



HANDBOOK ON **ADVANCE** **RULINGS**



AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
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This handbook should not be construed as an exhaustive statement of law. In case of doubt, reference should always be made to the relevant provisions of the Direct Tax Laws and Rules and where necessary notifications issued from time to time.

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PREFACE

This handbook aims to provide general guidance on the scheme of Advance Rulings under the Indian Income-tax Act. In addition to law and procedure relating to this scheme, it also includes summaries of some of the important rulings pronounced by the Authority for Advance Rulings (Income Tax) India. Relevant provisions of the Income-tax Act and Rules, statutory forms, circulars issued by Central Board of Direct Taxes and other orders of Government of India have also been included. It also exposes the reader to the global perspective in the area of advance rulings and how these are administered in different jurisdictions.

The information contained in this publicaition is intended for general guidance only. It is not a substitute for the relevant acts, rules, circulars or orders, for which a reference must invariably be made to the authorised text.

Apart from being available in hard copy, a version of this handbook will be made available through the website of Authority for Advance Rulings (I.T.) www.aar.gov.in

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INTRODUCTION

In the present era of globalization international trade is the driving force of the modern world. There is a growing realization that no economy can grow and flourish in isolation. There is also an increasing awareness that good tax laws and good tax administration are essential for all modern economies.

Double Taxation Agreements or Tax Treaties are the established ways for the States to agree on international level for the remission of problems of double taxation arising from the cross border trade and investment. The OECD/UN model convention and other models provide the framework for the States to draw their agreements. The Government of India has entered into tax treaties with various foreign countries to provide stability and certainty to the tax laws governing collaborators and their counterparts in India. The Double Taxation Avoidance Agreements (DTAA) have helped both the collaborators from abroad and the Indian enterprises in the public and private sectors to know precisely the nature, extent, and the scope of their tax liability as also the country in which the tax is payable. For determining the tax liability in India, the provisions of the Income-tax Act come into play with Double Taxation Avoidance Agreements or otherwise.

In view of the complexity of modern tax laws, taxpayers would like to be sure of the tax implications of their proposed transactions and in that context the facility of Advance Rulings on the interpretation of the tax laws would go a long way in making up their mind for investment in a particular country.

Advance ruling has been internationally recognized as "A more or less binding statement from the revenue authorities upon the voluntary request of a private person, concerning the treatment and

consequences of one or a series of contemplated future actions or transactions.”

In India the need for such a system was recognised since 1970s by certain committees viz. The Wanchoo Committee, the Choksi Committee and the Chelliah Committee, as appointed by the Government from time to time.

The office of Authority for Advance Ruling was created by the Finance Act, 1993 under the Income tax Act (hereinafter referred to as I.T. Act).

The substantive provision of law relating to this Authority are contained in sections 245N to 245V of the IT Act (Chapter XIX-B) and the procedure is spelt out in Income-tax Rules, 1962 - Rules 44E and 44F and also the “Authority for Advance Ruling (Procedure) Rules, 1996” notified under the powers vested in the Authority u/s 245V.

This handbook will give a fair idea of the statute, procedure, as well as illustrate the scope of questions of law or fact on which ruling may be sought, by way of documentation of frequently asked questions and summary of the cases wherein the ruling has been pronounced by this Authority.



C H A P T E R 1

ADVANCE RULINGS UNDER THE INDIAN LEGAL SYSTEM

1.1 CONCEPT OF ADVANCE RULING AND CREATION OF AUTHORITY FOR ADVANCE RULING:

Under the scheme, as now enacted, it has been decided to entrust the power of giving advance rulings to an independent adjudicatory body and to ensure further that the **procedure is simple, inexpensive, expeditious and authoritative.**

Accordingly, a high level body headed by a retired Judge of the Supreme Court has been set up which is empowered to issue rulings which are binding both on the Income-tax



Department and the applicant. It has two other members drawn from the top of the revenue and legal hierarchy in the country. This Authority is a quasi-judicial body having full powers of a civil court under the Income-tax Act to give its rulings in respect of specific questions of law or fact.

1.2 ADVANTAGES UNDER THE SCHEME:

Some of the advantages of seeking rulings from the Authority are:

- (i) The non-resident investor can be sure of its liability towards income-tax even before the start of investment in India. Hence, it can mould its investment plans accordingly and it would be able to avoid long-drawn litigation.

- (ii) The Authority constituted as above, is best suited to sort out complex issues of Income-tax¹ including those concerning double taxation avoidance agreements (DTAA) which arise as a result of differences of opinion between the tax collectors and the taxpayers.
- (iii) The Public Sector Companies can take advantage of getting a ruling on questions of facts or law pending before any tax authority.
- (iv) The rulings of the Authority are binding on the applicant as well as the Commissioner of Income-tax and authorities below him, not only for one year but for all the years unless the facts or the law change, therefore, having obtained the ruling on a given set of facts the taxpayer may be sure about his tax liability in future.
- (v) The authority is to pronounce its rulings within six months of the receipt of the application. This enables the investor to obtain the ruling and draw up the details of his transaction without undue delay on this account and ensures full certainty regarding its tax implications.

1.3 UNIQUENESS OF THE INDIAN SYSTEM:

Advance Ruling system has been practiced in approximately 60 countries for the past four decades. India is a comparatively late entrant. Today, Advance Rulings is becoming more and more indispensable as trade and commerce are getting more global; and complex problems are swamping the tax administration the world over.

It is recognised today that a well executed advance rulings system will improve the perception of the Administration of Income-tax laws in the eyes of the taxpayers and the public.

In many ways the advance rulings system in India is unique and far more effective than in most other countries. In most countries the advance rulings are given by the Revenue officials with different variations of the theme, and these rulings are mostly not binding, as

1. 228 ITR 61 (AAR No.P.-12 of 1995).

they are not given by judicial or quasi-judicial Authority. However, in India like in Denmark the rulings are binding. In India the Authority is a high level quasi-judicial and independent statutory body chaired by a retired Judge of the Supreme Court. Since the rulings are binding on the applicant and the Income-tax authorities they are quite effective in substantially eliminating long drawn out litigation. Only in cases where an aggrieved party chooses to exercise its constitutional right to go in Writ to the High Court or file a SLP before the Supreme Court, do the issues take time to resolve.

It also flows from the quasi-judicial nature of the Indian AAR that the rulings, though may not be treated as precedent, have a great persuasive value.



1.4 PROVISIONS OF ADVANCE RULING:

The Authority for Advance Rulings was introduced in the Income-tax Act by the insertion of chapter XIXB consisting of sections 245N to 245V by the Finance Act, 1993 with effect from 1-6-1993. The Authority subsequently underwent modifications through Finance (No.2) Act of 1998, Finance Act, 2000 and Finance Act, 2003. The scope of the Authority was expanded to include Public Sector Undertakings.

The Authority for Advance Rulings stands today as follows:

245N. In this Chapter, unless the context otherwise requires,—

²[(a) “advance ruling” means—

2. Clauses (a) and (b) substituted by the Finance Act, 2000, w.e.f. 1-6-2000. Prior to their substitution, clauses (a) and (b), as inserted by the Finance Act, 1993, w.e.f. 1-6-1993 and later on substituted by the Finance (No. 2) Act, 1998, w.e.f. 1-10-1998, read as under :

Contd.

- (i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or
 - (ii) a determination by the Authority in relation to ³[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 ⁴[such] non-resident, and such determination shall include the determination of any question of law or of fact specified in the application;
 - (iii) a determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision shall include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application :
- ⁵**Provided** that where an advance ruling has been pronounced, before the date on which the Finance Act,

Contd.

- (a) "advance ruling" means—
 - (i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant and such determination shall include the determination of any question of law or of fact specified in the application;
 - (ii) a decision by the Authority in relation to an assessment which is pending before any of the Income-tax Authority or the Tribunal in case of an applicant who is a resident in India and such decision shall include the decision on question of law or fact arising out of the orders of assessment in respect of which an application has been made by a resident applicant;
- (b) "applicant" means any person who—
 - (i) is a non-resident; or
 - (ii) is a resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify in this behalf;
 - (iii) makes an application under sub-section (1) of section 245Q;

3. Inserted by the Finance Act, 2003, w.e.f. 1-6-2000.

4. Substituted for "a" by the Finance Act, 2003, w.r.e.f. 1-6-2000.

5. Inserted by the Finance Act, 2003, w.e.f. 14-5-2003.

2003 receives the assent of the President, by the Authority in respect of an application by a resident applicant referred to in sub-clause (ii) of this clause as it stood immediately before such date, such ruling shall be binding on the persons specified in section 245S;]

(b) “applicant” means any person who—

- (i) is a non-resident referred to in sub-clause (i) of clause (a); or
- (ii) is a resident referred to in sub-clause (ii) of clause (a); or
- (iii) is a resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify in this behalf; and
- (iv) makes an application under sub-section (1) of section 245Q;]

From a coherent reading of the amended section 245N, it can be gathered that the ruling can be obtained by an applicant who may be either non-resident or resident having transaction with non-resident in respect of any question of law or fact and in relation to a transaction undertaken or proposed to be undertaken by a non-resident or with a non-resident. However, the resident applicant has to limit the question to the tax liability of the non-resident arising out of such transaction.

A Public Sector Company can also apply to seek a ruling in advance in respect of issues relating to computation of total income which is pending before any income-tax authority or appellate tribunal or any question of law or fact relating to such computation of total income. The P.S.Us however, have to obtain the clearance from the C.O.D.⁶ before the application is admitted u/s 245R(2).

6. The C.O.D. or Committee on Disputes was constituted in December, 1991 pursuant to Supreme Court judgment in ONGC. (1992-(104)- CTR - 0031-SC) case.

(Central Government *vide* Notification No.11456, dated 3-8-2000 has specified public sector company as defined in clause (36A) of section 2 of the Income-tax Act being such class of persons under section 245N(b)(iii) of Chapter XIXB of the Act).

1.5 THE COMPOSITION OF THE AUTHORITY :

The advance ruling in India is rendered by an Authority constituted specifically for this purpose known as the Authority for Advance Rulings.⁷ It consists of a Chairman and two Members. The Chairman is a retired Judge of the Supreme Court⁸. One of the Members to be appointed is from the Indian Revenue Service (Income-tax) who is qualified to be a member of the CBDT, who may be referred to as the Revenue Member⁹. The other Member is an officer of the Indian Legal Service, who is qualified to be an Additional Secretary to the Government of India and may be referred to as the Law Member.¹⁰ The salaries and allowances payable to, and the terms and conditions of service of the Members have been prescribed by the Government of India.¹¹ The constitution of the Authority is such that it functions as an independent quasi-judicial body deemed to be a Civil Court for the purposes of section 195 of the Code of Criminal Procedure, 1973.

1.6 FUNCTIONS AS A WHOLE :

All the three Members of the Authority function as a body in disposing off the applications before them. However, section 245P makes it clear that no proceeding before the Authority, or the pronouncement of advance ruling by the Authority, shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the Constitution of the Authority.

7. Section 245-O(1) of the Act.

8. Section 245-O(2)(a).

9. Section 245-O(2)(b).

10. Section 245-O(2)(c).

11. Section 245-O(3). Terms & Conditions of Service of Chairman & Members notified *vide* Not. No.GSR-587(E), dated 15th July, 1994. (See Appendix-VI of this Handbook).

Under Rule 27 of the AAR Procedure Rules, 1996 the proceeding of the Authority has been laid down as below :-

27. (1) When one or both of the members of the Authority other than the Chairman is unable to discharge his functions owing to absence, illness or any other cause or in the event of occurrence of any vacancy or vacancies in the office of the members and the case cannot be adjourned for any reason, the Chairman alone or the Chairman and the remaining member may function as the Authority.

(2) Subject to the provisions of sub-rule (3), in case there is difference of opinion among the members hearing an application the opinion of the majority of members shall prevail and orders of the Authority shall be expressed in terms of the views of the majority but any member dissenting from the majority view may record his reasons separately.

(3) Where the Chairman and one other member hear a case under sub-rule (1) and are divided in their opinion, the opinion of the Chairman shall prevail.

1.7 POWERS OF THE AUTHORITY :

Section 245U deals with the powers of the Authority. Sub-section (1) provides that for the purpose of exercising its powers, the Authority shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) as are referred to in section 131 of the Income-tax Act, when trying a suit in respect of the following matters, namely :

- (a) discovery and inspection;
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) issuing commissions.

Under sub-section (2), the Authority shall be deemed to be a Civil Court for the purposes of section 195 of the Code of Criminal Procedure. Section 195 deals with 'Prosecution for Contempt of

lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence'. But it would not be deemed to be a Court for the purposes of Chapter XXVI of the Code of Criminal Procedure which deals with 'Provisions as to offences affecting the administration of justice'. Further, every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code. Section 193 deals with punishment for false evidence and the same is reproduced below :

"193 : Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

Section 228 of the Indian Penal Code deals with intentional insult or interruption to public servant sitting in judicial proceeding and the same is reproduced as below:

"228 : Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both"

Section 196 of the I.P.C. deals with 'using evidence known to be false' and is set-out as follows :

"196 : Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence."

Thus, the Authority would have all the powers of the Civil Court for the purposes of dealing with intentional insult, false evidence etc.

1.8 POWERS TO MAKE RULES :

Section 245V empowers the Authority to frame rules to regulate its own procedure in all matters arising out of the exercise of its powers under the Act. In accordance with the powers vested in the authority *vide* this section, the Authority for Advance Rulings (Procedure) Rules, 1996 have been promulgated and the same have been notified in the Gazette of India *vide* Notification No.298 dated 18th Sept., 1996. These Procedure Rules are called AAR (Procedure) Rules, 1996 and have been given in detail in Appendix-IV of this Handbook.



1.9 SECRETARIAT OF THE AUTHORITY :

Sub-section(4) of section 245-O of the Act empowers the Central Government to provide the Authority with such officers and staff as may be necessary for the efficient exercise of the powers of the Authority under the Act. The head of the establishment of the Authority is its Secretary, who is an officer of the rank of a Commissioner of Income-Tax ('CIT') assisted by two Directors or Deputy Secretaries of the rank of Additional or Joint Commissioners of Income-tax.¹² These officers look after the technical as well as administrative requirements of the Authority. Their powers and duties are set out in the Rules in details.¹³

The Act and the Procedure Rules also envisage the Authority being assisted by the jurisdictional/designated Commissioner and the authorized representatives of the applicants as well as of the

12. Rule 2(m) of the Procedure Rules (See Appendix-IV).

13. Rules 7, 8, 10 & 26 of the Procedure Rules (See Appendix-IV).

Commissioner after receipt of an application for seeking Advance Ruling from the Authority. The role of these functionaries is discussed later.¹⁴

1.10 LANGUAGE OF THE AUTHORITY :

Rule 3 of the Procedure Rules reads:

“Rule 3 : Language of the Authority : (1) The language of the Authority shall ordinarily be English:

Provided that the Authority may, at the request of the parties, permit the use of the Hindi in the proceedings before it to the extent it may consider appropriate and practical.

(2) Where any document is in a language other than English or Hindi, an English translation thereof should also be filed along therewith.

(3) The ruling of, and other orders passed by, the Authority may, at the discretion of the Authority, be in Hindi or English.”

Many of the documents such as incorporation certificates of companies, salary certificates of individuals etc. submitted by the non-residents may be in languages other than English or Hindi when they are issued in foreign countries. In such cases, the applicants are required to submit English translations of such documents also along with the original documents. Such translations should also be properly verified.

1.11 LOCATION & SITTINGS OF THE AUTHORITY :



Section 245-O(5) provides that the office of the Authority shall be located in Delhi. At present the Authority has its office on the 5th floor of the NDMC Building at Yashwant Place, Satya Marg, Chanakyapuri, New Delhi. However, the Procedure Rules

14. In Chapter-III of this Handbook relating to Procedure of the Authority.

permit the Authority to hold its sittings at any other place or places in India as may be authorized by the Chairman. In fixing the place of hearing, the exigencies of the Authority's business as well as the convenience of the parties to appear at the hearing are taken into account.¹⁵

1.12 DRESS REGULATIONS :

Rule 29 requires the authorized representative appearing before the Authority to be in the dress prescribed for the members of his profession by the competent professional body. Other persons appearing before the Authority should be properly dressed.



15. Rule 4 of the Procedure Rules (See Appendix-IV).



REQUISITES FOR OBTAINING ADVANCE RULING

2.1 WHO CAN SEEK ADVANCE RULING :

As per section 245N(b) of the IT Act, the advance ruling under the Income-tax Act could be sought by :

- (a) a non-resident.
- (b) resident having transactions with non-residents.
- (c) specified categories of residents :

(a) NON-RESIDENT APPLICANT

- I. A non-resident is defined u/s 2(30) of the IT Act as a person who is not a 'resident' and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of clause 6 of section 6.
- II. A resident has been defined u/s 2(42) of the IT Act as a person who is resident in India within the meaning of section 6.
- III. A person has been defined u/s 2(31) of the IT Act as including—
 - i. an individual
 - ii. a Hindu undivided family
 - iii. a company
 - iv. a firm



- v. an association of persons or a body of individuals, whether incorporated or not
- vi. a local authority, and
- vii. every artificial juridical person, not falling within any of the preceding sub-clauses.

CONCEPT OF RESIDENCE

The term “resident” has been defined in section 6 of the Act. According to the provisions of this section,

(1) **An individual** is a resident in any previous year if he has been in India during that year for 182 days or more. He will also be a resident if he is in India for 60 days or more in a year if he has also been in India for 365 days or more within the preceding four years.

However, a citizen of India or a person of Indian origin who comes to visit India during the year or an Indian citizen who leaves India during the year for employment outside India or as a member of the crew of an Indian ship will be resident only if the individual has been in India for 182 days in the previous year.¹⁶

(2) **A company** is resident in India, if it is an Indian company or the control and management of its affairs is situated wholly in India during that year.

(3) **A Hindu undivided family or an association of persons** will always be resident unless the management and control of their affairs is situated wholly outside India during that year.¹⁷

A person who is not ‘resident’ as per the provisions of section 6, is a ‘non-resident’ and can apply to the Authority for a Ruling.

The following illustrations will clarify the concept of resident in case of an ‘individual’ :

A. A person leaves India for the first time on 1st August, 1998 and remains out of India in the remaining part of the financial year. His period of stay in India in the previous year 1998-99, being less than 182 days, he is not as resident for that year.

16. Explanation to section 6(1).

17. See also notes to the back of Form No.34C.

B. A person leaves India in December, 1998 and continues to remain abroad in the remaining part of the financial year. His period of stay in India being more than 182 days, he will be a 'resident' in the previous year 1998-99.

C. A person leaves India in 1993. In the financial years 1993-94 to 1996-97 he visited India several times and the total period of stay during these four years was 400 days. During the financial year 1997-98, he came to India for total period of 180 days. Although his stay in India in the financial year 1997-98 is less than 182 days, he becomes a 'resident' by virtue of the fact that his stay in the preceding four years was more than 365 days and he was in India for more than 60 days in the year under consideration.

D. In the above example, if the person as a member of the crew of an Indian ship or a citizen of India or a person of Indian origin, he would not have become a 'resident' for the year 1997-98 since his period of stay in India in that year was less than 182 days.

Non-resident when : A question that generally arises is as to at what point of time the applicant must be a non-resident. It cannot



be the date of application because, conceptually, residence or non-residence for the purposes of Act has to be determined with reference to a previous year and not with reference to a particular date. It cannot be the financial year in which the application is made because it may not be possible in all cases to predict with reasonable accuracy whether the stay of the applicant in India during that financial year will exceed 182 days or not. Therefore, it is the residential status of the applicant in the earlier previous year i.e. the financial year immediately preceding the financial year in which the application is made that has to be considered for purposes of determining the maintainability of an application for advance

ruling.¹⁸ This interpretation would enable a non-resident investor who comes to India for business etc. to avail of the benefit of these provisions even after starting the business, who would have become resident by the time he realizes the need to file an application or receives the ruling.¹⁹

(b) RESIDENT APPLICANT HAVING TRANSACTIONS WITH NON-RESIDENTS

A resident can apply 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,

(c) SPECIFIED CATEGORY OF RESIDENT APPLICANTS

A resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify in this behalf may also apply to advance rulings after duly obtaining the permission of the COD. The Central Govt. specified public sector companies (as defined in section 2(36A) of the IT Act) as applicant, vide its Notification No. SO 725(E), dated 3-8-2000.

Based on the residential status of taxpayer and the place where the income is earned under the Income-tax Act, the income is included in the total income as under :

Residential Status	Nature of Income
1. Resident	All income which is received or is deemed to be received in India by or on behalf of such person ; or accrues or arises or is deemed to accrue or arise to him in India or accrues or arise to him outside India, during such year
2. Resident not ordinarily resident	All income which is received or is deemed to be received in India by or on behalf of such person ; or accrues or arises or is

18. Proviso to section 245R(2).

19. Monte Harris 1996-218 ITR 413 (AAR).

Residential Status	Nature of Income
3. Non-resident	deemed to accrue or arise to him in India or accrue or arise to him outside India, during such year, provided it is derived from a business controlled in or a profession set up in India. All income which is received or is deemed to be received in India by or on behalf of such person ; or accrues or arises or is deemed to accrue or arise to him in India during such year.

Since a resident is liable to pay tax in India on his world income it is possible that he may have to pay tax on the income earned on a foreign land in that country also, such situation leads to double taxation of the same income in India and again in the country where the income has been generated. To avoid such a situation, the Government of India has entered into agreements for avoidance of double taxation with different countries. In all, till 30th November, 2006, Indian Government has entered into DTAA with about 70 countries excluding limited agreements. A non-resident generally seeks an interpretation of income-tax statute vis-a-vis tax treaties in their petition filed before Authority for Advance Rulings.

2.2 AVAILABLE ONLY FOR INCOME-TAX :

The procedure of advance ruling is available only under the Income-tax Act, 1961. The facility has not been extended to other direct taxes levied by Parliament. Another Authority for Advance Ruling for the Indirect Taxes was established for the Indirect Taxes by the Finance Act, 1999.



2.3 MUST RELATE TO APPLICANT'S TRANSACTION :

The advance ruling is to be given on questions specified in relation to a transaction by the applicant. There are two aspects of this requirement. The first is the use of the words "in relation to". The question must relate to the applicant itself and not to any other person. Thus, where the question sought to be raised relates not to the applicant, which is a non-resident company, but to its resident Indian subsidiary the application is liable to be rejected²⁰. However, a foreign company can ask for a ruling on questions regarding its tax liability on the income derived by it from an Indian trust and as to whether the trust would be taxable under section 164 or section 161 on which would depend the assessment of the foreign company as a beneficiary²¹.

2.4 QUESTIONS ON WHICH RULING CAN BE SOUGHT :

- (a) Even though the word used in the definition is 'question', it is clear that the applicant can raise more than one question in one application. This has been made amply clear by Column No. 8 of the form of application for obtaining an advance ruling (Form No.34C).
- (b) Though the word "question" is unqualified, it is only proper to read it as a reference to questions, of law or fact, pertaining to the income-tax liability of the applicant *qua* the transaction undertaken or proposed to be undertaken by him.
- (c) The questions may be on points of law as well as on fact; therefore, mixed questions of law and fact can also be included in the application. The questions should be so drafted that each question is capable of a brief answer. This may need breaking-up of complex questions into two or more simple questions.
- (d) The questions should arise out of the statement of facts given with the application. No ruling will be given on a purely hypothetical question.²² No questions not specified in the

20. AAR 207 of 1994.

21. In application No.P10 of 1995 (1997- 224 ITR 473).

22. Application No.P8 of 1995 (1997-223 ITR 416). This is also clarified in the notes to application form.

application can be urged. Normally, a question is not allowed to be amended but in deserving cases the Authority may allow amendment of one or more questions.²³

- (e) Subject to the limitations referred to above the question may relate to any aspect of the applicant's liability including international aspects and aspects governed by double tax agreements. The questions may cover aspects of allied Laws that may have a leaning on tax liability such as the Law of Contracts, the Law of Trusts and the like, but the question must have a direct bearing with Indian Income-tax Act.

2.5 THREE TYPES OF QUESTIONS PRECLUDED :

Under section 245R of the Income Tax Act, certain restrictions have been imposed on the admissibility of application.

The Authority is bound to reject applications which raise three categories of questions.²⁴

A. Questions pending before other authorities :

Under clause (a) of the proviso to section 245R(2), the Authority cannot allow any application where the question raised in it is already pending in the applicant's case before any income-tax authority,²⁵ the Appellate Tribunal²⁶ or any court. This restriction raises a number of issues :



- (i) When is a 'question' said to be pending? Can a question be said to be pending where the assessment proceedings are pending but the particular question has not been raised therein. The mere pendency of assessment proceedings would not debar the applicant from approaching the Authority. For

23. Rule 12 of the Procedure Rules (See Appendix IV).

24. Proviso to section 245R(2).

25. AAR 229 of 1995.

26. Jagtar Singh Purewal, 1995, 213 ITR 512 (AAR).

instance, a return may have been filed by the applicant but he may not have raised in it the question on which he seeks advance ruling. Or again, he may have raised the contention but nevertheless paid tax thereon and the assessment may have been completed without accepting his claim. In a case where a notice under section 142(1) is issued for submission of an income-tax return by the



applicant, unless there is any indication in the notice or some other material to show that the issue of this notice was in such circumstances as to show that the questions posed before the Authority has already been agitated by the assessee before, or had already risen in the mind of, or discussed by, the Assessing Officer, it is difficult to say that the terms of clause (a) of the proviso to section 245R(2) are attracted. From the foregoing it is quite clear that the Authority would refuse to admit an application only if the question raised by the applicant is already pending before the income-tax authorities and not simply because assessment proceedings are pending in that case. It is also clear that for rejection of the application, the question should be pending consideration by that other authority.

- (ii) Again, a question cannot be said to be pending in the case of the applicant if the same has been raised before the income-tax authorities by some other person. For example, if some tax deductor raises a question before the income-tax authorities as to at what rate tax should be deducted in the case of another person and that question is pending, it would not preclude the other person from approaching the Authority to know as to at what rate tax should be deducted from its income.²⁷

27. Ericsson Telephone Corporation, 1997-224 ITR 203 (AAR).

- (iii) Another important issue relates to the point of time at which the question should not be already pending. Should it be the date on which the application to the Authority is filed or the date on which the Authority hears or disposes of the application. It would seem reasonable that the words 'already pending' should be interpreted to mean: 'already pending as on the date of application' and not with reference to any future date. Thus, if after making the application to the Authority, the applicant also files a return of income before the income-tax authorities and agitates the same question in the return, which was earlier raised before the Authority, the application cannot be rejected.

