Legal Decisions[1]

Income-tax Act

LD/61/5

Alstom Transport SA, In Re
June 7, 2012 (AAR)

Section 9 read with Section 2(31) of Income-tax Act, 1961 - Income - Deemed to accrue or arise in India

Where in terms of contract between Metro Rail and Consortium of four 'to implement the design, manufacture, supply, installation, testing and commissioning of signaling/train-control and communication system', consortium is jointly and severally responsible for work tendered and receipt from whole contract has to be taxed as a whole as an AOP; said contract cannot be split up to treat a part of it as confined to offshore supply of equipment which is done by non-resident consortium member and receipt therefrom cannot be said to be not capable of being taxed in India

The applicant French company along with its Indian subsidiary APIL, Portugal company Thales and Japanese company Sumitomo entered into a Consortium Agreement which was registered in Bangalore in India. Under the contract between Metro Rail (BMRC) and the Consortium of four, the consortium was jointly and severally responsible for the work tendered. The tender floated by BMRC was a composite work tender. A part of the contract was for design, manufacture, supply, installation, testing & commissioning of signaling/ train control and communication system.

The applicant contended that the design and supply of equipment it 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 could be deemed to arise in India.

The Revenue 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. It was also contended that Members of the Consortium who came forward to bid, formed an Association of Persons within the meaning of section 2(31). Hence, the income from the transaction is chargeable to tax in India.

The Authority for Advance Rulings ruled that 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.

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. The contract involved herein is a composite contract and it cannot be dissected into parts even if a dissecting approach is permissible after the *Vodafone International Holdings BV v. UOI & another*, 341 ITR 1 ruling. For the purpose of taxation, the contract must be taken as one, for installation and commissioning of a project in India.

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 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 therefrom. 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. 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.

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.

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

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. Therefore, 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.

What has to be considered is the transaction which is the source of the receipt. The source of the receipt in this case 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. Therefore, it is to be concluded 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.

The members of the Consortium, may be with 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.

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

In the light of the above discussion, it has to be ruled that the contract entered into with BMRC by the Consortium, of which the applicant is a member, 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 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.

LD/61/6

Aramex International Logistics Private Limited, In Re
June 7, 2012 (AAR)

Section 9 of Income-tax Act, 1961 read with Articles 5 & 10 of the India-Singapore DTAC - Income - Deemed to accrue or arise in India

Where fully owned subsidiary secures orders in India wholly for the group and it has the right to conclude contracts for the group for its Express shipment business, such subsidiary has to be deemed to be a permanent establishment of the group in India

The applicant is a Singapore company looking after business of Aramax International-Bermuda. AIPL is a 100% subsidiary of Aramex International Bermuda. Aramex group has admittedly business in various countries all over the world including India. Its business in India is conducted by it through AIPL. AIPL has been formed as a subsidiary and has an identity under the Companies Act, 1956. The fact remains that the business is that of Aramex group and the reputation and appealability is that of the Aramex group.

When actually taking up the work in India, Aramex group enters into agreements with customers for the purpose of acceptance of articles and for their deliveries at various destinations around the world. It has to arrange, for picking up the articles from the customers collecting them at a convenient place for transportation to various destinations around the world. This is the position regarding the outbound services undertaken by Aramex group. As far as "inward business" is concerned, Aramex group companies in various parts of the world contact the customers, take delivery of the articles to be delivered to various cities and towns in India and deliver them at a chosen destination. The business is completed by delivery of the consignments

to the concerned addressees in India. For that, the Aramex group has created a subsidiary, in India, AIPL. The business of Aramex group as regards the articles sent to India, was performed in India by AIPL. It is the case of the applicant that the goods are brought to a common destination and delivered to AIPL and AIPL ensures that the articles are delivered to the concerned parties in various parts of India

