

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

**The 14<sup>th</sup> of August 2012**

**A.A.R. No.973 of 2010**

**PRESENT**

Justice Mr. P.K.Balasubramanyan (Chairman)

Name & address of the applicant	Orient Green Power Pte. Ltd. 1,Robinson Road # 17-00 AIA Towers, Singapore 048542
Present for the applicant	Mr.N.Venkatraman, Sr. Advocate Mr. R.Vinayaraghavan, Advocate Mr. P.Bharath, C.A.
Present for the Department	Mr. K.R.Vasudevan, Addl. DIT(IT) Mr. R.S.Rawal, CIT(DR), New Delhi

**RULING**

The applicant is a company incorporated in Singapore. It holds 99.61% of the share capital in Orient Green Power Ltd., a company incorporated under the Companies Act, 1956 which is hereinafter referred to as OGPL India. The applicant also holds 49.75% of the share capital in Bharath Wind Farm Limited, (BWFL India, hereafter) a company incorporated under the Companies Act, 1956. The balance 56.25% shares in BWFL India is held by OGPL India. According to the applicant, it has transferred its 49.75% shares held in BWFL India, to OGPL India without consideration. The transaction is evidenced by a memorandum of gift dated 30.01.2010. Since the transfer was effected before the coming into force of section 56(2) (viiia) of the Income-tax Act, the transaction was not taxable under the Act in terms of section 45 of the Act read with section 48 of the Act, since the transfer was one without consideration.

The transaction which was a gift, was also exempted from the operation of section 45 of the Act, by virtue of section 47(iii) of the Act. The applicant was approaching this Authority for a Ruling on the relevant questions raised in the application.

2. This Authority allowed the application under section 245R(2) of the Act for giving rulings on the following questions:

- (1) *On the facts and in the circumstances of the case, whether the transfer of Bharath Wind Farm Limited ('BWFL India') shares by Orient Green Power Pte Ltd ('OGPP Singapore') to Orient Green Power Company Limited ('OGPL India') without consideration, in order to consolidate its Indian operations, would be subject to tax under the Act in India in the hands of OGPP Singapore?*
- (2) *Without prejudice to the above, whether the transfer of BWFL India shares by OGPP Singapore to OGPL India without consideration would be covered under section 47(iii) of the Act and therefore not chargeable to tax in the hands of OGPP Singapore?*
- (3) *On the facts and in the circumstances of the case, whether the transfer pricing provisions contained in section 92 to 92F of the Act would be applicable to transfer of shares by OGPP Singapore to OGPL India for no consideration/without consideration?*
- (4) *Without prejudice to above, in the instance where the transfer of shares by OGPP Singapore to OGPL India is subject to the transfer pricing provisions whether the maximum price which can be paid to OGPP Singapore, as prescribed under the exchange control regulations and arrived at using Comptroller of Capital Issue ('CCI') guidelines, can be considered as the arm's length price for the purposes of the Act?*
- (5) *On the facts and circumstances of the case, if there is no income chargeable to tax in the hands of OGPP Singapore, whether OGPL India, the recipient of shares, is required to withhold tax in accordance with the provisions of section 195 of the Act, especially when there is no payment made by OGPL India to OGPP Singapore?*
- (6) *On the facts and in the circumstances of the case, if the transfer of shares is not taxable in India by virtue of Question No.1 and Question No.2, whether OGPP Singapore, the applicant, is required to file any return of income under section 139 of the Act?*

3. According to the applicant, the transaction cannot be said to have generated any taxable income to the applicant. Income must be understood as income chargeable to tax under the Act. The transaction was a transfer by way of gift. The investment in BWFL was held by the applicant as a capital asset. Since, no consideration passed for the transfer, the transaction could not be taxed under section 45 of the Act read with section 48 of the Act. Section 45 of the Act has to be read with section 48 of the Act. No gain could be computed in terms of section 48 of the Act. Hence on the principle of the decision in CIT V B.C.Srinivasa Setty (128 ITR 294) accepted in subsequent decisions, the transaction is not taxable under the Act. Even otherwise, being a gift, it is exempt from the operation of section 45, the charging section under the Act, by virtue of section 47 (iii) of the Act. Since the transaction is not chargeable to tax under the Act, section 92 has no application. There is also no obligation to withhold any tax in terms of section 195 of the Act or to file a return of income in terms of section 139 of the Act.