B. Market value of any property : The second prohibition in clause (b) is on questions relating to the determination of fair market value of any property, movable or immovable. This will keep out of the purview of the Authority questions as to valuation and, perhaps, such vital issues as transfer pricing. A similar restriction prevails in other countries as well.

C. Transactions designed for the avoidance of tax : Thirdly, the Authority would not allow any application if it relates to a transaction which is designed *prima facie* for the avoidance of income-tax²⁸. What can be said to be *prima facie* avoidance of income-tax? To determine whether a particular transaction is designed *prima facie* for avoidance of income-tax, it is not necessary to go into greater factual details. Clause (c) of the proviso to section 245R(2) refers only to the *prima facie* impression created in the mind of the Authority on the facts stated before it. Thus, in a case where two Mauritian subsidiaries of a foreign bank which was their sole shareholder claimed concessional tax rates under the Indo-Mauritius treaty on their Indian investments, it was held that the transaction was *prima facie* designed to avoid income-tax. No such concession would have been available to the bank had it directly invested the monies; the creation of the subsidiaries and funneling of investments through them, it was held, was for the avoidance of income-tax.²⁹

28. There is no reference to any other tax here.

29. Application No.P-9 of 1995 (1996-220 ITR 337).

2.6 APPLICATION FOR ADVANCE RULING:

An applicant desirous of obtaining an advance ruling should apply to the Authority in a prescribed form stating the question on which ruling is sought.³⁰ The application has to be made³¹ in quadruplicate in Form Nos:

- 34C³² - Applicable for a non-resident applicant
- 34D³³ - Applicable for a resident having transactions with a non-resident and
- 34E - Applicable for notified categories of residents (at present notified category include only public sector company)

The application is to be accompanied by an account payee demand draft for 2,500³⁴ Indian rupees drawn in favour of 'Authority for Advance Rulings' and made payable at New Delhi.

2.7 CONTENTS OF APPLICATION AND VERIFICATION :

Form Nos. 34C, 34D and 34E are simple application forms. Notes for guidance for filling up the application are also set out on the reverse of the forms. The main information which the applicant is required to furnish in the application is as follows:-

- (a) The question(s) relating to the transaction on which the advance ruling is required.³⁵
- (b) Details of the relevant facts having a bearing on the question, e.g. the nature of the business or profession, the date/likely date of the transaction, nature of transaction, etc.³⁶
- (c) The applicant's interpretation of law or facts in respect of the question on which the advance ruling has been sought.³⁷

30. Section 245Q(1).

31. In English or Hindi.

32. See Appendix III for the Forms.

33. Forms 34D & 34E were introduced vide CBDT notification dated 28-5-1999.

34. Section 245Q(2).

35. These may be set out in a separate Annexure, if need be.

36. Annexure I to the application form.

37. Annexure II to the application form.

- (d) If the applicant is assessed to tax in India or he is aware of the jurisdiction of his case, the address of the Commissioner of Income-tax and PAN/GIR number of the applicant, if any, may be given in the application form.
- (e) If questions of law or fact are pending before a tax authority, the details thereof need be submitted.

2.8 SIGNATURE AND VERIFICATION :

The signatures on the application and the annexures thereto are very important. Therefore, Rule 44E³⁸ requires that only proper person makes the signature. Under that rule, the application has to be signed and verified -

- (a) in the case of an individual, by himself;
- (b) in the case of Hindu undivided family (HUF), the karta thereof;
- (c) in the case of a Company, by its Managing Director or, where there is no Managing Director, by a Director thereof;
- (d) in the case of a firm, by the managing partner, or if there is no managing partner, by an adult partner;
- (e) in the case of an association of persons, by any member of the association or principal officer thereof; and
- (f) in the case of any other person, by that person or some person competent to act on his behalf.

In rare cases where for some totally unavoidable reasons the signature cannot be made by that person, Rule 44E of the Income-tax Rules provides a concession that some other person can sign the application. Thus in the case of a HUF, any adult member, in the case of a company, any

director and in the case of a firm, any adult partner can do this. In the case of an individual and company, any other person duly



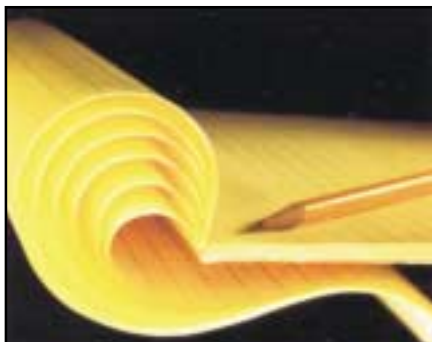
38. See Appendix II of this Handbook.

authorized though a valid power of attorney to be filed in original can also sign the application. In view of this, rule 10(2) of the Procedure Rules also require an affidavit of the person authorizing the attorney stating the unavoidable circumstances under which the signatures could not be made by the applicant himself.

2.9 CHECKLIST FOR SUBMISSION OF APPLICATION:

While submitting an application for seeking advance ruling, the following may be kept in view:

1. The application, in quadruplicate, should be presented in the prescribed form either by the applicant in person or by an authorised representative or may be sent by registered post to the Authority.
2. The application and the accompanying annexures may be neatly typed on one side of plain paper of A-4 size (210×297 mm) leaving sufficient margin on all the four sides and may be duly indexed and paged.
3. Only photocopies of the documents on A-4 size may be enclosed with the application except when a document cannot be legibly reduced to A-4 size on photocopier and, in the latter case, it should be folded to A-4 size.
4. All copies of the application along with annexures and documents may have loose sheets stapled on the left hand corner. These copies need not be in the form of paper books.
5. The applicant is entitled to represent his case before the Authority either personally or through an authorised representative. If the applicant desires to be represented by an authorised representative, a duly authenticated document



authorizing him to appear for the applicant should be enclosed in original.

2.10 PROCEDURE FOR FILING APPLICATION :

Rule 10 of the Procedure Rules requires the application (in quadruplicate in the prescribed form) to be either presented at the office of the Authority or sent by registered post addressed to the Secretary.³⁹ It shall be deemed to have been made on the date on which it is received in the office of the Authority. If the application is defective in any respect, it can be returned for rectification within a specified period. Such an application will be deemed to be made only when it is presented in the prescribed manner, after removal of the defect.⁴⁰

39. It can be faxed to the office of the Authority on Fax No.(0091)(11) 26113407.

40. Rule 10 of the Procedure Rules.



PROCEDURE OF THE AUTHORITY

3.1 PROCEDURE ON RECEIPT OF APPLICATION :

On receipt of an application, one copy is forwarded to the Commissioner having jurisdiction over the case of the applicant and, if considered necessary by the Authority, relevant records are also obtained from him.⁴¹ In cases where the applicants are not existing assesseees, sometimes it becomes difficult to determine as to which Commissioner would have jurisdiction over the case of the applicant. In such cases, the Central Board of Direct Taxes (CBDT) is requested under rule 13(1) of the Procedure Rules to designate a Commissioner⁴² in respect of an applicant within two weeks. The



designated Commissioner is also called upon to offer his comments on the contents of the application under rule 13(2) of the Procedure Rules, which are considered by the Authority along with the statement of facts and submissions of the applicant. Section 245R(2) of the I.T. Act provides that the Authority may, after examining the application and the records called for, either '**allow**' or '**reject**' the application.⁴³ The word 'allow' has been used as synonymously with 'admit'. In other words, after examining the records, the Authority either admits

41. Section 245R(1).

42. This is different from the Commissioner/Additional Commissioner/Deputy Commissioner in the office of the Authority who principally plays an administrative role and may assist the Authority, if needed.

43. Section 245R(2).

or rejects the application. In case the Authority has admitted the application, it is empowered to collect or receive additional material and it will examine all the material thus available to it at the time of hearing and pronouncing a ruling on the application.⁴⁴

3.2 WITHDRAWAL OF APPLICATION :

As per the provisions of sub-section (3) of section 245Q, an application can be withdrawn by the applicant within thirty days from the date of filing of a valid application complete in all respects according to the Act and Rules in the office of the Authority⁴⁵. However, this does



not preclude the applicant from withdrawing the application after the said period with the permission of the Authority⁴⁶.

3.3 REJECTION OF APPLICATION :

The proviso to section 245R(2) inserted by the Finance Act, 2000 w.e.f. 1-6-2000 requires the Authority to reject the application for advance ruling where :

- (i) the question raised in the application is already pending before any Income-tax Authority, Tribunal or any Court in regard to non-resident applicant, and to a resident applicant in relation to a transaction with a non-resident, however, this bar would be operative in the case of a resident applicant falling under section 245N(b)(iii) only when the issue is pending in a Court; or
- (ii) the question involves determination of fair market value of any property; or
- (iii) the question relates to a transaction or issue which is designed *prima facie* for avoidance of income-tax.

44. Section 245R(4) and section 245U.

45. Section 245Q(3).

46. AAR No.594 of 2002, Mr. Manfred Stoehr, Germany.

The Authority is required to give a reasonable opportunity of being heard to the applicant before rejecting the application⁴⁷. Wherever, the application for advance ruling is rejected, reasons for same should be stated in the order⁴⁸. Every order of the Authority must be sent by the Authority both to the applicant and to the Commissioner.

3.4 HEARING WHEN NECESSARY :

If the application is allowed and the applicant desires to be heard, an opportunity shall be provided to the applicant of being heard by the Authority.⁴⁹ However, the application may be allowed/rejected by the Authority even without hearing the applicant and the Commissioner where the opportunity of being heard is not availed.

Rule 13 of Procedure Rules, 1996 provides as follows :- “On receipt of an application, the AAR shall notify the applicant and the Commissioner of the date and place of hearing the application and forward a copy of the application to the Commissioner calling upon him to furnish the relevant records of the case along with his comments, if any, on the contents of the application and nominate his authorized representative if he desires to be heard.” The applicant and/or Commissioner can appear in person or through his authorized representative.⁵⁰ The authorized representative should file a document authorizing him to appear and also explain the nature of his authority.⁵¹ The authorisation should be signed by the applicant/ Commissioner as well as the authorized representatives. The hearings are not open to the public.⁵²

3.5 AUTHORISED REPRESENTATIVE :

An applicant’s authorised representative should fulfil the requirements spelt out in section 288(2) of the I.T. Act. The expression “authorised representative”, in relation to the Commissioner, means a person

47. Second proviso to section 245R(2).

48. Third proviso to section 245R(2).

49. Section 245R(5).

50. Section 245R(5), Rules 13(2) and 16 of the Procedure Rules.

51. Rule 14 of the Procedure Rules.

52. Rule 24 of the Procedure Rules.

authorised by him in writing to appear, plead and act for him in any proceedings before the Authority.⁵³

3.6 ISSUE AND SERVICE OF NOTICES :

When a hearing becomes necessary, and even otherwise, notices and communications may have to be served on the applicant and the Commissioner. The procedure therefor is set out in rules 8, 9 and 13 of the Procedure Rules.

3.7 PROCEDURE FOR HEARING :

Rule 16 of the Procedure Rules reads thus :

“Rule 16 : Hearing of application : (1) On the day fixed, or any other day to which the hearing may be adjourned, the Authority shall hear the applicant or his authorized representative in cases where it is proposed to reject the application or the applicant seeks/has sought an opportunity of being heard. The Authority may also hear the Commissioner or his authorized representative as well if it considers it necessary before pronouncing its advance ruling.

(2) In appropriate cases the Authority may call upon any person to supply such material as it may consider necessary to assist the Authority in arriving at a decision.

(3) The Authority may, on such conditions as the circumstances of the case may require, adjourn the hearing of the application.”

Under this rule read with sections 245R(4) and 245U, the Authority can, in appropriate cases, collect information from any other person. Thus, if the question raised by the applicant is regarding the date of encashment of a cheque, the Authority can seek necessary details from the concerned bank.⁵⁴ If, on the date fixed for hearing, there is a default of appearance of either party, the Authority can dispose off the application *ex parte*. This order may be, however, set aside and the application restored for fresh hearing if the defaulting

53. Rule 2(e) of the Procedure Rules.

54. Application No.P-2 : [1966-221 ITR 72].

party satisfies the Authority that there was sufficient cause for his non-appearance. This application must be filed within 15 days of the receipt of the *ex parte* order.⁵⁵

3.8 ADDITIONAL FACTS :

Rule 11 of the Procedure Rules reads thus

“Rule 11 : Submission of additional facts before the Authority : (1) The Authority may at its discretion permit or require the applicant to submit such additional facts as may be necessary to enable it to pronounce its advance ruling.

(2) Where in the course of the proceedings before the Authority, a fact is alleged which cannot be borne out by or is contrary to the record, it shall be stated clearly and concisely and supported by a duly sworn affidavit.”

Depending upon the circumstances of the case, an applicant can be allowed to modify or reframe the questions till the time of hearing. Similarly, additional facts or a change in the facts can be intimated by the



applicant (or the Commissioner) before the time of hearing. They can also be gathered by the Authority on its own⁵⁶. When additional facts are so intimated and the same are allowed by the Authority, the other party is confronted with these facts. When such facts are gathered by the Authority on its own, both the parties, namely the applicant and the Commissioner, are confronted with the same.

3.9 THE RULING AND ITS COMMUNICATION :

The ruling of the Authority on the questions posed by the applicant is pronounced in writing⁵⁷ and gives reasons for the conclusions arrived at by it. The ruling has to be pronounced within six months

55. Rule 17 of the Procedure Rules.

56. Section 245R(4).

57. Section 245R(6).

of the receipt of the application. However, it is made clear that the time limit of six months for pronouncing advance ruling is not mandatory and an advance ruling given after the expiry of six months is not invalid as being beyond the said period. Every ruling pronounced by the authority has to be signed by the Members who heard the application and bear the official seal of the Authority.⁵⁸ A copy of the advance ruling certified in the prescribed manner⁵⁹ will be sent to the applicant and to the Commissioner after such pronouncement.⁶⁰

3.10 OTHER PROCEEDINGS :

Apart from disposing of the application under section 245Q, the Authority will find it necessary to deal with applications of other types as well. Rule 5 of the Procedure Rules empowers the Authority to hear and determine other applications, petitions and representations of an interlocutory, incidental or ancillary nature found necessary for a complete and effective disposal of the main application. Some of these eventualities are covered by the following rules :

“Rule 6 : Power to remove difficulty : If any difficulty arises in giving effect to any order of the Authority, the Authority may, on its own motion or on an application made by the applicant or the Commissioner, remove the difficulty insofar as it is not inconsistent with the provisions of the Act.

Rule 15 : Continuation of proceedings after the death etc. of the applicant: Where the applicant dies or is wound up or dissolved or disrupted or amalgamated or succeeded to by any other person or otherwise comes to an end, the application shall not abate and may be permitted by the Authority, where it considers that the circumstances justify it, to be continued by the executor, administrator or other legal representative of the applicant or by the liquidator, receiver or assignee, as the case may be, on an application made in this behalf.

58. It is only the original of the Ruling that has to be signed by the Members. The copies sent are only to be certified by the Secretary. See Rule 26 of the Procedure Rules.

59. Rules 7(ix) and 21 of the Procedure Rules and Rule 44F of the Income-tax Rules (see Appendix).

60. Section 245R(7).

Rule 18 : Modification of the Order : Where the Authority finds *suo moto* 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 a 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.



Rule 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 moto* 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.

Rule 20 : Amendment of the Record : If at the stage of the proceedings before the Authority it appears that there is any factual or material error in the records the same shall be amended after hearing the applicant and the Commissioner.

Under rule 19, only those mistakes can be rectified which are apparent from record. The expression 'mistake apparent from the record' is the same as used in section 154 of the Income-tax Act. It is open to the Authority to examine whether there is a mistake apparent from record and if so, whether it could be rectified, having regard to the facts and circumstances of the case and the materials on record, already before it.⁶¹ The error may be either an error of fact or an error of law. Unlike the provisions of section 154 of the Act,

61. Instrumentarium Corporation 274 ITR 83 (AAR).

there is no time limit of four years for the rectification of rulings under this rule. However, the rectification can be made only till the time the ruling has been given effect to. In other words, the ruling can be rectified at any time before the Assessing Officer has passed the order giving effect to the ruling.

There are also two other eventualities outlined in sections 245S and 245T in which the Authority may have to pass orders after the disposal of an application under sections 245Q and 245R. These aspects are discussed in the succeeding chapter. The procedure to be followed in regard to these applications is the same as that for the principal application *mutatis mutandis* except that no fees will be chargeable for these applications.⁶²

3.11 INSPECTION AND COPIES :

Rules 21 and 22 provide for the procedure for inspection and obtaining copies of the orders and documents at the request of the applicant or the Commissioner. They read thus :

“Rule 21 : Fees for supply of additional certified copies :

(1) The Secretary may order grant of additional certified copies of documents or orders to the applicant or the Commissioner on a written request made by either of them.

(2) Copying fees for supply of additional certified copies to the applicant shall be charged at rupees three per page and such fees shall be paid in advance in cash.”

“Rule 22 : Inspection of records and fees thereof : (1) The applicant or the Commissioner or an authorised representative may be allowed to inspect the records of the case on making an application in writing to the Secretary provided that only those documents shall be allowed to be inspected which have been relied upon in the proceedings before the Authority.

(2) The inspection shall be allowed only in the presence of an officer of the Authority and the applicant may be permitted to make notes of inspection but not to take copies of any document.

62. Rule 28 of the Procedure Rules.

(3) Fees for inspecting records of the Authority shall be charged from the applicant as follows :

- (a) Rupees one hundred for the first hour or part thereof; and
 - (b) Rupees fifty for every additional hour or part thereof.
- (4) Fees for inspection shall be paid in advance, in cash."

3.12 EFFECT OF VACANCIES IN THE AUTHORITY :

Section 245P provides that no proceeding before or the pronouncement of advance ruling by the Authority shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the Constitution of the Authority.



3.13 TIME TAKEN BY THE AUTHORITY IN REJECTING AN APPLICATION OR PRONOUNCING AN ADVANCE RULING TO BE EXCLUDED FROM THE PERIOD OF LIMITATION FOR MAKING AN ASSESSMENT :

It has been provided by an amendment to section 153 of the Income-tax Act by the Finance Act, 2004, w.e.f. 1-10-2004 that the period commencing on the date on which the application for advance ruling is filed and ending on the date on which the order rejecting the application is received by the Commissioner shall be excluded for computing the period of limitation under section 153. Further, the period commencing on the date on which the application is filed for advance ruling and ending on the date on which the advance ruling pronounced by the authority is received by the Commissioner shall be excluded for computing the period of limitation under section 153. Even under section 153B similar provisions for exclusion of time limit have been incorporated, effective from 1-10-2004.



EFFECT OF RULINGS

4.1 BINDING ON BOTH PARTIES :

The ruling pronounced by the authority is binding on both parties before it. Section 245S(1) expresses the rule thus :

“245S: Applicability of Advance Ruling:

(1) The advance ruling pronounced by the Authority under section 245R 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.”

The effect of the ruling is, understandably, stated to be confined to the applicant who has sought it as well as the Commissioner and the income-tax authority subordinate to him having jurisdiction over the case and that too only in relation to transaction for which advance ruling was sought. It may, however, be stated that the Authority generally follows the ruling in other cases on materially similar facts and, most certainly in other cases raising the same question of law, if any, which it has decided. The rule here is different from the



position in other countries where either the taxpayer or the revenue or both are at liberty to accept the ruling or not.

4.2 NO CHANGE IN LAW OR FACTS:

As stated above, the ruling of the Authority is based on the statement of facts given by the applicant in relation to the transaction he has entered into or proposes to enter into. The provision of section 245S(2) reads as below:-

“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.”

The ruling will, therefore, have no binding effect on the tax authorities should they find that the facts pertaining to the transaction as put through actually differ, in material respects, from those on the basis of which the ruling has been obtained. So also, the ruling cannot be operative if there is any change of law in regard to the transaction in question.

Rule 18 of the Procedure Rules,⁶³ however, enables an applicant or Commissioner to approach the Authority to issue a modification of the ruling in the light of a change in facts or law on the basis of which the ruling was pronounced, but before the ruling is given effect to by the Assessing Officer.

4.3 PERSUASIVE NATURE OF RULING :

The advance ruling does not have the precedent value of a judgment of the High Court or the Supreme Court. However, even for persons other than the applicant and the respondent, the advance ruling would be of a persuasive nature.

4.4 FRAUD OR MISREPRESENTATION :

A situation in which the ruling cannot be sought to be given effect to is where it is obtained on the basis of a misstatement of the relevant facts or by fraud. Section 245T provides for this situation. It reads thus:

63. Referred to in Chapter-III earlier.

"245T : Advance ruling to be void in certain circumstances:

(1) Where the Authority finds, on a representation made to it by the Commissioner or otherwise, that an advance ruling pronounced by it under sub-section (6) of section 245R has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void *ab initio* and thereupon all the provisions of this Act shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.



(2) A copy of the order made under sub-section (1) shall be sent to the applicant and the Commissioner."

This is supplemented by rule 23 of the Procedure Rules which reads:

"23 : Declaration of advance rulings to be void in certain circumstances:

(1) Where a representation is made under section 245T of the Act to the authority by the Commissioner or otherwise that an advance ruling pronounced by it under sub-section (6) of section 245R has been obtained by the applicant by fraud or misrepresentation of facts, such representation shall be made in quadruplicate and shall be accompanied by a statement of facts incorporating the fraud or misrepresentation as also particulars of the evidence to substantiate the claim of fraud or misrepresentation of facts.

(2) On receipt of such representation a notice shall be issued to the applicant along with a copy of the representation for rebuttal and reasonable opportunity shall be allowed to the applicant and the Commissioner of being heard before passing an order under section 245T." The rule specifically enunciates the rule of natural justice which is implicit in the

section. It will be seen there is a difference between the nature of operation of sections 245S and 245T. In the former case the ruling is valid but is not given effect to because of the change in circumstances. In the latter, the ruling itself stands avoided and is to be treated as *non est*.”

4.5 DURATION OF THE RULING:

In some countries, the efficacy of an advance ruling is restricted to a number of years. In India, the binding effect of the ruling is related to the transaction and not to a number of years. The ruling would remain in force so long as the transaction continues and so long as there is no change in law or facts on the basis of which the ruling was pronounced. There is no limitation as to the number of assessment years for which it would continue to be applicable except where the law itself restricts the period of applicability.

4.6 MODIFICATION OF THE ORDER:

Save for the above two situations, the ruling has a binding effect. The procedure Rules confer powers on the Authority for modifying or correcting the records and ruling which have been referred to in Chapter-III of this Handbook.⁶⁴

64. Rules 18, 19 and 20 of the Procedure Rules.



CONCEPT OF ADVANCE RULINGS - A GLOBAL PERSPECTIVE

5.1 BRIEF BACKGROUND OF THE SCHEME OF ADVANCE RULINGS IN OTHER COUNTRIES:

The Advance Rulings system is in vogue in many countries, albeit with substantial variations. The International Bureau of Fiscal Documentation (IBFD) published the International Guide to Advance Rulings in 1997-2000, which contained articles by authors of various countries on Advance Rulings. In the 1999 IFA Congress a number of participating countries reported on their respective Advance Ruling systems. These articles in the IBFD guide and reports at the IFA Congress illustrate the commonalities as well as the variations in the Advance Rulings Systems the world over. The information compiled in the ensuing paragraph draw heavily from these two authoritative publications.



Advance Ruling is internationally recognized as **“A more or less binding statement from the revenue authorities upon the voluntary request of a private person, concerning the treatment and consequences of one or a series of contemplated future actions or transactions⁶⁵.”**

65. Prof. Maarten J. Ellis, General Report, IFA Congress 1999.

Some of the country specific characteristics of the Advance Ruling systems, such as their scope, structural set up, the authorities pronouncing the rulings, their binding character, confidentiality and questions on which rulings may and may not be sought, are outlined in this chapter.

Despite the fact that Advance Rulings facility serves similar purposes in all countries, there are significant differences in the procedure adopted in the various countries. Some countries have highly developed systems sanctioned by the statute, others have very informal, almost *ad hoc* procedure. Different countries may have very different “tax cultures” resulting in different administrative procedures thus making it difficult to exactly compare or generalize the ruling procedures around the world.

In most countries, tax authorities are generally willing to answer inquiries made by taxpayers even without a formalized ruling procedure whereas in some countries there is a advance statutory backed up procedure for pronouncing such rulings on questions of fact or law emanating from the queries of the taxpayers.

⁶⁶The 1967 report by the **Carter Commission** in Canada recommended the establishment of a formal ruling system:

- I. to foster and encourage self-assessment;
- II. to contribute to good relations between income-tax administrators and the general public;
- III. to give certainty to transactions;
- IV. to give more consistency in the application of law;
- V. to minimize controversy and litigation; and
- VI. to achieve a more coordinated system.

In India, the scheme was first recommended by the Wanchoo Committee in the mid seventies, and was finally introduced by the Finance Act, 1993

Under the scheme, as enacted, the power of giving advance rulings is conferred upon an independent high level adjudicatory body

66. General Report, IFA, 1999, Prof. Maartin.

headed by a retired judge of the Supreme Court. And it is ensured that the procedure is simple, inexpensive, expeditious and authoritative inasmuch as rulings are binding both on income-tax deptt. and the applicant. This authority is a quasi-judicial body having all such powers of the civil court as are exercisable under section 131 of the Income-tax Act to give its rulings in respect of specific questions of law or fact.

In Sweden, the advance tax ruling system is well developed and is in existence since 1951. Prior to 1991, it was working under the control of National Tax Committee or National Tax Board. After 1991, it has been made an independent quasi-judicial body known as 'Council of Advance Tax Rulings.' Sweden also has well established procedure to be followed. The advance tax ruling in Sweden is appealable both by the taxpayer as well as National Tax Board. Surprisingly, the ruling is binding upon the revenue officers but it is not binding upon the taxpayer. There are two sections of the Council of Advance Tax Rulings meant for direct taxes and indirect taxes. The advance tax rulings in Sweden are also binding upon the Courts.

In Netherlands, the system of advance rulings has been well defined, but it is administered through Tax Office itself and the taxpayer can seek a ruling from the regular/competent tax officer. The advance ruling pronounced in Netherlands are not appealable and they bind both the administration as well as taxpayer. The ruling can be obtained on any question of law or fact covered in the Income-Tax Act, Goods and Services Tax Act and other Federal taxation. Germany has also an established procedure to pronounce advance ruling. But the scope restricted only in respect of cases prescribed by law particularly after a tax investigation.

