

Advance Ruling is Subjected to Writ Jurisdiction of High Court



The authority for advance ruling may determine not only 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. The authority may determine the quantum of income and such determination may include a determination on an issue of fact or issue of law. The determination of the authority is not just advisory but binding on the applicant and the department. In the income tax, there is no provision for filing an appeal against the advance ruling. However, the authority being a tribunal is subject to the superintendence of high court. The Supreme Court held that the advance ruling is subjected to the writ jurisdiction of high court. Read on to know more.



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ADVANCE RULING:

Chapter XIX of Income-tax Act, 1961 ('Act' for short) deals with the advance ruling. Section 245N (a) of the Act defines the term 'advance ruling' as-

- 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
- 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 respondent applicant with such non resident and such determination shall include the determination of any question of law or of fact specified in the application;
- 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.

BINDING NATURE OF ADVANCE RULING:

The determination of the Authority for Advance Ruling ('Authority' for short) is not advisory but binding under Section 245S of the Act. The said section provides that the advance ruling pronounced

by the Authority under Section 245R shall be binding only-

- On the applicant who had sought it;
- In respect of the transactions in relation to which the ruling had been sought; and
- On the Commissioner and the income tax authorities subordinate to him, in respect of the applicant and the said transaction.

The advance ruling shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced. The Authority in '*Cyril Eugene Pereira*' – (1999) 239 ITR 650 held that Section 245S (2) has limited the binding nature of the ruling to the case of the applicant in respect of transaction in relation to which the advance ruling is sought and to the Commissioner and authorities subordinate to him only in respect of the applicant and the transaction involved. This is not to say that a principle of law laid down in a case will not be followed in future. The Act has made the ruling binding in the case of one transaction only and the parties involved in that case in respect of that transaction. For any other transaction and for other parties, the ruling will be of a persuasive nature.

The decision of the Authority in the above said case has been taken note of by Supreme Court in '*Union of India & another vs. Azadi Bachao Andolan and another*' – (2003) 263 ITR 706. The Supreme Court held that the advance ruling of the Authority is binding on the applicant, in respect of transaction in relation to which the ruling had been sought and on the Commissioner of 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.

WHETHER THE AUTHORITY IS A TRIBUNAL?

Before going into the above said question we may see what Tribunal is. The expression 'Tribunal' in Article 227 of the Constitution has been explained by the Supreme Court in '*Harinagar Sugar Mills vs. Shyam Sunder*' – AIR 1961 SC 1669 as – "With the growth of civilisation and the problems of modern life, a large number of administrative tribunals have come into existence. These tribunals have the authority of law to pronounce upon valuable rights; they act in a judicial manner and even on evidence on oath, but they are not part of the ordinary courts of civil judicature. **They share the exercise of the judicial**

Where a Tribunal is constituted by an Act of the legislature for adjudicating any particular matter the power of the Constitutional Courts under Article 226/227 or 136 is not ousted even if the Act makes the decision of the Tribunal final as held by the Supreme Court in '*Union of India V. R. Gandhi, President, Madras Bar Association*' – 2010 (261) ELT 3 (SC). Under Article 226 of the Constitution, the High Court can issue writs of certiorari and prohibition to control the proceedings of not only a sub ordinate court but also of any person, body or authority having the duty to act judicially, such as a Tribunal.

power of the State, but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law. **They are very similar to courts but are not Courts.** When the Constitution speaks of 'Courts; in Article 136, 227 or 288 or in Article 223 to 237 or in the Lists, it contemplates Courts of Civil Judicature but not tribunals other than such Courts. This is the reason for using both the expressions in Article 136 and 227. By 'Courts' is meant Courts of Civil Judicature and by 'Tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals and the residue goes before the ordinary Courts of Civil Judicature. Their procedure may differ, but the functions are not essentially different. What distinguishes them has never been successfully established.

In '*Durga Shankar Mehta vs. Thakur Raghuraj Singh and others*' – (1955) 1 SCR 267 the Supreme Court held that the expression 'Tribunal' used in Article 136 of the Constitution includes, within its ambit, all adjudicating bodies, provided they are created by the State and are invested with judicial, as distinguished from purely administrative and executive functions.

Test for Tribunal:

From the above discussion, it is clear that the test for

determination whether a body is a Tribunal or not is to find out whether it is vested with the judicial power of the State by any law to pronounce upon rights or liabilities arising out of some special law .

