

Does AAR Have the Power to Review its Own Rulings?

The Hon'ble Supreme Court in the case of Columbia Sportswear Company v DIT held that the Authority for Advance ruling (AAR) is exercising judicial power and is a "Tribunal". It was further held that writ petitions against the ruling of AAR should be filed before High Court under Article 226. Therefore, it is now clear that the AAR is subordinate to High Court in judicial hierarchy, being juridical tribunal.

The Tribunals do not have the power to review their own decisions, although they have the power to rectify mistakes apparent from record. The Hon'ble Supreme Court in the case of CIT v Karam Chand Thapar [176 ITR 535] held that "The mistake has to be such for which no elaborate reason or enquiry is necessary. The powers so conferred u/s 254(2) do not contemplate rehearing which would have the effect of re-writing an order affecting the merits of the case." There are number of other decisions of the various High Courts including Delhi High Court wherein it has been held that a Tribunal does not have power to review its own orders. In the above context the recent decision of the AAR in the case of CTCI Overseas Corporation Ltd, in AAR No 854 of 2009 dated 27.08.2012 needs to be looked into. In this case, the Revenue has filed an application for rectification of the ruling of AAR originally pronounced on 01.02.2012.

The facts of the above case are that CTCI, a Hong Kong company, formed a consortium with CINDA Engineering and Construction Pvt. Ltd. (CINDA) with a view to execute a project awarded by Petronet India. Under the contract, the consortium members are to undertake various services and supplies including offshore supplies. CTCI was responsible for offshore supplies and offshore services. Pursuant to the aforesaid contract, CTCI made offshore supplies of goods. The issue before the AAR was "Whether any income arises to CTCI on offshore supplies to Petronet? Whether such income can be brought to tax under the Act pursuant to the consortium formed by CTCI and CINDA?"

The AAR in its ruling dated 01.02.2012 held that the amount payable for offshore supplies is not taxable. Further, it also observed that "all such issues, including whether the contract is composite and indivisible, have been addressed in the case of IHHI and we are not free to travel outside the realm of the Supreme Court's decision". The ruling was rendered by the AAR after considering the argument of the Revenue that the consortium of CINDA and CTCI forms an Association of Persons (AOP). The Revenue sought rectification of the above order alleging that the status of the taxable unit in India is AOP and the AAR has failed to consider the same. The AAR allowed the rectification application and fixed the case for regular hearing. The AAR finally held vide its order dated 27.08.2012 that there is a mistake apparent from record which needs to be corrected and the case is to be re-fixed for hearing.

The above ruling of the AAR is clearly against the decision of the Supreme Court in case of Karam Chand [Supra] mainly on following counts, besides others: The Supreme Court has clearly held that the powers so conferred u/s 254(2) do not contemplate rehearing. However, in the above case, the AAR posted the case for rehearing.

From the facts discussed above, it is clear the status of AOP has already been considered by AAR in its original decision dated 01.02.2012, and the AAR have given its ruling on the basis of IHHI, a decision of Supreme Court.

Moreover, there are rulings of AAR itself wherein it has been held that even if the contract is awarded to a consortium, the parties could to be assessed independently and not as AOP. In other words, it is always a subject matter of legal controversy whether a consortium will be taxed as AOP or not. (refer Hyundai Rotem Co, 323 ITR 277) Further, Rule 19 of Authority for Advance Rulings (Procedure) Rules, 1996 provides that rectification can be done by AAR only before the ruling pronounced by Authority has been given effect to by the Assessing Officer.

In the instant case, the assessee submitted that the Officer dealing with withholding tax, has given effect to the Order by modifying the withholding tax Order. However, this argument of the assessee was ignored by the Authority. Therefore, it appears that in the case of CTCL Overseas Corporation (supra) the Authority has clearly exceeded its powers and has made review of its ruling in the garb of rectification. The intent of creation of AAR was to ensure that foreign enterprises get to know their tax liability in India in advance. However, the rulings as discussed above would create confusion in the mind of foreign investors. It will have a serious impact on investments to be made by foreign enterprises in India. Therefore, the Government should take note of the situation and take serious measures to ensure consistency in the Indian judicial system.

www.business-standard.com