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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**  
12-18.

+ **W.P.(C) 5818/2013**

HYOSUNG CORPORATION ..... Petitioner  
Through: Mr.Deepak Chopra, Mr. Amit Srivastava  
and Ms. Manasvini Bajpai, Advocates.

versus

THE AUTHORITY FOR ADVANCE  
RULINGS & ANR ..... Respondents  
Through: Mr.Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr.Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

**With**

+ **W.P.(C) 7788/2013 & CM 16560/2013**

HYOSUNG CORPORATION ..... Petitioner  
Through: Mr.Deepak Chopra, Mr. Amit Srivastava  
and Ms. Manasvini Bajpai, Advocates.

versus

THE AUTHORITY FOR ADVANCE  
RULINGS & ORS. .... Respondents  
Through: Mr.Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr.Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

**With**

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**W.P.(C) 7789/2013 & CM 16562/2013**

**HYOSUNG CORPORATION**

..... Petitioner

Through: Mr.Deepak Chopra, Mr. Amit Srivastava  
and Ms. Manasvini Bajpai, Advocates.

versus

**THE AUTHORITY FOR ADVANCE  
RULINGS & ORS.**

.... Respondents

Through: Mr.Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr.Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

**With**

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**W.P.(C) 7790/2013 & CM 16564/2013**

**HYOSUNG CORPORATION**

..... Petitioner

Through: Mr.Deepak Chopra, Mr. Amit Srivastava  
Ms. Manasvini Bajpai, Advocates.

versus

**THE AUTHORITY FOR ADVANCE  
RULINGS & ORS.**

..... Respondents

Through: Mr.Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr.Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

**With**

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**W.P.(C) 7791/2013 & CM 16566/2013**

HYOSUNG CORPORATION

..... Petitioner

Through: Mr.Deepak Chopra, Mr. Amit Srivastava  
and Ms. Manasvini Bajpai, Advocates.

versus

THE AUTHORITY FOR ADVANCE  
RULINGS & ORS.

..... Respondents

Through: Mr.Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr.Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

With

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**W.P.(C) 8086/2013 & CM 17073/2013**

HYOSUNG CORPORATION

..... Petitioner

Through: Mr.Deepak Chopra, Mr. Amit Srivastava  
and Ms. Manasvini Bajpai, Advocates.

versus

THE AUTHORITY FOR ADVANCE  
RULINGS & ORS.

..... Respondents

Through: Mr. Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr.Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

And

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**W.P.(C) 8088/2013 & CM 17077/2013**

HYOSUNG CORPORATION

..... Petitioner

Through: Mr. Deepak Chopra, Mr. Amit Srivastava  
and Ms. Manasvini Bajpai, Advocates.

versus

THE AUTHORITY FOR ADVANCE  
RULINGS & ORS.

..... Respondents

Through: Mr. Ashok K. Manchanda, Senior  
Standing counsel with Ms. Vibhooti and Mr. Aamir  
Aziz, Advocates.  
Mr. Vivek Goyal, CGSC for UOI.

**CORAM:**  
**JUSTICE S. MURALIDHAR**  
**JUSTICE VIBHU BAKHRU**

**ORDER**  
**11.02.2016**

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**Dr. S. Muralidhar, J.:**

**CM No. 16561/2013 (for exemption) in W.P.(C) 7788/2013**

**CM No. 16563/2013 (for exemption) in W.P.(C) 7789/2013**

**CM No. 16565/2013 (for exemption) in W.P.(C) 7790/2013**

**CM No. 16567/2013 (for exemption) in W.P.(C) 7791/2013**

1. Exemption allowed subject to all just exceptions.

2. The applications are disposed of.

***Introduction***

3. The challenge in these writ Petitions filed by Hyosung Corporation, having its office in South Korea, is to an order passed by the Authority for Advance Rulings ('AAR') on 7<sup>th</sup> August 2013, rejecting the applications

*W.P.(C) Nos. 5818/2013, 7788/2013, 7789/2013,  
7790/2013, 7791/2013, 8086/2013 & 8088/2013*

filed by the Petitioner, for determination of the question regarding taxability of its profits arising from offshore sales. The AAR rejected the applications accepting the plea of the Respondent Income Tax Department that the bar under clause (i) of the proviso to Section 245R (2) of the Income Tax Act, 1961 ('Act') to the AAR allowing the applications stood attracted.

