IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2632 OF 2012

Mahindra BT Investment Co. (Mauritius) Ltd.
A company incorporated and registered
under the laws of Mauritius having its
registered office at IFS Court,
Twenty Eight, Cybercity, Ebene, Mauritius. ..Petitioner.

vs.

1. The Director of Income Tax
(International Taxation)-11,
having his office at Scindia House, Mumbai.

2. Authority for Advance Ruling
having its office at 5th floor, NDMC Bldg.,
Yeshwant Place, Satya Marg, Chanakypuri,
New Delhi 110 001.

3. Union of India,
Through the Secretary,
Ministry of Finance,
Govt. of India, North Block,
New Delhi 110001. ..Respondents.

Mr. S.E. Dastur, Senior Advocate along with Madhur Agarwal, Mr. Sanjay Sanghvi and Ms. Shabnam Shaikh i/by Khaitan & Co. for the Petitioner.
Mr. Tejveer Singh for the Respondents.

CORAM : MOHIT S. SHAH, C.J. AND
M.S. SANKLECHA, J.

DATE : Reserved on 09 July 2012
Pronounced on 25 July 2012

JUDGMENT :(PER M.S. SANKLECHA, J.)

Rule. Respondents waive service. At the request of the Counsel for both sides, petition taken up for final hearing.

2) This petition under Article 226 of the Constitution of India takes exception to the order dated 27 August 2012 passed by the Authority for Advance Ruling ("the Authority") constituted under Section 245-O of the Income Tax Act, 1961 ("the Act"). By the impugned order the Authority while closing the application for Advance Ruling refused to give a ruling on the question formulated while admitting the application of the petitioner.

3) This refusal of the Authority to give a ruling at the time of final hearing according to the petitioner is completely without jurisdiction on the following grounds :-

(a) the Authority after having accepted/admitted the application under Section 245R(2) of the Act for the purposes of giving a ruling cannot refuse to give a ruling at the final hearing;

(b) the jurisdiction of the Authority not to entertain and/or give a ruling on an application for advance ruling is only restricted to questions relating to issues as set out in the proviso to

Section 245R (2) of the Act i. e. question raised is already pending before some other authority under the Act, or involves determination of fair market value of any property, or relates to an issue designed for avoidance of tax. In this case un-disputedly the bar of the proviso to Section 245R(2) of the Act is not applicable; and

(c) In the alternative to the above, in any case the Authority proceeded on an unfounded assumption that giving a ruling on the question raised by the Petitioner would be to give a ruling in respect of which the applicant has acted to defeat public interest i.e. the guidelines issued by the Securities and Exchange Board of India (SEBI).

4) Brief facts leading to the petition are as under:

a) The petitioner is a company incorporated in and is also a tax resident of Mauritius. The share holding of the petitioner company is to the extent of 57% with one Mahindra Overseas Investment Company (Mauritius) Ltd. (MOICML) a company incorporated in Mauritius and 43% is with B.T. Holdings Ltd. (BTH) a company incorporated in England.

b) The petitioner company owns shares in M/s. Tech

Mahindra Ltd. (TML). TML is engaged in the business of information technology and telecommunication in India. The shareholding of TML was originally distributed between Mahindra and Mahindra Ltd. (M &M) and British Telecommunication (BT) in the ratio of 60:40 respectively.

c) On 28 December 2004 TML had entered into a Software and Professional Services agreement with one SBC Services Inc USA now known as AT&T (AT & T). In order to motivate AT&T to give business to TML it was understood between them that AT&T that would be offered an opportunity to become a shareholder of TML by TML granting it option to purchase shares of TML. However, this option could only be exercised by AT&T if it was able to achieve/generate certain level of business for TML by 30 April 2010.

d) However the aforesaid obligation of the TML to offer an option to AT&T to purchase its shares would hinder TML from making a public issue of its shares in view of it being construed to be in breach of Guideline 2.6.1 of the SEBI Guidelines. The SEBI Guideline 2.6.1 reads as under:-

> "Outstanding Warrants of Financial Instruments
> 2.6.1 No unlisted company shall make a public issue of equity share or any security convertible at later date into equity share, if there are any outstanding financial instruments or any other

> right which would entitle the existing promoters or share holders any option to receive equity share capital after the initial public offering."

