* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

DECIDED ON : 14.08.2012

\+ **W.P.(C) 3959/2012, C.M. APPL. 8300/2012 & 9783/2012**

NETAPP B V ..... Petitioner

Through : Sh. Nageswar Rao and Ms. Sayaree Basu Mallik, Advocates.

versus

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

Through : Sh. Deepak Chopra, Sr. Standing Counsel with Sh. Harpreet Singh Ajmani, for Income Tax Department. Sh.Varun Dubey, for Sh. Sumeet Pushkarna, Advocate, for UOI.

\+ **W.P.(C) 4040/2012 , C.M. APPL. 8469/2012 AND W.P.(C) 4041/2012**

SIN OCEANIC SHIPPING ASA ..... Petitioner

Through : Sh. Nageswar Rao and Ms. Sayaree Basu Mallik, Advocates.

versus

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

Through : Sh. Abhishek Maratha, Sr. Standing Counsel with Ms. Anshul Sharma, Advocate. Sh. Varun Dubey, for Sh. Sumeet Pushkarna, Advocate, for UOI.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT
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1. These writ petitions involve decision on identical questions of law, and were, with consent of counsel for parties, taken up for final hearing. All the petitioners question the orders of the Authority on Advance Ruling (AAR) declining to entertain their applications seeking advance rulings.

2. The facts necessary for determination of these petitions are brief. The First Petitioner had filed its return of income under Section 139(1) of the Act on 31.03.2010. The transactions which form the basis of the application before the AAR were entered into on 26.04.2008 and 26.11.2008. The application for advance ruling was filed on 17.06.2010. The Second Petitioner had entered into a sub-contract with Cellseis Geophysical Inc. From this contract it derived an income. Based on this sub-contract, the applicant entered into an agreement with Spectrum USA for hiring a vessel. It withheld taxes under Section 195 ITA on the payments made by it. It filed its return of income for the Assessment Year 2009-2010. After having filed the return, it had filed the application before the AAR on 17.05.2010, raising identical questions. The Third Petition is also filed by Sin Oceanic, and arises out of the same transaction as mentioned in the second writ and is against the same order of the AAR.

3. All the Petitioners had contended before the AAR, that the objective of the mechanism of advance rulings, with respect to applicants entitled to apply, is to cut short the delay in dispute resolution, and therefore the bar enacted under Section 245R(2) must be strictly construed. They also urged that since the purpose of this mechanism was also to attract foreign investment, the AAR should be wary of interpreting the proviso too widely and consequently, of restricting its own jurisdiction. They also contended that restrictions on jurisdiction conferred have to

be considered strictly, and jurisdiction ought not to be declined unless the application comes strictly within the clauses of the restricting proviso.

4. The applicants also argued that in consequence, the restriction enacted through Clause (1) of the proviso, only applied to those questions which were raised by the Income Tax Authority and the filing of a return of income did not automatically result in a question being "pending" before the Income Tax Authority. It was contended that unless the assessing authority specifically raised a question, and for instance, issued notice calling the assesee to respond to it, the question would not arise, and consequently, the bar would not apply.

5. The Authority considered these contentions but in its final ruling differed from the Applicants. On the question of what questions "arise" before the assessing authority, when returns are filed before it, the Authority stated that merely by filing the return, all questions that can possibly arise, are ushered into the proceeding, and every question is left at large, such that the AAR cannot exercise jurisdiction to entertain the question. All questions that can possibly arise with respect to that transaction are then within the purview of the assessing authority. This means that once returns are filed before the assessing authority, there are no questions that cannot be raised, and no questions left for the AAR to entertain, thereby effectively ousting its jurisdiction. The AAR held that the jurisdiction did not depend upon such vagaries such as whether the assessing officer or the parties raised all the pertinent questions at the time of filing of returns. When a return is after scrutiny or without scrutiny, the implication is that the questions were answered in favour of the assessee.

6. The AAR also held that it was consistent with the purpose of the Act that applications before it be made at the earliest possible opportunity and not after it

invokes or is obliged to invoke the jurisdiction of the assessing authority. The obligation to file returns will be fulfilled in such case, after the AAR is moved and the assessing officer will have wait for the ruling by the AAR to complete the assessment, as had been provided in Section 153 Income Tax Act. It was also held that the date of filing of the return by the assessee is the crucial question for determining the applicability of Clause (1) of the Proviso to Section 245R (2) and not the date when the assessing authority issues a notice; neither should it be dependent on the date when the application comes up for hearing under Section 245R (2) or under Section 245R (4) of the Act. The Authority felt that this period could not be left to the vagaries of the progress of the process of the Income Tax Authority issuing a notice or the uncertainties of the progress of the application before the authority. It said that jurisdiction could not depend on such vagaries and therefore the need for fixing a definite common point for determining jurisdiction necessitated that the date of filing of return by the applicant would serve as this point.