4. These petitions challenge *inter alia* the said impugned order of the AAR and constitutional validity of clause (i) of the proviso to 245R (2) of the Act on the ground that the said provision is discriminatory and violative of Article 14 of the Constitution of India as well Article 25 of the Double Taxation Avoidance Agreement ('DTAA') between India and the Republic of South Korea.

5. At the outset, it requires to be noticed that this Court by its decision in ***Net App BV and Sin Oceanic Shipping ASA v. The Authority for Advance Rulings (2013) 357 ITR 102 (Del)*** held that where a return of income has been filed, the bar in terms of clause (i) of the proviso to Section 245R (2) of the Act would be attracted and the AAR would be justified in such a case in declining to entertain the application for advance ruling at the instance of a non-resident. The said decision of this Court was set aside by the Supreme Court in ***Sin Oceanic Shipping ASA v. AAR (2014) 223 Taxman 102 (SC)***. The Supreme Court took note of the fact that the AAR itself had subsequently, by an order dated 13<sup>th</sup> December 2013, taken the view that the mere filing of a return would not constitute a bar to entertaining an application for advance ruling in terms of Section 245N of the Act.

***Relevant facts***

6. The facts of the present case are that the Petitioner is a company incorporated in South Korea. It states that it is a comprehensive energy solution provider and manufactures transformers, switchgears, motors, decelerators and industrial pumps and is also engaged in the wind energy business. It supplies transformers to customers all over the world including in India. The Petitioner states that it has been engaged in several projects in India and has been regularly assessed to income tax since the Assessment Year ('AY') 2008-09. It is further stated that, it being a resident of South Korea, it is entitled to the benefit of the DTAA between the India and South Korea.

7. It is stated that Power Grid Corporation of India Ltd. ('PGCIL') floated tenders inviting global bids for setting up sub-stations in various locations in India. The Petitioner being a successful bidder, supplied equipments for the said projects. The case of the Petitioner is that supply of the equipment was effected outside India and all work related thereto was also to be performed outside India. As far as the on shore portion, including transportation, was concerned that was to be carried out in India by Larsen and Toubro Ltd. ('L&T') in terms of a memorandum of understanding ('MOU') entered into between the Petitioner and L&T.

8. It is stated that in relation to the invoices raised by the Petitioner on PGCIL for the supply of equipment, PGCIL released advance payment to the Petitioner after deducting tax at source. There were supplies of equipment by the Petitioner to PGCIL during AYs 2008-09, 2009-2010 and

2010-2011 for the various projects of PGCIL. Some portion of the payment was made by PGCIL after deducting TDS. While filing its return of income for the aforementioned AYs, the Petitioner took the stand that no portion of its revenue from off shore supplies was liable to be taxed in India. Consistent with this position, the Petitioner claimed refund of TDS deducted by PGCIL. In reference to each of the returns filed by the Petitioner, notices were issued both under Section 143(2) of the Act as well as 142(1) of the Act by the Assessing Officer ('AO') concerned.

### ***Applications before the AAR***

9. On 23<sup>rd</sup> September 2011, the Petitioner filed separate applications before the AAR seeking a ruling on the issue of taxability of the profits from off shore supplies made during the aforementioned AYs to PGCIL. On 10<sup>th</sup> October 2011, one more application was filed before the AAR with respect to the supply made for a project of PGCIL at Maharani Bagh. In fact there were seven applications filed by the Petitioner before the AAR for advance rulings.

10. The details of dates of issuance of notices under Section 143(2) and 142(1), the dates of filing of the applications before the AAR for each of the transactions in the three AYs are as under:

| S.No. | Writ<br>Petition<br>No. | AAR<br>No. | Project          | Relevant<br>AY | Date of<br>filing of<br>return | Date<br>of<br>143(2) | Limitations<br>143 (2) | AAR<br>filing<br>date | Date of<br>142 (1) |
|-------|-------------------------|------------|------------------|----------------|--------------------------------|----------------------|------------------------|-----------------------|--------------------|
| 1     | 5818/2013               | 1138/11    | Bidadi           | 2010-11        | 15.10.10                       | 25.08.11             | 30.09.11               | 23.09.11              | 23.11.12           |
| 2     | 8086/2013               | 1150/11    | Maharani<br>bagh | 2008-09        | 30.09.08                       | 25.09.09             | 30.09.09               | 10.10.11              | 30.08.10           |
| 3     | 8088/2013               | 1141/11    | Sipat            | 2010-11        | 15.10.10                       | 25.08.11             | 30.09.11               | 23.09.11              | 23.11.12           |