4. On behalf of the Revenue, the genuineness of the transaction is seriously questioned. The purpose of the transaction is also questioned. After describing the earlier circumstances leading to the acquisition of shares by the applicant, it is pleaded that the applicant has hardly any income and it has been used as a conduit to transfer money in form of share capital, from one Group Company in India to another Group Company in India through Singapore. It is submitted that by an intricate and complex transfer of shares, the applicant, a virtual shell company with hardly any independent earnings, was holding 99.61% shares of

OGPL India (pre-issue) the market value of which was about Rs.11063.28 millions. The present transaction should not be viewed in isolation and should be seen as part of the complex web of transactions as set out in the statement. The transaction was not a gift. The transaction is couched in this form only to eliminate tax implications. The transaction is not a gift and in any event, it is null and void. It has also been deliberately pre-dated to get out of the clutches of the amendment to the Income-tax Act affecting such transactions.

5. In its reply to the comments of the Revenue, the applicant has reiterated its position that it was a gift of the shares held by it, that the transaction was a part of reorganization of its business and that there was nothing to invalidate the transaction. Various decisions and Rulings have upheld such transactions and the applicant is entitled to a favourable ruling on the question of taxability raised. The applicant is not a conduit company as alleged; it is an investment company.

6. It is claimed by the applicant, that on 28.1.2010, a resolution was passed by the Board of Directors of the applicant, resolving that the company has decided voluntarily to gift the shares to OGPL for no consideration from OGPL, as it is in the interests of the company to make the gift and authorizing and approving the gift and authorizing any director of the company to execute the necessary documents and to do all such other acts for and on behalf of the company as may be deemed necessary to give effect to or implement the gift. It is the case of the applicant that the gift was evidenced by a memorandum of gift dated 30.1.2010 entered into between the applicant and OGPL India. The Memorandum of Gift produced recited that on 29.1.2010, a representative of the

applicant had physically delivered to a representative of OGPL India, the share of BWFL together with appropriate share transfer forms and the representative of the applicant had declared that he was doing so by way of voluntary gift and placed before the parties, the Board Resolution of the applicant dated 28.1.2010 in that regard. The representative of OGPL India had accepted the gift of the share for no consideration and thanked the applicant for the same and the transfer of the shares from the applicant to OGPL India by way of gift was thereby completed. The Memorandum proceeds to record that the applicant had voluntarily gifted to OGPL India, the BWFL shares, that OGPL India had accepted the gift of shares, that the transfer by way of gift was thereby completed and that the applicant had assured OGPL India that it had the absolute right, full power and absolute authority to gift the shares and that it was duly authorized to make the gift.

7. The applicant has submitted that OGPL India is a company in which the public are substantially interested and that it is listed in recognized stock exchanges in India. The applicant, according to it, is an investment company. The genuineness of the gift set up by the applicant has been seriously disputed by the Revenue. The case of the applicant is that on the strength of a board resolution, the representative of the applicant handed over the share certificates and the share transfer forms to the representative of OGPL India declaring that he was making the gift of the shares on behalf of the applicant. It may be noted that the shares allegedly gifted are the shares in an India company. Under section 82 of the Companies Act, the shares in any company shall be moveable

property transferable in the manner provided by the articles of the company. The applicant has not pleaded either in the original application or in the subsequent written submissions, that the transfer of the shares allegedly gifted, was in the manner provided by the Articles of the company. In other words, it is not pleaded by the applicant that the Articles of the company authorized the transfer of shares without consideration by physically handing over the share certificates along with the transfer forms to another company. Section 108 of the Companies Act mandates that the transfer shall not be registered except on production of the instrument of transfer. What is the manner of transfer provided by the Articles of Association is not made clear. Even the red herring prospectus produced with the application makes no mention of the enabling article in the Articles of Association authorizing the giving away free of assets of the company or prescribing such a mode of transfer of the shares held by the company. Even in the Board resolution, authorizing the so called gift, there is no mention of any power derived from the Articles of Association. The board resolution relied on, also does not refer to any article in the Articles of Association, authorizing such transfer or providing for such manner of transfer. The financial statement of OGPL India also merely refers to the Memorandum of Understanding dated 31.2.2010 as evidencing the gift. Without anything more, it is difficult to imagine the Articles of Association of a company providing for gifting away of the assets in the form of shares in another company by what is attempted to be described as oral gift. The Revenue has attempted to point out the revenue implications of the transaction as put forward to plead that it is a scheme for avoidance of tax.