The Authority for Advance Rulings ruled that when a business cannot be carried on exclusively in so far as it relates to customers in India like in the present case, without intervention of another entity, a subsidiary, normally that entity must be deemed to be the establishment of the group in that particular country. The position may be different when the entity is an independent entity uncontrolled by the group unless it satisfies the other requirements mentioned in Article 5(2) of the DTAC. But in a case where a 100% subsidiary is created for the purpose of attending to the business of the group in a particular country, here, in India, the Indian subsidiary must be taken to be a permanent establishment of the group in India. It is not pretended that the without its part being played by the Indian entity, AIPL, the business of the applicant could be successfully transacted. Thus, AIPL is an essential part of the business of the group now routed through the applicant in India. No doubt, AIPL may have an independent existence as a subsidiary. Clearly, the authority over it of the principal, vertical or persuasive, cannot be in doubt. Therefore, satisfied that in a case like the present, the subsidiary must be considered to be a permanent establishment of the group in the concerned country, here, India.

AIPL has a fixed place of business and branches. The business of the applicant Aramex group in India is only carried on by AIPL. APIL obtains orders, collects articles, transports them to a specified destination so as to be taken over by the group and then delivered to the addressees in various countries through its entities in those countries. Therefore, it would not be incorrect to say that AIPL is a permanent establishment of Aramex group in India.

The fact that the applicant, on behalf of the Aramex group, controls AIPL or that AIPL carries on its business in India, shall not of itself constitute AIPL a permanent establishment of the applicant. It is really a case of a group carrying on its business in India or that part of the business relatable to India through a fully owned subsidiary involving all its business activities.

Merely entering into an agreement describing the subsidiary controlled legally or persuasively by the principal as an independent entity or a non-exclusive agent, would not bring the case of a subsidiary like AIPL within the ambit of paragraph 10 to Article 5 of the DTAC. There is considerable force in the argument on behalf of the Revenue that the agreement put forward by the applicant relating to its business with AIPL is a mere camouflage to screen the fact that AIPL is really a permanent establishment of the applicant's group in India. Therefore, AIPL should be considered as a permanent establishment of the applicant, on the facts and in the circumstances of the case.

AIPL secures orders in India wholly for the Aramex group. It also has the right to conclude and concludes contracts for the group for its Express shipment business. On facts it appears to me that AIPL has to be deemed to be a permanent establishment of Aramex group and the applicant in India. Here, the applicant gets done its entire business related to India through AIPL.

Thus, AIPL is a Permanent Establishment of the applicant in India within the meaning of Article 5 of the DTAC between India and Singapore.

LD/61/7

Columbia Sportswear Company
Vs.
Director of Income Tax, Bangalore
July 30, 2012 (SC)

Section 245N of the Income-tax Act, 1961 read with Articles 136,226/227 of the Constitution of India – Advance Ruling

Authority for advance ruling is a tribunal within meaning of articles 136 and 227 of the Constitution; an advance ruling pronounced by the Authority can be challenged by the applicant or by the Commissioner or any income-tax authority subordinate to him under Article 226/227 of the Constitution before the High Court

A. Authority for advance ruling is a tribunal

Under Article 226 of the Constitution, the High Court can issue writs of Certiorari and Prohibition to control the proceedings of not only a subordinate court but also of any person, body or authority having the duty to act judicially, such as a tribunal. Under Article 227 of the Constitution, the High Court has superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. Under Article 136 of the Constitution, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence

or order in any cause or matter passed or made by any court or tribunal in the territory of India.