|   |           |         |                           |         |          |          |          |          |          |
|---|-----------|---------|---------------------------|---------|----------|----------|----------|----------|----------|
| 4 | 7788/2013 | 1144/11 | T3                        | 2009-10 | 25.09.09 | 19.08.10 | 30.09.10 | 23.09.11 | 28.02.11 |
| 5 | 7789/2013 | 1140/11 | T4                        | 2009-10 | 25.09.09 | 19.08.10 | 30.09.10 | 23.09.11 | 28.02.11 |
| 6 | 7790/2013 | 1142/11 | Maharani<br>Bagh<br>Extn. | 2010-11 | 15.10.10 | 25.08.11 | 30.09.11 | 23.09.11 | 23.11.12 |
| 7 | 7791/2013 | 1143/11 | Gurgaon                   | 2009-10 | 25.09.09 | 19.08.10 | 30.09.10 | 23.09.11 | 28.02.11 |

11. Before the AAR, a preliminary objection raised by the Revenue was that the above applications of the Petitioner could not be entertained in view of the bar under proviso to Section 245R(2) of the Act. In other words, it was contended that the question involved in the applications filed by the Petitioner was already pending before the AO and therefore the AAR could not entertain the applications.

12. The Petitioner resisted the above applications on the ground that the bar contained in clause (i) of the proviso to Section 245R (2) made a distinction between resident and non-resident applicants. While the bar applied to non-resident applicants like the Petitioner, it did not apply to a resident applicant falling under the ambit of sub-clause (iii) of clause (b) of Section 245N which defines 'applicant'. In other words, the Public Sector Undertakings ('PSUs') notified by the Government of India in the official gazette were exempt from the bar in terms of clause (i) of the proviso to Section 245R(2). Such PSUs notified by the Central Government could maintain an application for advance ruling notwithstanding that the question raised therein was already pending before any income tax authority. It was accordingly contended before the AAR by the Petitioner that the above clause (i) to the proviso to Section 245R(2) was violative of Article 14 of the

Constitution as well as Article 25 of the DTAA, which mandates that the nationals of the South Korea would not be subjected to any taxation or any requirement connected therewith which is more burdensome than the requirements to which Indian nationals are subjected.

***Impugned order of the AAR***

13. By the impugned order, the AAR while rejecting the Petitioner's applications, came to the following conclusions:

(i) A mere filing of returns does not attract the bar unless question raised in the application for advance ruling is already in issue in the return filed. In other words, the mere filing of a return prior to the date of the application before the AAR does not necessarily mean that the question raised in the application is already pending before the income tax authority.

(ii) In the instant cases, notices under Section 143(2) were already issued prior to the filing of the application before the AAR, the transaction in respect of which the ruling of the AAR was sought was filed before the date of the application.

(iii) With the issue of notice under Section 143(2) of the Act, claims of the Assessee in the return are pending for adjudication before the AO. Therefore, the question raised in the application for advance ruling was pending adjudication before the assessing authority and the bar created under clause (i) of the proviso to Section 245R (2) of the Act operates.

(iv) As regards the plea that the aforementioned clause (i) of the proviso to Section 245 R (2) was discriminatory, the AAR was of the view that being a creature of the Act, it could not pronounce upon the constitutional validity or the *vires* of any provision of the Act. It held that the AAR had no jurisdiction to deal with the question of discrimination.

***Submissions of counsel***

14. Mr. Deepak Chopra, learned counsel for the Petitioner at the outset urged that on the face of it, clause (i) of the proviso to Section 245R(2) was discriminatory. It exempted PSUs notified by the Central Government from the bar imposed by the said clause. There was no justification in creating such a classification that had no nexus to the object of the legislation. However, Mr. Chopra was candid to submit that the attempt by the Petitioner was not to deny the benefit to the PSUs but to ensure that non-resident applicants like the Petitioner are also extended the same benefit i.e. being exempted from the bar imposed by clause (i) of the proviso to Section 245R (2) of the Act. In other words, the Petitioner states that it would not be satisfied by removal of the offending part of clause (i) of the proviso to Section 245R(2) but would want the Court to rule that non-residents will also be exempted from the bar just as resident applicant in terms of sub-clause (iii) of clause (b) of Section 245N.