7. On the basis of the above reasoning, the AAR held that in the case of the applicants, keeping the dates of filing of return in mind, its jurisdiction to entertain the application was barred under Section 245R(2) Proviso (1).

8. It is argued by Counsel for the petitioners that the impugned orders, declining to entertain the applications (for advance ruling) are in grave error of law. Counsel submitted that the unduly restrictive interpretation placed by the AAR in these cases, is inconsistent with the rulings of the previously constituted authorities, which had kept in mind the objective of including a special procedure for advance rulings, to facilitate speedy resolution of taxation disputes and queries. It was held that the settled interpretation, which had been previously followed by the authority, favored exercise of jurisdiction. Counsel also relied on the manual

issued by the Income Tax department to contend that there was no bar to the exercise of jurisdiction, by the AAR in such cases.

9. It was also submitted that the AAR should have taken note of the previous rulings, which consistently entertained applications whenever returns had been filed, and were the subject matter of assessment. Relying on the decision in *Union of India v Paras Laminates (Pvt.) Ltd* 186 ITR 722 it was urged that when authorities, even quasi-judicial authorities, adopt a particular approach or interpretation, unless there is fundamental infirmity or illegality in such interpretation, there should be no departure from it. It was argued that therefore, the AAR should have, having regard to consistency, at least entertained and examined the application on merits. Reliance was also placed on the judgment of the Supreme Court, reported as *Auto and Metal Engineers & Ors v Union of India* 229 (ITR) 399 to say that regular assessment proceedings commence on issuance of notice under Section 142 (1) of the Income Tax Act. Lastly, it was argued that if something is not mentioned, and consciously kept out of the return for the purpose of securing an advance ruling, it cannot be treated as a question pending before the Assessing Officer.

Relevant Provisions of the Income Tax Act

10. The relevant provisions of the Income Tax Act, dealing with advance ruling are extracted below:

> *"**245N. Definitions.-** In this Chapter, unless the context otherwise requires,—*
>
> *[(a) "advance, ruling" means—*

(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,

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]:

*[**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;]*

(b) "applicant" means any person who—

(i) is a non-resident referred to in sub-clause (i) of clause (a); or

(ii) is a resident referred to in sub-clause (ii) of clause (a); or

(iii) is a resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify in this behalf; and

(iv) makes an application under sub-section (1) of Section 245Q;]

(c) "application" means an application made to the Authority under sub-section (1) of Section 245Q;

(d) "Authority" means the Authority for Advance Rulings constituted under Section 245-O;

(e) "Chairman" means the Chairman of the Authority;

(f) "Member" means a Member of the Authority and includes the Chairman.

245Q. Application for advance ruling- *(1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed, stating the question on which the advance ruling is sought.*

(2) The application shall be made in quadruplicate and be accompanied by a fee of two thousand five hundred rupees.

(3) An applicant may withdraw an application within thirty days from the date of the application.

245R. Procedure on receipt of application *- (1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner and, if necessary, call upon him to furnish the relevant records:*

Provided *that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Commissioner.*

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application :

*[**Provided** that the Authority shall not allow the application where the question raised in the application,—*

(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 Section 245N] or any court;

(ii) involves determination of fair market value of any property;

(iii) relates to a transaction or issue which is designed prima facie for the avoidance of income-tax [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of Section 245N

Provided further *that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:*

Provided also *that where the application is rejected, reasons for such rejection shall be given in the order.*

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the Commissioner.

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

Explanation.—For the purposes of this sub-section, "authorised representative" shall have the meaning assigned to it in sub-section (2) of Section 288, as if the applicant were an assessee.

(6) The Authority shall pronounce its advance ruling in writing within six months of the receipt of application.