Authority is a Tribunal:

The Supreme Court in '*Columbia Sportswear Co., vs. Director of Income Tax, Bangalore*' – 2012 (283) ELT 321 (SC) held that as Section 245S of the Income-tax Act 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. The Supreme Court also referred the quotes of Shri H.M. Seervai in his book 'Constitutional Law of India'. In that book, the author while discussing the tests for identifying judicial functions, quotes the passage from Prof. de Smiths Judicial Review – "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 the individuals".

The Supreme Court, therefore, held that the Authority is a body exercising judicial power conferred by the Chapter XIX B of the Act and is a Tribunal within the meaning of the expression in Article 136 and 227 of the Constitution.

AUTHORITY, A TRIBUNAL, IS SUBJECT TO WRIT JURISDICTION:

Where a Tribunal is constituted by an Act of the legislature for adjudicating any particular matter the power of the Constitutional Courts under Article 226/227 or 136 is not ousted even if the Act makes the decision of the Tribunal final as held by the Supreme Court in '*Union of India vs. R. Gandhi, President, Madras Bar Association*' – 2010 (261) ELT 3 (SC). 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 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.

In '*Columbia Sportswear Co., vs. Director of Income Tax, Bangalore*' (*supra*) the Supreme Court held that the fact that Section 245S(2) of the Act 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 jurisdictions 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 to challenge the advance ruling pronounced by the Authority. The Supreme Court further held that considering the settled position of the 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 the statute by the legislature making the decision of the Tribunal final or conclusive, the Supreme Court held that Section 245S(1) of the Act, insofar, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and the Commissioner and income tax authorities subordinate to him, does not bar the jurisdiction of the Supreme Court under Article 136 of the Constitution or the jurisdiction of the High Court under Article 226 and 227 of the Constitution to entertain a challenge to the advance ruling authority.

The Authority in response to the jurisdiction of the Supreme Court and the High Court in this regard in an advance ruling in '*Groupe Industrial Marcel Dassault*' – (2012) 340 ITR 353 (AAR) observed as – 'Permitting a challenge in the High Court would become counter productive since writ petitions are likely to be pending in High Courts for years and in the case of some High Courts, even in Letters Patent Appeals and then again in the Supreme Court. It appears to be appropriate to point out that considering the object of giving an advance ruling expeditiously, it would be considered with the object sought to be achieved, if **the Supreme Court were to entertain the application for Special Leave to appeal directly from a ruling of this Authority**, preliminary or final, and render a decision thereon rather than leaving the parties to approach the High Courts for such a challenge'.

The Supreme Court also considered the above observation of the Authority in '*Columbia Sportswear*

Co., vs. Director of Income Tax, Bangalore' (supra). The Supreme Court did not think that they can hold 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 227 of the Constitution before the High Court. For this the Supreme Court relied on the decision of the Constitution Bench of the Supreme Court in '*L. Chandra Kumar vs. Union of India and others'* 1997 (92) ELT 318 (SC) which 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 as 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. Nonetheless the Supreme Court did understand 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 before the Division Bench and as a result the Object of Chapter XIX-B of the Act which is to enable an applicant to get an advance ruling in respect of a transaction expeditiously would be defeated. The Supreme Court is of the opinion that when an advance ruling of the Authority is challenged before the High Court under Article 226/227 of the Constitution, **the same should be heard directly by a Division Bench of the High Court and decided as expeditiously as possible.**

The Supreme Court in the above said case decided accordingly. In this case the petitioner is a company incorporated in USA and is engaged in the business of designing, developing, marketing and distributing

The advance ruling of the authority is subject to writ jurisdiction of High Court. As observed by the Supreme Court the process would somewhat cause delay and the purpose of Chapter XIX-B would also be defeated. The Supreme Court, therefore, opined that the challenge to the advance ruling may be heard by the Division Bench of the High Court which would hear and dispose the petition as expeditiously as possible. Considering the opinion of the Supreme Court amendment may be brought in the Income Tax Act in this regard suitably by the Government of India.

outdoor apparel. For making purchases for its business, the petitioner established a liaison office in Chennai with the permission of the RBI in 1995 which granted the permission subject to conditions stipulated therein. The RBI stated that the liaison office of the petitioner was for the purpose of undertaking purely liaison activities viz., to inspect the quality, to ensure shipments and to act as a communication channel between head office and parties in India except such liaison work, the liaison office will not undertake any other activity of a trading, commercial or industrial nature nor shall it enter into any business contracts in its own name without the prior permission of the RBI. The petitioner also opened a liaison office at Bangalore also on the same terms and conditions of the RBI.