Thus any outstanding financial instrument which would entitle an existing promoter or shareholder an option to receive equity share capital of the unlisted company, will prohibit the unlisted company from making a public issue, unless the option is compulsorily converted into the shares of the unlisted company which is going public by an Initial Public offer (IPO). In the above circumstances, TML could not at the time of its IPO keep an option to AT&T open/available nor could it give its shares to AT&T prior to the public issue in the absence of AT&T achieving/generating the required quantum of business for the TML.

e) In the above circumstances, the petitioner along with M&M, BT and TML entered into option agreement dated 10 May 2005 with AT&T. The aforesaid option agreement provided that if AT&T is able to generate certain amount of business for TML by 30 April 2010 it would be entitled to purchase shares of TML at US dollars 3.5022 per share from the petitioner. Pursuant to the above, another agreement dated 23 June 2005, was entered into between TML and the petitioner under which the petitioner subscribed to 9931638 i.e. 8.12% of equity capital of TML by way of preferential allotment at the price of Rs.67 per share.

f) In 2006 an IPO was offered by TML and the shares were listed on Bombay Stock Exchange and National Stock Exchange. At the time of IPO, TML complied with each and every requirement under the SEBI Guidelines and made full disclosure about the aforesaid option agreement dated 10 May 2005 in its Red Herring Prospectus. The same received due approvals inter alia from SEBI and the IPO was successfully fulfilled/carried out.

g) Consequent to the public issue of TML in 2006, the share holding of TML was distributed amongst its shareholders as under:

(i) 43.99 % with M&M;
(ii) 30.86 % with BT;
(iii) 17.2% with public investors; and
(iv) 8.13 % with the petitioner.

h) Thereafter, AT&T secured a large quantum of business for TML and achieved its milestone target in December 2009 ahead of 30 April 2010 dead line. At that point of time, AT&T decided to exercise its option to purchase shares of TML with the petitioner, in terms of the option agreement dated 10 May 2005. Therefore, in terms of the option agreement dated 10 May 2005 the petitioner sold a part of its 9931631 equity shares i.e. 9870912 shares in TML to AT&T at US dollars 3.5022 per share on 22 March 2010. On the above sale of 9870912 shares to AT&T the

petitioner earned long term capital gain of Rs.91.01 crores.

i) Accordingly, on 20 September 2012 the petitioner filed an application before the Authority under Section 245Q(1) of the Act seeking a ruling from the Authority on the following questions of law(regarding capital gains) arising out of transfer of shares it held in TML (Indian Company) to AT&T (an American Company):-

> a) Whether the applicant, a tax resident of Mauritius, is not chargeable to capital gains tax in India under Article 13(4) of the Double Taxation Avoidance Agreement ("DTAA") between India and Mauritius in respect of transfer of 98,70,912 shares of an Indian company, to AT&T International inc, a corporation organized and existing under the laws of Delaware, United States of America?
>
> b) In the event the answer to question (a) was negative and if the applicant is chargeable to capital gains tax in India, whether the applicant will be chargeable on the long term capital gains, at the rate of 10% under the proviso to section 112(1) of the Income Tax Act, 1961?

j) The Director of Income Tax (International Taxation) respondent No.1 herein raised objection to the petitioner's application for advance ruling. However, no objection was taken with regard to the maintainability of the petitioner's application before the Authority. The objection raised by the Director of Income Tax was that the only activity of the petitioner was

acquisition of shares of TML and transferring the same to AT&T as per the option agreement.

