid down as guidance to the

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Revenue and the Courts is that a transaction must be taken as a whole and not dissected from the angle of taxation. As I understand it, it is a reiteration of a principle in the approach to taxation of a transaction by the Authorities under the Income-tax Act. To refuse to follow the 'look at' test clearly postulated by the Supreme Court, would in effect be a refusal to follow the ratio of that decision.

12. It is true that the Supreme Court in Vodafone has not overruled *Ishikawajima – Harima Heavy Industries Limited* or dealt with a situation similar to the one that was available in *Ishikawajima – Harima Heavy Industries Limited* . But that does not mean that the clear disapproval of the dissecting approach in Vodafone in the context of Section 9 of the Income-tax Act, can be ignored or bypassed by this Authority, any court or the Income-tax Authorities. It is not possible to accept the submission that the Vodafone ratio of non-dissecting approach to a transaction cannot be applied to a case like the present one.

13. Learned Senior counsel then contended that while considering the question whether the Consortium formed an Association of Persons, the Authority has to first consider that question and not the question whether the contract is indivisible and on finding that it is, approach the question on that basis. He submitted that because of that wrong approach what the Authority

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has done in its Ruling in AAR 962 of 2010 is to put the cart before the horse. With respect to the learned counsel, I am not able to agree. To understand whether the members of the Consortium formed an Association of Persons, one has to see first what actually they are involved in and its nature. That can be discerned only on understanding the terms of the contract and its effect. Without first understanding the effect of the contract, the nature of the activity undertaken, and the obligations incurred thereunder, the nature of the relationship between the parties cannot be understood. The question whether the members of the Consortium form as Association of Persons cannot be decided without understanding the obligations undertaken by them under the contract. That alone will lead to a proper adjudication of the question of the nature of the association among the members of the Consortium.

14. Learned counsel then argued that the obligations undertaken by the Consortium jointly and directly under the contract is not relevant in considering the question whether the members of the Consortium form an Association of Persons. He submitted that what was relevant was only their relationship inter se and their obligations to one another and their rights against one another. Their joint and several liability to the tenderer or the joint obligation to perform an erection contract are not relevant. It is not possible

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to agree with the submission. The coming together of the members of the Consortium is based on the tender floated for a particular work. The coming together is to meet the obligations to the tenderer arising out of that tender notification. On winning the bid, the contract entered into is for the purpose of performing that obligation. Thus, the tender is the *rai-son d'etre* and the contract with the tenderer is the foundation for the combination of the members coming together to perform the obligation thereunder. After committing themselves to perform the contract in terms of the contract with the tenderer, however the members of the Consortium divide the performance of the obligation, that would not affect the nature and content of the obligation undertaken by them jointly. Their arranging the inter se relationship while performing that joint and common obligation, cannot alter the status they acquire as Consortium members in performing a joint obligation undertaken by the Consortium. Even in the Consortium agreement, the joint and several liability to the tenderer is reiterated. I am therefore satisfied that the members dividing the obligation among themselves after the bid is knocked down in favour of the Consortium cannot alter the status they acquire while entering into a contract with a common purpose and incurring a joint liability thereby.

15. The main question posed for Ruling arises out of a transaction. The income arises out of that transaction. That transaction is the one the applicant and the others have entered into with BMRC. Both the decisions of the Supreme Court, CIT v. Motors and General Stores (P) Ltd. [66 ITR 692] and CIT v. Gillanders Arbuthnot and Co. [87 ITR 407] relied on in the written submissions filed on 23.5.2012, indicate that what has to be considered is the transaction which is the source of the receipt. The source of the receipt in this case, according to me, is the contract with BMRC and not the contract inter se or the understanding among the members of the Consortium. The receipt in rupees and Euros arise out of that transaction. I have, therefore, no hesitation in coming to the conclusion that what is relevant in this context is to consider the legal rights and obligations arising out of and undertaken under that transaction to determine the status of the Consortium as a person.

16. It was argued that the inter se relationship among the members of the Consortium and the splitting up of obligations by them among themselves and the undertaking of separate responsibilities for performance, receipt of income and for profit or loss, should tilt the scale against the Consortium members being considered as an Association of Persons. We are looking at a tender for a project. The members of the Consortium, may be with

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their independent expertise, come together with a common object of winning the contract and performing the obligations under the contract for the bid amount offered by the Consortium and accepted by the tenderer. The effect of their coming together with a common object to earn an income by performing the common obligations incurred, cannot be got rid of by the members trying to separate the work among themselves or getting the tenderer to make separate payments. In fact, a public company like BMRC cannot depart from the tender it has floated or vary the scope of the work tendered or the manner of performance by its subsequent conduct. In this case, the applicant acts as the leader of the Consortium to deal with BMRC and the identity of the Consortium acquired under the contract, cannot get and does not get effaced by anything done after acceptance of the tender.

17. It is argued that a Consortium is nothing but a commercial arrangement of convenience between the parties and that it is a combination of people or resources desiring or attempting to execute a particular venture or project to the satisfaction of the customer and has the prior acceptance of the customer for such a formation. I find that this in no way affects the coming together with a common object with a common obligation vis-à-vis the customer with a view to earn an income or profit by a performance of the obligations jointly undertaken.

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18. It is contended that there would be problems in taxation if the Consortium is considered as a AOP and hence this Authority must be slow to come to such a conclusion. It cannot be said that the Consortium which is an AOP does not have a common income, arising out of a transaction with ONGC in this case. That income can be assessed in the hands of the AOP as provided for in the Act.

19. Thus, on the facts of this case and on the basis of the transaction involved, I conclude that the applicant along with the other members of the Consortium formed an Association of Persons liable to be taxed in India as such.

20. In the light of the above discussion, it has to be ruled on question no.1 that the contract the Consortium of which the applicant is a member, has entered into with BMRC cannot be split up to treat a part of it as confined to offshore supply of equipment not capable of being taxed in India, and that the income from it has to be taxed as a whole and on question no. 2 that in the nature of the transaction, the income received by the Consortium Members in terms of the contract, is taxable in India under the Income-tax Act and under the Double Taxation Avoidance Convention relied on.

(P.K. Balasubramanyan)
Chairman

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