Anurag Jain vs The Authority For Advance Rulings on 30 September, 2008

Author: P. Jyothimani

Bench: P. Jyothimani

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.09.2008

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THE HON'BLE MR. JUSTICE P. JYOTHIMANI

Writ Petition No.33856 of 2005 and
W.P.M.P. No.36756 of 2005

Anurag Jain
Represented by his Power of Attorney holder,
M.K.Jain ... Petitioner

-Vs-

1. The Authority for Advance Rulings
(Income Tax), Represented by Addl. Commissioner,
of Income Tax (A.A.R) New Delhi

2. The Director of Income Tax
(International Taxation)
Chennai 600 034 ... Respondents

PRAYER.: Writ petition filed under Article 226 of the Constitution of India for the is

For Petitioner : Mr. R.Muthukumarasamy, Senior Counsel,
for M/s. M.S.Soundararajan
For Respondents : Mrs. Pushya Sitaraman

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O R D E R

This writ petition is directed against the ruling of the authority for advance rulings (Income Tax) dated 30.03.2005 made in A.A.R.No.643 of 2004.

2. The petitioner and four others were the share holders in a Private Limited Company known as M/s.Vision Healthsource India Private Limited, registered under the Companies Act. Out of the paid-up share capital of the company which was Rs.10,00,000/-, divided into 1,00,000 equity shares of Rs.10/- each, the petitioner was holding 15,000 shares while the other four shareholders were holding the remaining shares. The company was carrying on business in medical billing which is an Information Technology enabling industry. The petitioner and two others were shareholders in a foreign company namely M/s. Vision Health Source Inc., incorporated in USA engaged in out-sourcing business in processing medical bills and medical insurance claims. The petitioner and other two shareholders have also decided to transfer all their respective shares in M/s.Vision Health Sources in USA. and they have obtained approval from the Reserve Bank of India for transferring their shares to one M/s.Perot Systems Investments BV and Perot Systems B.V. Two agreements were entered one relating to transfer of shares of US company M/s.Vision Healthsource Inc., called stock purchase agreement and another share purchase agreement in relation to M/s.Vision Healthsource India Private Limited. The writ petition relates to the transfer of shares by the petitioner and others held in M/s.Vision Healthsource India Private Limited under share purchase agreement dated 15.04.2003. In accordance with the said share purchase agreement the consideration for the sale of shares was in the following two terms:-

> (I) An amount equal to US $ 23 lakhs (2.3 U.S. million dollars) payable at the time of transfer of shares and (II) Balance constituting the contingent payments to be made in first year, second year and third year after the closing payment, up to a maximum of seven million U.S. $.

3. The closing date by which the first amount of 2.3 million dollar to be paid is 2003-2004 and thereafter the contingent payment in three years namely 2004, 2005 and 2006 to be made. Out of the five shareholders in M/s.Vision Healthsource India Private Limited, the petitioner and his wife were non-resident live in USA while others are Indian residents. The manner of determination of the contingent payment is provided in the share purchase agreement. The share purchase agreement is supported by other documents like the employment agreement with one V.Jain who was an Indian Shareholder apart from a non-competition agreement with all the shareholders.

4. It is stated that the petitioner has approached the first respondent by making an application under Section 245 (Q) (1) of the Income Tax Act, 1961 (hereinafter referred to as the Act) seeking advance ruling of certain questions relating to the liability of capital gains tax in respect of the transfer of 15,000 equity shares held by him in the Indian Company namely M/s. Vision Healthsource India Private Limited covered under the share purchase agreement dated 15.04.2003, with his contention that as per his interpretation of the agreement, the liability of the capital gains tax accrues only when there is a transfer of capital assets and consideration is ascertainable and therefore according to him, in the circumstances that the sale consideration for transfer was not

determinable and dependent upon contingency, the payment of capital gains would not arise on the transfer of shares held by him.

