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Application to Authority for Advance Rulings does not lie where a tax return is submitted before making the application

In brief

The Delhi High Court has recently dismissed, by a common order, the writ petitions filed by two separate petitioners NetApp BV and Sin Oceanic Shipping ASA¹ (assesseees) challenging the decision of the Authority for Advance Rulings (AAR), which rejected the applications on the ground that the applicants had submitted their tax returns before making the application before the AAR.

Facts of the case

The assesseees entered into transactions that form the basis of the applications before the AAR. However, before making the application to the AAR, the assesseees had submitted their tax returns for the respective years with the tax authorities.

- The AAR rejected the applications on the ground that the issue was already pending before the income-tax authority, since the tax returns were submitted.
- Aggrieved by the decision of the AAR, the assesseees filed a writ petition before the High Court (HC).

¹ NetApp BV, Sin Oceanic Shipping ASA. *In re.*, [TS-619-HC-2012 (Del)]

Issue

Whether an application made to the AAR should be rejected as per proviso (i) to section 245R(2) of the Income-tax Act, 1961(the Act)² where an issue is pending before the income tax authority upon the submission of the tax return

Assessee's contentions

- Submission of a tax return does amount to a matter 'pending' before the income tax authority. Unless a question was specifically raised by the authority, for instance by issuing a notice, proviso (i) to section 245R of the Act would not be applicable.
- The AAR should have taken note of the previous rulings, which consistently entertained applications even when returns had been submitted and were the subject matter of assessment. The assessee relied on the decision in the case of Rotem Company³, where the AAR had held that *"mere filing of returns by the applicant 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 assessing officer (AO) and the authority"*.
- The objective of the advance ruling mechanism was to cut short the delay in the dispute resolution. Hence, such a wide interpretation of the proviso by the AAR will lead to the restriction of its own jurisdiction.

² [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 of the Act] or any court;

³ Rotem Company., *In re* [2005] 195 CTR 289 (AAR)

- Where something was not mentioned and was consciously kept out of the tax return for the purpose of securing an advance ruling, it cannot be treated as a question pending before the assessing officer.
- The settled interpretation, which favoured the exercise of jurisdiction by the AAR, was ignored although the same had been previously followed by the AAR. The assessee relied on the decision in the case of Paras Laminates Pvt. Ltd.⁴, where the Supreme Court held 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"*.

AAR ruling

- The assessee should submit the application at the earliest possible opportunity and not after it invokes or is obliged to invoke the jurisdiction of the assessing authority. In case an application to the AAR was moved and the return was submitted consequently, the obligation to submit returns will be fulfilled in such case and the AO will have to wait for the ruling by the AAR to complete the assessment.
- On submitting the return of income, all questions that can possibly arise during the course of assessment proceedings are under the jurisdiction of the income tax authority or AO, such that the AAR cannot exercise jurisdiction to entertain the question. The AAR relied on the decision in the case of Ramabhai Jethabhai Patel⁵, where the Gujarat HC held 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"*.

⁴ UOI v. Paras Laminates Pvt Ltd [1990] 186 ITR 722 (SC)

⁵ Ramabhai Jethabhai Patel v. CIT [1977] 108 ITR 771 (Guj)

- On submitting of the tax return, there are no questions that cannot be raised by the AO. Hence, there are no questions left for the AAR to entertain.
- The date of submitting the tax return would be the cut-off date for determining the applicability of proviso (i) to section 245R of the Act (2) and not the date when the assessing authority issues a notice. The determination of this period cannot be left to the issuance of the notice by the income tax authority or the uncertainties of the progress of the application before the authority.

High Court ruling

- The proviso to section 245R(2) of the Act creates a bar upon the AAR for admitting an application. Further, there is a jurisdictional bar on the AAR to rule, under section 245R(4) of the Act. In case the applicant wishes to plan its affairs and transactions in advance, it is free to do so considering the wider tax ramifications.
- However, once it proceeds to submit a tax return, or take a similar step, the jurisdiction of the AAR 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 tax return.
- Conversely, if the authority is approached before an income tax return is submitted, 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.

- The argument that the AAR erred in not following a so-called past practice (the Rotem Company ruling) was unpersuasive. No practice based on an unchallenged understanding, without its roots in law, can be pursued. In case the practice is allowed to be continued, it would be creating an *estoppel* against a statute, which is a proposition that cannot be accepted.

PwC observations

- The HC has confirmed that once a tax return was submitted all questions are to be treated as pending before the income-tax authorities. .
- An application to the AAR would have to precede the submission of the tax return.
- An AO will have to wait for the ruling by the AAR to complete the assessment.

Our Offices

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<p>Ahmedabad President Plaza, 1st Floor Plot No 36 Opp Muktidham Derasar Thaltej Cross Road, SG Highway Ahmedabad, Gujarat 380054 Phone +91-79 3091 7000</p>	<p>Bangalore 6th Floor, Millenia Tower 'D' 1 & 2, Murphy Road, Ulsoor, Bangalore 560 008 Phone +91-80 4079 7000</p>	<p>Bhubaneswar IDCOL House, Sardar Patel Bhawan Block III, Ground Floor, Unit 2 Bhubaneswar 751009 Phone +91-674 253 2279 / 2296</p>	<p>Chennai 8th Floor, Prestige Palladium Bayan 129-140 Greams Road, Chennai 600 006 Phone +91-44 4228 5000</p>	<p>Hyderabad #8-2-293/82/A/113A Road no. 36, Jubilee Hills, Hyderabad 500 034, Andhra Pradesh Phone +91-40 6624 6600</p>
<p>Kolkata 56 & 57, Block DN. Ground Floor, A- Wing Sector - V, Salt Lake. Kolkata - 700 091, West Bengal, India Telephone: +91-33 2357 9101 / 4400 1111 Fax: (91) 033 2357 2754</p>	<p>Mumbai PwC House, Plot No. 18A, Guru Nanak Road - (Station Road), Bandra (West), Mumbai - 400 050 Phone +91-22 6689 1000</p>	<p>Gurgaon Building No. 10, Tower - C 17th & 18th Floor, DLF Cyber City, Gurgaon Haryana -122002 Phone : +91-124 330 6000</p>	<p>Pune GF-02, Tower C, Panchshil Tech Park, Don Bosco School Road, Yerwada, Pune - 411 006 Phone +91-20 4100 4444</p>	<p>For more information contact us at, pwctrs.knowledgemanagement@in.pwc.com</p>

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