15. Mr. Chopra urged that Section 90 of the Act would require the Central Government to give effect to the provision of DTAA notwithstanding the discriminatory provision under clause (i) of the first proviso to Section

245R(2) of the Act. It is further submitted by Mr. Chopra that the mere issuance of a notice under Section 143(2) of the Act would not amount to the question raised in the applications being pending before the income tax authorities. Referring to the notice issued to the Petitioner under Section 143(2) in these petitions, he submitted that none of those notices, which were issued in a pre-printed format, specified the questions on which information was being sought by the AO. However, Mr. Chopra did not dispute the fact that notices under Section 142 (1) of the Act accompanied by a detailed questionnaire were issued to the Petitioner even prior to the date of filing of the applications before the AAR as far as AYs 2008-09 and 2009-10 were concerned. He, therefore, submitted that in the event that the Petitioner did not succeed in persuading this Court about the consequential relief in respect of the proviso (i) to Section 245R(2) of the Act, then at least the applications for AY 2010-11 should be remanded to the AAR for a fresh decision.

16. Countering the above submissions, Mr. Ashok Manchanda, learned Senior Standing counsel for the Revenue, submitted that the classification made between PSUs notified by the Central Government and the non-resident applications for the purposes of the proviso to Section 245R of the Act was a reasonable one and had a nexus to the implied object of not having two adjudication proceedings on parallel basis in relation to the same issue. A conscious decision had been taken to exempt the Central Government PSUs seeking advance ruling from maintaining the applications before the AAR notwithstanding the pendency of such question before the

income tax authorities. As regards the interpretation of the words “where the question raised in the application is already pending” in clause (i) of the proviso to Section 245R(2) of the Act, Mr. Manchanda submitted that if the question was pending for one of the AYs, and in this case it was already pending for AYs 2008-09 and 2009-10, then such question should be taken to be pending even as regards AY 2010-11.

***Analysis of relevant provisions***

17. Section 245N (a) defines ‘advance ruling’ to mean:

“(i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or

(ii) a determination by the Authority in relation to [the tax liability of a non-resident arising out of] a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident; *or*

(iia) a determination by the Authority in relation to the tax liability of a resident applicant, arising out of a transaction which has been undertaken or is proposed to be undertaken by such applicant, and such determination shall include the determination of any question of law or of fact specified in the application;

(iii) a determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision shall include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application;

(iv) a determination or decision by the Authority whether an arrangement, which is proposed to be undertaken by any person being a resident or a non-resident, is an impermissible avoidance arrangement as referred to in Chapter X-A or not: Provided that where an advance ruling has been pronounced, before the date on which the Finance Act, 2003 receives the assent of the President, by the Authority in respect of an application by a resident applicant referred to in sub-clause (ii) of this clause as it stood immediately before such date, such ruling shall be binding on the persons specified in section 245S”

18. The definition of 'applicant under Section 245N(b) of the Act makes a distinction between non-residents referred to in Section 245N(a)(i) of the Act and a resident in Section 245N(a)(ii) of the Act'. It also introduces a third category - persons notified by the Central Government. Admittedly, one category of residents notified by the Central Government is the PSUs. An application can be made by a PSU to the AAR for advance ruling on a question of law or fact arising out of a transaction between such resident PSU and a non-resident entity.

19. Under Section 245Q an application has to be made to the AAR by an applicant seeking an advance ruling. Under Section 245R(2) of the Act the AAR, on examining the application and calling for the records, can either allow or reject the application. The proviso to Section 245R(2) places a restriction on the AAR allowing such an application if the question raised in the application is already pending before any income tax authority or Appellate Tribunal. However, this bar to the AAR entertaining an application does not apply “in the case of a resident applicant falling under

sub-clause (iii) of Clause (b) of Section 245N. It is this explanation carved out from the applicability of the bar under clause (i) to proviso to Section 245R (2) that is assailed by the Petitioner as being discriminatory and violative of Article 14 of the Constitution.

20. The other ground on which the above provision has been attacked for being discriminatory is that in terms of Section 90(2) of the Act, the said provision will have to give way to Article 25 of the DTAA between India and Republic of South Korea.

21. There is no doubt that the proviso to Section 245R(2) makes a distinction between applicants who are residents and those who are non-residents as far as the bar on the AAR allowing an application for advance ruling was concerned. In the context of the present case while PSUs notified by the Central Government can maintain an application for advance ruling notwithstanding that the question raised in the application is already pending before the income tax authorities, a non-resident applicant cannot, in the same circumstances, maintain such an application. The object behind the proviso to sub-section (2) of Section 245R is to ensure that parallel proceedings do not take place simultaneously before two different *fora* in respect of the same question. Therefore, the proviso is *per se* not irrational.