5. On the basis of the direction from the first respondent-Authority the petitioner has framed the questions to be ruled by the first respondent which are as follows:-

> (i)Whether the gains arising from the transfer of 15,000 equity shares in M/s.Vision Healthsource India Private Limited covered by the share purchase agreement dated 15.04.2003 read with Exs.A and B namely which are share purchase agreement and associated employment agreement respectively is chargeable to capital gain taxes or not either wholly or in part.
>
> (ii)If the aforesaid gains arising from the above transfer is liable to be charged to capital gain taxes either wholly or in part, in which year of assessment does the liability to pay capital gain taxes arise for the following amount received / receivable as consideration for the transfer of shares aforesaid, which, in aggregate amounts to 93 lakh US dollars (9.3 million U.S. dollars) termed as purchase price as per clause-1 of the share purchase agreement dated 15.04.2003.
>
> (I) Initial lumpsum payment equal to 23 lakhs US dollars (2.3 million U.S. dollars) (referred in the share purchase agreement as the closing payment) received on 01.07.2003 in the previous years relevant to assessment year 2004-2005.
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> (II) contingent payment as per clause (1) of the share purchase agreement dated 15.04.2003 (Ex.A) receivable for each of the three years in the following terms:-
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> Having regard to the fact that these amounts, contingent on the existence of the EBITDA, namely Earnings Before Interest, Tax Depreciation Allowance, can be determined only when the EBITDA as per clause (1) of the said share purchase agreement dated 15.04.2003 relating to the three contingent payments as defined in clause (1) therein is computed.
>
> By whom paid and nature of payment Year in which to be paid Where defined Payer and provider First Year Contingent Payment For year ended 31.3.2004 Exhibit A Payer and provider Second year Contingent Payment For year ended 31.3.2005 Exhibit A Payer and provider Third Year Contingent payment For year ended on 31.3.2006 Exhibit A
>
> (iii)If the gains arising from transfer of shares aforesaid is not to be charged as capital gains, either wholly or in part, under what head of Income the contingent payments made to/received by the applicant towards the transfer of shares covered by the aforesaid share purchase agreement dated 15.04.2003 read with exhibit attached thereto are taxable and in which of assessment.

> (iv)Whether any relief or concession in respect of income charged as capital gains or as other income under any other head is available under applicable provisions of Double Taxation Avoidance Agreement between India and United States of America and India and Netherlands? and if so, to what extent?

6. As far as question No.(iv) is concerned the same was not pressed by the petitioner and therefore no ruling was pronounced.

7. In respect of question Nos.1 to 3 the first respondent by the impugned order has pronounced the following ruling:-

> (i)the gains arising to the applicant from the transfer of 15,000 equity shares in M/s.Vision Healthsource India Private Limited covered by the share purchase agreement dated 15.04.2003 read with Exs.A and B thereto computed by taking the closing amount of 2.3 U.S. million dollars as a true value of consideration or chargeable to tax under the head capital gains.
>
> (ii)(I) initial lumpsum payment equal to 2.3 million US dollars (referred in the share purchase agreement as the closing payment) received on 01.07.2003 in the previous year relevant to the assessment year 2004-2005 as a consideration for the transfer of shares (including 15,000 shares of the applicant) represents the full value of the consideration thereunder.
>
> (II) Contingent payments as could be determined at the end of the first year 31.03.2004, second year 31.03.2004 and the third year 31.03.2006 under Ex.A-4 are not in truth and substance. A part of the consideration under the share purchase agreement shows that they cannot be taken into account in computing the capital gains but they would be taxable under the head 'salaries'.
>
> (III) contingent payments received / receivable by the applicant would fall within the meaning of profits in lieu of or in addition to salary in/ under sub-section (3) (ii) of Section 17 of the Act.