8. We are dealing with corporate business. The shares dealt with are shares of a public limited company governed by the Companies Act, 1956. It is claimed that, what can be called an oral gift, was made by one corporation to another corporation. Such a form of transfer appears to be strange, unless it be one which has been set up for some purpose. That purpose, according to the Revenue, is for avoiding the payment of tax and to get out of the clutches of Section 56(2)(viii) of the Act which came into effect on 1.6.2001. It cannot be said that this submission on behalf of the Revenue is far-fetched. This submission, in any event made it necessary for the applicant to demonstrate before this authority that the transfer was authorized by the Articles of Association and was effected in the mode prescribed by the Articles of Association and meeting the requirements of section 82 of the Companies Act.

9. This Authority has the jurisdiction not only to consider the law but also to consider the facts. The ruling is to be given at the instance of an applicant, on a transaction. Here, it is a concluded transaction, according to the applicant. While therefore, considering the question of giving the ruling, this Authority has also the right, nay, the duty, to consider the reality of the transaction and the genuineness of the transaction, in addition to its validity. When such transactions are entered into involving assets, substantially worth, it behoves the applicant before this Authority, to establish to the hilt, the factum, the genuineness and the validity of the transaction, of the right to enter into the transaction and the bona fides of the transaction especially when the Revenue has challenged the

genuineness of the transaction itself. In the light of the pleas raised by the Revenue and the circumstances obtaining, I feel that a proper enquiry into the question of the genuineness and validity of the transaction is necessary. I find that the Assessing Authority under the Act would be in a better position to go into and decide these questions. On the materials now before me, I do not think that I should venture into entering a finding one way or the other on the genuineness and validity of the transaction. If I undertake such an exercise on the materials now before me, I would not be doing justice to either of the parties or to the cause. Hence, I leave open the question for decision to the Assessing Officer. In view of the failure of the applicant to show that the alleged transfer in question was effected in the manner prescribed by its Articles of Association, I am satisfied that it would not be proper to accept the assertions in the application and in the submissions about the genuineness and validity of the transaction. There may be a resolution of the Board of Directors authorizing such a transaction and the question would be whether they have the right to pass such a resolution, in the light of Articles of Association and whether their resolution has been given effect to in the manner prescribed by the Articles of Association.

10. It is true that this Authority had allowed the application under section 245R(2) of the Act to give a ruling under section 245R(4) of the Act. According to me, that cannot stand in the way of this Authority deciding to give a ruling in terms of section 245R(4) of the Act once it feels satisfied that adequate materials are not before this Authority to enable it to give a ruling satisfactory to its conscience.

11. Before parting with the case, it appears to be proper to observe that in the context of section 47(i) and (iii), this gift referred to therein, is a gift by an individual or a Joint Hindu Family or a Human Agency. Section 47(iii) speaks of 'any transfer of a capital asset under a gift, or will or an irrecoverable trust'. Execution of a will involves a human agency. Cannot the expression gift take its colour from a will with which it is juxtaposed, especially in the background of clause (i) of section 47 and clause (ii) which earlier existed. A gift by a corporation to another corporation (though a subsidiary or an associate enterprise, which is always claimed to be independent for tax purposes) is a strange transaction. To postulate that a corporation can give away its assets free to another even orally can only be aiding dubious attempts at avoidance of tax payable under the Act. This is all the more so since section 47(iv) and section 47(v) specifically provide for covering cases of transfer of capital assets by the parent company to the subsidiary and by the subsidiary to the holding company and the other sub-clauses deal with amalgamation, demerger and reorganization of business and so on. As I see it, it is possible to say that a gift of shares held in a company by one company to another company would not fall under section 47(iii) of the Act. Senior counsel sought to counter this approach by pointing out that clauses (iv) and (v) deal with transfers for consideration whereas clause (iii) deals with transfers without consideration and that there was no warrant for whittling down the sweep of clause (iii) of section 47. Since I am declining a ruling in this case, it is not necessary to pursue this aspect further.

12. I therefore decline the prayer to rule on the questions formulated on the materials now made available. I leave open all the questions for decision before the authorities under the Act after a due enquiry into all relevant aspects.

14. Accordingly this ruling is pronounced on this the 14<sup>th</sup> day of August, 2012.

**Sd/-**  
**(P.K.Balasubramanyan)**  
**Chairman**

F.No. AAR/973/2010

Dated: 14.8.2012

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

1. The Applicant
2. The CIT (International Taxation), Chennai
3. The JS (FT & TR-I), M/o Finance, CBDT, Bhikaji Cama Place, New Delhi.
4. The JS (FT & TR-II), M/o Finance, CBDT, Bhikaji Cama Place, New Delhi.
5. Guard File.

(Munesh Kumar)  
Addl. CIT (AAR)