***Decision on constitutional validity***

22. The Court at this stage notes that the Petitioner is not content with getting the Court to declare that the exception carved out in favour of PSUs notified by the Central Government as discriminatory or violative of Article

14 of the Constitution of India or Article 25 of the DTAA. The Petitioner realises that merely declaring the exception as unconstitutional will not benefit the Petitioner unless the Court is prepared to say that the benefit of such exception should also be extended to the Petitioner as a non-resident. In other words, what the Petitioner is seeking is not merely a declaration of the invalidity of the discriminatory part of clause (i) of the proviso to Section 245R (2) of the Act but that the Court should read into clause (i) words to the effect that even non-resident applicants would be exempt from the bar. Apart from the fact that the Court cannot possibly re-write the statute, extending the exemption from the applicability of clause (i) of the proviso to Section 245R(2) of the Act would render the entire proviso otiose and defeat the very object of its insertion. At the same time, the mere declaration of the relevant portion of clause (i) of the proviso to Section 245 R (2) of the Act to be discriminatory and violative of Article 14 of the Constitution is, as far as the Petitioner is concerned, a pointless exercise.

23. Examining the issue from the point of view of the DTAA between India and Republic of South Korea, it is noted that Article 45 of the DTAA mandates that the Petitioner as a South Korean entity should not be subject to any taxation requirement which is more burdensome than the requirement to which an Indian entity is subject. Section 90 (2) of the Act mandates that where any provision of the Act is more beneficial to an Assessee than a provision of the DTAA, then the provision of the Act shall apply. It is not understood how clause (i) of the proviso to Section 245R of the Act can be said to be more beneficial to the Petitioner even if the discriminatory portion

which exempts Central Government notified PSUs from its ambit is invalidated. Even if the offending portion is invalidated, the result would be that in terms of clause (i) of the proviso to Section 245R(2) of the Act, the bar would apply equally to both a resident and a non-resident. In other words, the provision would become equally burdensome to both a resident and a non-resident. Consequently, neither Article 25 of the DTAA can come to the aid of the Petitioner.

24. For all of the aforementioned reasons, the Court finds that it serves no purpose, and certainly not that of the Petitioner, to pronounce on the validity of the portion of clause (i) of Section 245R(2) of the Act, that exempts resident PSUs from the bar of that provision, to be violative of Article 14 of the Constitution. Therefore, the Court declines the prayer to declare clause (i) of the proviso to Section 245 R (2) of the Act to be violative of Article 14 of the Constitution.

***When can a question be stated to be 'pending'?***

25. The Court next deals with the plea of the Petitioner that the mere issuance of a notice under Section 143 (2) of the Act would not per se make the question raised in the application before the AAR 'pending' before the income tax authorities.

26. As already noticed, mere filing of a return by the Petitioner claiming the refund in respect of the TDS deduction by the PGCIL in respect of the payment for the equipments supplied by the Petitioner overseas will not tantamount to the question raised in the applications before the AAR being

pending before the income tax authorities. The decision to the contrary of this in *Net App BV v. The Authority for Advance Rulings* (*supra*) stands overruled by the Supreme Court in *Sin Oceanic Shipping ASA v. The Authority for Advance Rulings* (*supra*).

27. As far as the notice under Section 143(2) of the Act is concerned, that provision itself stipulates that such notice will be issued by the AO where he has reason to believe that any claim of such exemption, deduction, allowance or relief made in return is inadmissible. It mandates that the notice should specify the particulars of such claim, loss, exemption, deduction or relief. Turning to the notice issued in the instant case to the Petitioner under Section 143(2) of the Act, it is seen that it is in a standard pre-printed format which merely states that “there are certain points in connection with the return of income on which the AO would like some further information”. The said notice fails to satisfy the particulars of claim of loss, exemption, deduction, allowance or relief as mandated by Section 143(2)(i) of the Act. In any event the question raised in the applications by the Petitioner before the AAR do not appear to be forming the subject matter of the notices under Section 143(2) of the Act. Consequently, the mere fact that such a notice was issued prior to the filing of the application by the Petitioner before the AAR will not constitute a bar, in terms of clause (i) to proviso to Section 245R(2) of the Act, on the AAR entertaining and allowing the applications.

