www.taxguru.in

**BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)**
**NEW DELHI**

**3rd Day of February, 2012**

**A.A.R. No.1050 of 2011**

**PRESENT**

Justice Mr. P.K.Balasubramanyan (Chairman)
Mr. V.K. Shridhar (Member)

| | |
|---|---|
| Name & address of the applicant | Red Hat India Private Limited, Mumbai |
| Present for the applicant | Mr. Rajan Vora, S R Batliboi & Co , CA<br>Mr. Kartik Rao, S R Batliboi & Co, CA |
| Present for the Department | None |

**ORDER**

In our order in AAR No.1009 of 2010 (SEPCO III Electric Power Corporation), we had taken the view that if the applicant before this Authority had already filed a return of income involving the amount arising out of the identical transaction on which a question for our ruling is raised by filing an application under section 245Q(1) of the Income-tax Act, the application before the Authority for Advance Rulings will be barred by the clause (i) of the proviso to section 245R(2) of the Act and the application will have to be rejected. On an application made by the applicant therein before this Authority to review or reconsider the correctness of that view, after considering the relevant aspects pointed out, this Authority again reiterated its view. The correctness of this view so taken is again

www.taxguru.in

sought to be canvassed in this Application and the other Applications heard along with it containing similar fact situation.

2. The assessments of the applicant before us for the Assessment Years 2007-2008 and 2008-2009 have been completed. The return for the Assessment Year 2009-2010 was filed in September 2010 and that for the year 2010-2011 has also been filed. The assessments are pending. The transaction based on which Rulings on various questions are sought, was entered into on 1.10.2006. The application for Advance Ruling before this Authority was filed on 14.3.2011 raising certain questions as contemplated by the relevant provisions of the Act and the Rules framed.

3. The view taken in SEPCO III order was that the applicant having filed a return of income, the question regarding the chargeability of the amount paid or recovered under a particular transaction during the Assessment Year, would arise for consideration and decision before the Assessing Officer and consequently, an application, for a ruling on the payment under that transaction, would be barred for the reason that the question raised in the application before this Authority was already pending before an Income-tax Authority within the meaning of clause(i) of the proviso to section 245R(2) of the Act. The proviso, as we see it, divests this Authority of jurisdiction in cases where its jurisdiction could be invoked by a qualified applicant, in three situations. The first is when the question on which a ruling is sought, is already pending before any Income-tax Authority or Appellate Tribunal or any court. The second is when the question involves determination of fair market value of any property. The third is where

www.taxguru.in

the question relates to a transaction or issue which is designed prima-facie for the avoidance of income-tax. When any one of those conditions is satisfied, obviously, this Authority has to decline jurisdiction and has to reject the application. Of course, as an authority constituted under a statute, this Authority may have a jurisdiction to decline a ruling even when one of these clauses in the proviso is not attracted or one of them is not strictly satisfied.[See the Ruling in Microsoft (AAR/781/2008)]

4. It is contended that the object of an Advance Ruling being to cut short the delay in dispute resolution as regards applicants who are eligible to apply, the bar enacted by the proviso to section 245R(2) of the Act must be strictly construed. It is also pointed out that the purpose is to attract foreign investment and keeping that in view, no applicant should be turned away by interpreting the proviso too widely and restricting the jurisdiction of this Authority. It is also submitted that a restriction on a jurisdiction conferred, should be construed strictly and jurisdiction ought not to be declined unless the case comes strictly within anyone of the clauses in the proviso.

5. It is argued as a Corollary that what is barred by clause (i) of the proviso is a case where the question raised in the application is already pending before an Income-tax Authority, Tribunal or Court and the filing of a return of income does not result in a ‘question’ pending before the Income-tax Authority. It is contended that unless the question has pointedly been raised by the Income-tax Officer, the question would not arise. The Assessing Officer may not raise the question at all or the assessee may have no occasion to raise it while the assessment is being

www.taxguru.in

completed and hence the question cannot be said to arise merely on the filing of a return. Therefore, on the filing of a return, the bar would not be attracted. The procedure now followed by the income-tax department on a return being filed, is explained in detail.