k) In its reply on 30 June 2011, the petitioner pointed out the circumstances in which the petitioner came to hold the shares of TML and the sale of the same to AT&T as stated herein above. It was emphasized that the reason for the agreements dated 10 May 2005 and 23 June 2005 were on account of commercial requirements/necessity on the part of TML and not with a view to avoid any tax liability. It was also pointed out that not all of its shares in TML have been transferred to AT&T. Moreover, the balance shares owned by the petitioner in TML, can be dealt with by the petitioner as it deems fit.

l) On 13 July 2011 the petitioner's application for advance ruling before the Authority was heard under Section 245R(2) of the Act. The Authority after hearing the parties by order dated 13 July 2011 admitted the application while inter alia recording as follows:-

> "No objection to admissibility is otherwise taken. The order passed under Section 137(1) of the Act is not a bar in admitting the application. We are also satisfied that the questions raised require to be ruled on. We, therefore, allow the application under Section 245R(2) of the Act.
>
> 2) The case therefore be listed on 9.8.2011 for final hearing."

m) On 27 August 2012, the Authority during the course of final hearing of the application, suo motu raised a question whether it should at all give a ruling on the questions formulated as the transaction giving rise to the questions was in blatant circumvention of the SEBI Guidelines which has been issued in the interest of the general public. In answering the above question, the Authority did concede that the issue of legality of a transaction and/or the circumvention of the concerned SEBI Guidelines is within the purview of the authorities entrusted with the obligation to ensure its compliance. Nevertheless the impugned order holds that when the jurisdiction of the Authority is invoked then the Authority would not shut its eyes to the illegality and proceed to give a ruling on such a transaction. The Authority concluded that the entire cause of action giving rise to the formulated questions is based on an illegal act committed by the petitioner. In these circumstances, the Authority held that it would not be proper for the Authority to give a ruling on the question of law posed before it, as according to the Authority, it emanates from the circumvention of SEBI Guidelines. In any event the Authority held that it has discretion to refuse to give a ruling in an appropriate case and the present case before it, is one such case.

5) When this petition reached hearing before us, Mr. Tejveer Singh learned Counsel appearing for the respondents

submitted a letter dated 9 May 2013 received by him from the office of the Assistant Director of Income Tax (International Taxation) to which was enclosed a letter dated 7 May 2013 addressed by SEBI to respondent No.1 herein i. e. Director of Income Tax (International Taxation). The letter dated 7 May 2013 reads as under:-

> "Shri. Kuntal Kumar Sen, I.R.S.
> Director of Income Tax
> (International Taxation -II)
> Room No.007, Scindia House,
> N.M. Road, Ballard Pier, Mumbai 400 038.
>
> Dear Sir,
>
> Subject: In the order of Advance Ruling, New Delhi in AAR No.991 of 2010 in the case of M/s. Mahindra BT Investment Company (Mauritius) Limited (herein referred to as "company")
>
> (1) Please refer to the order dated August 27, 2012 in the matter of ruling by Authority of Advance ruling (Income Tax (herein referred to as "AAR") on the captioned subject which was forwarded to SEBI for information vide your letter dated December 03, 2012.
>
> (2) It is observed from the said order that the Chairman of AAR while refusing to give ruling on the matter placed before it has made an observation that the agreement between the company and AT&T in the year 2005 was entered into by circumventing SEBI (Disclosure and Investor Protection) Guidelines, 2000 (herein referred to as "DIP Guidelines").

> (3) We have perused the documents forwarded by you and based on the information on record, it is observed that the aforesaid agreement was entered in 2005 by the then unlisted company and the same was not acted upon due to commercial consideration of the parties involved. Further, it is observed from the Draft Red Herring Prospectus filed with SEBI in 2006 that the company had made full disclosures regarding this agreement when it came out with an IPO in 2006 in line with the extant provisions of DIP Guidelines.
>
> (4) This is for your kind information."

It appears that by mistake the above letter refers to agreement of 2005 not being acted upon when in fact it is clear that the agreement not acted upon was the agreement dated 28 December 2004.