8. The above said rulings of the first respondent are challenged by the petitioner in this writ petition on the ground that the ruling in respect of the initial lumpsum payment and contingent payment by which it was held that the initial lumpsum payment would be treated as consideration for the transfer of shares and therefore the said consideration is taxable under capital gains and in respect of contingent payments in three years since the same is not ascertainable it does not attract the payment of capital gains but at the same time it would be taxable under the head salaries and according to the petitioner it is contrary to Sections 45, 48, 28 and 17 of the Act, that even in respect of the closing payment of Rs.2.3 million US dollars as well as the 7 million US dollars of contingent payment though they are in respect of the transfer of shares the consideration are indeterminable and therefore no liability of the capital gain could be made under Section 45 of the Act, that indeterminable contingent payment does not form part of the consideration while including salaries

as provided in lieu of or in addition to salary as taxable under the said head is opposed to the provisions of the Act especially in the circumstances that the share purchase agreement and the Reserve Bank of India approval discloses that the sale consideration is payable in respect of the shares taking into consideration the components of close payments as well as contingent payments, that the salary payable as per the associated employment agreement forms part of the stock purchase agreement and not share purchase agreement as stock purchase agreement relating to the transfer of shares to the U.S.based company while share purchase agreement alone deals with the transfer of shares with Indian companies and that even if it is admitted that the employment agreement is attached to stock purchase agreement, the contingent payments or in relation to the payments of performance under the employment agreement and as non-existent, in the share purchase agreement and the salary payable only for ensuring performance.

9. On the other hand it is the stand of the respondents in the counter affidavit especially the second respondent that the petitioner has filed a return before the assessment authority namely the Assistant Director of Income Tax (International Taxation), Chennai for assessment year 2004-2005 (accounting year 2003-2004) declaring the income-tax of Rs.8,04,465/- on 29.10.2004 and he has declared nil income for capital gains. The Assessee in the working sheet along with the letter dated 17.11.2004 has computed long term capital gain on sale of equity shares in M/s.Vision Healthsource India Private Limited at Rs.1,57,25,966/- claiming exemption on the investment of the amount of Rs.1,57,30,000/- in NABARD under Section 54 ED/54 F of the Act and in respect of the contingent payment received in 2004 the petitioner has stated that it would be covered by the return of Income Tax for the assessment year 2005-2006 to be filed.

10. It is the case of the second respondent that when the petitioner / assessee has approached the first respondent for advance ruling the same is having binding effect as per Section 245 (S) (1) (c) unless there is a change in law or facts on which the advance ruling has been pronounced. It is the case of the second respondent that inasmuch as it is not even the case of the petitioner that the first respondent Authority has acted contrary to its jurisdiction or has violated the principles of natural justice or acted in such a manner it would violate the legal rights of the petitioner, the writ petition challenging the ruling is not maintainable. It is also the case of the respondents by relying upon a judgment of the Supreme Court reported in (1989) 176 ITR 169 (R.B.Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I.T. and W.T.)) which relates to the settlement commission's decision that in the jurisdiction exercised by the High Court under Article 226 of the Constitution of India, the Court is concerned with the legality of the procedure followed or not as to the validity of the order. It is also stated that the benefit of approach to the advance ruling authority is enabled for the benefit of the non-residents so as to enable such person to get the clear picture of tax liability even before the assessment in respect of the transaction which is a high level body presided over by a retired Judge of the Supreme Court and the petitioner having preferred of the advance ruling authority and having invited a ruling it is not open to him to say that the said ruling should be quashed.

11. The basic contention of the learned senior counsel for the petitioner is that inasmuch as under share purchase agreement, which has nothing to do with the associated employment agreement, there is no definite amount of profit computable in respect of transfer of shares and therefore the