(7) A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner shall be sent to the applicant and to the Commissioner, as soon as may be, after such pronouncement

*[**Appellate authority not to proceed in certain cases.***

245RR. *No income-tax authority or the Appellate Tribunal shall proceed to decide any issue in respect to which an application has been made by an applicant, being a resident, under sub-section (1) of [Section 245Q].]*

Previous rulings by the AAR

11. In *Monte Hams, In re* (1996 218 ITR 413) the precise question of the AAR's jurisdiction, and whether the filing of a return (of income tax) is said to fall within

the expression "question pending" as to preclude exercise of jurisdiction (by the AAR) was considered. The Authority had then held that:

> *"12. The question that arises is whether, in view of the claim for exemption made before the income-tax authorities in the return which is pending consideration by them as on the date of the hearing of this application, this Authority is precluded from dealing with the application in view of the mandate contained in the proviso to Section 245R(2). At first sight and on a cursory reading of the above proviso, it might appear that the Authority will have to reject the application as the question sought to be raised before the Authority is "already pending" i.e., pending as on the date of the hearing and disposal of the application. But this, on second thoughts, would be seen to be not a tenable view. The date on which the Authority hears the application and the date on which it disposes of application may not be the same and the maintainability of the application cannot be made to depend on the pendency of the issue before the income-tax authorities on varying dates. It would appear more correct and practical to construe the embargo as applicable to cases where, while the issue is already pending before the income-tax authorities, the Appellate Tribunal or any court, the applicant also seeks recourse under Section 245Q. Having already availed himself of the remedies available under the Act, the Legislature understandably requires that an applicant should not be encouraged to have recourse to another remedy by way of an application before the Authority. It is true that subsequent to filing the application before the Authority, the applicant has also filed a return and made a claim before the authorities. But this is something which is not entirely based on the volition of the applicant. The statute requires a return of income to be filed within the prescribed time (very early in a financial year) and failure to do so might lead to consequences of a penal nature. No applicant can afford to ignore this mandatory provision merely because he has filed an application before the Authority. That step has to be taken by the applicant by way of protective action or as a precautionary measure. It does not also confer any great advantage on the applicant since, once his application before the Authority gets decided, the conclusion of the Authority will have to be given effect to by the income-tax authorities in the pending assessments. It is perhaps possible to think of cases where an applicant might take advantage of the above interpretation to have his problems resolved both in the course of regular income-tax proceedings as well as by moving an application to the Authority. During the course of the arguments, such an instance was put to*

the applicant's counsel. Suppose an applicant makes a claim in the return which is rejected by the Income-tax Officer. Immediately thereafter and before moving an appeal before the Appellate Commissioner, the applicant may move an application before the Authority and claim that the application should be disposed of because, as on the date of the application, no proceeding was pending before any income-tax authority, Appellate Tribunal or court. But this does not really confer a double advantage on the assessee because, once the application is heard and disposed of by the Authority, even if subsequent to such an application the applicant files an appeal before the Appellate Commissioner or higher appellate authority he will not be able to get any different relief as the opinion of the Authority will be binding on the applicant in the course of those appellate proceedings. The interpretation suggested above, therefore, appears to be more appropriate in the context of Section 245R. On the other hand, if the interpretation suggested on behalf of the Revenue is accepted, a non-resident applicant will forfeit the remedy provided by Chapter XIX-B for no good reason because he will, invariably, be compelled or constrained to file a return and make his claim in the regular assessment proceedings as well if he wishes to keep such claim alive. The words "already pending" should, therefore, be interpreted to mean : "already pending as on the date of the application" and not with reference to any future date. In the present case, since there was no return or claim before the authorities before the application was filed before this Authority, the application cannot be rejected by invoking Clause (a) of the proviso to Section 245R(2).

12. *In re Rotem Co* (2005) 195 CTR (AAR) 289 : (2005) 145 Taxman 488 (AAR) a different view was taken, when it was held that:

"Insofar as the third objection of the CIT referred to above, namely, pendency of the questions before the AO is concerned, we have held in our order dt. 22nd Nov., 2004 that mere filing of returns by the applicants would not fall within the mischief of Clause (i) referred to above. Where, however, a notice is issued under Section 143(2) of the Act, within the statutory period, the situation may warrant an enquiry into the identity of questions before the AO and the authority. In this case admittedly no notice under Section 143(2) of the Act is issued to the applicants before the date of filing of these applications before the Authority. So we need not delve on this aspect any further."