In Austria⁶⁷ the Federal Information Law (FIL) requires the tax authorities to give information (on questions of fact) and issue rulings (on questions of law) upon the request of the taxpayer.

The Department for International Tax Law of the Austrian Ministry of Finance offers an Express Answer Service (EAS), which provides fast tax rulings on contested international tax issues. The responses are

67. All data regarding Austria based on *International Guide to Advance Rulings*, IBFD, article by Gerald Gahleitner.

abstract in nature and are published as general guidelines for all taxpayers.

In Canada⁶⁸, in 1966, the Royal Commission on Taxation recommended the gradual introduction of a formal Advance Rulings procedure.

In 1970, in response to the recommendations of the Carter Report and in the context of the Government's proposals for tax law reform, the Department of National Revenue established a rulings division under its legislation branch to deal with ruling requests and a technical interpretations division, to deal with general questions of interpretation. The two provisions were subsequently merged into the Income Tax Rulings and Interpretations Directorate ("The Rulings Directorate"), within the policy and legislation branch at Revenue Canada's Head Office in Ottawa in 1970.

Advance Rulings and Technical Interpretations are administrative services provided by Revenue Canada (now C.R.A.). There is no legal requirement for C.R.A. to provide these private rulings.

The decision to apply for an Advance Ruling or Technical interpretation is entirely at the taxpayer's discretion. In theory, the decision to give a ruling of technical interpretation is entirely at the discretion of Revenue Canada because there is no legal obligation to give them. A taxpayer may withdraw a ruling request at any time. The Rulings Directorate will advise the taxpayer if an adverse ruling is to be issued, in which case the taxpayer is likely to withdraw the request. The Directorate is also likely to advise the taxpayer's local tax office of the circumstances of the ruling request.

In Mauritius⁶⁹, the ruling system was introduced in 1990s to give taxpayers the opportunity to seek clarification on interpretation of the Income-tax Act, 1995 with respect to a particular set of facts or circumstances.

68. All data regarding Canada based on International Guide to Advance Rulings, IBFD, article by Prof. Daniel Sandler.

69. All data regarding Mauritius based on International Guide to Advance Rulings, IBFD, article by Raffeeek Sham.

In United Kingdom⁷⁰, the main body of law on revenue rulings relates to the exercise by the Inland Revenue of its administrative functions. There are three categories of rulings namely :

- I. **U.K. Tax Code 1.1.1.** Statutory Clearances (Entitling a taxpayer to seek an advance clearance from the inland revenue on specific issues);
- II. **Public Rulings** (such as the department's guidance manuals on the interpretation and operation of the direct tax system); and particular industries; and
- III. **Private rulings** (which have no statutory basis. A taxpayer may require the Inland Revenue to provide a ruling on the interpretation or application of tax legislation to his circumstances. The Inland Revenue exercises its administrative power to respond to ruling requests).



In U.S.A.⁷¹, the Internal Revenue Service encompasses five types of rulings, namely,

- I. **"Revenue Ruling"** (An official published interpretation by IRS on how the law is applied to specific set of facts);
- II. **"Letter Ruling"** (a statement by IRS National Office to the taxpayer on application of law to his specific facts);
- III. **"Determination Letter"** (like a letter ruling, but by a local IRS Officer);
- IV. **"Information Letter"** (An advisory statement by IRS on established principle or interpretation of lax law);

70. All data regarding United Kingdom based on International Guide to Advance Rulings, IBFD, article by Malcolm Gammie Fti Att.

71. All data regarding USA based on International Guide to Advance Rulings, IBED, article by Charles S. Triplett and C. Cabell Chinnis, Jr.

- V. **“Technical Advice Memorandum”** (Guidance by National Office to local IRS offices on technical and procedural matters).

5.2 QUESTIONS ON WHICH ADVANCE RULING CAN BE SOUGHT:

In India, an Advance Ruling can be sought on any question of law or fact specified in the application in relation to a transaction which has been undertaken, or is proposed to be undertaken, by the non-resident applicant to the effect of tax implication of the non-resident.

In case of a Public Sector Undertaking, an issue of fact or law relating to computation of total income, pending before an Income-tax authority or the Appellate Tribunal can also be the subject matter of questions.

Some of the issues on which rulings can be asked for are:

- I. Conflicts between DTAA's and domestic legislation.
- II. Taxation of international partnerships
- III. Transfer of assets into and out of tax jurisdictions vis-à-vis Indian taxation.
- IV. Application of DTAA's entered into by India with other countries and their use in tax planning, e.g. determination of permanent establishment and residence on the basis of facts of a given case.
- V. Taxation of services, royalties, technical fees and income from supply of labour, equipments etc.
- VI. Taxation of investment funds, venture capital funds, offshore funds, financial instruments and derivatives, cross border leasing.
- VII. Problems relating to withholding of tax and accompanying penal provisions.

In Austria, the Ministry of Finance is willing to give rulings on the interpretation of important tax questions. A request for a ruling may include questions relating to the substantive as well as procedural

aspects of a law, both with regard to completed transactions and with regard to transactions, which have not yet been carried out.

In Canada, the Advance Rulings and Technical Interpretation Services apply only to the Federal Income Tax Act. An Advance Ruling may be requested only in respect of a proposed transaction that is seriously contemplated by the taxpayer.

Technical interpretations concern the interpretation of specific provisions of the Act but not in the context of a specific fact situation. An Advance Ruling is unavailable with respect to completed transactions.

In Mauritius, as per the Mauritius Income Tax Act, 1995, taxpayers may seek a ruling from the Commissioner of Income Tax on the practical effect of the Act in any particular case in respect of a completed or partially completed or even a future transaction which would give rise to income.

In United Kingdom, the Code 1.1.1. statutory clearances include issues relating to company reconstruction for *bona fide* commercial reasons, transaction in securities falling within specified circumstances and capital gain as taxable income vs capital receipts etc..

Public and Private rulings extend to the interpretation and application of the legislative provisions which are the subjects of those rulings, including a ruling under the majority of those listed under 1.1.1. which must normally be sought before the transaction is entered into. In relation to private rulings, if the transaction has proceeded, a taxpayer may still seek a post-transaction ruling prior to submitting a tax return.

In U.S.A., the current ruling practice of the IRS encompasses five types of rulings, as discussed in the previous paras.

Letter rulings may cover prospective transactions or completed transactions which have not yet been reported in a return. Determination letters, by contrast, involve only issues that are in returns that have already been filed. Unlike a letter ruling, a determination letter is issued only where a determination can be made on the basis of clearly established rules.

5.3 QUESTIONS PRECLUDED FROM ADVANCE RULINGS:

In India, ruling requests are not entertained if:

- I. The question is already pending in the case of the applicant before any Income Tax Authority, the Appellate Tribunal or any Court; except in the case of resident applicants as notified by the Central Govt., presently Public Sector Undertakings.
- II. Involves determination of fair market value of any property; or
- III. Relates to a transaction which is designed *prima facie* for avoidance of income-tax.

In Austria, some of the cases which are precluded from rulings are:-

- I. Exceptions to the obligation of the tax authorities to provide information under the FIL or if
- II. Requests relating to hypothetical tax questions,
- III. Violates the constitutional rights of Government secrecy, and confidentiality of personal data, and tax collection confidentiality, or
- IV. If the request is frivolous.

In Canada, ruling request is not entertained if it relates to:

- I. Hypothetical transactions or transactions that are completed or that are significantly advanced of it;
- II. Transaction is the same in character as a transaction completed by the applicant in a previous year and which is under discussion with the taxpayer, in dispute or under assessment or proposed assessment, but is not before the courts;
- III. A matter currently before the Courts, or, an appeal to a higher court is being considered;



- IV. The transaction is to be completed at some indefinite time, or the transaction is not being seriously contemplated;
- V. The ruling involves a determination of the fair market value of property;
- VI. The question concerns tax-related calculations;
- VII. The issue is primarily one of fact and the circumstances are such that all of the pertinent facts cannot be established at the time of the request;
- VIII. The ruling involves the interpretation of a foreign law.

In Mauritius, there is no prescribed list of issues or list of exclusions in respect of the ruling system. However, rulings are only given in respect of real cases based on specific facts as opposed to hypothetical questions.

In United Kingdom, no formal pre-transaction rulings are given, and in certain circumstances even on a post-transaction basis questions are not entertained such as hypothetical transactions, frivolous applications, tax avoidance transactions etc.

In USA, there are a large number of "No ruling areas". The National Office will not issue a ruling where the identical issue: Is being considered by a District Director; or by an Appeals Office; or has been considered but and the statutory period of limitations has not expired for assessment or for filing a claim for refund or credit of tax; or if it is pending in litigation in a case involving the taxpayer or a related taxpayer;

A District Director will not issue a determination letter, where on the same issue the taxpayer has directed an inquiry to the National Office; or it is pending in a case in litigation or before an Appeals Office;

The IRS either will also not rule or generally will not rule on transactions that lack a *bona fide* business purpose or have as their principle purpose the reduction of federal taxes; or involve hypothetical situations, or any matter in which the determination requested is primarily one of fact (e.g. market value of property), or a matter upon which a court decision adverse to the Government has been handed

down and the question of following the decision or litigating further has not been resolved;

In the area of Tax Treaties/International Law, the IRS also does not issue letter rulings on the effects of a tax treaty or the tax laws of a treaty country for purposes of the tax laws of the treaty country. In the international areas, the other significant issues on which the IRS will not rule include the following:

- I. I.R.C. 984: Whether a person that is a resident of a foreign country and derives income from the United States is entitled to benefits under the United States Income Tax Treaty with that foreign country pursuant to the limitation on benefits article;
- II. I.R.C. 954: foreign base company income. The effective rate of tax that a foreign country will impose on income.
- III. In the International Area, some significant subjects on which the IRS "Generally" will not rule include the following:
- IV. Transfers of property from the United States where the determination requires extensive factual inquiry;
- V. Whether a taxpayer is engaged in a trade or business within the United States, and whether income is efficiently connected with the conduct of a trade or business within the United States;
- VI. Whether a taxpayer has a permanent establishment in the United States for purposes of any United States Income Tax Treaty and whether income is attributable to permanent establishment in the United States;
- VII. Whether a recipient of payments is or has been a resident of a country for purposes of any United States Tax Treaty.

5.4 THE AUTHORITY FOR ADVANCE RULING :

In most of the instances the Advance Rulings are pronounced as an administrative measure, by the respective Finance Ministries or Revenue Departments. The three exceptions are Sweden, Denmark and India.

In Sweden⁷², the ruling procedure is like a court procedure. “The ruling process takes the form of an adversarial process between two opposing parties, the taxpayer and the National Tax Board, which is resolved by an independent authority, the Council for Advance Rulings. The ruling issued by this Council may be appealed, by either party, to the Supreme Administrative Court”.

In Denmark⁷³, though advance rulings are issued by a political Body, namely, the Board of Assessment, its rulings are binding on the tax administration. However, the taxpayer may appeal against the rulings to the National Tax Tribunal, and before the courts.

In India, unlike most other countries, the advance rulings are not given as an administrative measure but a quasi-judicial pronouncement by a high level statutory, independent authority, the Authority for Advance Rulings headed by a retired Judge of the Supreme Court, which is the apex judicial court in India.



In Austria, the matters concerning income and revenue taxes, fees and transaction taxes fall within the responsibility of the Local Finance Offices while the Ministry of Finance deals with the matters concerning Double taxation and tax treatment of foreign residents. The Minister of Finance is the highest administrative authority. If the Minister of Finance refuses to give a ruling, a direct complaint (charge) to the Administrative or Constitutional Supreme Court can be made.

In Canada, a request for an Advance Income Tax Ruling or a Technical Interpretation is made to the Income Tax Ruling and Interpretation Directorate. The procedures governing Advance Rulings and Technical Interpretations are part of the tax administration.

72. All data regarding Sweden based on International Guide to Advance Rulings, IBED, article by Nils C. Von Koch and Anna Olrog.

73. All data regarding Denmark based on International Guide to Advance Rulings, IBED, article by Bente Moll Pedersen.

There is no legal basis for the procedures and they are not referred to anywhere in the Income Tax Legislation. However, the importance and legitimacy of both Advance Rulings and Technical Interpretations have been well recognized by the Courts.

In Mauritius, an application for a ruling must be submitted to the Commissioner of Income Tax.

In United Kingdom, the statutory provisions listed in Code 1.1.1. provide the Authority for those procedures. The Authority for Public and Private Rulings derives from the Inland Revenue's Administrative Power. Legal effect is given to public and private rulings through the Administrative law machinery of the rules of the Supreme Court and the various decisions of the Courts on Judicial review matter.

In U.S.A., the IRS ruling system derives from I.R.C. 7805, which gives the Secretary of the Treasury the authority to prescribe "Any Ruling or Regulation" whenever appropriate in the interest of sound tax administration.

5.5 BINDING EFFECT AND PRECEDENCE VALUE :

In India, an advance ruling is binding in respect of the transaction(s) for which ruling has been sought. It is binding on the Commissioner and the Income Tax Authorities subordinate to him in respect of the applicant; and on the applicant who had sought it. However, it will not be binding if the facts of the case or law on the basis of which ruling has been pronounced have changed. Advance ruling becomes void where the Authority finds, on a representation made to it by the Commissioner or otherwise, that an advance ruling pronounced by it under sub-section (6) of section 245R has been obtained by the applicant by fraud or misrepresentation of facts. The Authority may, by order, declare such ruling to be void *ab initio*.

In Austria, the information given by the tax authorities in accordance with the Federal Information Law is not considered to be a legal decision and is not binding. A ruling is treated as a Governmental Act subject to Administrative law. However, they provide the taxpayer with certain degree of certainty. There are a few provisions in the individual tax laws which impose a duty to issue binding legal

information. The authorities may revoke a ruling if they discover an error, or a misinterpretation of facts.

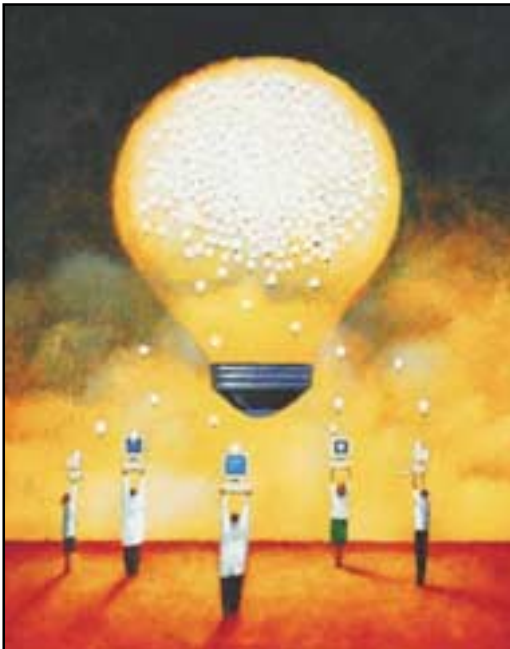
In Canada, neither an Advance Ruling nor a Technical Interpretation given by Revenue Canada (now CRA), has any legally binding effect on the taxpayer or on Revenue Canada.

As a matter of policy, however, CRA considers itself bound by its Advance Rulings, subject to any qualifications stated in the particular ruling and subject to the general limitations. CRA does not consider itself bound by technical interpretations. CRA will not consider itself bound in the event that there is a material omission or misrepresentation in the statement of relevant facts or proposed transactions contained in the ruling request.

An Advance Ruling ceases to be valid if it was based on an interpretation of the law and that interpretation of law is subsequently changed. CRA may revoke a ruling that covers a continuing action or a series of transactions or a transaction that has not, as yet, been completed, if it is subsequently determined that the ruling was issued

in error. A taxpayer is not bound by an Advance Ruling issued to the taxpayer. However, the taxpayer will likely be audited and reassessed in accordance with the adverse ruling. The time period for the validity of the ruling is stipulated in the ruling itself.

In contrast to Advance Rulings, Technical Interpretations have no binding effect on Revenue Canada.



In Mauritius, a ruling under section 159 of the Mauritius Income-tax Act, 1995 is binding upon the Commissioner. A ruling is not binding on the Commissioner if there is a material variance between the facts of the case or transactions and the details provided by the applicant or if a “cessation notice” has been published to nullify the binding effect of a previously published ruling. A published ruling may be revoked by the Commissioner at any time provided the Commissioner gives public notice to that effect in the Government Gazette.

The Act does not specifically provide that a ruling has binding effect on the applicant or other taxpayers. There is no prescribed time limit governing the validity of a ruling.

In United Kingdom, the rulings given under the provisions mentioned in Code 1.1.1. are statutory in nature and binding upon the Inland Revenue once given provided the transaction proceeds as described to the Inland Revenue, within any time limit that the Inland Revenue may specify; and the taxpayer has disclosed all facts and circumstances material to the Inland Revenue’s decision.

The Inland Revenue is bound by a Private Ruling once the taxpayer has acted in reliance upon it. In the normal case, only the taxpayer that applied for the Private Ruling may rely upon it.

The taxpayer is not bound to carry out the transaction described in the ruling application. In the case of an interpretative ruling the taxpayer is not bound to adopt the Inland Revenue’s interpretation in making his return.

The Inland Revenue may revoke a ruling under one of the statutory provisions only if the taxpayer in his application has failed to draw to the Inland Revenue’s attention all those facts and circumstances that are material to the Inland Revenue’s decision under those provisions.

The Inland Revenue is free to withdraw a private ruling at any time unless, prior to its notifying the taxpayer of that change of view, the taxpayer has acted in reliance upon the ruling. A private ruling may state the period during which it is valid. The ruling would however cease to be valid within its time limit if there is a change in the

legislation affecting the transaction or a relevant decision of the Court.

In USA, although Letter Rulings, Determination Letters and Technical Advice Memoranda are available to the public, they are not binding on the IRS as precedent and have no legal authority. The legal effect is limited to the particular transaction described in the request for ruling.

Technically, the IRS National Office has the power to disregard, modify, or revoke Letter Rulings. As a matter of policy, a letter ruling issued by the National Office generally is binding on a District Office in determining a taxpayer's liability.

The IRS revokes or modifies this type of ruling when it later determines that the ruling is in error or no longer reflects the IRS's position provided at the time of the revocation, the transaction has not yet been entered into in reliance on the ruling.

A Letter Ruling or determination letter binds the Government, not the taxpayer.

Precedence value :- With the exception of Finland and Hong Kong, in nearly all the countries that have formal rulings system, persons other than the applicant cannot derive any rights from them. In India too rulings do not have any precedence value unlike court judgments. However, since the rulings are pronounced by a high level and independent quasi-judicial authority, they have great persuasive value.

5.6 APPEALS :

India - Inasmuch as Advance Rulings pronounced by the Authority is binding on the Revenue as well as the Applicant, it has not been made appealable. However this does not preclude the parties from exercising their constitutional right to go in a writ before the High Court or file a Special Leave Petition before the Supreme Court of India.

Austria - Since a ruling does not have the attributes of administrative decision, one cannot appeal against a negative ruling. However, if the authority refuses to issue a ruling the taxpayer may appeal. If the

Ministry of Finance or the Provincial Tax Authorities refuse to rule, appeal can be made to the Administrator or Constitutional Court.

Canada - In Canada also since Advance Rulings as well as Technical Interpretations are provided as an administrative service, taxpayers have no right to appeal against an adverse ruling or technical interpretation. Interestingly unlike in Austria here taxpayer does not have a right to appeal even against a decision not to issue ruling or technical interpretation. However, since the ruling is not binding on a taxpayer, the taxpayer is free to appeal any reassessment based on the adverse ruling in the context of normal objection and appeal process.

Mauritius - There is no statutory right of appeal in respect of a ruling issued by the Commissioner u/s 159 of the Mauritius Income Tax Act which provides that taxpayer may seek a ruling from the Commissioner of Income Tax on the practical effect of the Act in any particular case. If the Commissioner fails to issue a ruling within the mandatory 30 days period or the ruling delivered appears to contravene the rules of natural justice, the applicant may seek the judicial review of the matter under the rules applying to the review of administrative matters.

When the Commissioner would issue an assessment based on the ruling delivered, the applicant would then have the opportunity to appeal against the Commissioner's assessment to the Tribunal. There is no right of appeal against a ruling issued by the Commissioner. A ruling is regarded as final and conclusive and cannot be disputed in any court or in any other proceedings.

United Kingdom - The Inland Revenue is bound through judicial review by its rulings without enquiry into the validity of the interpretation or application of the tax provisions in question. The appeal process for refusal of Statutory Rulings is different from the appeal against the refusal of Public and Private Rulings.

In case of statutory rulings, the taxpayer may ask Special Commissioner for review to decide whether a favourable ruling should be given. There is no further appeal beyond Special Commissioner.

If the Inland Revenue refused to respond to a request for a Private Ruling or respond adversely, the taxpayer has no remedy. The taxpayer may proceed with the transaction nevertheless in absence of a ruling or a favourable ruling. If the Inland Revenue disputes his view of the tax effects of the transactions, the taxpayer may exercise his ordinary appeal rights.

The usual remedy for a taxpayer if the Inland Revenue seeks to revoke a private ruling is to apply for judicial review under the Rules of the Supreme Court. The tribunals that ordinarily consider tax appeals have no jurisdiction to apply or enforce rulings. If the taxpayer's application for judicial review is unsuccessful, its ordinary appeal rights to the Commissioners are unaffected.

U.S.A. - There are two separate appeals process in the USA namely appeal against Letter Rulings and appeal against Determination letters.

There is no formal right to appeal the action of the Branch Chief after a letter ruling has been issued.

If a taxpayer wishes to contest an adverse determination letter he may request the District Director to reconsider the matter or to request the technical advice from the National



Office. The District Director may refuse to request technical advice from the National Office. In such a situation the taxpayer may appeal against this refusal to the Chief Appeals Office.

5.7 CONFIDENTIALITY AND PUBLICATION :

The perspective has been well summarized by the statement of Prof. Martin J Ellis that "At the one extreme, nothing is made available to such other persons except with the applicant's consent, on the

grounds that any taxpayer's affairs are secret and only the taxpayer may waive that right. On the other extreme, in countries such as the USA and Canada, all advance rulings are made available to the public in principle, albeit anonymised to protect the taxpayer's privacy."

India - The contents of the application are not disclosed to unauthorized persons. Only the applicant and the concerned Commissioner are permitted to attend the proceedings. Name of the applicant and documents filed in support of the application are kept confidential in the publication of the rulings.

Austria - Rulings issued by the Ministry of Finance are published in the tax journals. However, the rulings are kept abstract and the taxpayers right to privacy is protected.

Canada - Since 1996 all Advance Rulings have been provided to Commercial Tax publishers but in a heavily edited form. The purpose has been to protect the taxpayers privacy.

Mauritius - A ruling is published by the Commissioner in such manner as he thinks fit, in the Government Gazette except that the identity of the person to which it relates shall not be disclosed.

United Kingdom - Public Rulings are by nature public documents but statutory and Private Rulings are not published unless there is a general consent.

U.S.A. - Prior to publishing a Letter Ruling or Determination Letter, the IRS is required to send a notice of its intent to disclose the Letter Ruling or Determination Letter along with a copy of the version proposed to be open to public inspection. The taxpayer may protest the disclosure of certain information in the Letter Ruling or Determination Letter. The IRS will inform the taxpayer of its final administrative conclusion regarding the deletions to be made. In addition, the taxpayer may request a delay of public inspection of the Letter Ruling or Determination Letter.

A comparative table has been provided herein below covering the scheme of advance ruling in India and certain other countries :

	U.S.A.	FRANCE	NETHERLANDS	GERMANY	SWEDEN	INDIA
Definition of Advance Ruling						
A decision regarding the tax consequences of a proposed transaction, given by the competent authority binding upon that Authority	The decision must be in writing	The advance ruling should be in writing, although there is one case of non-written agreement	The decision must be in writing	Decision may be written or verbal	The decision must be in writing	The decision must be in writing and should give facts and reasons
Which Authority takes the decision?	IRS	Local department or central administration depending on the case.	Tax Inspector (Rotterdam)	Competent authority	Council for Advance Rulings	The Authority for Advance Rulings, a quasi judicial, independent statutory body.

	U.S.A.	FRANCE	NETHERLANDS	GERMANY	SWEDEN	INDIA
Does the taxpayer have the right to obtain an advance ruling?	No Advance rulings can only be given in certain fields.	Generally not.	No advance ruling can only be given in certain fields.	Only in cases prescribed by law particularly after a tax investigation.	Only in certain cases	Yes, except in three excluded cases: i) alternative remedy pursued; ii) question of valuation; iii) tax avoidance design.
Does the taxpayer have a right to appeal against an advance ruling or against refusal to provide one?	No.	None to date.	No.	Yes, in principle	Yes	No appeal is available, but constitutional remedies if any may be sought.

	U.S.A.	FRANCE	NETHERLANDS	GERMANY	SWEDEN	INDIA
Are the tax authorities bound by advance ruling on legal questions?	Yes, until it is revoked.	Yes. The ruling can change only with regard to future case.	Yes, for four years of imposition	Yes	Yes	Yes, to the transaction to which the ruling relates
Are the Authorities bound by an advance ruling if the facts change?	No.	No.	No.	No.	No.	Not if there is a change in the facts or the law on the basis of which the ruling was pronounced
Are advance ruling binding upon the courts?	Open question.	Yes, in France advance ruling have a legal base.	Not if it contradicts the law.	Yes	Yes	No
Can the tax-payer renounce the right to rely on an advance ruling?	Yes	Yes	Yes	Yes	Yes	No. Neither party can ignore the ruling.

	U.S.A.	FRANCE	NETHERLANDS	GERMANY	SWEDEN	INDIA
Fields in which advance rulings are given:						
(i) Taxation: income-tax inheritance tax, indirect taxes (especially VAT, customs duties)	Yes, in case of federal taxes.	Yes	Tax on company profits only.	Yes, except in certain cases (customs duties indirect taxes tax audit)	Yes, except tax on gifts and inheritance.	Only in matters relating to income-tax, Customs, Central Excise, Service Tax
(ii) Does an advance ruling concern only interpretation of law?	Yes	Based on facts	No, but advance ruling can be given in five specific cases.	No. They also concern the facts of the case, application of the law to the said facts and matters of judging the facts of the case and the law.	Yes	No. They also concern the facts of the case, application of the law to the said facts, and matters of judging the facts of the case and the law

	U.S.A.	FRANCE	NETHERLANDS	GERMANY	SWEDEN	INDIA
iii) Are Advance ruling limited to precise fields?	Yes	Yes	Yes, they cover only holding companies - finance companies - financing of fixed establishments - licence contract conducted by Dutch companies - application of cost price method for transfer pricing.	There are a number of exclusions. The main reason for refusal of an advance ruling is where the claimant is only attempting to gain a fiscal advantage.	No.	It can cover any area relating to income-tax liability whether pertaining to the statute or double taxation avoidance treaties.
iv) Can advance rulings cover matters of international taxation?	Yes, exclusion list specified	Not forbidden in law.				