question of treating it as a capital gain and making the assessment either on 2.3 U.S. million dollars or 7.7 million U.S. dollars does not arise. His contention is that the first respondent having ruled that in respect of the contingent amount which is not ascertainable and therefore having rejected even the case of the Department that the same should be treated as a profit or gain or business or provision under Section 28 of the Act has committed a gross error in holding that the petitioner is liable in respect of the salaries received under the associated employment agreement under Section 17 of the Act. His further contention is that the salary receivable to the petitioner under the associated employment agreement which relates to the share purchase agreement is relating to the service to be rendered by the petitioner and has nothing to do with the consideration for transfer of shares and therefore according to him the first respondent ought not have relied upon Section 17 of the Act taking into consideration the salaries payable to the petitioners under associated employment agreement in Ex.B. He would state that under the share purchase agreement dated 15.04.2003 which relates to the agreement to purchase from the shareholders and the shareholders agreeing to sell and the purchase price has been stated as up to 9.3 million U.S. dollars in the manner that out of which 2.3 U.S. million dollars to be treated as closing payment and the remaining contingent payments payable in the first, second and third years namely, 2004, 2005 and 2006 and the consideration for the transfer is the payment of the amount and it has nothing to do with the employment agreement Ex.B-1. He would submit that the contents of the associated employment agreement dated 15.04.2003 especially relating to the term 'employment' has no relationship with the share purchase agreement at all. It is his further contention that when such associated employment agreement has been entered not with all the five shareholders of the company and only in respect of the petitioner and another employee the contents of such agreement in relation to the employment wherein it is agreed by the petitioner that in the event of the petitioner's termination from the services due to the reasons of material failure to adhere to any critical policy, gross negligence or willful misconduct or commission of an act of fraud embezzlement or theft involving more than 1,000 U.S. Dollars or conviction, of, or plea of noto contendere to, a felony or for a crime involving moral turpitude undertaking that in such an act, he would not be entitled for any proceeds from the future payments made under the purchase agreement including without limitation any contingent payments which may be received will be paid back to the company by way of forfeiture can only be treated as a penalty and can never be linked with purchase agreement and anything related with the consideration thereon and therefore according to him the ruling of the first respondent in basing reliance on the contents of the employment agreement is outside the scope of reference. To substantiate his contention that the capital gain assessment under Sections 45 and 48 of the Act can be only on the determined amount he would rely upon the judgments reported in

(i)128 ITR 294 (SC) (C.I.T. v. B.C.Srinivasa Setty)

(ii)273 ITR 1 (SC) (CIT v. D.P.Sandu Bros. Chembur P. Ltd.)

(iii)137 ITR 493 (Bombay) (Evans Fraser & Co. Ltd., v. C.I.T.), and

(iv)161 ITR 524 (SC) C.I.T. v. Hindustan Housing & Land Devpt. Trust (S.C.) Therefore in short his contention is that even if it is taken taken that 2.3 U.S. million dollars to be treated as an amount of

consideration ascertainable which may be chargeable for capital gain, in respect of the un-ascertained amount applying Section 17 of the Act is not valid in law apart from the fact that even in respect of the contingent payment for the salary payable to the petitioner and another person who are only two among the five total shareholders is taken that would be an arbitrary decision affecting even other shareholders.

12. On the other hand it is the submission of the learned counsel appearing for the Income Tax Department-the respondents that the petitioner having invited a ruling from the first respondent as per Section 245 (S) of the Act is bound by the decision. She would also submit that inasmuch as the first respondent whose rulings are invited by the petitioner is at New Delhi, this Court could not have jurisdiction under Article 226 of the Constitution of India. She would also submit that even though there are no specific rulings or procedures or regulations enabling any party who is aggrieved by the ruling of the first respondent authority which is headed by a retired Supreme Court Judge that an appeal or a proceeding can be initiated only in the Supreme Court, normally that appeals are being filed to the Supreme Court. She would also further submit that the entire averments of the petitioner in the affidavit does not disclose the first respondent has either acted outside its jurisdiction or the ruling was without giving an opportunity and therefore it is in violative of principles of natural justice and on the other hand the intention of the petitioner is to find fault with the decision of the ruling authority and not decision making process and therefore the High Court cannot decide about the validity or otherwise of the decision. She also would rely upon a judgment reported in 201 ITR 611 (SC) (Jyotendrasinhji v. S.I.Tripathi) to substantiate her contention that when the finding of the settlement commission has become final the validity of it can only be challenged on the ground that there is a defect in decision making. It is also her submission that it is not as if the amount should be treated as contingent inasmuch as the maximum amount of 9.3 U.S. million dollars had been agreed between the parties. She would submit that when the employment conferred to the petitioner and another person is for three years and the contingent amount payable to the extent of 7 U.S. million dollars is also in the said period, the terms of the service agreement has the relationship with the share purchase agreement and there is no illegality or irregularity in the ruling given by the first respondent.