13. The view which the AAR took in the present cases was that the filing of the return under the Income Tax Act falls within the sweep of the expression "pending" as to attract the bar of Section 245-R (2). The Tribunal was of the opinion that in this context, if a return of income is furnished and the proceedings for assessment are on, a claim by the person that the income returned by him or one of the items of income returned by him is not taxable in this country has not arisen for consideration by the assessing officer or that it is not pending before him cannot be validly urged. The reason given is that a question raised in the application before the authority under section 245Q of the Act is whether the amounts received by the applicant are liable to tax in India under the provisions of the Income-tax Act. This issue has to be subject matter of adjudication before the Assessing Officer, so far as that particular income is concerned.

14. The AAR, in these cases, considered the statutory scheme and the importance of filing of a return, and if it attracts the bar under Section 245R (2) (a) of the Act. The AAR felt that even if an issue is not specifically raised, requires examination and determination, in the course of assessment proceedings before the Tax-Authorities, a preliminary objection under clause (a) by the Revenue would be justified. It was emphasized that if no return of income is filed or no claim is pending before the Tax-Authorities, an application cannot be rejected under Section 245R(2)(a)(i) of the Act. In this the AAR followed *Monte Harris* (1996) 218 ITR 413.

15. As to what is "pending" before a court or authority, was the subject matter of consideration by the Supreme Court, in *Asgarali Nazarali vs. State of Bombay* AIR 1957 SC 503, where it was held as follows:

> *"Pending":- (1) 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. Similar are the observations of Jessel, M.R. In re Clagett's Estate, Fordham v. Clagett (1) :

> *"What is the meaning of the word "pending"? In my opinion, it includes every insolvency in which any proceeding can by any possibility be taken. That I think is the meaning of the word "pending..... A cause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test."*

There is no doubt therefore that the case of the appellant was not concluded and was pending before the learned Presidency Magistrate at the date of the commencement of the impugned Act."

In the case of *Rambhai Jethabhai Patel vs. Commissioner of Income Tax* 108 ITR 771, the Gujarat High Court held that it could safely be said that a matter can be said to be pending in a Court of Justice when any proceedings could be taken in it and that was the test which was required to be applied.

16. It would be relevant here to notice a decision of the Supreme Court rendered in the context of when are income tax proceedings said to be "pending". In *Auto and Metal Engineers* (supra), it was held that:

> *"The process of assessment thus commences with the filing of the return or when the return is not filed by the issuance by the Assessing Officer of the notice to file the return under Section 142(1) and it culminates with the issuance of the notice of demand under Section 156. The making of the order of assessment is, therefore, an integral part of the process of assessment. Having regard to the fact that the object underlying the explanation is to extend the period prescribed for making the order of assessment, the expression "assessment proceeding" in the explanation must be construed to comprehend the entire process of assessment starting from the stage of filing of the return under Section 139 or issuance of notice under Section 142(1) till the making of the order of assessment under Section 143(3) or Section 144."*

17. If the law is understood in the above context, i.e. that upon a return of income being filed, the matter is pending, in the sense that the Assessing Officer has the right to take such steps, including issuance of notice, etc, the further duty cast on the assesse to disclose all facts, including every potential income, needs to be highlighted. Thus, in *Calcutta Discount Company v Income Tax Officer* AIR 1961 SC 372 the Supreme Court underlined this duty in the following terms:

> *"a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his Possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise-the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.*
>
> *There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee."*

18. The proviso to Section 245R(2) of the Act creates a bar upon the AAR to admitting an application (for advance ruling); it is also is a jurisdictional bar to the Authority to rule, under Section 245R(4). The proviso to Section 245R(2) of the Act creates a bar to the jurisdiction of the Authority if it is seen that any of the conditions are fulfilled. The *rationale* for the bar appears to be straightforward; if the applicant wishes to plan its affairs and transactions in advance, it is free to do

so to consider the wider tax ramifications. However, once it proceeds to file a return, or take a similar step, the Authority's jurisdiction to entertain the application for advance ruling is taken away, because the Income Tax authority concerned would then be seized of the matter, and would potentially possess a multitude of statutory powers to examine and rule on the return. Conversely, if the authority is approached before an income tax return is filed, or any other income tax authority is approached, the application can be entertained, and the AAR would be exclusively dealing with the matter before it.

19. In the light of the above reasoning, the argument that the AAR erred in not following a so called past practice is unpersuasive. No practice, without its roots in the law, but based on an unchallenged understanding can be pursued; holding otherwise would be creating an estoppel against a statute – a proposition only stated to be rejected.

20. In view of the above reasons, the Court is of opinion that the Petitions are without merit; they are accordingly rejected. No costs.

S. RAVINDRA BHAT, J.

R.V.EASWAR, J.

AUGUST 14, 2012