The petitioner filed an application before the Authority on the questions relating to its transactions in its liaison office in India as detailed below:

1. Whether based on the nature of activities carried on by the Liaison Office in India of the applicant in India, any income accrues or arises in India as per Section 5(2) 9(B) of the Act?
2. Whether based on the nature of activities carried on by the India Liaison Office, the applicant can be said to have a business connection in India as per the provisions of Section 9(1)(i) of the Act read with its Explanation 2?
3. If the answer to the query 2 is in the affirmative, whether various activities carried out by the Liaison Office are covered under the phrase 'through or from operations which are confined to the purchase of goods in India for the purpose of export' as stated in part (b) of Explanation 1 to Section 9(1)(i) of the Act?
4. If the answer to the query 3 is negative, how would the profits attributable to the 'operations in India' be determined and what would be the broad principles to be borne in mind for attributing income to the India liaison office?
5. Whether the India Liaison Office creates a permanent establishment for the applicant in India under Article 5(1) of the Agreement for avoidance of Double Taxation and prevention of fiscal evasion with respect to taxes on Income and capital gains entered into between the Government of the Republic of India and the Government of USA ('Treaty') read with the PE exclusion available for purchase function in terms of paragraph 3(d) of Article 5 of the Treaty?
6. If the answer to the query 5 is in the affirmative, how would be the profits attributable to PE in India be determined and what would be the broad principles

to be borne in mind for attributing income to India Liaison Office under the Treaty?

After hearing the both sides the Authority gave its rulings for the six questions as follows:

1. A portion of the income of the business of designing, manufacturing and sale of the products imported by the applicant from India accrues to the applicant in India;
2. The applicant has a business connection in India being its liaison office located in India;
3. The activities of the Liaison Office in India are not confirmed to the purchase of goods in India for the purpose of export;
4. The income taxable in India will be only that part of the income that can be attributed to the operations carried out in India. This is a matter of computation;
5. The Indian Liaison Office involves a Permanent Establishment for the applicant under Article 5.1 of the DTAA;
6. In terms of Article 7 of DTAA only the income attributable to the Liaison Office of the applicant is taxable in India.

Aggrieved against the order of the Authority the petitioner filed a special leave petition before the Supreme Court challenging the same. The petitioner put forth the following arguments for the maintainability of special leave petition:

- The provisions of Chapter XIX-B of the Act shows that the Authority is a quasi judicial Tribunal;
- The order of the Authority is an adjudicating order determining a question of law or fact specified in the application and Section 245R(5) of the Act mandates compliance with the principles of Natural Justice;
- The Authority is also vested with the power of a civil court in relation to discovery and inspection, enforcing the attendance of persons and examining them on oath and compelling production of books of accounts etc;
- As the Authority is a quasi judicial Tribunal, its orders can be challenged before the High Court by way of judicial review under Article 226/227 of the Constitution or before Supreme Court under Article 136 of the Constitution;
- The Supreme Court may decline to interfere with the order passed by the Authority in exercise of their power under Article 136 of the Constitution where it feels that it would be more appropriate that the order of the Authority must first be examined

by the High Court under Article 226/227 of the Constitution;

The Supreme Court considered the primary question in this case to decide is whether 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 or under Article 136 of the constitution before the Supreme Court. The Supreme Court relied on the judgment in “*Sirpur Paper Mills Limited vs. Commissioner of Wealth Tax, Hyderabad*” – AIR 1970 SC 1520 in which the Supreme Court held 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 function unless it appears to the Court that a question of principle of general importance or a similar question of principle of great importance arises. Unless a SLP 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 SLP directly against an order of the Tribunal.

In this SLP, the Supreme Court did not find that a substantial question of general importance arises nor it is 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 SLP was disposed by the Supreme Court granting liberty to the petitioner to move the appropriate High Court under Article 226 and/or 227 of the Constitution. The Supreme Court requested the High Court concerned to ensure that the writ petition, if filed, be heard by the Division Bench hearing income tax matters and requested the Division Bench to hear and dispose of the matter as expeditiously as possible.

CONCLUSION:

As discussed in the article, it is clear that the advance ruling of the authority is subject to writ jurisdiction of High Court. As observed by the Supreme Court the process would somewhat cause delay and the purpose of Chapter XIX-B would also be defeated. The Supreme Court, therefore, opined that the challenge to the advance ruling may be heard by the Division Bench of the High Court which would hear and dispose the petition as expeditiously as possible. Considering the opinion of the Supreme Court, the amendment may be brought in the Income Tax Act in this regard suitably by the Government of India. ■