13. A perusal of the entire documents including the rulings given by the first respondent makes it is clear that the basic issue that is raised by the petitioner in this petition is as to whether the ruling of the first respondent in directing that the lumpsum payment equal to 2.3 million US dollars as closing payment attracts capital gain and hence chargeable under Sections 45 and 48 of the Act and in so far as the contingent payment for three years namely in the end of 31.03.2004, 31.03.2005 and 31.03.2006 with a minimum of 7 million US dollars having decided that the same cannot be treated as a capital gain and therefore it cannot be even assessable under Section 28 of the Act, can the same be linked to Section 17 of the Act based on the associated employment Agreement. In effect, it is clear that the petitioner seeks this Court to decide while exercising jurisdiction under Article 226 of the Constitution of India that the ruling of the first respondent and the basis of the said decision is not legal. As correctly submitted by the learned counsel for the respondent it is nowhere in the case of the petitioner throughout that while passing such ruling the first respondent has either not followed the procedure or failed to give adequate opportunity or the decision is basically against law except to say that the associate employment agreement should not be linked with the share purchase

agreement.

14. On the other hand it is not also factually in dispute that the said associated employment agreement formed part of the share purchase agreement. The contents of the associated employment agreement makes it very clear in its preamble which is as follows:-

> Vision Healthsource India Private Limited (Company) and Anurag Jain agree to enter into an employment relationship in accordance with the terms of this Agreement and any written offer of employment delivered to me on or before the date of this Associate Employment (Agreement). Unless otherwise defined herein, capitalized terms used herein have the meanings ascribed thereto in that certain Share Purchase Agreement (including Exhibit A thereto) among Perot Systems Corporation (Perot), Perot Systems Investments BV, Perot Systems BV, Company and the shareholders named therein, dated April 15, 2003 (the Purchase Agreement).

The intention of the parties in entering into the associated employment agreement appears to be that the share purchase agreement dated 15.04.2003 also should form part of the same. Even in clause (8) relating to employment under the associated employment agreement while there is a forfeiture clause a reference has been made to the purchase agreement also and therefore it cannot be said that the undertaking given by the petitioner to forfeit the contingent, payments which is the crux of the purchase agreement does not form part of the associated employment agreement. Clause (8) of the associated employment agreement makes the same clear which is as follows:-

> 8. Employment. I understand that this Agreement is for a term beginning on the date hereof and ending on December 31, 2006 unless Company terminates my services for Cause (as defined below) or I resign for Good Reason (as defined below). I understand that Company may transfer my employment among its affiliates and I hereby consent to the assignment of this agreement by Company to an affiliate in connection with any such transfer(s). I agree that this Agreement will continue to apply to me if I am transferred to an affiliate of Company. As used herein, Cause means (a) material failure to adhere to any Critical Policy (after written notice and a period of at least five days to cure such failure); (b) violation of any term or condition of this agreement (after written notice and a period of at least five days to cure such violation); (c) Willful misconduct or gross negligence in the performance of a material duty to Company; (d) commission of an act of fraud embezzlement or theft involving more than $ 1,000 or conviction of, or plea of noto contendere to, a felony or for a crime involving moral turpitude; or (e) the failure of the sum of the aggregate EBITDA for both the Payer and Provider businesses for any applicable period set forth in Exhibit A to the Purchase Agreement to equal or exceed the sum of the Payer Cummulative Threshold EBITDA and the Provider Cumulative Threshold EBITDA for such applicable period, without regard to the allocation between Payer EBITDA or

> Provider EBITDA. A termination by Company for any reason other than as set forth in the preceding sentence shall be a termination without Cause. Company will give me written notice of (30 days) in the case of termination for Cause. If I am terminated for Cause pursuant to the preceding clauses (a) or (c) or with respect to clause (d) due to anact against the Company or any of its affiliates, I will no longer be entitled to any proceeds from future payments made under the Purchase Agreement, including without limitation, any Contingent Payments, and if I receive any such payments, such payments shall be immediately paid to Company. Any such proceeds forfeited by me pursuant to the preceding sentence shall be paid as an anonymous gift to a bona fide tax-exempt charitable organization to be designated by me prior to the payment date. As used herein, the term Good Reason means, without my prior written consent, and so long as Company has no right to terminated me for Cause, (1) any reduction in my base salary or benefits (other than a reducation applicable to all similarly situated Associates of Company) or (2) a material reduction in my responsibilities and duties.