A plain reading of the very definition of advance ruling in Section 245N(a) would show that the Authority is called upon to make a determination in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant or in relation to the tax liability of a non-resident arising out of such transaction which has been undertaken or proposed to be undertaken by a resident applicant with such non-resident and such determination may be on any question of law or fact specified in the application. Further, the Authority may make a determination or decision in respect of a issue relating to the computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision may include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application. Thus, the Authority may determine not only a transaction but also the tax liability arising out of a transaction and such determination may include a determination of issue of fact or issue of law. Moreover, the Authority may determine the quantum of income and such determination may include a determination on a issue of fact or issue of law. It may also be found that the determination of the Authority is not just advisory but binding. The binding effect of advance ruling as provided in Section 245S has been dealt with by the Authority (Chairman and two Members) in *Cyril Eugene Pereira, In re*, [1999] 239 ITR 650, where the Authority, held that the advance ruling of the Authority is binding in the case of one transaction only and the parties involved in respect of that transaction and for other parties, the ruling will be of persuasive nature. The Authority, however, has clarified that this is not to say that a principle of law laid down in a case will not be followed in future. This decision of the Authority in Cyril Eugene Pereira, In re (supra) has been taken note of by the Supreme Court in *Union of India & Anr. v. Azadi Bachao Andolan & Anr*, [2003] 263 ITR 706 at 742 to hold that the advance ruling of the Authority is binding on the applicant, in respect of the transaction in relation to which the ruling had been sought and on the Commissioner and the income-tax authorities subordinate to him and has persuasive value in respect of other parties. However, it has also been rightly held by the Authority itself that this does not mean that a principle of law laid down in a case will not be followed in future.

As Section 245S expressly makes the Advance Ruling binding on the applicant, in respect of the transaction and on the Commissioner and the income tax authorities subordinate to him, the Authority is a body acting in judicial capacity. According to Prof. de Smiths "an authority acts in a judicial capacity when, after investigation and deliberation, it performs an act or makes a decision that is binding and collusive and imposes obligation upon or affects the rights of individuals."

Thus, the Authority is a body exercising judicial power conferred on it by Chapter XIX-B and is a tribunal within the meaning of the expression in Articles 136 and 227 of the Constitution.

The fact that sub-section (1) of Section 245S makes the advance ruling pronounced by the Authority binding on the applicant, in respect of the transaction and on the Commissioner and the income-tax authorities subordinate to him in respect of the applicant and the transaction would not affect the jurisdiction of either the Supreme Court under Article 136 of the Constitution or of the High Courts under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling pronounced by the Authority. The reason for this view is that Articles 136, 226 and 227 of the Constitution are constitutional provisions vesting jurisdiction on the Supreme Court and the High Courts and a provision of an Act of legislature making the decision of the Authority final or binding could not come in the way of the Supreme Court or the High Courts to exercise jurisdiction vested under the Constitution. In *Kihoto Hollohan v. Zachillhu and Others*, 1992 Supp (2) SCC 651, the Supreme Court held that the finality clause in Paragraph 6 of the Schedule-X of the Constitution does not completely exclude the jurisdiction of the Courts under Articles 136, 226 and 227 of the Constitution, though it may limit the scope of this jurisdiction. In *Jyotendrasinhji v. S. I. Tripathi and Others*, 1993 Supp (3) SCC 389] the Supreme Court held that the provision in Section 245-I of the Income Tax Act, 1961, declaring that every order of settlement passed under sub-section (4) of Section 245D shall be conclusive as to the matters stated therein would not bar the jurisdiction of the High Court under Article 226 of the Constitution or of the Supreme Court under Article 136 of the Constitution. Considering the settled position of law that the powers of the Supreme Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by

the Legislature making the decision of the tribunal final or conclusive, sub-section (1) of Section 245S , insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority.

It cannot be held that an advance ruling of the Authority can only be challenged under Article 136 of the Constitution before the Supreme Court and not under Articles 226 and/or 227 of the Constitution before the High Court. In *L. Chandra Kumar v. Union of India and Others*, (1997) 3 SCC 261, the Constitution Bench of the Supreme Court has held that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is part of the basic structure of the Constitution. Therefore, to hold that an advance ruling of the authority should not be permitted to be challenged before the High Court under Articles 226 and/or 227 of the Constitution would be to negate a part of the basic structure of the Constitution. There is no force in the apprehension of the Authority that a writ petition may remain pending in the High Court for years, first before a Single Judge and thereafter in Letters Patent Appeal before the Division Bench and as a result the object of Chapter XIX-B which is to enable an applicant to get an advance ruling in respect of a transaction expeditiously would be defeated. When an advance ruling of the Authority is challenged before the High Court under Articles 226 and/or 227 of the Constitution, the same should be heard directly by a Division Bench of the High Court and decided as expeditiously as possible.