A copy of the aforesaid communication was also given to the learned Counsel appearing for the petitioner at the hearing.

6) In the above communication dated 7 May 2013 issued by SEBI being handed over to the petitioner's Counsel, he informs the Court that SEBI had by its letter dated 20 March 2013 sought the petitioner's comments on the observations of the Authority. The petitioner responded to the same explaining all the facts by its letter dated 5 April 2013 and the communication of SEBI dated 7 May 2013 to the Director of Income Tax (Respondent No.1 herein) was after considering the petitioner's response. Copy of the letter

dated 5 April 2013 addressed by the petitioner to SEBI was handed over to us and the Counsel appearing for the respondents. Thus. Mr. Dastur, learned Senior Counsel on behalf of the petitioner submits that in view of the clarification now issued by SEBI letter dated 7 May 2013 it is clear that there is/nor has been any breach/circumvention of the SEBI Guideline 2.6.1. In the circumstances, he prays that the impugned order of the Authority be quashed and the Authority be directed to give a ruling on the questions posed before it.

7) Mr. Tejveer Singh, learned Counsel for the respondents submits that in view of the communication dated 7 May 2013 from SEBI, the petitioner should move the Authority for appropriate relief and this Court should not entertain this petition. Mr. Singh states that under Rule 18 of Advance Ruling(Procedure)Rules 1996 (Advance Ruling Rules) the petitioner can move the Authority for modification of the impugned Order dated 27 August, 2012. Rule 18 of Advance Ruling Rules reads as under :-

> Modification of the order-
>
> 18. Where the Authority finds suo motu or on a representation made to it by the applicant or the Commissioner or otherwise, but before the ruling pronounced by the Authority has been given effect to by the Assessing officer, that there is change in law or facts on the basis of which the ruling was pronounced, it may by order modify such ruling in such respects as it considers appropriate, after

allowing the applicant and the Commissioner a reasonable opportunity of being heard.

(emphasis supplied)

It was pointed out to Mr. Singh that the above rule may not apply as no ruling has been rendered by the Authority in view of its refusal to give a ruling. Being confronted with the above, Mr. Tejveer Singh submitted that in that case the petitioner can move the Authority under Rule 19 of the Advance Ruling Rules for rectification of mistake. Rule 19 of the Advance Ruling Rules reads as under:-

19. Rectification of mistakes -

(1) The Authority may, with a view to rectifying any mistake apparent from the record, amend any order passed by it before the ruling pronounced by the Authority has been given effect to by the Assessing Officer.

(2) Such amendment may be made suo motu or when the mistake is brought to its notice by the applicant or the Commissioner, but only after allowing the applicant and the Commissioner reasonable opportunity of being heard.

(emphasis supplied)

Rule 19 also presupposes that the order to be rectified is an order on which a ruling is rendered. Admittedly no ruling has been rendered by the impugned order. Therefore, rectification application would also not lie.

8) We find that the Authority has proceeded to refuse to give a ruling on the basis that the petitioner had contravened the SEBI Guidelines. The Authority has conceded in the impugned order that the issue whether or not there is a circumvention of the SEBI Guidelines is to be determined by the authorities implementing the SEBI Guidelines. In spite of the above, the Authority refused to give a ruling on the ground that the transactions underlying the questions formulated were in breach of the SEBI Guidelines and therefore based on an illegal act.

9) We now have the communication dated 7 May 2013 received by the Director of Income Tax from SEBI. On examination of the letter dated 7 May 2013 we are of the view that it states that the agreement entered into in 2004 between TIL and AT&T was not acted upon due to commercial reasons and that the Draft Prospectus filed with SEBI in 2006 while coming out with the IPO had disclosed the agreement entered into by it with AT&T. From the above, it is clear that on examination of the facts of the Petitioner's case SEBI has concluded that there has been no breach of SEBI guidelines. In case there had been any breach of its guidelines and/or an illegal act as suggested by the Authority in its impugned order, SEBI would have issued to the petitioner a notice to show cause. In these circumstances, it must be held that there is in fact no contravention of the SEBI Guidelines even according to SEBI.