INDIA'S DOUBLE TAXATION AVOIDANCE AGREEMENTS

The constitution of India has conferred the sovereign powers to levy taxes and to enforce collection and recovery thereto on the State under Article 265 by providing that no taxes shall be levied or collected except by authority of law. The power to levy taxes are conferred on the Union of India in respect of



matters falling within its domain in list 1m, Schedule VII of the Constitution. Power to levy taxes, conferred on the State Legislative fall within the scope of list 2 of Schedule VII. Entry (4) of list 1 under Schedule VII to the Constitution of India empowers the Union of India to enter into treaties and agreements with foreign countries and implement such treaties, agreements with foreign countries and implement such treaties, agreements and conventions and entry (10) of list 1, dealing with foreign affairs and entry (9) of list 1 of Schedule VII covers Diplomats, Councils and trade representation and, therefore, the tax treaties including those for Avoidance of Double Taxation fall within the exclusive domain of the Central Government in view of the Constitutional Authority conferred on it.

6.1 To remove any doubt and to avoid any confusion, the Income-tax Act, 1961 contains explicit statutory provisions to confer on the Central Government the power to enter into Agreements with foreign countries for Avoidance of Double Taxation as contained in Chapter IX of the IT Act. Section 90 of this Chapter reads as under :

⁷⁴[**Agreement with foreign countries.**

⁷⁵**90.** ⁷⁶[(1)] The Central Government may enter into an agreement with the Government of any country outside India—

⁷⁷[(a) for the granting of relief in respect of

- (i) income on which have been paid both income-tax under this Act and income-tax in that country; or
- (ii) income-tax chargeable under this Act and under the corresponding law in force in that country to promote mutual economic relations, trade and investment, or]
- (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or
- (c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or
- (d) for recovery of income-tax under this Act and under the corresponding law in force in that country,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.]

⁷⁸[(2) Where the Central Government has entered into an agreement with the Government of any country outside India under sub-

74. Substituted by the Finance Act, 1972, w.e.f. 1-4-1972.

75. For notified agreements for avoidance of double taxation, refer Taxmann's Direct Taxes Circulars and Taxmann's Yearly Tax Digest & Referencer.

See also Circular No.333, dated 2-4-1982, Circular No. 638, dated 28-10-1992, Circular No. 659, dated 8-9-1993, Circular No. 682, dated 30-3-1994, Circular No. 789, dated 13-4-2000, Circular No. 1/2003, dated 10-2-2003 and Instruction No. 3/2004, dated 19-3-2004.

For details, see Taxmann's Master Guide to Income-tax Act.

See relevant case laws, see Taxmann's Master Guide to Income-tax Act.

See also rules 44G & 44H & Form No. 34F.

76. Renumbered by the Finance (No.2) Act, 1991, w.r.e.f. 1-4-1972.

77. Substituted by the Finance Act, 2003, w.e.f. 1.4.2004. Prior to its substitution, clause (a) read as under :

"(a) for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country, or"

78. Inserted by the Finance (No.2) Act, 1991, w.r.e.f. 1-4-1972.

section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.]

⁷⁹[(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.]

⁸⁰[*Explanation.* For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company ⁸¹[***].]



Corresponding to section 90 of the IT Act, section 44A of the Wealth Tax Act, 1957 and section 44 of the Gift Tax Act, 1958, contains identical provisions to empower the Central Government to enter into agreements for avoidance of double taxation in regard to the levy of wealth tax or gift tax or for exchange of information for the prevention of evasion or avoidance etc. or for recovery of tax etc. *No gift tax is chargeable on gifts made on or after 1-10-1998.*

The Finance Act, 2006 has inserted a new section 90A⁸² in the IT Act w.e.f. 1-6-2006 under which the Central Government is empowered to adopt agreements between specified associations in India and the foreign country for providing Double Taxation Relief. According

79. Inserted by the Finance Act, 2003, w.e.f. 1-4-2004.

80. Inserted by the Finance Act, 2001, w.r.e.f. 1-4-1962.

81. Words “, where such foreign company has not made the prescribed arrangement for declaration and payment within India, of the dividends (including dividends on preference shares) payable out of its income in India” omitted by the Finance (No. 2) Act, 2004, w.r.e.f. 1-4-1962.

82. Inserted by Finance Act, 2006, w.e.f. 1-6-2006.

to the new provision, any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may by notification in the Official Gazette make such provisions as may be necessary for adopting and implementing such agreement for grant of relief from double taxation in respect of income on which tax has been paid both in India and in the specified territory outside India or income-tax chargeable under the Income-tax Act in India and under the corresponding law in force in that foreign country. It is further provided that in relation to any assessee to whom the said agreement applies, the provisions of the Income-tax Act shall apply to the extent they are more beneficial to that assessee. Notification under this provision are expected soon to indicate details of the requirements, conditions etc. to be fulfilled by the parties in India and abroad to avail the benefit of relief from double taxation under this provision⁸³.

Section 91 of the IT Act provides for unilateral relief in the certain cases and circumstances specified therein. According to it, if any person who is resident in India in any previous year proves that in respect of his income accruing or arising in the previous year outside India on which he has paid tax in a country with which there is no Double Taxation Avoidance Agreements, he shall be entitled to the deduction from the Indian Income-tax, a sum calculated on such doubly taxed income at the India rate of tax or the rate of tax of the said country whichever is lower. There are also specific provisions in respect of income earned in Pakistan by a resident in India.

There are specific instructions and also decided rulings/judgments⁸⁴ which made clear that in respect of matters which are governed both by the Income-tax Act and the Double Taxation Avoidance Agreements (DTAA), provisions of DTAA would prevail.

Whether there is no provision in the agreement for avoidance of double taxation on the subject-matter, falling within the purview of Income-tax Act, the relevant provisions of IT Act would apply. In another ruling⁸⁵, AAR has clarified and laid down that the specific

83. Extract from Explanatory Memorandum to Finance Act, 2006.

84. Ruling P-13 of AAR, 238 ITR 487; Circular Nos. 333 and 738 of CBDT.

85. Ruling P-11 of 1995 228 ITR 55.

provisions of DTAA will override the general provisions of Income-tax Act.

The relief of DTAA can be sought only when a person has paid the tax in one of the countries and the same income is liable to be taxed in another country. But if the person is not a tax resident in a Contracting State, then he cannot avail of the benefit of the DTAA⁸⁶.

Under the authority of law, the Central Government has so far entered into Agreements with more than 70 countries.



List of countries with which India has DTAA's are given on our website www.aar.gov.in

86. 276 ITR 306, Abdul Razak A. Meman.



FREQUENTLY ASKED QUESTIONS

The Advance rulings can be sought on any question of law or fact specified in the application in relation to a transaction which has been undertaken, or is proposed to be undertaken, by the non-resident applicant. Even a resident applicant may seek rulings regarding tax liability of a non-resident in relation to a transaction with the resident applicant. In case of a public sector undertaking advance rulings may be sought on an issue of fact or law relating to computation of total income, pending before an Income-tax Authority or the Appellate Tribunal.

Some of the issues on which rulings are frequently sought are :—



- I. Application of DTAA entered into by India and their use in tax planning, conflicts between DTAA and domestic tax legislation, e.g. determination of tax residence on the basis of facts of a particular case.
- II. Determination of permanent establishment, particularly in relation to cases involving Business Process Outsourcing (BPO), Liaison offices.
- III. Taxation problems in India of International partnerships.
- IV. Transfer of assets into and out of tax jurisdictions vis-à-vis Indian taxation.

- V. Taxation of services, royalties, technical fees and income from supply of labour, equipments etc.
- VI. Taxation of Foreign Investment Institutions, investment funds, venture capital funds, offshore funds, financial instruments and derivatives, cross-border leasing.
- VII. Taxation of e-commerce.
- VIII. Problems relating to withholding of tax.

On the scope of the AAR and related procedural issues the questions that often arise are:-

Q. What is the scheme of "Advance Rulings"?

Ans. With a view to avoiding disputes in respect of assessment of income-tax liability in the cases of non-residents, residents having transactions with non-residents, and public sector companies, a Scheme of Advance Ruling is currently in force in India. Chapter XIX-B of the Income-tax Act, 1961 contains statutory provisions in this behalf. The scheme enables the aforesaid categories of applicants to obtain, in advance, a binding ruling from the Authority for Advance Rulings on issues which may arise in determining their tax liabilities. Time consuming and expensive litigation can, thus be avoided.

Q. Who can apply for Advance Ruling?

Ans. Under section 245N of the Income-tax Act, 1961, a request for advance ruling can be made by an applicant. Section 245N(b) of the Income-tax Act lays down various categories of applicants.

- (i) **Non-resident applicants:** Under section 2(30) of the Income-tax Act a non-resident is one who is not a resident in India. Section 6 of the Income-tax Act, 1961 contains statutory provisions to determine the residential status of various tax entities, namely, individual, Hindu Undivided Family, a company, a firm, an association of persons, local authority and others.
- (ii) **Resident applicants:** A resident can also make an application for advance ruling in relation to a transaction undertaken or

proposed to be undertaken by him with a non-resident. According to section 2(42) of the Income-tax Act, a “resident” means a person who is resident in India within the meaning of section 6 of the Income-tax Act. As already mentioned above, section 6 of the Income-tax Act contains statutory provisions to determine the residential status of various tax entities.

- (iii) **Public sector companies:** As per notification issued by the Government of India, public sector companies have also been notified to be eligible for making application for seeking advance ruling under Chapter XIX-B of the Income-tax Act. According to section 2(36A) of the Income-tax Act, 1961 a “public sector company” means any corporation established by or under any Central, State, or Provincial Act or a Government Company as defined in section 617 of the Companies Act, 1956.

Q. What are the advantages in seeking advance rulings?

Ans. The principal advantages in seeking advance ruling are as under :

- (i) It helps the non-residents and residents having transactions with a non-resident, in planning their income-tax affairs well in advance. It also helps the public sector companies in resolving their disputes relating to computation of total income pending before any income-tax authority or the Income-tax Appellate Tribunal.
- (ii) It brings certainty in determination of income-tax liability.
- (iii) It helps avoid long-drawn and expensive litigation.

In short, the scheme of advance ruling provides inexpensive, expeditious and binding solutions to the income-tax problems.

(At times, the parties may exercise their constitutional right to file a writ or a SLP before the High Court or the Supreme Court.)

Q. Is advance ruling binding on the applicant and the Income-tax authorities?

Ans. The Advance ruling pronounced by the Authority is binding on the applicant in respect of the transaction in relation to which the

Ruling had been sought. The Ruling is also binding on the Commissioner, and the Income-tax authorities subordinate to him, in respect of the applicant who had sought it and the transaction in relation to which it had been sought. The advance ruling so pronounced continues to be binding unless there is a change in law or facts on the basis of which the advance ruling was pronounced.

Q. Can application of advance ruling be made at any time?

Ans. Non-resident applicants and resident applicants having transactions with a non-resident can apply for advance ruling even before taking up a transaction in India (i.e. proposed transaction) or in respect of a transaction, which has already been undertaken by them. In terms of section 245R(2) of the Income-tax Act, a non-resident as well as a resident having transactions with a non-resident cannot make an application for advance ruling in case the question raised by them is already pending before any income-tax authority or the Income-tax Appellate Tribunal or any Court. As a matter of caution, non-resident applicants as well as resident applicants having transaction with non-resident should apply for advance ruling before the submission of their return of income.



Public sector companies can seek advance ruling only when an issue relating to computation of their total income is pending before any income-tax authority or the Income-tax Appellate Tribunal. Thus, the pendency of an issue before any income-tax authority or the Income-tax Appellate Tribunal, on which advance ruling is sought is a pre-condition for public sector companies for making an application for advance ruling. Public sector companies are also precluded from seeking advance ruling on a question, which is already pending before any court.

Q. Can ruling already pronounced by the Authority for Advance Rulings be revoked?

Ans. Section 245T of the Income-tax Act, 1961 provides certain

circumstances under which advance ruling pronounced by the Authority for Advance Rulings becomes void. Under the said provisions, an advance ruling becomes void where the Authority finds, on a representation made to it by the Commissioner of Income-tax or otherwise, that an advance ruling pronounced by it has been obtained by the applicant by fraud or misrepresentation of facts. In such a situation all the provisions of the Income-tax Act shall apply as if such advance ruling had never been made. The applicants are advised to ensure that there is full and true disclosure of all material facts while seeking ruling from the Authority.

In terms of the provisions of sub-section (2) of section 245S of the Income-tax Act, the advance ruling shall cease to be binding where there is a change in law or facts on the basis of which the advance ruling was pronounced.

Q. Is there any period prescribed during which ruling remains valid? If no, can ruling already pronounced remain valid indefinitely?

Ans. The ruling is valid only in respect of the transaction/transactions, in relation to which the Ruling had been sought for the period of that transaction. The ruling remains valid and in force unless there is a change in law or facts of the basis of which the advance ruling had been pronounced.

Q. What is the procedure for making application for advance ruling?

Ans. Procedure for making application for advance ruling has been prescribed under the Authority for Advance Rulings (Procedure) Rules, 1996. An application for advance ruling should be made in the prescribed form duly signed by the applicant or a person duly authorized in accordance with the provisions of Rule 44E of the Income-tax Rules, 1962 as amended from time to time. Application should be made in quadruplicate and be accompanied by bank draft of Rs.2500 in favour of the Authority for Advance Rulings payable at Delhi.

Three different forms have been prescribed for different categories of applicants. While Form No. 34C has been prescribed for non-

resident applicants, Form No. 34D has been prescribed for residents having transactions with a non-resident and Form No. 34E for public sector companies.

Applications are required to be accompanied by two Annexures. While Annexure-I is a statement of the relevant facts having a bearing on the question(s) on which advance ruling is required, Annexure-II is a statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the question(s) on which advance ruling is required.

Application forms are incorporated in this Handbook, they are also available online on the website of AAR www.aar.gov.in

Application may be delivered either personally or sent through Registered Post at the following address :

**Authority for Advance Rulings
5th Floor, NDMC Building,
Yashwant Place, Satya Marg,
Chanakyapuri,
New Delhi-110021 (INDIA)**

Q. What is procedure for hearing of the application etc.?

Ans. Section 245R of the Income-tax Act, 1961 lays down the procedure required to be followed on receipt of the application. Under the said provision a copy of the application is forwarded to the jurisdictional Commissioner of Income-tax calling upon him to furnish the relevant records. The Authority may, after examining the application and the records called for, by order, either allow or reject the application. However, no application can be rejected unless an opportunity has been given to the applicant of being heard. Statutory provisions further require the reasons for rejection to be given by the Authority where the Authority decides to reject the application.

In case the Authority decides to proceed with the application, an opportunity of hearing is given both to the jurisdictional Commissioner of Income-tax as well as to the applicant. The applicant may himself attend before the Authority or may appoint an authorized representative to represent him before the Authority.

Q. Can an applicant challenge the ruling pronounced by the authority before any Court?

Ans. The advance ruling is binding on the applicant who had sought it and in respect of the transaction in relation to which it had been sought. Thus, the applicant cannot challenge the advance ruling pronounced by the Authority. However, the applicant can invoke, in appropriate cases, the writ jurisdiction of the High Courts in terms of Articles 226 and 227 of the Constitution. Similarly, extraordinary jurisdiction as conferred upon the Supreme Court of India under Article 136 of the Constitution of India can also be invoked in appropriate cases.

Q. How can the applicant be sure that his application is in order?

Ans. In order to ensure that the application is in order, the applicants are advised to check the following points before submitting the application to the Authority:

- (i) Whether application is in the prescribed form.
- (ii) Whether verification and the annexures/statements accompanying the application are duly signed by the applicant himself or a competent person [Rule 44E(2) of Income-tax Rules].
- (iii) Whether Power of Attorney is enclosed by the authorized signatory together with affidavit in terms of proviso to sub-rule (2) of rule 10 of the Authority for Advance Rulings (Procedure) Rules, 1996.
- (iv) Whether basis of claim for being a non-resident is properly documented, viz., details of stay of individual applicant in India duly supported by authenticated photocopy of passport; in case of non-resident company, authenticated copy of certificate of incorporation etc.



- (v) Whether the English translation of a document is enclosed, if the document is in any language other than Hindi or English.
- (vi) (a) Whether the questions framed by the applicant are based on actual or proposed transactions.
(b) Whether the questions are framed in such a manner that their reply can be given in affirmative ("Yes") or negative ("No").
- (vii) Whether the applicant has stated in detail the relevant facts and also disclosed the details/nature of transactions as also his business or profession.
- (viii) Whether the applicant has clearly stated his interpretation of law or facts in respect of questions on which ruling is sought.
- (ix) Whether complete details of assessment viz., details of Assessing Officer having jurisdiction over the applicant, Permanent Account Number (PAN) etc. have been stated wherever possible.
- (x) Whether, in case of resident having transaction with non-resident, basis of claim of the related person to be treated as a non-resident is spelt out.
- (xi) Whether, in case of public sector company, the questions of law or of fact arise out of computation of total income and whether such questions are pending before any income-tax authority or the Income-tax Appellate Tribunal.
- (xii) Whether copies of assessment order or appellate order (in case they have been passed) are enclosed along with application in the case of a Public Sector Company.

Q. Can the applicant withdraw the application once made?

Ans. In terms of sub-section (3) of section 245Q of the Income-tax Act, an applicant may withdraw the application within 30 days from the date of the application. However, traditionally, the Authority has been permitting withdrawal of application even thereafter in appropriate cases.⁸⁷

87. Manfred Stoehr (AAR 594 of 2002).

Q. What is the time generally taken by the authority to pronounce the ruling?

Ans. Sub-section (6) of section 245R of the Income-tax Act requires the Authority to pronounce its advance ruling in writing within six months of the receipt of the application. The aforesaid time limit is however, directory in nature. Efforts are made to pronounce the rulings as expeditiously as possible.

Q. Are the contents of the application or information revealed by the applicant during proceeding kept confidential?

Ans. The contents of the application or the information revealed by the applicant during the course of proceedings before the Authority are not revealed to outsider. Rule 24 and rule 25 of the Authority for Advance Rulings (Procedure) rules provide that the proceedings before the Authority are not open to the public and the order/ruling may be released for publication on such terms and conditions as the Chairman of the Authority may specify. As a matter of policy the Authority does not reveal business/trade secrets of applicants to outsiders. Even the names of the applicants or their associates are sometimes withheld while releasing the rulings for publication in various law journals. Thus, the Authority ensures due protection of business interest of the applicant.

Q. Can ruling be sought by the applicant in respect of Income-tax matters only or in respect of other matters such as Wealth Tax, Customs Duty, Excise Duty, Service Tax etc.?

Ans. Questions of law or facts pertaining to income-tax matters alone can be raised before the Authority for Advance rulings. Another Authority for Advance Rulings for the indirect taxes has been established by the Finance Act, 1999.

Q. Are the rulings pronounced by the Authority reported/published, if so where they can be seen?

Ans. Since February 2005, the AAR (IT) has introduced its website which contains all the rulings pronounced since February 2004. The website address is www.aar.gov.in.

Important rulings are released for publication in various tax law journals on such terms and conditions as may be prescribed by the

Chairman of the Authority. These rulings are generally published in Income-tax Reports (ITR), Current Tax Reporter (CTR), Taxman, Taxation, etc. Published rulings are also generally available in the form of CDs through various income-tax software providers such as Jurix, Tax-experts etc. There are many other websites of leading tax information services which report the rulings pronounced by the Authority.

Q. Can advance ruling be sought by a non-resident even after submitting his return of income?

Ans. According to first proviso to sub-section (2) of section 245R of the Income-tax Act, 1961, the Authority shall not allow the application



of a non-resident where the question raised in the application is one which is already pending before any income-tax authority or the Income-tax Appellate Tribunal. The Authority may, therefore, decide upon the maintainability of such applications after due appreciation of the facts and issues involved in each case. As a matter of caution, a non-resident should submit his application before submission of his return of income.

Q. Can a ruling be sought on an issue which is already sub-judice before the Income-tax Appellate Tribunal or Court in the applicant's own case or some other cases where identical issues are involved?

Ans. A non-resident applicant and a resident having transactions with a non-resident are precluded from seeking a ruling on such questions, which are already pending before any income-tax authority or the Income-tax Appellate Tribunal, in its own case.

A public sector company can, however, seek ruling on such questions, which are pending before any income-tax authority or the Income-tax Appellate Tribunal. In no case, a question, which is already

pending before any court can be raised in the application for advance ruling.

Q. Is the applicant bound to execute proposed transactions in relation to which he had obtained advance ruling?

Ans. There is nothing in the Income-tax Act, 1961 requiring such applicants to actually execute such transactions.

Q. If I submit my income-tax return after having submitted application for advance ruling, what would be the fate of my application?

Ans. According to section 245RR of the Income-tax Act, 1961, no income-tax authority or the Income-tax Appellate Tribunal shall proceed to decide any issue in respect of which an application has been made by a resident applicant. As far as non-resident applicants are concerned, the income-tax authorities can proceed with the return and to that extent the mere submission of application for advance ruling will not have any impact on the actions to be taken by the income-tax authorities on the return of income furnished by them. As a matter of caution, non-resident applicants should submit their application for advance ruling well before the submission of their return of income.



SOME IMPORTANT RULINGS OF THE AUTHORITY

This Chapter summarizes some of the important rulings pronounced since the constitution of AAR. These summaries only provide the gist of the Rulings pronounced by the Authority. They have been categorised here on the basis of the main issue dealt with in each case. For details of the Ruling, the website of the Authority, www.aar.gov.in may be referred to.

MAINTAINABILITY OF THE APPLICATION

MONTE HARRIS

[1996] 218 ITR 413/[1995] 82 TAXMAN 365

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- (i) For determining the maintainability of the application, residential status of the applicant in the financial year immediately preceding the financial year in which the application is made should be looked into.
 - (ii) The words “already pending” used in proviso (a) to section 245R(2) should be interpreted to mean ‘already pending as on the date of application’ and not with reference to any future date.

APPLICATION NO.P-9 OF 1995
[1996] 220 ITR 377/86 TAXMAN 252

The application was rejected under clause (c) of the 2nd proviso to section 245R of the IT Act, 1961 on the ground that the question raised therein related to a transaction which was designed *prima facie* for the avoidance of tax.

APPLICATION NO.P-10 OF 1995
[1997] 224 ITR 473/[1996] 89 TAXMAN 125

- (i) The application by a non-resident investment company, a beneficiary of an Indian contributory trust was held to be maintained as the assessment on the trust would only be in a representative capacity.
- (ii) Section 161 and not section 164(4) of the Act would come into operation as the trust deed set out expressly the manner in which shares of each of the beneficiaries would be ascertained. Income earned by the trust would accordingly be charged at the rates prescribed in Articles 10, 11, 13 & 22 of the DTAA in the hands of the applicant.
- (iii) The Indian company was not required to withhold tax in respect of the management fee or carried interest paid to the Investment Management Company, a resident in Mauritius, as long as no permanent establishment has been set up by the Mauritius company in India.

X LIMITED
[2005] 145 TAXMAN 573

Where applicant is a non-resident seeking ruling of Authority on transaction of loan which is between two Indian companies of which applicant is a holding company, it was held that determination of questions by Authority would not fall either under clause (i) or clause (ii) of section 245N(a) and, therefore, application filed by applicant was not maintainable.

MEENU SAHI MAMIK
[2006] 157 TAXMAN 189

Applicant, a resident of Netherlands, wants to establish a manufacturing unit for formulation of pharmaceuticals in partnership with her husband in State of Himachal Pradesh, India, to avail of tax holiday under section 80-IC in said State. 'B', a resident com-

pany, proposes to have their products manufactured at said proposed unit by outsourcing production but under their license and control for which 'B' would pay negotiated processing charges to firm. In addition to that, firm would also procure direct business. On facts stated, applicant had sought ruling of the Authority on question as to whether firm would be entitled to exemption under section 80-IC against direct business procured by it and in respect of processing charges received by firm from 'B' and secondly, whether profits and gains included in gross total income of 'B' derived from production outsourced to firm would be exempted under section 80-IC. It was held that since *de facto* control and management of affairs of firm would be with applicant's husband in India, firm could not be said to be non-resident entity and in such circumstances, application would not be maintainable. As with reference to questions of exemption under section 80-IC against direct business and in respect of processing charges, complete facts were not placed before the Authority, no ruling can be made in respect of said questions in a hypothetical manner. Since question regarding exemption under section 80-IC pertaining to profits and gains derived by 'B' from production outsourced to applicant's firm, and included in gross total income of 'B', being beyond scope and consideration of 'Advance Rulings' under Chapter XIX-B, same could not be entertained and, therefore, application was rejected.

MUSTAQ AHMED
[2007] 163 TAXMAN 638

In order to decide whether question raised in application is already pending before income-tax authority, as laid down in proviso to section 245R(2), crucial point of time to be taken into account is date on which application was filed before authority and it is on that date, that factual position as regards pendency of question has to be decided. Mere fact that exemption is claimed by assessee relying on a particular provision of Act cannot be construed to be a design for avoidance of income-tax, and in order to clamp bar under clause (iii) of proviso to section 245R(2) at threshold, there must be necessary facts pointing to *prima facie* inference of a

design to avoid tax by illegal or improper means. Where assessee/applicant made claim for relief/exemption under provisions of Act for first time in revised return subsequent to filing of application before AAR seeking advance ruling on issue of said claim for relief/exemption, it was held that no question or issue can be said to be pending before Assessing Officer on date of filing application before AAR, so as to reject application in terms of proviso to section 245R(2).

AIRPORTS AUTHORITY OF INDIA
[2008] 168 TAXMAN 158

Applicant sought advance ruling in respect of its obligation to deduct tax under section 195 in connection with contracts entered into by it with a foreign company 'R'. Revenue challenged maintainability of application contending that since identical question regarding R's liability to pay income-tax in India was pending before income-tax appellate authority, application for advance ruling is liable to be rejected *in limine*. Whether in case of appeal of 'R', its liability



under provisions of Act, read with DTAA, arose for consideration directly and that was sole question to be decided in appeal, but in instant application, question to be decided at instance of applicant was about tax deduction at source; issues may be inter-related, but question raised before Authority cannot be said to be identical nor can it be said to be very same question pending determination by income-tax appellate authority and, therefore, applicant's right to have recourse to advance ruling on point of tax deduction cannot be defeated by reason of pendency of an appeal filed by 'R' and, thus, application was maintainable and was not hit by embargo laid down in clause (i) of proviso to section 245R(2).