6. This Authority is a creature of the Income-tax Act. The provisions of the Act that create it and confer jurisdiction on it in certain matters, also restricts its jurisdiction or divests it of its jurisdiction in certain circumstances. One of the situations or circumstances, is when the question raised before it, has arisen before the Income-tax Authority. The question referred to in the proviso to section 245R(2) of the Act, is the question before the Authority for Advance Rulings. When a return is filed, so many aspects arise out of that return. The question of computation of total income, of computation of the exemptions and exclusions, acceptance or non-acceptance of an item of expenditure and ultimately the determination of chargeable income and the determination of the tax due, are all questions that arise. Therefore filing of a return ushers in all these questions. By filing a return, an assessee invites an adjudication on all the questions arising out of that return. Subsection (2) of section 245R only speaks of the question arising before the Authority. So if an answer to that question would be involved in the return filed or would arise out of the return filed, it would be a case where the bar is attracted. The arising of a question from out of a return filed, cannot depend on the volition, diligence, care or lack of care on the part of the Assessing Officer. A jurisdiction cannot depend on such vagaries.

www.taxguru.in

7. When an income is received or is expended as a permissible expenditure, both figure in the return and are dealt with while completing the assessment. If the return is accepted after scrutiny or without scrutiny, it would only mean that the claim of the applicant has been accepted by the Assessing Officer. The implication is that the question is answered in his favour. That would not mean that, that question or aspect has not arisen before the Assessing Officer, on the filing of the return. We have dealt with some of the relevant aspects in our orders in SEPCO III.

8. We have also referred to the relevant earlier Rulings of this Authority and discussed them. What we understand from them is that the relevant date for considering the question is the date of filing of the application and that filing of a return prior to filing of the application for Advance Ruling would lead to a rejection of the application. Consistent with the purpose sought to be achieved, emphasized on behalf of the applicant, it is for an applicant, eligible in that behalf, to move this Authority at the earliest opportunity and not to wait until after it invokes the jurisdiction or is obliged to invoke the jurisdiction of the Assessing Officer, by filing a return of income. The obligation to file a return can well be fulfilled after moving this Authority and the Assessing Officer will have to await a Ruling by this Authority and take shelter under Section 153 of the Act to complete the assessment. We may note that it could not be denied that the Ruling this Authority will give, will also impact the return already pending when the application before this Authority was moved. It will then be impossible to say that

www.taxguru.in

the aspect does not arise out of the return filed. The question raised before us will be covered by that aspect.

9. When this Authority took the view in Monte Harris and other cases that the date of the filing of the application before the Authority should be the crucial date for determining the question of the applicability of clause (i) of the proviso to section 245R(2) of the Act and not the date when the application comes up for hearing either under section 245R(2) or under section 245R(4) of the Act, the Authority was searching for a definite and *consistant terminus a quo*. This Authority felt that the period could not be left to the vagaries of the progress of the application before this Authority or the vicissitudes of procedure. We think that the same principle should be applied to the other limb of the proviso. That can be achieved only by fixing the point at the filing of a return of income by the applicant and not the vagaries of the Income-tax authority issuing a notice or on the date of that notice. The Assessing Authority has a period of one year to issue a notice under any one of the provisions, and the starting point could not be made to depend on his issuing a notice or on his not issuing a notice at all. After all, while filing a return, a person is expected to be honest and is expected to set out all information truthfully even if he is of the view that an item of income derived is not chargeable to tax or is not chargeable to tax in this country. By filing a return, that person is inviting the Assessing Officer to decide the question for him and that makes the question pending before the income-tax authority. Then clearly, the bar under clause (i) of the proviso to section 245R(2) of the Act would be attracted.

www.taxguru.in

10. Just like our considering the date of hearing of the application under section 245R of the Act would make for uncertainty, the fixing of the date of notice under section 143(2) / 142(1) of the Act by the income-tax authority as the starting point, would result in vagaries and to the use of different yardsticks to different applicants, it would depend on the diligence or non-diligence of the Assessing Officer, whether he had issued the notice before or after the application before this Authority has been filed and the nature of the notice. A jurisdiction cannot depend on such vagaries. It is, therefore, necessary to have a fixed common point or event for determining the existence or absence of jurisdiction. Applying that test, we have no hesitation in holding that the definite point should be the date of filing of the return juxtaposed with the filing of the application before this Authority. Certainty is obviously a must for ascertaining the existence of jurisdiction.

11. Once we come to the conclusion that the date of filing of the return is the relevant date to consider the applicability of the proviso to section 245R(2) of the Act, and that the filing of the return of income generates questions including the ones raised before this Authority, the jurisdiction to give a ruling in the present application has to be held to be barred. We are, therefore, constrained to reject the application as being barred by clause (i) of the proviso to section 245R(2) of the Act.

12. This is also a case where we can justifiably exercise our discretion not to allow the application under section 245R(2) of the Act on the ground that the applicant has not approached this Authority with reasonable diligence and has

www.taxguru.in

approached it only more than four years after the transaction giving rise to the application was entered into and even assessments for two years were already completed.

We reject the application.

**(V.K.Shridhar)**
**Member**

**(P.K.Balasubramanyan)**
**Chairman**