

AAR – Advance Ruling can be challenged in HC in writ; a subsidiary to subsidiary co of a Government Co would also be Govt Co entitled to Advance Ruling; AAR cannot reject application on ground that subsidiary's appeal is pending in CESTAT: HC

By TIOL News Service

AHMEDABAD, AUG 27, 2012: THE petitioners M/s. GSPL India Transco Ltd. and M/s. GSPL India Gasnet Ltd., are subsidiary companies of Gujarat State Petronet Ltd. which is a subsidiary company of Gujarat State Petroleum Corporation Ltd. The petitioners are Government Companies under the provisions of the Companies Act, 1956 and have obtained service tax registration from the Commissioner of Central Excise, Ahmedabad.

The petitioners propose to provide service that would be taxable under the category of ¶Transport of goods through pipeline or other conduit service¶ under section 65(105)(zzz) of the Finance Act, 1994. For providing service, the petitioners are required to lay pipeline for which they would be procuring pipes, get the pipes installed and commissioned along the identified route so as to connect the source to the destination. In this regard, the petitioners propose to grant various turnkey Engineering Procurement and Construction Contracts to EPC contractors. The contracts would involve supply of pipelines as well as installation and commissioning of the pipes to bring into existence the desired pipeline connecting the sources to the destination. The petitioners would also require service of other contractors for inspection, consulting, engineering etc. which would be required to bring into existence the pipeline.

Under the contract, composite price would be agreed between the parties, however, the same would be divided into two key components, namely, price and supply of goods and price for provision of service.

The petitioners propose to avail the CENVAT credit of excise duty of the pipes and valves paid by it to the contractors used for bringing into existence the desired pipeline in accordance with the provision of the CENVAT Credit Rules, 2004 and utilising the same for discharging its output service tax liability.

The petitioners filed separate applications on 13.12.2011 under section 96C of the Finance Act before Authority for Advance Rulings (Central Excise, Customs and Service Tax) [for short the AAR] and sought to obtain advance ruling from AAR on the following question:

¶Whether the Petitioner is eligible to avail CENVAT Credit of excise duty paid by it on pipes and valves to the manufacturer, against the Petitioner's output service tax liability under the taxable service category of ¶transport of goods through pipeline or conduit¶.

The AAR exercising its discretionary power by order dated 30.3.2012 [[2012-TIOL-02-ARA-ST](#)] rejected the application filed by the petitioners under Section 96C as not maintainable on the ground that an identical issue was pending before the CESTAT in the case of the petitioners' holding company on account of which, if the contention of the petitioners is accepted then it would lead to incongruous situation. In the opinion of AAR, any order passed by it could lead to incompatible decision by different authorities on an identical transaction and identical issue.

PRELIMINARY OBJECTION

Mr. Ravani, the counsel appearing for the revenue has fervently urged that these writ petitions are not maintainable and the order of AAR could only be challenged directly before the Apex Court in a Special Leave Petition and consequently, the writ petitions are to be dismissed for lack of jurisdiction.

The High Court found this argument of Mr. Ravani devoid of any merit. The Apex Court in *Columbia Sportswear Company v. Director of Income Tax, Bangalore*, - [2012-TII-04-SC-LB-INTL](#) in paragraph 10 had held as under:

“We have, therefore, no doubt in our mind that 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 Article 136 and 227 of the Constitution.”

In the aforesaid decision the Apex Court was considering the question whether the advance ruling pronounced by the Authority for Advance Rulings (Income Tax) constituted under Chapter XIX-B of the Income Tax Act, 1961, could be challenged under Article 226/227 of the Constitution before the High Court or under Article 136 before the Supreme Court and whether the authority is a court or tribunal. The Apex Court in paragraph 12 had held as under:

“ 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. ”

The Apex Court further held that advance ruling pronounced by the Authority for Advance Rulings should be heard by a Division Bench hearing income tax matters.

Therefore, the High Court did not find any substance in the preliminary objection raised by the counsel for the respondents. High Court was of the veritable opinion that the writ petitions filed by the petitioners are maintainable and the preliminary objection is rejected.

FIRST QUESTION

The first question, which arises for consideration in these writ petitions, is whether a subsidiary to subsidiary company of a Government Company would also be a Government Company. If yes, then a further question arises whether such subsidiary to subsidiary company could maintain an application under section 96C of the Finance Act?

Before the AAR, the Commissioner had raised an objection that the petitioners being a subsidiary to subsidiary company of a Government Company did not fall within the definition of the ‘applicant’ in terms of section 96A of the Finance Act and, therefore, the petitioners were not entitled to obtain advance ruling from AAR and the applications filed by them under section 96C were not maintainable.