Applicant entered into two contracts of hardware repair and software maintenance with a foreign company 'R'. It sought advance

ruling in respect of its obligation to deduct tax under section 195 in connection with those contracts and rate at which tax was to be withheld in relation to payments made to 'R' on software maintenance contract. It was held that payments received by 'R' from applicant in connection with hardware repair contract were not liable to be taxed in India by virtue of article 7 of DTAA and, therefore, applicant was not liable to deduct tax on payments made in respect of such contract; and that payment received by 'R' in respect of software maintenance contract was liable to tax in India in its hands and tax was required to be withheld by applicant in relation to that payment at rate of 10 per cent.

A resident, who has entered into a transaction with a non-resident, is an applicant within meaning of section 245N(b) and such applicant can approach Authority for Advance Ruling to determine a question which has bearing on tax liability of its non-resident collaborator. A PSU, being a resident, can very well fall within sweep of clause (b)(ii) of section 245N if it has undertaken a transaction with a non-resident and it can seek a ruling in respect of tax liability of non-resident as per clause (a)(ii) of section 245N.

RESIDENT OF A CONTRACTING STATE

MR. CYRIL PEREIRA, UAE
[1999] 239 ITR 650/105 TAXMAN 273

It was held that since an individual is not taxable in UAE, the applicant cannot take advantage of the treaty to claim tax concessions under the DTAA.

ABDUL RAZAK A. MEMAN, MRS. AKILA A. MEMAN,
MR. MANISH BHATIA
[AAR/637, 638 & 640/2004]
[2005] 276 ITR 306/146 TAXMAN 115

This is one of the landmark rulings delivered by the Authority which has wide & far reaching implications. It was delivered in the

backdrop of the fact that rulings taking divergent views were delivered in the past on identical issue. The ruling refers to various commentaries by international experts on tax treaties, judgments available on the issue and the very basic documents leading to the culmination of the Treaty under reference.

A common ruling is given in these three applications as the facts and the questions involved were similar. The applicants in these applications are non-resident Indians residing in Abu Dhabi (UAE). They claimed to be treaty residents of UAE and non-residents in India. The applicants were in receipt of interest, dividend etc. from their investments in shares & debentures in Indian companies and also from NRI accounts maintained in India. Income is also earned from sale of shares yielding short/long term capital gains. To have a clear picture of their tax liability in India, advance ruling was sought on the questions: whether they are entitled for the benefits of the treaty, whether applicants were liable to capital gains tax in India on alienation of shares, in terms of Article 13(3) and Article 4 of the Treaty and whether dividend & interest income is liable to tax at the rates provided under Articles 10 & 11 respectively of the Treaty.

Apart from other issues the ruling thrashes out the main issue whether the applicant was qualified to be a “resident of a contracting state” within the meaning of Article 4(1) of the Double Taxation Avoidance Agreement between India and UAE so as to avail benefits of the Treaty. Sailing through the various commentaries on interpretation of tax treaties by international tax experts such as Prof. J.G. Starke, Prof. Roy Rohatagi, Mr. Michael Edwardes Ker, Prof. Vogel, Phillip Baker and the judgment of Hon’ble Supreme Court in the case of *Azadi Bachao Andolan* [2003] 263 ITR 706/132 Taxman 373 it was held that there was no confabulation as to the principles of interpretation of treaties and that the complexity was encountered in the application of the principles to the facts of each case.

Clause (e) of article 3 defines the term ‘person’ to include ‘natural’ as well as ‘artificial persons’ such individual, company or any other entity which is treated a taxable unit under the taxation laws in force in the respective contracting state. Under the taxation law in India,

an individual is a taxable unit unlike the UAE Tax Decree of 1969, which defines the term 'person' to mean a body corporate wherever established. It may be immediately noticed that an individual is excluded from the definition of "person" under the UAE Decree and therefore he is not a taxable unit. It was further observed that the pivotal term was 'resident' which was not defined in the treaty except for the limited purpose of articles 20 and 21. Though the title of



article 4 is 'resident', what is defined therein is the expression "resident of a contracting state". It was observed that article 4 of the Treaty was the germane provision whose true interpretation would set at rest the controversy in these applications. Para 1 of article 4 defines the expression 'resident of the contracting state' to mean as any person who under the law of that state is liable to tax therein by reason of domicile, residence, place of management, place of incorporation or any other criteria of similar nature. In the case of individual, the nexus for tax liability in the concerned state may appropriately be linked to either domicile or residence. Observing that article 4(1) of the treaty was verbatim the same as article 4(1) of OECD MC and after referring to the commentary on article 4 by Professor Vogel and Phillip Baker and the decision of Supreme Court of Canada in *Her Majesty the Queen v/s Crown Forest Industries Ltd., and the Govt., of United States of America*, the authority rejected the interpretation of the applicant that the term would also include an individual even though the tax liability might arise in future on the basis of any of the criteria such as domicile residence etc. It was held that para 4(1) of the Treaty postulates existence of tax liability in *praesenti* by reason of domicile residence etc., on the date of making the claim and not on a future date.

The reference quoted from the commentary of Professor Vogel by the applicant was held to be misplaced and misconceived and it was observed that the definition of the term "person" in the Treaty was

differently worded in contrast with article 3(1)(a) of OECD MC; the latter did not have the words “which is treated as taxable unit under the taxation laws in force in the contracting states” as part of the definition of the ‘person’. It was further observed that in using the expression ‘not liable to tax’ what Professor Vogel could have meant, was a person not liable to tax in his state of residence because he had no income or capital or because he was exempt from tax. His commentary could not be understood to refer to a person who was not liable to tax because the person was not a taxable unit under the domestic law of the state. It was also explained that expression “liable to tax in a state” meant that the net of the law of taxation of that state covered that person and not that he would pay the tax in that state.

The Authority rejected the submissions that the applicants must be treated as residents of UAE based on the residence certificates issued by the UAE authorities. Distinguishing the decision of the Hon’ble Supreme Court in the case of *Azadi Bachao Andolan* wherein the Revenue’s stand in granting residential status based on certificate issued by the Mauritius Authorities in view of Circular No.789 dated 13th April, 2000 was upheld, it was observed that the said circular was not in general and no such circular was issued by the board in regard to Indo-UAE Treaty, therefore the certificates filed in these applications couldn’t be treated on par with the certificate issued by Mauritius authorities. Further there was no provision in the treaty of the contracting states providing for issuance of a certificate of residence and, therefore, the certificate of residence issued by UAE authorities had no legal effect and couldn’t be accepted as proof of residence of the applicants in UAE for the purpose of the Treaty.

Authority observed before concluding that it was only due to the fortuitous circumstance of the anticipated codified tax law not coming into force in UAE that the individuals had to be denied the benefit of the Treaty.

It was ruled that the applicants were not entitled to claim the benefit of the provisions of the Treaty between India and UAE and were liable to capital gains tax in India on transfer of shares effected in

India. In terms of article 11 of the Treaty read with Circular No. 734, dated 24-1-96 issued by the CBDT, the income by way of interest was held to be liable to tax at the rates mentioned in the said circular.

GUTAL TRADING EST. DUBAI, UAE
[AAR634/2004] [2005] 278 ITR 643/149 TAXMAN 498

The applicant was based in Dubai (UAE) and according to the law of that country it was treated as an 'individual establishment'. It was owned by a national of Dubai who was a non-resident in India. The applicant, by virtue of a consolidated agreement entered into with the Principal Company/GVB, was an agent of GVB group of companies. The agreement specifically prohibited the applicant from concluding contracts on behalf of the Principle Company. The applicant, as per the agreement, would be entitled to a lump-sum commission at the pre-fixed rate only after the execution of orders from the territory assigned to the applicant. The applicant proposes to set up a liaison office (LO) in India to hold seminars, conferences for providing information about the products of the GVB and to receive trade queries from potential customers to be passed on to the Dubai office or directly to GVB. All the expenses for the maintenance of LO are to be met by the applicant and no income shall be earned/generated in India by LO.

The main issues before the Authority were: (i) whether looking to the nature of activities carried on by the LO, any income could be said to have accrued or deemed to have accrued or arisen in India; (ii) whether the applicant had any 'business connection' within the meaning of section 9 of the Act; and (iii) whether liaison office constituted permanent establishment under the treaty.

Delving through the salient features of "business connection" as summed up in the ruling given by this authority in the case of UAE Exchange Centre [268 ITR 9] and Sutron Corporation [268 ITR 156], and after referring to the activities of the liaison office, it was held that there did not exist an intimate relationship between the trading activity of the principal company/GVB and the activities of the liaison office in India and therefore it would not tantamount to having a "business connection" in India. In the light of recent ruling given in

the case of Abdul Razak A Mamon and others, it was further held that since there was no tax regime for individuals in UAE, they were not covered under the expression “resident of the contracting state” as contained in article 4(1) of the DTAA between India and UAE and therefore the applicant was not entitled to claim the benefit of the Treaty.

GENERAL ELECTRIC PENSION TRUST, USA
[AAR659/2005] [2006] 280 ITR 425/150 TAXMAN 545

The applicant, a trust established by General Electric Company and its participating affiliated companies, was a tax resident of USA. It was managed by a Board of Trustees which had delegated the sole and exclusive authority to manage the assets of the applicant to GE Asset Management (GEAM). The applicant was registered with the Securities and Exchange Board of India (SEBI) as a sub-account of GEAM under the SEBI (FII) Regulations, 1995. For investments held by it world-wide, it had appointed State Street Corporation as its global custodian which in turn appointed Deutsche Bank AG, Mumbai (the Bank) as its domestic Custodian in India in respect of Indian Investments of the applicant. The Bank rendered, in addition



to the applicant, similar services to other FIIs also. Investment decisions were taken by GEAM after analyzing the advice of portfolio managers appointed by it, who were located at Stamford USA. According to the applicant it neither had any employee, branch, office or place of business in India nor did it have any advisor or agent in India.

The questions before the Authority were: whether profits arising from sale of portfolio Investments in India would be treated as ‘business income’ and whether such business income would be taxable in India?

As regards the nature of income from sale of portfolio investments in India, Authority reiterated the principles laid down in this regard

in its earlier rulings in Fidelity Advisory Series -VIII, USA and Morgan Stanley & Co., and after analyzing the facts of the case, held that such profits would be treated as business income of the applicant. Another important issue which arose for the consideration of the Authority was whether the applicant could at all be treated as resident of a contracting state so as to avail the benefits of the Treaty. After analyzing the provisions of article 1 (General Scope) and article 4 (Residence), the Authority drew a distinction between the meaning of the phrase "liable to tax" used in para 1 of article 4 and the phrase "subject to tax" in proviso (b) to para 1 of article 4, and held that para 1 spoke of being in the tax net, whereas the proviso was concerned with actual taxation. In the light of the admitted facts that the applicant enjoyed exemption from payment of US tax under section 501C of USA Act, and in the absence of anything on record to show that the income from securities of Indian companies was taxed in USA in the hands of beneficiaries of the trust, it was held that the applicant was not a treaty resident of the contracting state - USA- and, therefore, it was not entitled to the benefits of the Treaty.

PERMANENT ESTABLISHMENT

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— **■■■■■** —
APPLICATION NO.P-8 OF 1995
[1997] 223 ITR 416/90 TAXMAN 47
— **■■■■■** —

It was held that the Indian subsidiary of the applicant was a PE of the applicant as there was an intimate and continuous relationship which constituted business connection for the purpose of section 9(1)(i) of the Act.

— **■■■■■** —
APPLICATION NO.P-11 OF 1995
[1997] 228 ITR 55/94 TAXMAN 152
— **■■■■■** —

The profits were held to be not taxable in India under Article 7 of DTAA as the project did not continue for more than 183 days though the activities of the applicant company were covered under article 5(3) of the DTAA between India and Singapore.

APPLICATION NO.P-24 OF 1995
[1999] 237 ITR 798/104 TAXMAN 377

It was held that the applicant did not have a PE in India since the contracts were executed in less than 183 days and, therefore, the income derived from execution of sub-contracts was not liable to tax in India.

TVM LTD. MAURITIUS
[1999] 237 ITR 230/102 TAXMAN 578

It was held that the business profits earned by the applicant through Indian company TVI were profits deemed to accrue or arise in India under section 9 of the IT Act, 1961 but the same were not taxable in India by virtue of article 7 of DTAA. The applicant would be entitled to the benefits of article 7 only if it is established that it is liable to pay tax in Mauritius.

The Indian company would constitute PE of the applicant, if it were shown that only the applicant had the power to conclude agreements for sale of air-time.

UAE EXCHANGE CENTRE LLC, UAE
[AAR/608/2003] [2004] 268 ITR 09/139 TAXMAN 82

The applicant, a limited liability company, was incorporated in UAE. It was engaged in offering remittance services for transferring amounts from UAE to various places in India. The applicant was granted license by the Reserve Bank of India for the purpose of setting up liaison office in India. The entire expenses of liaison office in India were met exclusively out of funds received from UAE through normal banking channels. The liaison office undertook no activity of trading, commercial or industrial nature and no fee was charged to or received from the clients in India by liaison office for the services rendered by it.

The Authority observed that Explanation 2 to section 9(1) of the IT Act, 1961, which was inserted w.e.f. 1-4-2004, contained an

inclusive definition of the term 'Business Connection' and for a proper connotation of the term it would be useful to refer to the exposition by the courts in various decisions. After referring to various judgments in this regard, the Authority laid down essential features of "Business connection". The Authority segregated the activities of the liaison office into two categories: (i) where the liaison office attended to the complaints of the clients in cases when remittances were sent directly to the banks in India from UAE; and (ii) where the liaison office downloaded the information from the internet, printed cheques/drafts in the name of the beneficiaries in India and sent them to the respective places in India. It was held with regard to (ii) above, that there existed a real relation between the business carried out by the applicant for which it received commission in UAE, and the activities of the liaison office. The activities at (ii) therefore, could not be said to be of auxiliary character. Authority ruled that the liaison office of the applicant for the purposes of mode of remittance mentioned at (ii) would constitute "Permanent Establishment" within the meaning of the expression in the DTAA and such profits which were attributable to the permanent establishment would be taxable in India.

SUTRON CORPORATION

[AAR/603/2002] [2004] 268 ITR 156/138 TAXMAN 87, 07 ITLR 185

The applicant a non-resident company, in response to the tenders floated by Government of Andhra Pradesh, India (GOAP) for installation of remote stations, submitted proposals prepared and signed in USA. It was awarded contract for packages 2 and 3. Through its authorized country manager at Hyderabad Shri Naresh Goel, the applicant entered into 2 contracts with GOAP, first on 14-6-2002 for supply, installation and commissioning of gauging equipment and ancillary services termed as package 3 and the second on 25-6-2002 for supply and commissioning of Satellite Telemetry associated systems and ancillary services termed as package 2. MOU was executed between the applicant & M/s Arraycom (India) Ltd (Arraycom) for supply of all local material & services and for giving warranty services for 2 years and AMC for 4

years for which the Arraycom would recover the cost from the applicant.

The main issues which came up for the consideration of the Authority were whether any income/profit accrued or deemed to have been accrued to the applicant in India from the sale of machinery/equipment and providing of services under the contracts with GOAP and the applicant had any PE in India.

After referring to the provisions of section 9(1)(i) of the Act and going through the judgments of the Supreme Court given in *R.D. Agarwal & Co.* ([1965] 56 ITR 20) and *Anglo-French Textile Co. Ltd.* ([1953] 23 ITR 101), the Authority summed up essential features of 'business connection'. Considering that Mr.

Naresh Goel Country Manager of the applicant was getting salary and perks and in the absence of any material to show that he was an agent of independence status, the Authority concluded that he was a paid agent of the applicant. The address of Shri Goel was held to be the place from which the business of the applicant was partly carried out in India and, therefore, the applicant had PE in India. The plea of the applicant that it along with Arraycom gave joint bid for two independent activities, the



applicant for supply of equipment, and the latter for providing local services, for which the applicant got paid in US \$ and Arraycom in Indian rupees in respect of their activities, was rejected. Considering the facts: that the agreements for supply of equipments under packages 2 & 3 were concluded by the GOAP in the name of the applicant which was duly approved by the World Bank, that the applicant was asked to open an account to receive the Indian currency payment whenever due, it followed that the applicant alone was entitled to receive payments both for sale and supply of equipments as well as for providing services and it was only due to internal arrangement that Arraycom would receive part of

consideration with regard to division of work between them. It was, thus, ruled that the income would be deemed to accrue or arise to the applicant in India and the applicant had a permanent establishment in India as defined under the Treaty with the USA.

ABC LTD., UK
(AAR 656 & 657) [2006] 152 TAXMAN 593

The applicant, a non-resident company, incorporated in UK, is a subsidiary of A Ltd. An Indian Company, B Ltd is a 100% subsidiary of C Ltd, a company incorporated in Caymen Islands. A Ltd holds 10% of the shares of C Ltd. The balance 90% shares of C Ltd are held by investors and employees of C Ltd and B Ltd. D Ltd (parent of A Ltd), a US corporation, is leading seller of Business Information Reports (BIRs). BIR provides information about a company on various aspects like its line of business, location, financial condition, management experience, pendencies of any suits/liens etc. Each associate of D Group compiles information in respect of companies functioning in its country in the standardized Group format which is copied electronically on the server of the associate company and is mirrored on the central data base server in US. The US server farm is owned and operated by D Ltd. B Ltd., is also engaged in the business of compiling and selling BIRs. Whenever an Indian customer places an order for a BIR of a company situated in UK, B Ltd would access master server of ABC Ltd through G Ltd.(i.e; the regional server), situated in Country E (referred to as E Ltd.) which would allow access to the selected country (UK in this case) and on locating the required BIR, B Ltd. would download, print and deliver a copy thereof to the customer. B Ltd is under an obligation not to take additional copies or reproduce the BIR in any manner. A copyright in BIR would neither be licensed nor assigned to either B Ltd or the customer. B Ltd is free to determine the price on 'principle-to-principle' basis and the price at which the BIR is sold by the applicant is its average domestic price.

Amongst others, the issues before the Authority were whether the payments made by B Ltd. for electronic purchase of BIR would be treated as part of applicant's business profits falling under Article 7

of the Treaty and whether the applicant has PE in India within the meaning of Article 5 of the Treaty.

Relying on its ruling in *Z Ltd.* [[2005] 272 ITR 99/142 Taxman 284], it was thus held that B Ltd cannot be said to be the PE of the applicant.

With regard to the nature of payment, the Authority ruled that it could not be characterized as royalty/fee for technical services under Article 13 of the treaty as (i) it was not a case of paying consideration for the use of a right to use any copyright of literary, artistic work or any patent/trademark (ii) BIR being collection of factual information in a standardized format which is accessible by any subscriber on payment of requisite price (iii) the copyright in BIR is neither licensed nor assigned either to B Ltd. or the Indian customer. Thus, the payments made by B Ltd. to the applicant, were held to be in the nature of business profits under Article 7. Further, in the absence of any PE in India, the applicant would not be taxable in India in respect of the business profits and consequently B Ltd is not required to withhold any tax under section 195 of the IT Act, 1961.

AGENCY PERMANENT ESTABLISHMENT

A COURIER COMPANY, USA (UNREPORTED)

- (i) The objection on the maintainability of the application was overruled holding that the issue relating to tax deduction at source was not raised by the applicant but by the Indian company before the IT Authorities and not the applicant and, therefore, it was not covered by clause (a) to the proviso to section 245R(2).
- (ii) It was held that the business profits of the American Courier company which had entered into a service agreement with an Indian courier company would be taxable in India only if it had a PE in India. The Indian company was held to be an agent of independent status as it was not devoted wholly to the American company and the latter had no control over the management of Indian company.

FIDELITY ADVISOR SERIES, USA VIII
[AAR566/2002] [2004] 271 ITR 001/[2005] 142 TAXMAN 111

The applicant was a tax resident trust of USA and a non-resident in India. The trust was set up with the object of providing investors a continuous source of managed investments in securities. It was registered with Securities Exchange Board of India (SEBI) as a sub-account of Fidelity Management and Research Company - a Foreign Institutional Investor under the SEBI (FII) Regulations, 1995. As per Regulation 16(1) of the SEBI (FII) Regulations, 1995, the applicant appointed M/s Brown Bros. Harriman (Luxembourg) SA as its global custodian which in turn appointed M/s Standard Chartered Bank (SCB) as its domestic custodian. The SCB performed services in its normal course of business for the applicant as well as for other FIIs in India. The applicant did not have any branch office, advisor or agent in India.

The main issues before the Authority were: (i) whether, on the facts and in the circumstances of the case, gains arising from the sale of portfolio investments in India would be treated



as applicant's business income and hence be covered by the provisions of article 7 of the DTAA between India and USA; and (ii) whether applicant had any permanent establishment in India in terms of article 5 of the treaty.

In regard to reframing of a question the Hon'ble authority observed that provisions relating to advance ruling were intended to provide a facility and, if the applicant intended to confine a question to only some of the items mentioned therein and give up the other items, he might be permitted to do so as long as the modified question did not change the very complexion of the original question. Accordingly, the applicant was permitted to reframe the question.

The Authority observed that whether a receipt was a revenue or a capital receipt or whether the income from sale of shares was capital gains or business income was a mixed question of law and fact and had to be decided on facts and circumstances of each case.

After discussing a series of decisions cited before it the Authority enumerated following principles:-

- “(i) where a company purchases and sells shares, it must be shown that they were held as stock in trade and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the nature of transaction;*
- (ii) substantial nature of transactions, manner of maintaining books of account, magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions;*
- (iii) ordinarily purchase and sale of shares with the motive of earning a profit, would result in the transaction being in the nature of trade/an adventure in the nature of trade; but where the object of the investment in shares of a company is to derive income by way of dividend etc. then the profits accruing by change in such investment (by sale of shares) will yield capital gain and not revenue receipt”.*

Having regard to the documents such as Custodian Agreement with the global custodian, object clause in the declaration of the Trust and the enormity and frequency of the purchases & sales, the authority concluded as a fact that the applicant held the shares and securities as business assets and the profits from the purchases and the sales of the shares were in the nature of ‘business income’ which could be taxed only if the applicant had a PE in India under the Treaty. It was further held that though there was no dispute that the domestic custodian was an agent of the applicant in India, however, having regard to the fact that it was providing custodial services to many FII's and domestic mutual funds, the aspects which were not denied by the revenue, the SCB was an agent of an independent

status. It was, thus, ruled that the applicant had no permanent establishment in India in terms of article 5 of the Treaty.

XYZ & CO. LTD.
(AAR/542/2001) [2005] 274 ITR 501/142 TAXMAN 71

The applicant, an Indian company, was formed as a joint venture between an American company and another Indian company holding 60% and 40% equity respectively. The Indian JV partner was engaged in the business of sales agent for international and domestic airline companies in India. All these and some other companies were members of an international group engaged in international transportation services which used common international group logo. The applicant entered into an agreement with the American company in regard to the international transportation services (Transportation Agreement) as per which the applicant was to provide services for transportation of packages in India and the American company would provide services throughout the world in respect of out-bound consignments. The applicant would make payment to the American company for the services rendered in respect of out-bound consignments and the latter would pay to the applicant for services rendered in respect of in-bound consignments. The applicant and the American company worked on principle-to-principle basis. The American company did not own or otherwise operate through any business premises in India.

The issue before the Authority was whether income arising to the American company from transactions entered into as per the agreement with the applicant would be taxable in India having regard to the provisions of the DTAA between India and USA.

Referring to the Transportation Agreement wherein the applicant was termed as 'an independent contractor' and it was specifically provided that the said agreement would not constitute a partnership between the parties and neither of the parties had any authority to bind or to contract in the name of the other, the Authority observed that such terms of agreement could not be determinative as to whether a person was an agent acting for or on behalf of the other

party, which had to be decided on a true interpretation of the agreement as a whole in the light of the circumstances of the case. Having regard to the facts: (i) that in the case of in-bound consignments only specified amounts were paid to the applicant and the balance remained with the American company, and that the same position did not prevail in the case of out-bound consignments where the American company paid to the Indian company for its services such as booking and collecting parcels and sending to airlines from where the American company collected and delivered to the consignees in foreign countries, (ii) that the term 'compensation' was outlined in the agreement in the widest possible terms so as to include not only charges for services of the applicant but also compensation of the employees, their salaries and other benefits, maintenance and repairs expenses of the equipment of the applicant and insurance expenses etc. incurred by it, the Authority held the view that the business operations of the applicant and American company were interconnected and the business activities carried out by it could not be said to be that of the applicant alone but were for and on behalf of the American company as well. It was, therefore, concluded that the requirement of the *Explanation (1)(a)* to section 9(1) (i) of the Act, viz. there must exist business connection (of American company) in India, was satisfied.



As the applicant was held to be an agent acting for or on behalf of the American company, it followed that it constituted PE within the meaning of para (1) of article 5 of the Treaty. In the light of the facts that the applicant, in case of outbound consignments was booking orders, collecting parcel etc. as also in the case of inbound consignments in regard to clearance and delivery of parcels was acting for the American company, it was held that clause (c) of para (4) of article 5 would also be attracted. The applicant thus, constituted PE of the American company within the meaning of para 1 of article 5 and also para 4 of article 5 of the Treaty. In view of the above, the Authority ruled that the income arising to the

American company as per the Transportation Agreement, was taxable in India both under the Treaty as well as the IT Act, 1961.

DUN & BRADSTREET ESPANA SA, SPAIN
[AAR/615/2003] [2005] 272 ITR 99/142 TAXMAN 284

The applicant company was incorporated in Spain and was a non-resident in India. It was a subsidiary of Dun & Bradstreet International USA (D&B US), a company engaged in production & sale of Business Information Reports (BIRs). A BIR provides information about a company on various aspects like its line of business, location, financial condition, management experience, pendencies of any suits/liens etc. Each associate company of D&B group compiles information in respect of companies functioning in its country in the standardized D&B format which is electronically uploaded on the server of the associate company and is mirrored (copied) on the central data base server situated in US. The US server farm was owned and operated by D&B US. Dun & Bradstreet Information Service India Pvt. Ltd (DBIS), an Indian company, was also engaged in the business of compiling and selling BIRs. Whenever an Indian customer place an order for a BIR of a company situated in Spain, DBIS would access the master server which would allow access to the mirror server of the applicant and on locating the required BIR, DBIS would download, print and deliver a copy thereof to the customer. The DBIS was under an obligation not to take additional copies or reproduce the BIR in any manner. A copyright in BIR would neither be licensed nor assigned to either DBIS or the customer. DBIS was free to determine the price on 'principle-to- principle' basis and the price at which the BIR was sold by the applicant was its average domestic price. The applicant did not have any branch or office or place of business in India.