B. Petitioner to approach the High Court under Articles 226 and/or 227 of the Constitution

Article 136 of the Constitution itself states that the Supreme Court may, "in its discretion", grant special leave to appeal from any order passed or made by any court or tribunal in the territory of India. The words "in its discretion" in Article 136 of the Constitution makes the exercise of the power of the Supreme Court in Article 136 discretionary. Hence, even if good grounds are made out in a Special Leave Petition under Article 136 for challenge to an advance ruling given by the Authority, the Supreme Court may still, in its discretion, refuse to grant special leave on the ground that the challenge to the advance ruling of the authority can also be made to the High Court under Articles 226 and/or 227 of the Constitution on the self same grounds. In fact, in *Sirpur Paper Mills Ltd. v. Commissioner of Wealth Tax, Hyderabad*, AIR 1970 SC 1520, it has been observed that the Supreme Court does not encourage an aggrieved party to appeal directly to the Supreme Court against the order of a Tribunal exercising judicial functions unless it appears to the Court that a question of principle of great importance arises. Unless, therefore, a Special Leave Petition raises substantial questions of general importance or a similar question is already pending before the Supreme Court for decision, the Supreme Court does not entertain a Special Leave Petition directly against an order of the tribunal.

In this Special Leave Petition, neither a substantial question of general importance arises nor is it shown that a similar question is already pending before the Supreme Court for which the petitioner should be permitted to approach the Supreme Court directly against the advance ruling of the Authority. The petitioner could move to the appropriate High Court under Article 226 and/or 227 of the Constitution.

Wealth Tax Act

LD/61/8

AIMS Oxygen Pvt. Ltd.
Vs.
Commissioner of Wealth –Tax
August 2, 2011 (GUJ-FB)

Section 7 of the Wealth Tax Act, 1957 – Valuation of Assets

Where land was acquired and allotted to assessee company and same was later on declared surplus under Urban Land (Ceiling & Regulation) Act, valuation of said land in hand of allottee should be done based on compensation receivable by company

The Assessee-Company has shown the value of the open land at ₹62,538 in its return. The Assessing Officer was of the opinion that the valuation given by the Assessee-Company was shown at the same price at which the said land was acquired pursuant to land acquisition proceedings as early as in 1960. He therefore, referred the matter to the Departmental Valuation Officer under Sec.16A for assessing the fair market value of the said open land. In the meantime, the Assessee got another Govt. Regd. Valuer's report and on that basis, it filed revised return of wealth showing value of the open land at ₹1,44,146. Contention of the Assessee was that the land in question was subject

matter of Urban Land (Ceiling & Regulation) Act, 1976 (ULC Act) and its value should be at the rate of compensation to be awarded to the company by the Government under the provisions of the ULC Act and the valuation as worked out by the Govt. Regd. Valuer should be believed. The Assessing Officer relied upon the report of the Departmental Valuation Officer who had considered the impact of the ULC Act also while arriving at the valuation of the open land in question at ₹51,18,400

The Full Bench of the Gujarat High Court held that the settled law can be summarized as follows:

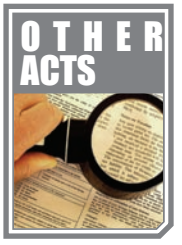
[i] The words 'if sold in open market' do not contemplate actual sale or the actual state of the market, but only enjoins that it should be assumed that there is an open market and the property can be sold in such a market and on that basis, the value has to be found out. It is a hypothetical case which is contemplated and the Tax Officer must assume that there is an open market in which the asset can be sold.