28. However that cannot be said of the notices under Section 142(1) of the Act issued to the Petitioner by the AOs for AYs 2008-09 and 2009-10 which

were prior to the filing of the applications before the AAR. For instance, for a notice under Section 142(1) of the Act was issued to the Petitioner on 30<sup>th</sup> August 2010 in respect of one of the supply contracts for AY 2008-09, whereas the date of filing of the application before the AAR was 10<sup>th</sup> August 2011. In respect of the three supply contracts of AY 2009-10 the date of issuance of the notice under Section 142(1) of the Act was 28<sup>th</sup> February 2011, whereas the date of filing the application before the AAR was 22<sup>nd</sup> September 2011. Further it is not in dispute that the notices under Section 142(1) of the Act were accompanied by a questionnaire which raised the question of supply contracts which according to the Petitioner were executed overseas.

29. Therefore, in as much as, the notices under Section 142(1) of the Act raising the very questions that form subject matter of the applications by the Petitioner before the AAR for AYs 2008-09 and 2009-10 were issued prior to the filing of the applications, clause (i) of the proviso to Section 245R(2) of the Act stood attracted. Therefore the rejection by the AAR of the applications filed by the Petitioner for advance ruling in respect of AYs 2008-09 and 2009-10 are not erroneous and do not call for any interference.

30. However, as far as the notices under Section 142(1) of the Act issued by the AO to the Petitioner in respect of the equipments supply contracts for AY 2010-11 is concerned, the notices were issued only on 24<sup>th</sup> November 2012 whereas the date of filing of the application before the AAR was 23<sup>rd</sup> September 2011.

31. Here it is sought to be submitted by Mr. Manchanda that as long as the notice under Section 142 (1) of the Act was issued prior to the date when the AAR took up for decision the applications filed by the Petitioner, it could be said that the question raised in the applications were already pending before the income tax authorities. The above submission appears to be contrary to the legislative intent spelt out in Section 245R(2) of the Act that the question raised in the application for advance ruling should be 'already pending'. The words 'already pending' should be related to the date of filing of the application and not what happens subsequent to the filing of such application. In other words, it is only if on the date of filing of the application before the AAR the question raised therein was already the subject matter of proceedings before the income tax authorities that the bar in terms of the proviso to Section 245R(2) of the Act would apply. If such application is not already pending on the date of the application, and is the subject matter of a notice issued thereafter by the income tax authority, it cannot be said that such question is 'already pending before such income tax authority'. What is relevant is not the date of consideration of the application by the AAR but the date of filing of such application before the AAR.

32. In *Asgarali Nazarali v. State of Bombay AIR 1957 SC 503* it was clarified that "a legal proceeding is 'pending' as soon as commenced and until it is concluded, i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein". In *Monte Harris v. Commissioner of Income Tax 1996 (218) ITR 413 (AAR)* the same question was addressed with reference to the filing of a return.

There it was clarified that the words ‘already pending’ in Section 245R should be interpreted to mean ‘already pending as on the date of the application and not with reference to any future date’. Although these observations were with reference to the filing of a return, it would equally apply to the issuance of any notice raising the same question by any income tax authority.

### ***Conclusion***

33. The net result of the above discussion is that the applications filed by the Petitioner in respect of the transaction of supply of equipment for AY 2008-09 and 2009-10 were rightly rejected by the AAR since on the date of filing of such applications before the AAR, the question raised therein was already pending before the income tax authorities by virtue of the notices under Section 142 (1) of the Act having already been issued to the Petitioner. Accordingly writ petitions, W.P.(C) Nos. 7788/2013, 7789/2013, 7791/2013 and 8086/2013 and the applications in those writ petitions are dismissed.

34. However as regards the three applications concerning the supply contracts executed during AY 2010-11, the AAR erred in rejecting them by applying clause (i) to proviso to Section 245R(2) of the Act. Notices under Section 142(1) of the Act in respect of those transactions pertaining to AY 2010-11 were issued only after the filing of the application before the AAR.

35. Consequently, the Court sets aside the impugned order dated 7th August 2013 of the AAR to the extent that it has rejected the Petitioner’s three applications for AY 2010-11 being AAR Nos. 1138/2011, 1141/2011 and 1142/2011 and restores the said applications to the file of the AAR for a

decision afresh in accordance with law. The parties will appear before the AAR in the said applications on 1st March 2016 at 11 am.

36. The writ petitions, W.P.(C) Nos. 5818,7790 and 8088 of 2013 and the pending applications therein are disposed of in the above terms but in the circumstances with no order as to costs.

**FEBRUARY 11, 2016**  
mg/dn

**S. MURALIDHAR, J**

**VIBHU BAKHRU, J**