Amongst others, the main issues before the Authority were whether the payments made by the DBIS for electronic purchase of BIR would be treated as part of applicant's business profits covered by article 7 of the treaty and whether the applicant would be held as having a PE in India under the provisions of article 5 of the treaty.

After analyzing the provisions of article 5 of the treaty, it was observed with regard to para 4 of article 5 that the access of BIR from the applicant's server farm was akin to 'sale' rather than delegation of sale function to DBIS. It was a case of permitting DBIS to take a BIR from the stock maintained by the applicant and not that of maintaining stock of BIRs by DBIS.

With regard to para 5 of article 5, it was held that since DBIS was carrying on its own business as an independent entity by settling its own price without any control and instructions from the applicant and further, it would not also be a case of DBIS devoting itself wholly to the applicant and that in the absence of any material to conclude that DBIS itself was an agent of the applicant, it couldn't be said to be a dependent agent. It was, thus held that DBIS was not the PE of the applicant in terms of the Treaty provisions.

With regard to the nature of payment, the authority ruled that it could not be characterized as 'royalty'/'fee for technical services' under article 13 of the treaty as (i) it was not a case of paying consideration for the use of or right to use any copyright of literary, artistic work or any patent/trademark; (ii) BIR being collection of factual information in a standardized format was accessible to any subscriber on payment of requisite price; and (iii) the copyright in BIR was neither licensed nor assigned either to DBIS or the Indian customer. Thus, the payments made by DBIS to the applicant, were held to be in the nature of 'business profits' under article 7. Further, in the absence of any PE in India, it was held that the applicant would not be taxable in India in respect of the business profits and consequently DBIS was not required to withhold any tax under section 195 of the IT Act, 1961.

MORGAN STANLEY & CO.
[AAR/611/2003] [2005] 272 ITR 416/142 TAXMAN 630

The applicant was incorporated under the laws of UK and was a tax resident of UK. It is a non-resident company of Morgan Stanley Group. It is registered as FII with Securities and Exchange Board of India (SEBI). The applicant has been investing in Indian stock market

and to further expand its business to derivative trading operations in India, it had obtained permission of the Reserve Bank of India (RBI). The applicant in the process would avail services of parties like brokers, custodian & bankers which would render services, in addition to the other clients, to the applicant in ordinary course of their business.

The issue for the consideration of the Authority was, whether income derived from trading in exchange traded derivative instruments in India would be taxable in India having regard to the provisions of the DTAA between India and UK.



Two important points emerged for consideration in this case i.e. whether income arising from trading in exchange traded derivatives was classifiable as 'capital gains' or 'business income' and if it was not classifiable as 'capital income' then whether the applicant had a permanent establishment in India. Noting that the term 'business profits' is not defined in the treaty and after going through a series of judicial pronouncements on the issue in the case of (i) *Raja Bahadur Visheshwara Singh v. Commissioner of Income Tax, Bihar* [1961] 41 ITR 685 (SC), (ii) *Dalhousie Investment Trust Co. Ltd. v. CIT (Central), Calcutta* [1968] 68 ITR 486 (SC), (iii) *CIT, Nagpur v. Sutlej Cotton Mills Supply Agency Ltd.* [1975] 100 ITR 706 (SC), (iv) *XYZ/ABC Equity Fund* [2001] 250 ITR 194/116 Taxman 719 (AAR), Authority culled out principles to determine the nature of transaction i.e. trade or capital gains. After discussing the relevant provisions under the Act such as section 2(14), 2(42A), 2(42B), 2(47), 2(45), analyzing various features of derivatives as an instrument and considering the facts such as short life span of the derivatives, their incapacity to yield any income like dividend etc. and the details of derivatives traded by the applicant, it was held that the income from trading in derivatives would be business income and not capital gains. Elaborating upon the definition of PE as provided in article 5 of the DTAA and rejecting the plea of the Commissioner in this regard, it was held that the

difference between the 'dependent' and 'independent' agent had to be seen from the perspective of the 'principal' and not from that of agent. After perusing the agreement of the applicant with brokers and custodian and considering the fact that brokers, custodian and bankers are providing similar services to various other clients also, it was held that the applicant had no PE in India in terms of article 5 of the Treaty. It was, thus ruled that the income derived by the applicant from trading in exchange traded derivative instrument would not be taxable in India having regard to the provisions of the DTAA between India and UK.

SPECIALTY MAGAZINE PVT. LTD.
[AAR610/2003] [2005] 274 ITR 310/144 TAXMAN 153

The applicant (SMPL), an Indian Company, was an advertisement concessionaire of M/s. The Economists Newspaper Ltd. (TENL), a company registered in the United Kingdom and engaged in the business of publishing magazines from London. As an advertisement concessionaire for TENL in India, SMPL got 15% commission, payable in US dollars, on gross value of invoices raised outside India directly on the Indian advertisers by TENL. TENL proposed to extend the facility of payment of advertisement charges in Indian currency for which it authorized SMPL through an agreement to collect the advertisement charges from Indian advertisers in Indian currency and remit the same in foreign currency (US dollars) to TENL.

The main issues before the Authority were; (i) whether any income would be deemed to accrue or arise in India under section 9 of the Act to TENL; and (ii) whether tax at source was deductible by SMPL while making remittance to TENL.

After discussing at length provisions of section 9(1)(i) along with the explanations thereto and the meaning of the term "business connection", it was held that there existed business connection within the meaning of *Explanation 2* to section 9(1)(i) of the IT Act, 1961 (the Act). The Authority, after analyzing para 5 of article 5 among other provisions of the Treaty defining PE, rejected the plea of the revenue that SMPL was a dependent agent as it carried out

its activities wholly or almost wholly for TENL and its income from TENL constituted 75 to 80% of its entire income. It was observed that the terms 'wholly' and 'almost wholly' must receive their ordinary meaning as understood by English speaking people at large. Though SMPL was the sole agent of TENL, yet what was required to be shown was that TENL was the sole client of SMPL to bring it within the mischief of the second part of para 5 of article 5 of the Treaty. It was held that SMPL was not covered by the definition of PE contained in article 5 of the Treaty as it was an agent of independent status.

It was observed by the authority that the questions set forth by the applicant were not properly framed as the questions did not refer to the Treaty even though the thrust of the case was on the Treaty. However, having regard to rule 12 of the Authority for Advance Rulings (Procedure) Rules, 1996, the Authority considered all aspects of the questions necessary to pronounce ruling on the substance of the questions posed in the application.

MORGAN STANLEY & CO INC, USA
[2006] 284 ITR 260/152 TAXMAN 1

The applicant, a non-resident company, incorporated in the United States of America (USA), was a resident of USA, and a wholly owned subsidiary of Morgan Stanley US. The applicant, *inter alia*, was to provide financial advisory services, corporate lending and securities underwriting. Morgan Stanley Advantage Services Private Limited (MSAS), one of the group companies of the applicant was incorporated in India to provide support services, such as, IT support, develop computer software including customized electronic data or product or computer program, provide research report, data analysis, which were of critical relevance for the various divisions of the applicant, like equity research division, fixed income division, equity financing service division and investment banking divisions etc. The applicant had proposed to send its staff on deputation to MSAS for stewardship activities and other similar activities to ensure that high standards of quality are met. MSAS was

required to reimburse as the compensation cost, without any profit element, to the applicant for the stewardship activities. However, the applicant was to pay MSAS for the services rendered a consideration at cost and a mark-up at a certain agreed percentage of the costs. The profit margin was valued using the Transaction Net Margin Method (TNMM) as the most appropriate method of arm's length pricing and it came to 29 per cent of the costs incurred.

Amongst others, the main issues before the Authority were: (i) whether the applicant would be held to have a permanent establishment (PE) in India under Article 5 of the DTAA between India and the USA (Treaty) on account of services rendered by MSAS; (ii) whether MSAS would be regarded as



agency PE of the applicant under Article 5(4) of the Treaty; (iii) the applicant would be regarded as having a PE under Article 5(2)(l) of the Treaty for sending employees to MSAS on deputation for stewardship activities; or, (iv) the applicant would have a PE for any other reason and in the event MSAS is held to be PE of the applicant then, whether any further income other than remuneration at arm's length can be attributed in the hands of the PE.

After analyzing the provisions of Article 5 of the Treaty, it was observed that as per para 1 of Article 5, first there should be a fixed place of business and, secondly, the business of the enterprise should be wholly or partly carried out through that place. It was held that though the place of business of MSAS was a fixed place of business, there was nothing to show that the business of the applicant was carried out through the place of business of MSAS. Therefore, MSAS could not be treated as PE of the applicant under article 5(1) of the Treaty. With regard to para 4 of Article 5 of the Treaty it was observed that to constitute MSAS a PE of the applicant it had to be established that (a) MSAS was acting on behalf of the applicant; (b) MSAS was a person other than an agent of an

independent status to whom article 5 applied; (c) MSAS habitually exercised an authority to conclude contracts on behalf of the applicant; (d) though it had not such authority MSAS habitually maintained a regular stock of goods or merchandise from which it regularly delivered goods on behalf of the applicant or habitually secured orders in India wholly or almost wholly for the applicant. Examining the agreement between MSAS and the applicant, it was held that though MSAS was acting in India on behalf of the applicant and the functions and activities of MSAS were wholly and exclusively dependent on the applicant both legally and economically, there was no material on record to show that requisites of requirement (c) and (d) were also satisfied, therefore, Article 5(4) was not attracted in the case. It was found that the employees sent by the applicant on deputation for stewardship activities to MSAS would be actively involved in the key managerial activities of MSAS for a period beyond 90 days and therefore, requirements of para 2(l) of article 5 would be satisfied and MSAS would constitute the PE of the applicant under Article 5(2)(l). Further, relying on Circular No.23 of 1969 dated 23rd July 1969 and Circular No. 5 of 2004 dated 25th Sept. 2004, it was held that as long as MSAS, being PE of the applicant in India, is remunerated for its services at arm's length by the applicant, and as long as all its actual income is brought to tax, no further income can be attributed in the hands of the PE of the applicant.

With regard to the use of TNMM as the most appropriate method under the arm's length price, the Authority ruled that since the issue of determination of arm's length price was pending before the assessing officer and such valuation involved determination of value of tangibles, like intellectual property, software and other deliverables it would fall within the prohibition provided in section 245R(2) (i) & (ii) of the IT Act, 1961.

INTEREST INCOME

APPLICATION NO.P-12 OF 1995 [1997] 228 ITR 61/94 TAXMAN 157

- (i) No income tax would be payable on withdrawals from non-resident-non-repatriable rupee deposit (NR-NR-RD) account as these do not constitute income in the hands of the applicant.
- (ii) Withdrawals that represent income accrued on the investments subsequent to the applicant's arrival in India would not be taxable as long as the applicant's status is that of a resident but not ordinarily resident. However, the same would be taxable when the applicant ceases to be a non-resident/RNOR.
- (iii) Authority declined to answer a question relating to gift tax liability as it did not have any jurisdiction with regard to the other taxes.

YU BO INVESTMENT CO. PVT. LTD., CHENNAI [AAR/596/2002] [2004] 267 ITR 734/139 TAXMAN 277

The applicant, a resident company, was engaged in the business of development of properties and allied activities. The applicant allotted 43,500 partly convertible debentures of Rs.1,000 each to West Star Investment Holdings Ltd. (WIHL), a company incorporated in Mauritius. The debentures were issued with the approval of the Reserve Bank of India as per which interests on these debentures could be paid at a rate not exceeding 14% per annum and only to



the extent of profit available. In the year ended 31-3-2002, the interest being more than the profits, the entire profit would be paid by way of interest to WIHL. WIHL did not have any place of business or a permanent establishment in India.

The applicant desired ruling on the issue: whether it was required to deduct tax at source having regard to the terms of borrowal and also the clauses of the DTAA between India and Mauritius, for the year ended 31-3-2002 on interest paid to the foreign company which had no PE in India.

The Authority observed that having regard to the Press Note F.No.4(48)/96-ECB dated 19-6-1996 in regard to guidelines on Policy and Procedure for ECBs for 1996-97 the power for granting exemption from withholding tax was not delegated to the RBI by the Govt. and the approval accorded by the RBI was only under the FERAs. It was held that the approval accorded by the RBI with regard to the terms of the loan did not amount to granting tax exemption by the Govt. of India for the purpose of article 11(4) of the DTAA with Mauritius and therefore the applicant was required to deduct tax at source in accordance with section 193 of the Act for the year ended 31-3-2002.

ROCKWOOL (INDIA) LIMITED
[AAR/600/2002] [2004] 268 ITR 20/138 TAXMAN 106

The applicant, (RIL), was a company resident in India. It suffered heavy losses and was declared sick unit on 3-1-96. With the permission of Board for Industrial and Financial Reconstruction (BIFR) and the Reserve Bank of India (RBI), Alghanim Industries (Mauritius) Limited (AIL), a company registered in Mauritius, was inducted as co-promoters in May, 1997. It held 77.7% equity in RIL as on 31-3-2002. The AIL was to extend loan in the form of External Commercial Borrowing (ECB) under the automatic route of approval, as notified by Ministry of Finance, Govt. of India.

The applicant desired Ruling on the question whether payment/credit of interest, upfront fees to AIL for an ECB to be contracted under the automatic route would be exempt from withholding tax under the DTAA between India and Mauritius.

Delving upon ECB guidelines, citing Circular No.60 of 31st Jan., 2004 issued by the RBI explaining guidelines under Automatic route and Approval route for ECBs, it was held that ECB under Automatic

route did not amount to automatic tax exemption. Considering that Article 3(1)(h) of the DTAA defined the term 'competent authority' and the facts that Nodal Ministry for entering into Tax Avoidance Agreement and their implementation is Department of Revenue, Ministry of Finance, the tax exemption under article 11(4) could be granted only by the said department of Ministry of Finance. Loan taken under automatic approval route notified by Govt. of India, could not be treated as an 'approved loan' for the purpose of Article 11(4) of the Treaty. It was, thus, ruled that the payment of interest, upfront fees to AIL for an ECB under the automatic route would not be exempt from withholding tax as the applicant had not obtained approval under article 11(4) of the DTAA from Govt. of India namely Department of Revenue, Ministry of Finance.

SHAMS TABREZ VANTI
[2005] 143 TAXMAN 215

Applicant, a non-resident individual, had proposed to set up a jewellery unit in Special Economic Zone (SEZ). For that purpose he was to import precious metal to India for which he was required to submit import performance guarantee/financial security, etc., and had to mortgage/pledge 100 per cent security to bank in form of FDRs. Applicant filed an application seeking advance ruling on question as to whether interest accrued to him on FDRs is his 'business income' derived from business of export by his SEZ unit. It was held that merely because as a requirement to import precious metal applicant had to furnish import performance Guarantee/Financial Security/Letter of Credit from a nationalized bank and for that purpose he had to mortgage FDRs with bank, interest accrued on FDRs did not become income derived from his export business which was yet to commence; interest on FDRs which were not held by applicant as stock in trade/business assets, would fall under head 'Income from other sources'; said interest on securities/FDRs, etc., cannot be set-off with expenses incurred on such securities/FDRs; and that interest income from FDRs computed after deducting reasonable sum paid by applicant by way of commission or

remuneration to a banker or any other person for purpose of realizing such interest by or on behalf of applicant would be chargeable to tax under head 'Income from other sources' and expenses to extent specified in section 57(i) would be allowed as permissible deduction.

JAY SHREE TEA & INDUSTRIES LTD.
[2005] 145 TAXMAN 516

Applicant, a resident company, had taken an interest bearing loan from non-resident bank, having no permanent establishment in India - As per agreement between parties, tax liability of bank was to be borne by applicant and payment of interest was to be made net of all taxes. It was held that as per article 11 of DTAA between India and Singapore interest paid to non-resident bank would constitute income in hands of non-resident and TDS under section 195 will be deductible.

On above facts it was also held that since applicant was only discharging liability of a non-resident and no liability was attached to him under Act, it cannot be said that resident had sought advance ruling pertaining to his own tax liability and, therefore, it would not affect jurisdiction of Authority under amended provisions of section 245N(a)(ii).

V. RAVI NARAYANAN
[2008] 168 TAXMAN 65

Non-Resident Ordinary (NRO) deposit acquired with convertible foreign exchange in a banking company, which is not a private company as per Companies Act, 1956, shall be treated as a 'foreign exchange asset' under section 115C(b). Interest on such NRO deposit shall be treated as investment income under section 115C(c) which is liable to be taxed at rate of 20 per cent under section 115E and, therefore, banks paying interest on such NRO deposit are required to deduct tax at source at rate of 20 per cent.

CAPITAL GAINS

APPLICATION NO. AAR/203 OF 1994
[1999] 240 ITR 518/105 TAXMAN 257

No tax on capital gains is chargeable in view of provisions of section 47(via) of the IT Act, 1961, unless it is found that such gains are assessed to Income Tax in the other country.

XYZ, EQUITY FUNDS, MAURITIUS (UNREPORTED)

It was held that, the proceeds of sale of shares in India would amount to 'business receipts' and not 'capital gains'. The activities of investment advisor and custodian cannot be treated to constitute a PE of the applicant in India. It was also held that the applicant was required to file the IT returns even if it is entitled to exemption and deductions under the DTAA between India and Mauritius.



UNIVERSITIES SUPERANNUATION SCHEME LTD., UK
[AAR636/2004] [2005] 275 ITR 434/145 TAXMAN 141

The applicant was a tax resident of the UK and it was registered in India as Foreign Institutional Investor with the Securities and Exchange Board of India (SEBI). The applicant had invested in securities in India and in the accounting year relevant to the Assessment Year 2003-04 and incurred long term capital loss which worked out after applying 2nd proviso to section 48 of the IT Act, 1961 (the Act), to be higher compared to the loss computed ignoring the indexation as provided u/s 115AD(3) of the Act.

The applicant sought rulings on the issue whether it had an option to opt out of the provisions of section 115AD of the Act and apply

the normal provisions (i.e. section 48 read with section 112) for computing capital loss and whether the applicant could take a position different in subsequent year.

The Authority observed that section 115AD was introduced by the Finance Act, 1993 as a special provision for FIs; it was a comprehensive provision under Chapter XII which dealt with determination of tax in certain special cases. Section 115AD, being a special provision for FIs, would override the general provisions. The guidelines for computation of capital gains arising to FIs from the transfer of securities is embodied in sub-section (3) of section 115AD. It may be seen that even in the case of FIs, capital gains are computed under section 48 by excluding the first and the second provisos thereof. Rejecting the contention of the applicant that section 115AD was applicable in case of 'capital gain' and not that of 'capital loss' on transfer of securities, it was held that its application did not depend upon the result of computation. On the plea of discrimination based on the nationality of the applicant under article 26 of the Treaty, it was held that the different treatment, if any, was based not on the nationality but on the residential status which did not amount to discrimination under article 26 of the Treaty.

EMIRATES FERTILIZERS TRADING COMPANY
[AAR/628/2004] [2005] 272 ITR 84/142 TAXMAN 127

The applicant in this case, a resident of UAE, desired ruling on the issue whether, as per article 13(3) of the DTAA between India & UAE, gains from alienation of shares in an Indian company would be taxable in UAE only; and, if no relief was available on this front, then, whether the applicant could avail benefits of first proviso to section 48 along with section 112 of the IT Act, 1961 (the Act).

It was held, in view of provisions of article 13, in particular para 3 thereof, of the Treaty and provisions of section 90(2) of the Act that capital gains could be taxed only in UAE, and not in India.

ANURAG JAIN
[2005] 145 TAXMAN 413

Full value of an asset for purpose of section 48 is true value bargained for by parties, which need not necessarily be market price and should not be an ersatz figure. Indian company, and its shareholders, including applicant, had entered into an agreement to transfer its entire business and share capital in favour of some foreign companies. Sale consideration under agreement comprised fixed amount (closing payment), payable in lump sum and contingent payments payable in instalments by 31-3-2004, 31-3-2005 and 31-3-2006 and contingent payments were not to be made unless aggregate Earnings Before Interest, Tax, Depreciation Allowance (EBITDA) of business for applicable period equal or exceeded contingent cumulative threshold EBITDA. Applicant had also entered into non-competition agreement/employment agreement under which he was to receive a portion of purchase price in respect of his ownership interest and was also to receive substantial and indirect benefits from transaction contemplated under agreement which was for his employment for five years as CEO. It was held that a combined reading of employment agreement, non-competition agreement and share purchase agreement, which were contemporaneous, left no doubt to conclude that contingent payments payable under share purchase agreement, were in substance and reality payments for ensuring performance under employment agreement to achieve desired object in exceeding EBITDA and had no real nexus to consideration for sale of shares, etc., under purchase agreement. So far as second part of consideration comprising of contingent payments was concerned, they were so arranged as to appear that they constituted a part of consideration for sale of shares, etc., whereas they were in truth and substance for achieving target of EBITDA and, therefore, consideration mentioned in purchase agreement was a composite consideration and closing payment alone represented full value of consideration for said agreement for purposes of section 48; and that contingent payments as would be determined at end of first year on 31-3-2004, second year on 31-3-2005 and third year on 31-3-2006 were not

in truth and substance part of consideration under share purchase agreement, so they could not be taken into account in computing capital gain but they would be taxable under head 'salaries' in hands of applicant.

On basis of above facts, it was also held that contingent payments received/receivable by applicant would fall within meaning of profits in lieu of or in addition to salary under section 17(3)(ii) as contingent payments had a real nexus with employment agreement and not with non-competition agreement, much less with purchase agreement and that contingent payments were nothing but in nature of incentives remuneration for achieving target.

On basis of above facts, it was further held that contingent payments receivable by applicant under share purchase agreement had nexus with performance of applicant for achieving defined target and had no direct connection with 'not carrying out any activity in relation to any business' and, therefore, contingent payments did not fall under section 28(va).

Where full value of consideration is agreed to be paid at a future date or is paid in instalments over a period, after previous year in which transfer of capital asset takes place, capital gains would be treated as income of previous year in which transfer takes place, irrespective of actual date of payment of consideration and any hardship that may be caused to transferor, and in such a case, transferor obviously cannot avail benefit of provisions of sections 54EB and 54EC.

FIDELITY GROUP CANADA & USA, MATHEWS INDIA FUND, USA
[AAR/678 TO 686, 694 TO 723/2006] &
[AAR/733/2006] [2007] 158 TAXMAN 373

This is one of the landmark rulings given by the Authority. It is a common ruling in Fidelity Group of cases USA & Canada and Matthews India Fund, as facts in all these cases were similar and germane issue involved in them is common. The applicants in these cases were registered with Securities Exchange Board of India (SEBI) as a sub-accounts of the respective FII. They have invested under FII

regime in shares in Indian companies. As required by the SEBI Regulations, each applicant had appointed a global custodian, which in turn has appointed a domestic custodian as its correspondent to act for the applicant. Both global and domestic custodians are acting in ordinary course of their business and were performing similar custodial services for other FII's as well. The applicant did not have any branch, office or place of business in India.

The important issue for the consideration of the Authority was whether profits arising from sale of portfolio investments in India would be treated as capital gains or business income of the applicants.



A preliminary objection was raised by the Commissioner that the Authority had no jurisdiction as the ruling sought by the applicant was with regard to a series of transactions as against 'a transaction' mentioned in the definition of 'advance ruling', was rejected by the Authority having regard to section 13 of the General Clauses Act, 1897 which provided that in all Central Acts and Regulations words in the singular should include the plural and vice versa.

The Authority observed that the issue whether a particular receipt was a revenue receipt or a capital receipt was a mixed question of law and facts which had to be decided on the facts and circumstances of each case. The Authority examined the legal framework and circumstances prevailing at the time FII's were allowed to enter in Indian capital market. The SEBI guidelines for FII's contained in Press Note dated 14-9-1992, modified guidelines for FII's (Taxation Aspect) as per Press Release dated 24-3-1994, various enactments and regulations in relation thereto such as SEBI (FII) Regulations, 1995, section 115AD of the IT Act, 1961 introduced by Finance Act, 1993, FEMA, 1999 and Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000, in particular regulations 2(f), 3(1), 12, 13, 14 & chapter III, Regulation 18 of SEBI (FII) Regulations, 1995, regulations 2, 5, 11(ii) of FEM Regulations (Security) 2000, were relied upon to hold that they raised a strong

presumption that the legal framework permitted only investment in securities yielding income such as dividends, interest etc. and capital gain on their transfer. Distinguishing the term 'transact business' from the term 'carrying on business' referred to in certain regulations on which the applicant placed reliance, and following the judgments of the Supreme Court in the case of *CIT v. H. Holck Larson* [1986] 160 ITR 67/26 Taxman 305 and *CIT v. Associated Industrial Development Co. (P.) Ltd.* [1971] 82 ITR 586 it was pointed out that the intention of FII as to the nature of transactions from the first step taken in that regard, the Authority observed that the circumstances and the framework of the plethora of legislations unmistakably pointed-out that a FII was not registered for carrying out trade in securities, it could only invest in securities for the purpose of earning income by way of dividends and interest etc. and realizing capital gains on their transfer. It was noted that facts which were material and within the knowledge of the applicants were not placed on record and that entries in the books of account which they were required to maintain and other material were not submitted by the applicants to show that the transactions were in the nature of trade in securities. On the basis of the facts on record, the Authority ruled that gains arising to the applicants from sale of portfolio investments in India would be capital gains and they could not be treated as business income.

HOECHST GMBH
[2007] 159 TAXMAN 207

Amalgamation of a wholly-owned subsidiary company with its parent company does not result in a transfer for consideration and, therefore, does not give rise to any capital gains. A company APH, wholly-owned subsidiary of applicant-company, a foreign company, was amalgamated with applicant. APH held certain shares in an Indian company and as a result of amalgamation, shares of APL held by APH vested in applicant. It was held that no capital gains chargeable under section 45 arose to APH on its amalgamation with applicant in respect of shares of Indian company held by APH.

VENENBURG GROUP B.V.
[2007] 159 TAXMAN 219

Applicant, a non-resident company incorporated in Netherlands, in course of its corporate reorganization of its group companies, proposed transfer of its entire shares held by it in its Indian subsidiary company to its 100 per cent subsidiary company incorporated in Netherlands. It was held that in view of provisions of the Act, read with provisions of DTAA between India and Netherlands, no taxable capital gains in respect of said transaction would arise in India. Since no tax would be payable in India, no tax would be required to be deducted under section 195 and, consequently, applicant will not be required to file any return under section 139 in respect of transaction in question and provisions of sections 92 to 92F will also not be attracted.