[ii] Whenever there is any restriction on transfer of any land, value of the property or land, as the case may be, would be normally reduced and the valuation is to be ascertained taking note of the restrictions and prohibitions contained in the Ceiling Act as if the land is notified as excess land.

[iii] Once the competent authority issues any notification under Section 10(1) or Section 10(3) of the Land Ceiling Act, the land has to be deemed to have been acquired by the Government and what the assessee owned was the right to compensation and in such case, the compensation amount would only be the maximum compensation as provided under the Ceiling Act which is to be taken into consideration.

The land in question was declared surplus land under the ULC Act, which was having depressing effect on the value of the asset, the valuation had to be made on the basis of assumption that the purchaser would be able to enjoy the property as the holder, but with restrictions and prohibitions contained in the ULC Act and in such case value of the property or land would be reduced. Following the same principle, the Revenue, having already accepted the depressed valuation during the Assessment Years 1988-89 to 1990 and then for Assessment Year 1991-92, it was not open to the Revenue to assess the property on the basis of the market value, which normally could have fetched without any restriction or prohibition, but ought to have accepted the value of open land with such restriction and prohibition at ₹1,44,146/-, as assessed by the Govt. Regd. Valuer.

Hence, the Appellate Tribunal was incorrect in holding that immovable property should be valued as per the open market rate, without any restriction and prohibition. In the result, the question, as referred is required to be answered in the negative, against the Revenue and in favour of the Assesee.



Arbitration and Conciliation Act

LD/61/9

ACC Ltd.

Vs.

Global Cements Ltd.

June 11, 2012 (SC)

Section 11 of the Arbitration and Conciliation Act, 1996 – Appointment of Arbitrators

Where arbitrators named in agreement died, in absence of any prohibition or debarment, parties can persuade court for appointment of an arbitrator under arbitration clause of agreement

The relevant arbitration clause 21 in the agreement between parties read that if any question or difference or dispute would arise between the parties at any time, question or dispute would be referred either to Mr. N. A. Palkhivala or Mr. D. S. Seth, whose decision in the matter would be final and binding on both the parties.

The petitioner submits that both Shri N. A. Palkhivala and Shri D. S. Seth are no more and therefore the arbitration clause in the agreement does not survive. The petitioner submits that since the arbitrators are no more, the arbitration clause in the agreement has no life and hence there is no question of entertaining the application preferred under Section 11 filed by the respondent.

The respondent submitted that the arbitration clause in the agreement would survive even after the death of the named arbitrators and the parties can still resolve their difference or dispute by referring them to another arbitrator or move the court for appointing a substitute arbitrator whose decision would be final and binding on both the parties.

The Bombay High Court took the view that clause 21 of the Agreement did constitute an agreement to refer disputes to arbitration and also took the view that in the absence of any prohibition or debarment, there was no reason for the court to presume an intent on

the part of the parties to the effect that a vacancy that would arise on account of a failure or inability of a named arbitrator to act couldnot be supplied by the court under Section 11.

The Supreme Court held that the words "at any time" which appear in Clause 21, is of considerable importance. "At any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. The arbitration clause 21 has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time frame within which the question or dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their life time. The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in clause 21 of the Agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the Agreement. Arbitration clause would have life so long as any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes, in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under clause 21 of the agreement.

The High Court was justified in entertaining such an application and appointing a former Judge of this Court as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties.

Companies Act

LD/61/10

AVM Capital Services Private Limited, In Re

July 12, 2012 (BOM)

Section 391 of the Companies Act, 1956 - Compromise or Arrangements

Where shares of Transferee Company were held by Transferor Companies and Transferee Company merged with Transferor Companies to enable Promoter thereof to hold shares directly in Transferee Company rather than indirectly, there was nothing illegal or unlawful or dubious or colourful in Scheme

By a Company Scheme of arrangement, five Companies were sought to be merged with the Transferee Company. Pursuant to the Scheme, the entire undertaking of the Transferor Companies would stand vested with the Transferee Company. The main objection of the Objector was that the Scheme was propounded to avoid capital gains tax that would have arisen if the Transferor Companies would have directly transferred their shares to the Promoters. It was alleged that the object of the Scheme was not to help the Transferee Company, but to transfer these shares to the Promoter. According to the Objector, it was not shown how long term stability would be achieved if the shares are transferred in the name of the said promoter. According to the Objector, the Scheme was a colourable device to evade tax, since such a transfer could well have been effected through the stock market.