15. It was taking the said factual circumstances the first respondent advance ruling authority has given a categoric factual finding which is as follows:-

> However, where the agreement is terminated for any of the specified cause which does not include the aforementioned clause (e), the applicant will no longer be entitled to any proceeds from future contingents payments payable under the purchase agreement including without limitation any contingent payments and if he had already received any such payment, he is obliged to pay back the amount immediately to the company. The non-competition agreement also includes a clause identical to clause (e) in the employment agreement, quoted above. Clause (4) of the employment agreement refers to non-competition agreement which in turn mentions that the applicant will receive a portion of the purchase price in respect of ownership interest and substantial direct and indirect benefits from the transactions contemplated by the share purchase agreement. The non-competition agreement is linked to the employment agreement which has nexus with the purchase agreement. Indeed, it is stated that the applicant s obligations under the non-competition agreement are a material inducement and condition to the buyer s entering into purchase agreement and the share purchase agreement under which substantial direct and indirect benefits are assured. Had the contingent payments been the second part of the full value of the consideration for the sale of shares and the business of the Indian Company, there is no reason why failure on the part of the applicant in regard to fulfilling his obligations under the employment agreement (which include the achieving the target mentioned above) should result not only in termination of the agreement for the specified cause but also in foregoing receipt of the second part of the consideration by way of contingent payments under the share purchase agreement and in refunding the same to the company where he has already received them. A combined reading of the employment agreement, non-competition agreement and the share purchase agreement which are contemporaneous leaves us

> in no doubt to conclude that contingent payments payable under the share purchase agreement, are in substance and reality payments for ensuring performance under the employment agreement to achieve the desired object in exceeding EBITDA and have no real nexus to the consideration for the sale of the shares etc., under the purchase agreement .

16. In such circumstances, it cannot be said that even on the merits of the findings the first respondent has not considered the factual issue. On the other hand, the entire issue has been considered in a threadbare manner and there is absolutely no reason for this Court to come to a conclusion that the finding is either perverse or totally opposed to law. On the factual assertion of the entire material, it has been considered by the first respondent authority and therefore there is no scope for this Court to hold as if the reference did not relate to the salary receivable by the petitioner under the associated employment agreement.

17. In 201 ITR 611 (SC) (referred to supra) the Supreme Court while dealing with the finding of the settlement commission under Chapter XIX-A of the Act by way of an order passed under Sections 245 D (4) and 245-I wherein the order of settlement is stated to be conclusive, the Supreme court has held that the decision of the settlement commission in interpreting a Trust Deed even if such interpretation is not coorect it would not be a ground for interference by the Supreme Court even in an appeal filed from the order of settlement commission in Section 254-D of the Act, holding that a wrong interpreting of a deed cannot be said to be a violation of the provisions of the Act, equally holding that the interpretation placed upon a deed by the commission does not bind the authorities in proceedings relating to other assessment years.

18. In that judgment while dealing with the jurisdiction of the High Court under Article 226 of the Constitution of India apart from that of the Supreme Court under Article 36, the Supreme Court has confirmed with approval the earlier judgment in (1989) 176 ITR 169 that the Court is concerned with the legality of the procedure followed and not the validity of the order and the Courts under Judicial Review are concerned not with the decision but with the decision making. The relevant portion of the judgment of the Supreme Court in this regard is as follows:-