FIDELITY NORTHSTAR FUND
[2007] 158 TAXMAN 372

Applicant, a business trust for implementing a scheme of investment fund, provides investors a continuous source of managed investments in securities. It is registered under Investment Company Act, 1940 of USA and is treated as corporation for purposes of taxation in USA. It makes investment in different parts of world including India. It is also registered with Securities and Exchange Board of India as a sub-account of FMR which is registered as FII under SEBI (Foreign Institutional Investors) Regulations, 1995. Under Foreign Institutional Investors (FIIs) regime, applicant invests in shares of Indian companies. Applicant's case was that trading in securities is not prohibited under any Act or Regulations; and if there was prohibition on trading in securities, nature of transactions being trading, income therefrom should be treated as profits

from illegal business. It was held that in view of various enactments and Regulations regarding policy of Government of India in regard to allowing FII/individuals to invest in Indian capital market, FII was not registered for trading in securities, it can only invest in securities for purposes of earning income by way of dividends and interest and realizing capital gains on their transfer and, therefore, plea of applicant that trading in securities was not prohibited could not be accepted. Since applicant had failed to produce necessary records, accounts and other relevant particulars to show that transactions were in the nature of trading in securities, it was not be possible to ascertain whether shares had been entered therein as stock-in-trade or capital assets. Thus it was concluded that presumption raised, that in view of provisions of Acts and Regulations the transactions of purchases and sales of shares in Indian companies by applicant were for realizing capital gains cannot be rebutted by applicant and, therefore, transactions of sales and purchases of shares in Indian companies by applicant, were investment in capital assets leading to realization of capital gains and profit arising from said transactions could not be treated as business income of applicant.

JASBIR SINGH SARKARIA
[2007] 164 TAXMAN 108

Actual receipt of entire sale consideration during year of transfer of a capital asset is not necessary for purpose of computing capital gains under section 45. Where agreement for transfer of immovable property by itself does not provide for immediate transfer of possession, date of entering into agreement cannot be considered to be date of transfer within meaning of sub-clause (v) of section 2(47). To attract sub-clause (v) of section 2(47) it is not necessary that entire sale consideration up to last instalment should be received by owner. Once it is held that transaction of nature referred to in sub-clause (v) of section 2(47) has taken place on a particular date, actual date of taking physical possession need not be probed into; it is enough if transferee has, by virtue of that transaction, a right to enter upon and exercise acts of possession effectively.

**MCLEOD RUSSEL INDIA LTD.
[2008] 168 TAXMAN 175**

Benefit of proviso to section 112(1) cannot be denied to non-residents/foreign companies even if they are entitled to another relief in terms of proviso to section 48.

A resident applicant, who has entered into a transaction with a non-resident, can file an application under section 245Q(1) in relation to tax liability of such non-resident arising out of such transaction.

ROYALTY AND FEES FOR TECHNICAL SERVICES

**APPLICATION NO.P-13 OF 1995
[1998] 228 ITR 487/[1997] 94 TAXMAN 171**

It was held that

- (1) The Project Head Office and Project Site Office of the applicant would together constitute the applicant's 'Permanent Establishment' (PE) for the purposes of taxation of the income from the contract;
- (2) The payments made by the Industrial House to the applicant under the various agreements will be in the nature of 'royalties' and/or 'fees for technical services' within the meaning of article 13(3) and 13(4) of DTAA and that the royalties and fees for technical services in relation to the activities conducted outside India were effectively connected with the PE of the applicant in India;
- (3) The applicant company could be considered as the 'beneficial owner' in terms of article 13(6) of the DTAA of the royalties and technical fees received by it from the said industrial house;
- (4) In determining the business profits of the PE of the applicant, all expenses shall be allowed in accordance with, and subject to the limitations laid down in, the Indian Income-tax Act;

- (5) Payments made by the PE to the head office of the applicant were not 're-imbursements' within the meaning of article 7(3)(b) of the DTAA and were, therefore, not deductible while computing the profits of the PE in India.
- (6) The Head Office of the applicant was not liable to withhold taxes under the Income-tax Act of India in respect of payments made by it to foreign suppliers of goods, services and technologies. Even though tax should be deducted on such payments in view of section 9(1)(vi) and (vii) of the I.T. Act, the applicant was entitled to relief because of para (7) of article 13 of the DTAA according to which royalties and technical services cannot be deemed to arise in India if such royalties etc. are not borne by the PE of the applicant. As the provisions of DTAA should prevail over the provisions of the Act, the applicant was held not liable for deduction of tax.
- (7) If the contract agreements under reference did not have the approval under section 115A of the Act, the profits of the PE in India will have to be computed as 'Profits & Gains of Business' and brought to tax at the rates applicable to the total income of a foreign company. If, however, these were got approved under section 115A, such profits would be computed as above but would be charged to tax at 30% on the amount of royalties and fees for technical services included therein and, at the rate applicable to a foreign company, on the balance thereof, if any;
- (8) In either of the above events, the provisions of sections 44D and 115A would not be applicable in respect of that part of the receipts of the applicant which represent payments in consideration of services under the agreements which relate to construction, assembly or like project.
- (9) The payments made under the agreements will be taxable under Article 7 read with article 13(6) of the DTAA and keeping in view the provisions of articles 7.1 and 7.2 of the DTAA read with Para 3 of the Protocol, only the profits of the applicant attributable to the operations carried out by its PE in India would be liable to tax.

ERICSSON TELEPHONE CORPORATION INDIA AB
[1997] 224 ITR 203/90 TAXMAN 144

It was held that

- (i) The application was not liable to be rejected on the ground that the question of tax deduction at source was pending before the IT Authorities in the case of one of the three companies with whom the applicant had entered into contract. Since as the question was not pending in applicant's case, the application was maintainable.
- (ii) The payments in question were 'fees for technical services' and their computation had to be made under article 7 of the DTAA. On construction of article 7(3) of the DTAA read with section 44D of the Act the entire gross amount of fees would be liable to tax at the rate of 55%. However, In view of the special relief provided under section 115A of the Act, tax was held to be chargeable at the rate of 30% and not at the rate of 55%.
- (iii) On the question whether the tax deduction at the rate mentioned would amount to discrimination or not, the answer it was held that; could be furnished only after the assessment and not at the tax deduction stage.

APPLICATION NO.P-30 OF 1997
[1999] 238 ITR 296/105 TAXMAN 240

The payments by Indian companies for use of software developed and protected by the applicant a company incorporated in USA, were held not to be in the nature of business income but that of royalty; and therefore taxable in India as royalty under article 12(3)(a) of DTAA between India and USA.

FLAKT INDIA LIMITED
[2004] 267 ITR 727/139 TAXMAN 238

The applicant, an Indian company is a member of Flakt Woods Group of Companies. It entered into two separate agreements with

M/s Flakt Wood AB, incorporated in Sweden and M/s Flakt Wood AG incorporated in Switzerland for providing technical services in consideration of payment of 'royalties' to the former company and payment of 'fees' to latter company. For the period Feb., 2002 to Dec., 2002 as soon as the applicant received invoices for royalties and fees, it credited the amounts due to the foreign companies in its own accounts. No amount however, was paid to the two foreign companies till 31st March, 2003. On this assumption, that since no amount was paid to or received by the foreign companies, no TDS was deducted by the applicant.

The issues before the Authority were; whether the foreign companies were liable to pay income tax in India on these amounts on cash or receipt basis; and whether the applicant had to deduct tax at source under section 195 of the Income-tax Act, 1961 on amounts so credited in its accounts.



After analyzing the provisions of Article 12 of the Treaty with Sweden and Swiss Confederation, it was observed that para-(1) of Article 12 of the Treaty was wholly irrelevant. The Authority ruled that para-(2) of Article 12 of the Treaty clearly laid down that the amount of such royalties or fees might also be taxed in India in accordance with the laws of India.

With regard to the liability of the applicant to deduct tax, the Authority after elaborating the provisions of section 195(1) of the IT Act observed that (a) section 195 came into play at the stage where a payer who was enjoined to deduct the tax, either credited such income to the account of the payee or made payment thereof whether in cash or by cheque or draft or any other mode and (b) the taxability of such amount in the hands of the payee or occasioning of the taxable events, was alien for the purposes of section 195(1). Therefore, it was ruled that the applicant was required to withhold tax under section 195(1) from the sums payable to the two foreign companies.

DHV CONSULTANTS BV
[2005] 147 TAXMAN 521

Section 44D and section 115A cannot be read as treating gross receipts of fees for technical services without allowing deduction on account of expenses incurred for earning same as income, as defined under section 2(24).

ROTEM COMPANY, KOREA & MITSUBISHI CORP., JAPAN
[2005] 279 ITR 165/148 TAXMAN 411

This is a common ruling in the two applications as the facts and the questions set forth were similar. M/s Rotem Company was incorporated in Korea and was a tax resident of Korea while Mitsubishi corporation was incorporated and registered in and a tax resident of Japan. The applicants, along with Mitsubishi Electric Corporation, Japan formed a consortium of which Mitsubishi Corporation was the leader. After qualifying in the international tender for the design, manufacture, supply and testing of passenger rolling stock for Delhi Metro Rail Corporation (DMRC), the consortium and the DMRC entered into a contract in respect of the said work (RS-1.) The consideration for the entire work was a fixed at lump-sum price of INR 31 10439836 and US Dollar 260,997,269 which was apportioned amongst various cost centers which were classified amongst various mile stones. The members of the consortium were entitled to receive interim payments on achieving one or more of mile stones. No license or patent concerning the machinery or copyright of its design was granted to the DMRC.

Amongst others, the main issues before the Authority were: whether it would be correct, considering composite nature of the contract, to disintegrate the contract and tax each of its components individually and, if so, what proportion of lump-sum price under contract RS-1 could be regarded as 'fee for technical services'.

The Authority observed that whether RS-1, a composite contract, was separable into its elements and whether it contained the

element of FTS were essentially issues of fact. In a contract for manufacture, installation, sale or supply of goods, the element of services would always be present. However, wherever services are inextricably linked with manufacture, installation sale or supply they cannot be evaluated separately for the purpose of FTS and it is only where the services are separable and independent that the FTS would be attracted.

After analyzing the relevant mile stone activities under various cost centers (A,B,G&J) and referring to RS-1 Employers Requirements, General Specifications, Project Management Plan, Interface Management Plan (para 2.3 of activity A2), it was concluded that RS-1 comprised of element of 'fee for technical services' in cost centers G&J within the meaning of article 13(4)/12(4) of the treaty with Korea/Japan and the proportion of the lump-sum price quoted against each of these items would be regarded as FTS. It was further held that 'fee for technical services' cannot be taxed as 'business profits' under article 7 in view of the fact that the FTS was specifically dealt with in article 13(4)/12(4) of the Treaty with Korea/Japan.

SOUTH WEST MINING LTD.
[2005] 148 TAXMAN 366

Applicant, a resident company, was engaged in prospecting and extraction of minerals, metals, ores, etc., as well as exporting minerals. It entered into an agreement with a non-resident consultant of Canada for getting samples of ores analyzed and tested at technical lab of consultant in Canada - Fees for such technical services were payable outside India in Dollars. It was held that fees being paid to consultant for rendering of technical and consultancy services satisfied all requirements of definition of fees for technical services within meaning of Explanation 2 to section 9(1)(vii)(b); and that since services of consultant in form of reports were utilized in India in business of applicant in India and also for earning income from source within India, services were considered to be as rendered in India and rate of tax applicable for purpose of TDS was held to be lesser of rates prescribed under Finance Act, 2005

or in para 2 of article 12 of the DTAA between India and Canada, whichever was more beneficial to applicant.

AIRPORTS AUTHORITY OF INDIA
[2005] 143 TAXMAN 129

When advance ruling is sought in respect of tax liability of a non-resident, within meaning of section 245N(a)(ii), it does not require clearance from Committee on Disputes.

Applicant-Airports Authority of India entered into supply and service contracts with an American company 'RC' for Modernisation of Air Traffic Services (MATS) in Delhi and Mumbai. Pursuant to those contracts, 'RC' handed over equipment software, etc., and applicant had been operating and maintaining equipments on its own. However, since some assemblies subsequently failed, applicant felt that same needed regular repairs. So, it entered into two separate contracts with 'RC' for (a) repair of hardware equipment of MATS system, and (b) modification and anomaly resolution of software of said system. Clauses of supply contract showed that insofar as software and documentation were concerned, applicant acquired a right to use the same subject to certain conditions but hardware and other equipment were subject-matter of outright sale in favour of applicant. It shows that since payment received by 'RC' in respect of repair of hardware, does not fall within meaning of income from rendering of services as defined in article 12 of DTAA between India and USA, said payment will be regarded as business profits within meaning of article 7 and 'RC' had no Permanent Establishment (PE) in India, said payment will not be taxable in India in view of provisions of article 7. However, deputation of an engineer by 'RC' to India for purpose of installation and testing of repaired software will not constitute PE of 'RC' in India and as payment received by 'RC' in respect of repair of software falls within description of fees for included services within



meaning of article 12, payment made for repair of software shall be taxable in India.

**ABC LTD., SWITZERLAND
[2007] 159 TAXMAN 344**

The applicant, a non-resident company incorporated in Switzerland, is a resident of Switzerland and is a part of D Group of companies. After reorganization of the D Group of companies, the applicant is engaged in the business of manufacturing turbochargers for passenger and commercial vehicles. The applicant entered into a turbocharger development and supply agreement (TDS Agreement) with XYZ Ltd, a company incorporated in India, for manufacturing and supply of turbochargers for vehicles manufactured by XYZ Ltd. The applicant established an Indian subsidiary, J Pvt.Ltd., and assigned its rights, interests and obligation in the TDS Agreement to its subsidiary through an Assignment Agreement on payment of an agreed consideration by the subsidiary.

Amongst others, the main issue for consideration of the Authority was whether the receipts arising to the applicant from the assignment of TDS Agreement would be taxable in India and whether the assignee was required to withhold tax u/s 195 of the Act.

After perusing and elaborating the TDS Agreement and the assignment agreement, the Authority proceeded to determine whether there existed any “business connection” within the meaning of section 5(2) read with section 9(1) of the IT Act, 1961. After going through a series of judicial pronouncements on this issue in the cases of (i) *R.D. Aggarwal & Co.* [1965] 56 ITR 20 (SC), (ii) *Anglo-French Textile Company Ltd.* [1953] 23 ITR 101 (SC), (iii) *Pfizer Corporation* [2004] 271 ITR 101/141 Taxman 642 (AAR) and (iv) *Ishikawajima Harima Heavy Industries Co. Ltd.* [2004] 271 ITR 193/141 Taxman 669 (AAR), the Authority culled out the essential features of “business connection”. After discussing the relevant provisions of Explanation 2 to section 9(1)(i) of the Act, it was observed that the subsidiary (i) did not conclude contracts on behalf of the applicant; (ii) did not maintain any stock of goods or merchandise in India on behalf of

the applicant; and (iii) did not habitually secure order for the applicant in India. Rejecting the plea of the Commissioner, it was, held that the applicant had no business connection in India through its subsidiary, J Pvt. Ltd.

With regard to the nature of payment, the Authority ruled that the consideration for assignment of TDS Agreement did not fall within the ambit of 'royalty' provided under Explanation 2 to section 9(1)(vi) of the Act.

Consequently, it was held that assignee of TDS Agreement was not required to withhold any tax under section 195 of the Act.

**HEADSTART BUSINESS SOLUTIONS (P.) LTD.
[2006] 155 TAXMAN 639**

'M', a non-resident company, entered into a solution provider agreement with applicant, an Indian company, for supplying packaged business software solutions to applicant-company. It was held that in view of provisions of section 195(1) there exists a legal obligation on part of applicant to withhold taxes whilst making payment for software purchased from 'M'.

**IMT LABS (INDIA) PVT. LTD
[AAR/676/2005] [2006] 157 TAXMAN 213**

The Applicant was a resident company. It secured license of a particular software as per the License Agreement with Conversagent Inc. a Delaware Corporation, New York, USA, a non-resident company, for which it was to pay license fee to the said company. The applicant sought ruling with regard to the tax liability of the non-resident company arising out of the said transaction.

The question before the Authority was whether periodical payments made by the applicant to the non-resident company, having no office/establishment in India, in connection with the use of software developed by it on internet, are subject to TDS having regard to the provisions of the DTAA between India and USA.

After referring to the specific clauses of the License Agreement and observing that the license was granted essentially for the use of a particular software i.e. 'Smarterchild software' on the Conversagent server platform and that the license fee was payable on monthly basis and was termed as 'royalty' in clause (4) of the Agreement, it was held that the payments would be covered by the expression 'royalties' as defined in article 12 of the DTAA and also section 9 of the IT Act, 1961. It was further held that once the payments were held to be in the nature of 'royalties', under article 12 of the DTAA the same could not be treated as 'business income' under article 7 thereof. The Authority, thus, ruled that the payments made to the non-resident company were subject to TDS.

INTERNATIONAL HOTEL LICENSING CO.
[2007] 158 TAXMAN 231

Amounts received by applicant-non-resident company from a resident hotel owner in connection with marketing and business promotion activities said to be conducted by applicant outside India under an agreement would be taxable in India.

CARGO COMMUNITY NETWORK (P.) LTD.
[2007] 159 TAXMAN 243

Applicant, a non-resident company, has its registered office at Singapore. It is engaged in business of providing access to an internet based Air Cargo Portal. An agent who books cargo through various airlines can subscribe for said portal, which, *inter alia*, enables him to access data bank of airlines like flight schedules, availability of cargo, etc. For this service applicant charges subscription fee, system connection fee and help desk support fee, etc. It was found that payments are made by a cargo agent ('resident') in India for use of portal developed by applicant and hosted on his server in Singapore; portal was displayed on computer screen of cargo agent through which he could access various airlines for booking of cargo, and acceptance of concerned airline was conveyed in India and, therefore, use of commercial equipment was

made in India and 'payments' also arose in India. It was held that payments made by Indian agent/subscriber to applicant for providing a password to access and use portal hosted from Singapore were in the nature of royalties and fees for technical services and taxable under article 12 of DTAA as also under section 9 and subject to deduction of tax at source.

REIMBURSEMENTS

DANFOSS INDUSTRIES PVT. LTD.
[AAR/606/2002] [2004] 268 ITR 01/138 TAXMAN 280

The Applicant, an Indian company, was a member of Danfoss Group. In order to carry out business operations in a more economic and efficient manner and to maintain the global standards set-out by Danfoss Group, it proposed to enter into an agreement with Danfoss Industries Pvt. Ltd, Singapore (Danfoss Singapore), to avail the services such as advise and assistance in the preparation and conduct of marketing research, financial matters and other assistance with regard to customer training, employees relation etc.. The consideration for availing these services was on the basis of allocation key determined on proportional percentage of budget turnover weighted by growth rate and market maturity of the group company and was payable on monthly basis.

After examining the facts of the case, in particular, clause 2 of the proposed service agreement, the Authority



concluded that there was no direct nexus between the actual cost incurred by the Danfoss Singapore and fee payable by the applicant. Even assuming that the fees charged by Danfoss Singapore to the applicant, was equivalent to the expenses incurred and there was no profit element it would then be a case of *quid pro quo* for the service fee and not a case of reimbursement of expenses. It was, thus, ruled

that payments were liable to withholding tax under section 195 of the IT Act, 1961.

TIMKEN INDIA LIMITED
[2005] 273 ITR 67/143 TAXMAN 257

Appellant, a tax resident of India, was engaged in the business of manufacture and sale of bearings and other ancillary products. It entered into an agreement with Timken USA whereby the said company agreed to render various services to the applicant in USA. It was also agreed that the compensation payable by the applicant to Timken USA would cover only the cost actually incurred and no profit element or mark-up on the cost would be added to it. It was ruled by the Authority, after analyzing the facts of the case and going through various decisions including the judgment delivered in the case of *Union of India v. A. Sanyasi Rao* [1996] 219 ITR 330 (SC) and ruling of the Authority in the case of *Danfoss Industries Pvt. Ltd.* 268 ITR 1, that it could not be said that the amount represented reimbursement of costs or expenses actually incurred by Timken USA, while rendering the service. The entire amount was held to be liable to deduction of tax at source u/s 195(1) of the Act in India at appropriate rate (under the Act or the Treaty), whichever is lesser.

WALLACE PHARMACEUTICALS (P.) LTD.
[2005] 148 TAXMAN 347

Applicant, an Indian company, with a view to expand its pharmaceutical business, entered into an agreement with an American company 'P' for availing its consultancy services. Applicant paid (i) consultancy fee to 'P'; (ii) commission to 'P' for procuring orders and (iii) it made reimbursement of payments to 'P' as 'P' had made payment to professionals for rendering services to applicant from time to time. It was held that applicant was required to deduct tax at source in respect of payments in question made by applicant to 'P'.

AT & S INDIA PVT LIMITED
[AAR/670/2005] [2006] 157 TAXMAN 198

The applicant, an Indian resident, was a subsidiary of AT&S Austria Technologies & Systemtechnik Aktiengesellschaft, Austria (AT & S, Austria). It was engaged in the business of manufacturing of printed circuit boards. It entered into two agreements namely Foreign Collaboration Agreement dated 17-8-2000 and Secondment Agreement dated 17-9-2002. Pursuant to the latter agreement, AT & S Austria or its subsidiaries would assign qualified employees to work for the applicant on full time basis on payment of compensation similar to what they will be receiving before the assignment.

The question was whether the payment to be made by the applicant towards reimbursement of salary cost pursuant to the Secondment Agreement would be subject to withholding tax u/s 195 of the Act when the payments were only in the nature of reimbursement of actual expenditure and AT & S, Austria was not engaged in the business of providing technical services nor is it charging any separate fee for secondment and the Seconded personnel worked under direct supervision & control of the applicant.

While discussing the scope of section 195 of the Act, the Authority observed that though the term used in the agreement was "reimbursement", what was required to be seen was whether those payments satisfied the characteristic of 'reimbursement'. After going through and discussing the relevant parts of Secondment Agreement, the Authority rejected the plea that payments were only in the nature of reimbursement. Having regard to the facts that AT & S Austria was to provide services on terms & conditions agreed, the employees would go back to AT & S Austria after their assignment was over, they would be paid part of salary by the applicant in Indian rupees and remaining part to be paid to AT & S Austria, in Euro; it was held that AT & S Austria and not the applicant was the real employer. Holding that the payments were in the nature of "fee for technical services" and not "royalty" and not covered by the exception provided in clause 4 of article 12 of DTAA and that as applicant was not the real

employer and the subject matter of payment was not merely salary but the compensation which was not chargeable to tax under the head “salaries” in the hands of the recipient, AT & S Austria, it was ruled that the payments made by the applicant were in the nature of FTS within the meaning of the Explanation 2 of clause (vii) of sub-section (1) of section 9 of the Act and Article 12(4) of the DTAA and would be subjected to withholding tax at source under section 195 of the Act.

INTERNATIONAL HOTEL LICENSING COMPANY, LUXEMBOURG
[AAR 674] [2007] 288 ITR 534/158 TAXMAN 231

The applicant, a non-resident company, is a subsidiary of International Hotel Licensing Company Investments SARL, which is a Luxembourg company. The applicant is engaged in promoting enterprises, conducting international advertising and sales programs for the Marriott chain of hotels. Different Marriott group entities entered into agreements with the Unitech Hospitality Ltd., an Indian company (referred to in the ruling as ‘owner’) to set up a hotel in India. The applicant was engaged by the owner for providing *inter alia*, advertising space in magazines, newspapers and other print media and electronic media outside India. The applicant also provides special Marriott Program to all the hotels of the Marriott chain including the owner. The owner reimburses the applicant for all these services.

The issue for consideration before the Authority was whether the reimbursement to the applicant by the owner for the marketing and business promotion activities conducted outside India would be taxable in India.

After perusing the activities of the applicant as provided in the agreement, it was observed that the applicant would be providing marketing and business promotion services both within and outside India for the brand of Marriott hotels and not individually to the owner of the hotel and there was no direct nexus between the owner and providing the said services, and therefore the payments were not in the nature of reimbursements.

The applicants contention that the applicant neither has any business connection nor has any source of income in India was rejected by the Authority. Delving through the salient features of “business connection” within the meaning of section 9 of the Act as summed up in the rulings by this Authority in the cases of (i) *UAE Exchange Centre LLC* [2004] 268 ITR 9/139 Taxman 82, (ii) *Sutron Corporation* [2004] 268 ITR 156/138 Taxman 87, (iii) *Speciality Magazine Private Ltd.* [2005] 274 ITR 310/144 Taxman 153, (iv) *Honeywell Technologies SARL* and after going through the judicial pronouncements of the Hon’ble Supreme Court in *R.D. Aggarwal & Co.* AIR 1965 SC 1526 and in *Anglo-French Textile Company Ltd.* 23 ITR 101, and after referring to the activities of the applicant, it was held that there existed a real and intimate relation



between the business of the applicant outside India and the activities of the owner in India which would tantamount to having a “business connection” in India. Further, it was observed that though business activities of advertisement and promotion were carried out outside India, they had extension in India, as the print media and electronic media had international circulation. The applicant was thus held to have a source of income in India as per section 9(1)(i) of the Act.

Noting that the applicant has business connection and source of income in India, the Authority proceeded to determine the nature of payment. After elaborating the provisions of section 9(1)(vii) of the Act it was held that the payment received by the applicant was in the nature of ‘fee for technical services’ as (i) it was paid by the owner having hotel business and source of income in India and (ii) the services of advertising, marketing promotion, sales program and special services would be managerial and consultancy services.

TRANSFER PRICING

INSTRUMENTARIUM CORPORATION, FINLAND [AAR609/2003] [2005] 272 ITR 499/143 TAXMAN 01

The applicant in this case was a tax resident of Finland and a non-resident in India. M/s Datex-Ohmeda (India) Pvt. Ltd. (Datex), an Indian company, was a wholly owned subsidiary of the applicant and also its distributor of medical equipments in India. The applicant granted interest free loan to Datex in US Dollar. The applicant sought ruling from the Authority on the following questions: (i) whether granting of loan without charging any interest and accordingly without adhering to the principles of arm's length price resulted in the revenue of the country being benefited; (ii) whether the applicant was required to comply with the provisions relating to transfer pricing namely sections 92 to 92F of the IT Act, 1961 (the Act) with respect to the said transaction of loan and accordingly charge interest as per the principles of arm's length price from Datex; and (iii) whether, in view of provisions of article 25(1) of the DTAA between India and Finland, applicant being a national and tax resident of Finland was not subjected to the rigours of the transfer pricing legislation of India.