The AAR in its impugned order had considered the objection and reply given by the petitioners but the AAR refused to decide the question as to whether a subsidiary to subsidiary company of a Government Company would also be a Government Company and it could maintain an application under section 96C of the Finance Act. The AAR rejected the applications filed by the petitioners holding that it had the discretion under section 96D(2) of the Finance Act to allow or disallow an application for an ultimate ruling under section 96D(4) of the Finance Act, relying on the decision of Authority for Advance Rulings constituted under the Income Tax Act, 1961,

The High Court observed, “It is clearly established that the petitioners are Government Companies being subsidiaries of Gujarat State Petronet Ltd. The holding company and each subsidiary company are separate and distinct legal entities and every company has an independent right to file an application before the AAR for pronouncement of an advance ruling on the questions raised in the applications. Section 96A(b)(ii) and (iii) support the case of the petitioners that a joint venture company could be an applicant. Further a resident falling within the class of mentioned in sub-clause (iii) could also maintain an application”. The petitioners fall within the ambit of section 96A(b)(iii), therefore, the High Court held that the petitioners being a step-down subsidiary company of a Government Company are covered within the definition of the ‘applicant’ in terms of section 96A(b) of the Finance Act. The applications filed by the petitioners before the AAR under section 96C were maintainable.

SECOND QUESTION

The second question is whether the AAR had been conferred with any discretionary power to either allow or reject the application on the ground other than those prescribed by the proviso to sub-section (2) of section 96D of the Finance Act or the AAR should have decided the applications filed before it under section 96C if the embargo contained in the proviso to section 96D(2) were absent?

The petitioners have sought advance ruling in respect of activity/service which is proposed one. No case is pending involving the issue raised by the petitioners in their application, as the petitioners have not yet started any activity or service. The only objection of the Commissioner was that an identical issue was pending before the CESTAT. The petitioners in their rejoinder as well as on the questions raised by AAR had answered that the question raised by the petitioners in their applications were not identical to that raised by the petitioners holding Company Gujarat State Petronet Ltd.

The AAR has rejected the applications of the petitioners by which advance ruling was sought on the ground that the transaction of the petitioners and the holding Company were identical. The advance ruling is sought on the question, before any activity or service as proposed by the applicant has commenced. Further, the petitioners had not yet entered into any transaction and this fact was not disputed by the Commissioner in his comments. Therefore, the High Court held that the view taken by the AAR that there were identical transactions of the petitioners and the petitioners' holding Company and it would result in giving incompatible decisions on an identical question, is erroneous.

The High Court was of the considered opinion that the applications filed under Section 96C by the petitioners were rejected by the AAR on non-existent grounds. The AAR could not reject the applications of the petitioners under its discretionary power as there were no exceptional circumstances, or abuse of the legal process or rendering incompatible decisions concerning the same parties or any anomalous situations would have arisen if the AAR would have pronounced advance ruling. The petitioners had not yet entered into any transaction and the advance ruling had been sought on the proposed activity or service, therefore, the petitioners' applications were maintainable and the AAR was required to pronounce advance ruling under section 96D of the Finance Act. Even assuming arguendo that the question pending before the CESTAT in the matter of holding company and the question raised before AAR by the petitioners were similar, if the AAR pronounces advance ruling on the question raised by the petitioners, then, it will not result in conflicting or incompatible

decision between the same parties, as the order of the AAR would be binding only on the petitioners and the tax authorities in view of section 96E of the Finance Act. The High Court was further of the considered opinion that the bar created by the proviso to section 96D(2) were absent and therefore, the petitioners applications filed under section 96C for advance ruling was maintainable before the AAR.

The order of the AAR deserves to be set aside and a direction is liable to be issued to the AAR for deciding the applications of the petitioners filed under Section 96C at the earliest.

CONCLUSION

The Order No.AAR/ST/02-03/2012 in Applications No.AAR/44/ST/08/11, AAR/44/ST/09/11 dated 30.3.2012 passed by the Authority for Advance Rulings (Central Excise, Customs and Service Tax), New Delhi, are quashed. The Authority for Advance Rulings (Central Excise, Customs and Service Tax), New Delhi, to decide the questions raised in the petitioners' applications, under section 96C, on merits, under section 96D of the Finance Act, 1994, preferably within a period of three months from the date a copy of this judgment is produced before the aforesaid Authority.

(See [2012-TIOL-665-HC-AHM-ST](#))