> The scope of enquiry, whether by the High Court under article 226 or by this court under article 136 is also the same whether the order of the Commission is contrary to anyof the provisions of the Act and if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category, has it prejudiced the petitioner/appellant. Reference in this behalf may be had to the decision of this court in R. B. Shreeram Durga Prasad and Fatechand Nursing Das v. Settlement Commission (I. T. and W. T.) [1989] 176 ITR 169, which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S. R. Pandian J., observed that, in such a case, this court is "concerned with the legality of the procedure followed and not with the validity of the order". The learned judge added "judicial review is concerned not with the decision but with the decision-making process". Reliance was placed upon the decision of the House of Lords in Chief Constable of the North Wales Police v. Evans

[1982] 1 WLR 1155 (HL). Thus, the appellate power under article 136 was equated with the power of judicial review, where the appeal is directed against the orders of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this court can interfere in these appeals is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds though it is true, some contentions of law are also raised. The Commission has interpreted the trust deeds in a particular manner. Even if the interpretation placed by the Commission on the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income-tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years. Applying the said judicial dictum laid down by the Supreme Court to the facts of the present case even assuming that the first respondent authority has not interpreted the associated employment agreement which on fact forms part of the share purchase agreement in the proper manner, it is certainly not open to this Court to go into the correctness or otherwise or validity or otherwise of the findings given by the first respondent.

19. The provisions under the Act relating to the advance rulings is incorporated under Chapter XIX-B next to the settlement proceedings by the Finance Act 1993 with effect from 01.06.1993. That the definition of advance ruling in so far as it relates to the factual situation in this case is under Section 245 (N) (a) (ii) which is as follows:-

45 n. ....

(a) ....

(ii) a determination by the Authority in relation to the tax liability of a non-resident arising out of a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with such non-resident, and such determination shall include the determination of any question of law or of fact specified in the application; the advance ruling authority consists of following members as per Section 245 (O) (ii) namely:

245-O.(1) ...

(2) ...

(a) a Chairman, who is a retired Judge of the Supreme Court;

(b) an officer of the Indian Revenue Service who is qualified to be a member of the Central Board of Direct Taxes;

(c) an officer of the Indian Legal Service who is, or is qualified to be, an Additional Secretary to the Government of India the binding effect of the ruling of the advance ruling authority is under Section 245 (S) which is as follows:-

45 (S). (1) The advance ruling pronounced by the Authority under Section 245 R shall be binding only -

(a) on the applicant who had sought it;

(b) in respect of the transaction in relation to which the ruling had been sought; and

(c) on the commissioner, and the income-tax authorities subordinate to him, in respect of the applicant and the said transaction.

(2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced

20. It is also relevant to the point out that under Section 245 (T) of the Act the ruling of the advance ruling authority becomes void if the same is obtained by fraud, misrepresentation of the facts, etc., Therefore the petitioner who has voluntarily invited the ruling from the first respondent is certainly bound by the ruling unless it is shown that the procedure followed by the authority while passing the said ruling is not in accordance with law and the same is basically opposed to law or against the principles of natural justice.

21. Learned counsel for the Income Tax Department-respondents who has also raised an issue about the maintainability of the writ petition in this court under Article 226 of the Constitution of India stating that even though there is no bar for this Court to entertain the writ petition under Article 226 of the Constitution of India, infact against the orders of the authority for advance ruling, appeals are filed before the Supreme Court, however has produced an order of the Supreme Court passed in the Special Leave to Appeal (Civil) Nos.21519 of 2008 dated 08.09.2008 preferred against order dated 09.05.2008 of the authority for advance ruling income tax, New Delhi, passed in AAR 736/06, wherein the Hon 'ble Apex Court by putting a query as to why the petitioner has not moved the High Court under Article 226 of the Constitution of India has permitted the petitioner therein to withdraw the said SLP with permission to move the High Court under Article 226 of the Constitution of India and the following is the operative portion of the order:-

This Special Leave Petition is filed against the ruling given by the Authority for Advance Rulings under the Income Tax Act.

When the matter reached hearing, we raised the query as to why petitioner has not moved the High Court under Article 226 of the Constitution? Realizing the difficulty, learned counsel for the petitioner seeks permission to withdraw the S.L.P. Permission granted with liberty to move the High Court within two weeks, if so advised.