The Bombay High Court held that the transferor companies are in existence since 1975. The shares of the transferee company held by the transferor companies. It was felt that it would be in the interest of the Transferee Company to merge the five Transferor Companies with the Transferee Company, and to enable the Promoter thereof to hold shares directly in the Transferee Company rather than indirectly. The object of the Scheme was not to avoid any tax. Even today the shares are owned/controlled by the same Promoter

albeit through the Transferor Companies. Under the Scheme the only difference was that the Promoter would now hold shares directly in the Transferee Company. It was correctly submitted by the Transferee Company that there was nothing illegal or unlawful or dubious or colourful in the Scheme and the same was a perfectly legitimate scheme and permissible by law. Therefore, the objection of the objector that the Scheme was a tax avoidance device and ought not to be approved, was to be rejected.

Copyright Act

LD/61/11

Super Cassettes Industries Ltd.
Vs.
Music Broadcast Pvt. Ltd.
May 4, 2012 (SC)

Section 31 of the Copyright Act, 1957 - Compulsory licence in works withheld from public

On a complaint made to the Copyright Board under Section 31, the said Board has power under Clause (b) of Sub-Section (1) to pass an interim order in the pending complaint

The Copyright Board has been empowered in cases where the owner of a copyright in a work has withheld the same from the public, after giving the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may consider necessary and on being satisfied that the grounds for withholding the work are not reasonable, to direct the Registrar of Copyrights to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public by broadcast, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Board may determine. The language used in the Section clearly contemplates a final order after a hearing and after holding an inquiry to see whether the ground for withholding of the work from the public was justified or not. There is no hint of any power having been given to the Board to make interim arrangements, such as, grant of interim compulsory licences, during the pendency of a final decision of an application.

As has been held by this Court in innumerable cases, a Tribunal is a creature of Statute and can exercise only such powers as are vested in it by the Statute. There is a second school of thought which propagates the view that since most Tribunals have the trappings of a Court, it would be deemed to have

certain ancillary powers, though not provided by the Statute, to maintain the status-quo as prevailing at the time of filing of an application, so that the relief sought for by the Applicant is not ultimately rendered otiose.

In the instant case, the power being sought to be attributed to the Copyright Board involves the grant of the final relief, which is the only relief contemplated under Section 31 of the Copyright Act. Even in matters under Order XXXIX Rules 1 and 2 and Section 151 of the Code of Civil Procedure, an interim relief granting the final relief should be given after exercise of great caution and in rare and exceptional cases. In the instant case, such a power is not even vested in the Copyright Board and hence the question of granting interim relief by grant of an interim compulsory licence cannot arise.

To grant an interim compulsory licence during the stay of the proceedings would amount to granting the final relief at the interim stage, although the power to grant such relief has not been vested in the Board. It is no doubt true, that Tribunals discharging quasi-judicial functions and having the trappings of a Court, are generally considered to be vested with incidental and ancillary powers to discharge their functions, but that cannot surely mean that in the absence of any provision to the contrary, such Tribunal would have the power to grant at the interim stage the final relief which it could grant.

Such incidental powers could at best be said to exist in order to preserve the status-quo, but not to alter the same, as will no doubt happen, if an interim compulsory licence is granted. If the legislature had intended that the Copyright Board should have powers to grant mandatory injunction at the interim stage, it would have vested the Board with such authority. The presence of a power cannot be inferred from the absence thereof in the Statute itself. ■