10) The Counsel for the respondents does not dispute the above position but his submission is that on the basis of the communication of SEBI dated 7 May 2013, the petitioner move the Authority for either modification or rectification. We see no reason to direct the petitioner to move the Authority for modification and/or rectification as we have already held that in the present facts no application for modification or rectification under Rule 18 or 19 of the Advance Ruling Rules would lie. In the above circumstances the entire controversy can be resolved by setting aside the impugned Order dated 27 August 2012 of the Authority and directing the Authority to give a ruling on the question as framed by the petitioner.

11) In view of the above, we need not examine the other issues with regard to jurisdiction raised by the petitioner. The larger question posed in the petition are whether the Authority after having admitted the questions can refuse to give a ruling on the question of law formulated at the final hearing without there being any change in facts or circumstances and whether an Authority being a creature of the statue can refuse to rule on the question raised before it even if the same is not hit by the proviso under Section 245R (2)of the Act.

The above issues are left open to be decided in an appropriate case.

12) However, before parting it, needs to be pointed out that even if it is assumed that in an appropriate case the Authority has a discretion to refuse to give a ruling on a question of law even in respect of matters outside the proviso to Section 245R(2) of the Act, yet this discretion of refusing to rule on a question cannot be arbitrary. The Authority can exercise its discretion not to give a ruling only in cases where fraud and/or illegality is ex facie evident or the fraud or illegality has been established in some proceedings. Such a discretion is not to be exercised on a mere suspicion of illegality or fraud having taken place. Reliance by the Authority on its own decision in the matter of Microsoft Operations Private Limited reported in 310 ITR 408 to conclude that the Authority has discretion even outside the proviso to Section 245R(2) of the Act to refuse to give a ruling in an appropriate case does not apply to the present facts. In Microsoft Operations (supra) the Authority has observed that:-

> "However, as said earlier, the exercise of discretion must be canalized on proper lines. Avoiding abuse of legal process, incompatible decisions concerning the same parties and anomalous situations are relevant considerations that guide the exercise of discretionary power to reject the application. For instance, in spite of a direct decision of the Supreme Court settling the point against an applicant, if the applicant seek advance rulings with a view to stall further proceedings, it may then be a fit case to reject the application at the stage of consideration under

> section 245R(2). Another instance that can be visualized is in a case where the applicant raises frivolous or hypothetical legal issues without factual foundation."

The above observations would have no application to the present facts. None of the situations contemplated in the above case arise here. Moreover, it may be pointed out that the Authority in the Microsoft Operations (supra) exercised its discretion at the time of admission.

13) In this case, we find that the Authority has refused to give a ruling merely on the assumption that an illegality has been committed by the applicant by circumventing SEBI Guidelines. The authorities administering the SEBI provision did not find it so, as is evident from the fact that no show cause notice or adjudication order for contravention of the SEBI Guidelines has been issued to /or against the petitioner. In these circumstances, the Authority is not correct in refusing to give a ruling at the time of final hearing in the absence of any fresh material, merely on the basis of the suspicion. The Authority may be entitled to consider questions of public interest and not answer the questions when the foundation of the transaction is on the face of it coloured by illegality/or mis-representation of facts in making the application to the Authority. However, where it is not so, then the revenue must bring on record facts to establish the same, failing which, it would not be open to the Authority to proceed on a suspicion that

an illegality has taken place and refuse to give a ruling.

14) In view of the letter dated 7 May 2013 of SEBI to the Director of Income Tax(International Taxation), we set aside the impugned order dated 27 August 2012. We further restore the questions formulated to the Authority and direct the Authority to give a ruling on the question framed by them on the petitioner's application for Advance Ruling.

15) The Petition is allowed in the above terms. No order as to costs.

CHIEF JUSTICE

(M.S.SANKELCHA, J.)