> For a period of two weeks, the Income Tax Department will not commence the assessment proceedings.
>
> Special Leave Petition is, accordingly, permitted to be withdrawn. Hence, it is not necessary for this Court to give any finding as to the jurisdiction of this Court under Article 226 of the Constitution of India.

22. The distinction sought to be made between Section 45 of the Act which is the computation provision and Section 48 which is a charging section , that when the computation provision cannot apply the same is applicable in respect of charging section also as held by the Supreme Court in 128 ITR 294 (SC) (referred to supra) and the same is not applicable to the facts of the present case at all. Even if it is taken on fact of the present case that in respect of the contingent amounts payable in three years since the same is not computable the advance ruling authority has come to the conclusion that it cannot be treated as a capital gain but at the same time treated as a salary under Section 17 (3) (2) of the Act by treating it as a profit in lieu of salaries or in addition to the salary the same cannot be said to be against law. The reliance placed by the learned senior counsel on the judgment of the Supreme Court in 273 ITR 1 (referred to supra) has no application since that is a case relating to tenancy right surrender of such right would attract Section 45 of the Act and therefore it was held that the same cannot be treated as a casual and non-recurring deposit under Section 10 (3) of the Act subject to tax under Section 56.

23. It was on that factual situation the Supreme Court has held that the tenancy right being capital asset, surrender would attract capital gain under Section 45 of the Act, if Section 45 is not applicable it cannot be taxed at all in the following words:-

> (iv) That it was not open for the Department to impose tax on such capital receipt by the assessee under any other head for the assessment year 1987-88, since income derived from a source falling under a specific head has to be computed under the appropriate section and no other. A tenancy right is a capital asset and its surrender would attract Section 45 and the gains derived would be assessable, if at all, only under the head Capital gains . That being so, it cannot be treated as a casual and non-recurring receipt under section 10 (3) and be subjected to tax under Section 56. If the income cannot be taxed under Section 45, it cannot be taxed at all .

Certainly the present finding given by the Authority in respect of the salaries receivable under the Associated Employment Agreement which is stated to be assessable under Section 17(3)(2) of the Act cannot be compared to the surrendering of tenancy right. It is relevant to point out that all the judgments which have been relied upon by the learned senior counsel for the petitioner are cases were adjudication process were completed against which appeals filed and the appellate tribunal s orders have been questioned.

24. Even though it is true as contended by the learned senior counsel for the petitioner that the ruling given by the first respondent authority is binding upon the party who has actually referred the same and invited such a ruling, it cannot be said that the said order is final and therefore the

jurisdiction of this Court could be ousted. Certainly as decided by the Supreme Court in the case reported in 201 ITR 611 (SC) (referred to supra), in case of procedural irregularities in arriving at the process of decision making, this Court can certainly interfere in the writ jurisdiction. On the other hand whether on the factual matrix by construction of two documents namely Associated Employment Agreement and Share Purchase Agreement which cannot be said to be totally different as one document is inter-linked with the other, by applying Section 17 of the Act it cannot be construed that the first respondent has gone beyond the jurisdiction and beyond the scope of reference.

25. In fact question No.3 which has been referred by the petitioner which is as follows:-

> If the gains arising from transfer of shares aforesaid is not to be charged as capital gains, either wholly or in part, under what head of income the contingent payments made to/received by the applicant towards transfer of shares covered by the aforesaid Share Purchase Agreement dated 15.04.2003 read with Exhibit attached thereto, are taxable and in which year of assessment? would be comprehensive enough to enable the first respondent authority to take into consideration the share purchase agreement with other exhibits connected thereto since the associated employment agreement is Ex.B which form part of the agreement and therefore it cannot be said that the first respondent has acted beyond the authority while deciding the reference.

26. In view of the same the writ petition fails and the same is dismissed.

srk To

1. The Additional Commissioner of Income Tax (A.A.R) New Delhi, Authority for Advance Rulings (Income Tax), New Delhi.

2. The Director of Income Tax (International Taxation), Chennai 600 034