After referring to the notes on the Finance Bill, 2001, inserting provisions relating to transfer pricing and Circular No.14, dated 11-5-2001 of CBDT, it was observed that the centre of controversy was sub-section (3) of section 92 which enjoined that the provisions of section 92 would not apply in a case where the computation of income under sub-section (1) thereof or the determination of the allowance for any expense or interest under that sub-section or the determination of any cost or expense apportioned under sub-section (2), as the case may be, had the effect of reducing the income chargeable to tax or increasing the loss. Referring to the definition of 'Advance ruling', it was observed that apparently the issue appeared to be covered under sub-clause (i) of clause (a) to section 245N, but on a close examination it became certain that it was outside the mischief of the said sub-clause. The issue essentially involved a determination of the impact in adhering to the principle

of arm's length and not a determination in regard to the tax implications of the transaction. After referring to clause 7 of the loan agreement, which provided for default interest of 16%, it was held that it would be pre-mature to assume the rate of interest to be 0% and proceed to pronounce a ruling on that premise. It was further held that clause (ii) to proviso to section 245R(2) gives no option to the Authority but to reject the application where the question raised involved determination of fair market value of any property and in the given case the determination of arm's length price would necessarily involve determination of fair market rate of interest. It was thus held that Authority could not pronounce any ruling on the applicability of sub-section (3) of section 92 of the Act and that the applicant had no option but to comply with the provisions of the Act including the legislation relating to transfer pricing namely sections 92 to 92F of the Act.

PSU MATTERS

NATIONAL FERTILIZERS LTD. [AAR/532 & 533/2001] [2005] 142 TAXMAN 5

The applicant, a public sector undertaking was engaged in the business of manufacturing and marketing of nitrogenous fertilizers. The corporate office of the applicant managed all activities relating to corporate affairs including statutory compliances and coordination between Ministry and Govt. agencies and that of marketing division for the purpose of promoting products of the company and to handle trading in products not manufactured by the company. As a policy, at the end of the year, all expenses incurred in the corporate office as well as marketing division were transferred to 4 units including Vijaipur unit in the ratio of their installed capacity.

The applicant sought ruling on the questions: (i) whether interest of Rs. 7,22,506 earned on deposit with M.P. Electricity Board qualified for deduction u/s 80-I; (ii) whether expenses of Rs. 2,76,03,364 (interest expenditure) allocated by marketing office and of Rs. 12,12,74,426 & Rs. 1,65,99,045 allocated by corporate office

should be excluded since the allocated interest income from corporate office of Rs. 5,22,94,939 credited to the P&L account of Vijaipur unit had been excluded for the purpose of deduction u/s 80-I; (iii) whether the income such as interest on bank deposit, interest on others, hire charges of construction equipment and heavy vehicles, medical charges recovered and amount realized on sale of scrap should not be excluded from its profit to the extent of expenses incurred for earning these incomes and debited to Profit & Loss Account and (iv) whether deduction u/s 80-I was to be allowed on miscellaneous income of Rs. 51,51,289.

The Authority observed that the interpretation of the words 'derived from' used in sub-section (1) of section 80-I is crucial for the issue under reference. Citing judgment of Hon'ble Supreme Court in *Sterling Foods* ([1999] 237 ITR 579/104 Taxman 204) it was observed that the said term meant a direct nexus between the profits and the industrial undertaking. It was, thus, held that the interest income earned on deposit with M.P. Electricity Board obviously did not qualify for deduction u/s 80-I and the same also was conceded by the applicant. The Authority rejected the plea of the applicant with regard to issue (ii), since the interest income was excluded, the expenditure should also be ignored while computing profits for the purpose of section 80-I. It was, thus, ruled that the expenses allocated by marketing and corporate office should be excluded as they were not relatable to the industrial undertaking and the fact that corresponding income allocated had been excluded, was opined as irrelevant. It was held with regard to issue (iii) that items such as interest on bank deposit and others, hire charges etc. cannot be said to be derived from industrial undertaking and, therefore, should be excluded. As regards the items like medical charges recovered from the employees and amount realized on sale of scrap, it was held that the AO would reconsider them after examining whether corresponding expenditure in the form of medical charges spent and the amount spent on goods to which the scrap related to, were debited in the books by the applicant. On the similar lines it was held that in respect of miscellaneous income too, the AO will reconsider the issue as with regard to items of income being amount realized on sale of scrap and medical charges recovered.

NATIONAL HYDROELECTRIC POWER CORPORATION LIMITED
[AAR 550/2001] [2005] 273 ITR 171/143 TAXMAN 176

The applicant, a public sector undertaking (PSU), was engaged in the construction and operation of Hydroelectric Power Projects. The power generated by the applicant was supplied to various States/ State Electricity Boards at tariff rates notified by Central Electricity Regulatory Commission (CERC). The tariff components included (a) the basic expenses incurred by the company, (b) depreciation and advance against depreciation (AAD), (c) return on equity and (d) incentive for higher production. Under the rules, the total depreciation including AAD could not exceed 90% of the capital cost during the life of the project which was taken to be between 25 to 30 years, but was allowed to be recovered through tariff over a shorter period of about 12 years. The AAD component of the tariff was meant to facilitate repayment of loan taken by a company for the project. As an accounting policy, the applicant had reduced from the total sales of the year, the amount representing AAD component in the tariff and had shown it as income received in advance on the liability side of the balance sheet which was to be transferred to sales shown in the profit and loss account in subsequent years when the depreciation charged in the books was more than the depreciation rate fixed for tariff purposes.

The issue before the Authority was whether the amount of advance against depreciation was to be included for the computation of book profit under section 115JB of the IT Act, 1961 in the year of receipt or in the year to which the depreciation related.

After elaborate discussion, it was observed by the Authority that there was nothing in section 115JB nor was there any provision in Parts II & III of Schedule VI of the Companies Act, 1956 in regard to the treatment of AAD which would justify the action of the applicant in deducting the AAD component from the total sale price of the electricity. The Hon'ble authority elucidated the import of expressions - 'depreciation', 'advance depreciation' and 'AAD' and observed that AAD was neither used in the Income-tax Act nor in the

Companies Act. To enable the electricity generating companies to raise additional revenue to discharge the loan raised on equipments/projects, the CERC coined the expression of AAD for including it as one of the components of tariff in addition to usual depreciation.

Noticing that the applicant supplied electricity at the tariff rate notified by CERC and accordingly recovered sales price from the beneficiaries which was shown as part of gross sales in the profit & loss A/c (no part of which was refundable or adjustable against the future bills of the beneficiaries), it was held that the amount under reference would represent the income of the applicant in the year of receipt. Distinguishing between the terms 'provision' and 'a reserve', and after discussing the judgment in *Apollo Tyres Ltd. v. CIT* 255 ITR 273 (SC) at length, it was further held that the amount of AAD so set apart from the sales was nothing short of creation of reserve and could not be treated as income received in advance and therefore, it had to be added back to the total income within clause (b) of the explanation to section 115JB for the purpose of arriving at the book profit.

It was, thus, ruled that the amount of advance against depreciation was required to be included for the computation of book profit u/s 115JB of the IT Act in the year of receipt.

RASHTRIYA ISPAT NIGAM LIMITED, VISAKHAPATNAM
(AAR/652/2004) [2006] 285 ITR 01/155 TAXMAN 60

The applicant a public sector company, commenced its commercial operations during the financial year 1989-90. In the financial years 1989-90 to 1992-93, 1997-98 and 1998-99 the applicant had operational losses from business excluding depreciation and in the years 1993-94 to 1996-97, 1999-2000 and 2000-01, the applicant had operational profit. At the end of financial year 2001-02 the applicant had business loss of Rs.1,755 crores (approx.) and unabsorbed depreciation of Rs.3,227 crores eligible to be carried forward and in the financial year 2002-03 it had a net profit of Rs.521 crores. In the financial year 2003-04 the applicant reported a profit of Rs.1,547 crores.

The main issues raised by the applicant in the application were: (i) Whether the applicant had the option to set off current year's profit against the loss brought forward or unabsorbed depreciation in its accounts in a manner different from what is adopted for determination of book profit u/s 115JB; (ii) can the applicant in the subsequent years, adopt a different manner of set off and can it set off current year's profit partly against the business loss brought forward and partly against unabsorbed depreciation in such proportion as it may decide; (iii) having disclosed aggregate loss in the accounts, can for the purpose of calculating the book profit u/s 115JB the applicant bifurcate such loss and avail the benefit of deduction envisaged under section 115JB(2) in a manner most beneficial to it and whether such adjustment can be changed from year to year.

Quoting provisions of section 205(1) of the Companies Act, 1956 and in particular proviso (b) thereto, the Authority rejected the contention of the applicant that the Companies Act did not contain any provision for bifurcation of loss and observed that a similar concept was incorporated in section 115J of the IT Act, 1961. It was held that for the purpose of section 115JB, the brought forward loss and unabsorbed depreciation were required to be mentioned separately and only after the current year's profit was reduced by the lesser of the two for the purpose of carrying forward to the next year, the closing balance of the immediately preceding year would be the opening balance for the succeeding year. It was observed that the proposition that each accounting year and assessment year would be independent, must be tempered with the requirement for consistency and regularity of treatment which was one of the primary foundation of law and accountancy, though there might be several streams of accounting prescribed by respective statutes e.g. under the Companies Act or under the Income Tax Act. The Authority held that it was not open to the taxpayer to opt for inconsistent method of accounting both on interpretation of section 115JB as well as on the principle of consistency on method of accounting and therefore, the claim of the applicant was untenable. It was, thus ruled that the applicant did not have an option to reduce current year's profit by the loss brought forward or unabsorbed depreciation (for the purpose of carry forward u/s 115JB) in its accounts in a manner

different from the manner adopted for determination of book profit u/s 115JB and that it could not reduce the current year's profit partly by brought forward business loss and partly by unabsorbed depreciation.

MAHANAGAR TELEPHONE NIGAM LIMITED
(AAR/651/2004) [2006] 286 ITR 211/156 TAXMAN 105

The applicant (MTNL) is a Public Sector Company (PSC) as defined in section 2(36A) of the IT Act (the Act). Indian Telephone Industry Ltd. (ITI), another PSC, was one of the suppliers of equipments and machinery to the applicant. As per the terms of the purchase order, if ITI failed to deliver equipments within stipulated time, it was to pay liquidated damages (LD) to MTNL. In the period 1987-88 to 1995-96, MTNL recovered LDs amounting to Rs.21.4 crores which were adjusted against the cost of assets in some years and shown as income in other years. Subsequently, consequent to the directions received from the Telecom Commission, the LDs were waived and certain amounts were refunded to ITI by MTNL in the financial year 2001-02, which it claimed as deduction from its income of that year.

The issue referred to for the consideration of the Authority was whether the amount refunded on account of waiver of LDs was an allowable deduction from its business income under the Act in the assessment year 2002-03.

Relying on the judgment of the Hon'ble Supreme Court in *Swadeshi Cotton Mills Co. Ltd.* 63 ITR 65 and after considering the facts of the case and noting that the liquidated damages related to delay in supplies of equipments and apparatus which constituted capital goods for the applicant, it was held that the damages recovered were in the nature of capital receipts. Authority further observed that what was relevant there; was the nature of goods purchased under the contract and not the treatment or method of accounting/ accounting policy adopted by the applicant; once it was held that the amount under reference was of capital in nature, it would be out of the purview of not only section 37(1) but also section 57(iii) of the Act, which stood similarly worded and further discussion as to

whether the refund granted was for the purpose of business or not would be of no avail. It was, thus, ruled that the amount refunded by the applicant to ITI Ltd on account of waiver of LDs was not an allowable deduction from its business income.

MISCELLANEOUS

MR. DIETER EBERHARD GUSTAN VON DER MARK, GERMANY
[1999] 235 ITR 698/102 TAXMAN 368

The amount received by the applicant for rendering professional services as engineer was held to be covered under Article 14, but it would not be taxable in India, as the applicant did not have any PE in India and the stay of the applicant in India was less than 120 days in a year. The fee paid to the applicant as director of Indian company was accessible in India under Article 16 of the DTAA.

VAN OORD ACZ, BV, THE NETHERLANDS (UNREPORTED)

It was held that joint venture formed by the applicant and Hindustan Company Ltd. cannot be treated as an AOP for the purpose of levy of income tax and the applicant would be liable to tax as a separate and independent entity.

SOPROPHA SA, SWITZERLAND
[AAR/508/2000] [2004] 138 TAXMAN 75

The applicant, a company incorporated in Switzerland, was a tax resident of that country. It proposed to set-up a branch office in India for dealing in 'Green Coffee'. Green coffee is a seasonable crop, available in the market once a year for a limited period. The branch office would buy green coffee in India and sell it to processors in India or export it to parties outside India at a price largely determined by the then prevailing international price. To safeguard itself against price fluctuations, the applicant would have to enter into hedging transaction on the International Commodity Exchange (ICE) in

which it would initially sell the green Coffee and thereafter settle the transaction by entering into a purchase transaction without taking actual delivery.

The questions referred to for the consideration of the Authority were:- (i) whether hedging in respect of stock in which the applicant dealt would be covered by clause (a) of proviso to section 43(5) of the IT Act, 1961 (the Act); (ii) whether existence of contract of sale of stock in trade was a condition precedent to attract the said clause; (iii) whether the said clause covered not only the forward purchase transaction but also forward sale transaction and (iv) whether the hedging transaction should be of the same quality/quantity of goods as were held in stock.

The Authority observed that Board's Circular No. 23D, dated 12-9-1960 had expanded the scope of hedging transaction, which was given a very restrictive meaning, so as to include hedging contract for both purchase as well as sale in connected commodities. Based on the said circular, along with observations contained in Chapter III of the report of the Direct Taxes Administration Enquiry Committee and the decision of Hon'ble Gujarat High Court in *Pankaj Oil Mills v. CIT* ([1978] 115 ITR 924), the Authority enumerated salient features of Hedging Contracts. It was ruled that forward contract of sale of green coffee to the extent of stock in which the applicant dealt would be in the nature of 'hedging contract'. Though, the existence of a contract of sale was a condition precedent to attract clause (a) of proviso to section 43(5) of the Act, it stood relaxed to the extent allowed by Circular No.23D. Forward sale transactions were covered within the said proviso due to the extended meaning given by the said circular. It was further ruled that hedging contracts need not be of identical quantity/quality as that of the goods held in stock by the applicant.

GOVINDRAM T. JARANI
[2004] 138 TAXMAN 73

Applicant, a non-resident, gifted certain shares of Indian companies to his wife - Out of those shares, wife sold some of shares and

earned capital gains. It is held that provisions of section 64(1)(iv) were attracted in instant case, since shares were transferred by applicant directly to spouse and therefore, capital gain earned by applicant's wife will be clubbed with his income and capital gain so included in income of applicant will be excluded from total income of his wife.

PFIZER CORPORATION, PANAMA
[AAR620/2003] [2004] 141 TAXMAN 642

The applicant, a tax resident of Panama and a non-resident in India, belonged to the Pfizer Group of companies. The applicant owned the technology information pertaining to the manufacture of nutritional food supplement under the trademarks 'Protinex' and 'Dumex' manufactured and sold by Pfizer India, another group company. Both the trademarks were registered in India. EAC Nutrition Ltd., A/s, Denmark (EAC), a corporation incorporated in Denmark, acquired from the applicant the trademarks and technology information related to the said products under two separate agreements. The technology information, which is relevant for this application, was sold for US\$ 5 millions. A dossier, accordingly, containing technology information as outlined in schedule 1 of the Agreement was handed over to EAC in Bangkok. Another agreement was entered into between EAC and Pfizer India for early termination of the license granted to Indian company to manufacture products under the said trademarks for a consideration of US\$ 7 millions.

The issue before the Authority was whether the amount received by the applicant on transfer of documents containing know-how and technical information outside India to EAC would be taxable in India having regard to the provisions of IT Act, 1961 (the Act).

It was observed that since there was no Double Taxation Avoidance Agreement between India and Panama, the taxability for the transaction had to be considered only under the domestic law i.e. Income-tax Act, 1961. After referring to the decisions of the Hon'ble Supreme Court in the case of *Scientific Engineering House Pvt. Ltd.*

([1986] 157 ITR 86/[1985] 23 Taxman 66) and *Associated Cement Companies Ltd.* [042 RLT 0937], it was held that the transfer of technical information in the form of a dossier was nothing but transfer of capital asset. Regarding the situs of the asset, it was observed that since the Indian company was only a licensee and the original technical know-how was always available with the owner i.e. the applicant, once the Indian company entered into an agreement with EAC for early termination of license to manufacture these products, the technical know-how reverted back to the owner. As a result, no asset related to technical know-how was located in India either in tangible or intangible form after termination of license and, therefore, the situs of the capital asset transferred to EAC was outside India. It was, thus, held that the amount received on transfer of know-how and technical information would not be chargeable to tax in India.

MADURA COATS (P.) LTD.
[2005] 145 TAXMAN 366

JPC was a UK based company and a major shareholder of applicant company, MCPL, which was an Indian company. Applicant proposed to advance loan to CFL (another UK based Co. belonging to the same group) out of its accumulated profits - According to Commissioner such loan should be treated as deemed dividend and taxable in hands of JPC being major shareholder of applicant. CFL was not a registered shareholder of applicant and JPC though having not less than 10 per cent voting power in applicant, was not member or a partner of CFL, much less having it any substantial interest in CFL as defined in section 2(32); and loan was not given directly by applicant to JPC and there was nothing on record to suggest that proposed loan was being advanced by applicant to CFL on behalf of or for individual benefit of JPC. It was held that none of essential conditions of third requirement of section 2(22)(e) was satisfied and, therefore, proposed loan would not be treated as deemed dividend as defined thereunder.

**BRITISH GAS INDIA (P.) LTD.
[2006] 155 TAXMAN 326**

A careful reading of *Explanation (a)* to section 6(1) would show that requirement of *Explanation* is not leaving India for employment but it is leaving India for purposes of employment outside India. For purpose of such *Explanation* an individual need not be an unemployed person who leaves India for employment outside India. Applicant an Indian company deputed its employee 'M' to UK for two years from 1-7-2005. In financial year 2005-06, 'M' stayed in India for less than 182 days. It was held that in view of *Explanation (a)* to section 6(1), 'M' would be considered as non-resident in India for financial year 2005-06, and, therefore, salary received by him in India for rendering services in UK would not be taxable in India.

**BRITISH GAS INDIA PRIVATE LIMITED
[AAR/725/2006] [2006] 157 TAXMAN 225**

The applicant is a resident company of BG Group of companies which deal in all kinds of natural gases. The applicant sought ruling from the Authority relating to, *inter alia*, the tax liability of its non-resident employees, Mr. Manish Gupta & Shri Nipun Pradhan who were lent to the group companies abroad. Shri Nipun Pradhan was deputed to BG International Ltd., UK (BG UK) w.e.f. 19-1-2004 and his assignment was extended till 18-1-2007. Shri Manish Gupta was deputed to BG UK w.e.f. 1-7-2005. During the period of deputation both the employees continued to be on the pay rolls of the applicant and received salary in India from the applicant in addition to certain allowances paid by BG UK. During the financial year 2005-06 Mr. Pradhan's total stay in India did not exceed 60 days and that of Mr. Gupta's 182 days. In the tax returns filed for the financial year 2003-04 in the UK, Mr. Pradhan included salary received in India during this period. The return for the tax years 2005-06 are due by 31st January 2007 which are yet to be filed by both of them.

The issue before the Authority was whether salary income received in India by Mr. Manish Gupta for rendering services outside India was taxable in India and whether the applicant was to withhold taxes on salary paid in India to both the employees for rendering services outside India.

With regard to the residential status of Shri Gupta in the financial year 2005-06 it was held (*vide* separate order dated 31-7-2006), while drawing distinction between the words “leaving India for employment” and “leaving India for the purposes of employment” as used in *Explanation (a)* to section 6(1) that in the applicant’s case the words “one hundred and eighty two days” would be substituted in place of the words “sixty days” in sub-clause (c) of section 6(1) of the Act. Since Mr. Gupta was in India for less than 182 days, he would be a non-resident. The application was, thus, held to be maintainable with regard to the tax implications of Shri Gupta.

The Authority observed that though there was no dispute that Indian salary of the concerned employees was taxable in India, what was needed to be seen was whether any relief was available under the Treaty between India and UK. It was held that, since Mr. Gupta and Mr. Pradhan were liable to income tax in the UK being residents of UK in terms of clause (1) of Article 4 of the Treaty and as they were drawing their salary in respect of employment being exercised in the UK, in the light of clause (1) of Article 16, the salary would be taxable in that country only i.e. UK. It was further observed that since the employees were receiving salary from BG UK, they were covered by the provision of sub-section (2) of section 192 of the IT Act, 1961. The tax was, therefore, not deductible from the salary paid to Mr. Pradhan and Mr. Gupta in India by the applicant provided it was satisfied from the details furnished u/s 192(2) that taxes were paid on such payments in the UK.

RAJIV MALHOTRA
[2006] 284 ITR 564/155 TAXMAN 101

The applicant in this case is the proprietor of Lotus Exhibition Marketing Services (LEMS) which is engaged in organizing India

International Food & Wine Shows (IIFWS) for which participation of foreign concerns and undertakings is desired. The applicant intends to appoint agents abroad for furnishing necessary information to the foreign participants who would be receiving commission for services so rendered. The terms and conditions with the agents are set out in the Agreement enclosed with the application.

The applicant sought ruling on the issue whether a non-resident agent rendering services outside India and also getting payment outside India would be liable to income tax in India on account of being agent of a resident in India and whether TDS was deductible from payments remitted to the non-resident agent.

In the light of provisions of sections 5(2)(b) and 9(1) of the Act, it was observed by the Authority, that it was important to examine the situs of source of income to the non-resident agent. Citing the terms and conditions under Article 5 of the Agreement with the agent and in the light of the fact that the commission becomes payable to the agent only after the exhibitor participates in the show in India and makes full payment due to the applicant, the Authority held that as the right to receive the commission arose in India, the commission income would be taxable in India in the light of provisions of sections 5(2)(b) & 9(1) of the Act. The fact that the commission was remittable to him abroad, was irrelevant for the purpose of determining the situs of source of his income. Accepting that the agent was the resident of France as stated, in view of para 3 of Article 23 (other income) no further benefit was available therein to the applicant. It was, thus, ruled that the source of income of the agent being situated in India, he would be liable to tax in India under the Act and tax was required to be deducted at source from the payments to be remitted by the applicant.

POPULATION COUNCIL INC, USA
[AAR/677/2006] [2006] 156 TAXMAN 125/286 ITR 243

The applicant, an international non-profit, non-governmental organization was incorporated under the New York Membership Corporation Law and it was a resident of USA. The applicant carried

on charitable, scientific and educational activities for population. It enjoyed tax exemption from federal income tax u/s 501(c) (3) of the internal Revenue Code of USA. The expenses incurred in India by the applicant, including fringe benefits provided to the employees falling under the heads travel, workshop/conference, entertainment/hospitality etc. were met by remittances from the head office in New York.

The question before the Authority was whether the applicant was liable to pay fringe benefit tax u/s 115WA of the Income-tax Act, 1961 (the Act) on the fringe benefits made available to its employees working in India.

Before interpreting the provisions relating to fringe benefit tax, Authority restated the basic rules in interpreting a statute after referring to dictas of English Judges as quoted in Craise on Statute Law, the Authority rejected the applicant's contention that, since it was not chargeable to income-tax in India in the absence of any income generating source, the question of charging FBT or additional tax would not arise. Observing that sub-section (2) to section 115WA of the IT Act was of clarificatory in nature it was held that any interpretation to mean that if there was no total income which could be computed in accordance with provisions of the Act, no FBT would be payable; would be contrary to not only the intention of the Parliament but also the plain language of the provision and the basic principles of interpretation. It was, thus, ruled that the applicant was liable to pay fringe benefit tax u/s 115WA of the Act.

ANGEL GARMENT LTD.
[2006] 157 TAXMAN 195

Where applicant, a non-resident company having its registered office in Hong Kong is proposing to set up a liaison office in India for purchase of goods for purpose of export, it is held that in view of *Explanation 1(b)* to section 9(1)(i), applicant has no taxable income in India as per provisions of Act.

R & B FALCON (A) PTY LIMITED
[AAR 730 OF 2006] [2007] 159 TAXMAN 228

The applicant, a non-resident company was incorporated in Australia. The applicant is engaged in the business of providing “Mobile Offshore Drilling Rig” (**MODR**) alongwith crew on a day rate charter hire basis to drill offshore wells. The applicant entered into a contract with ONGC for supplying MODR on commuter basis alongwith equipment and offshore crew. Under the commuter basis system an employee works on MODR for 28 days alternated by 28 days field break when he stays at the place of his residence. The members of the offshore crew provided by the applicant belong to Australia, USA, UK etc. The members of the crew are provided free air tickets of economy class by the applicant for travelling from their home country to a designated city in India and transported from that city in India to MODR through helicopter and in the same manner they are transported back after 28 days. They are not paid any conveyance or transport allowance.

The provisions levying Fringe Benefit Tax (FBT) were inserted by the Finance Act, 2005 w.e.f. 1-4-2006 and they were clarified in Board’s Circular No.8 of 2005 dated 29th August, 2005. The issue which arose for consideration of the Authority was, whether the transportation cost incurred by the applicant for transportation of offshore employees from their residence in home country to the place of work in India, would be liable to FBT.

After analyzing the said provisions imposing FBT w.e.f. 1-4-2006, the Authority observed that sub-section (1) of section 115WB embodied the import of the term ‘fringe benefit’ and sub-section (2) thereof deemed incurring of any expenditure on or making of any payment for any of the purposes enumerated in clauses A to Q of the said sub-section by an employer in the course of his business or profession, within the ambit of that term. Pointing out that the relief granted in sub-section (3) of section 115WB would be available when the fringe benefits fell within the scope of sub-section (1) of that provision, and would not be available to the deemed fringe benefits falling within sub-section (2) of that provision, it was held that as

section 115WB(1) did not take in its fold free or concessional tickets provided by an employer to his employee for the purpose of journeys outside India, the claim of the applicant that it was exempted under section 115WB(3), was unsustainable. The Authority explained in detail the meaning of “conveyance” or “tour and travel” (including foreign travel) mentioned in clauses (F) and (Q) respectively of section 115WB(2) of the Act, and observed that the transportation of employees from their residence in their home countries to the rig would fall within clauses (F) and (Q) of section 115WB (2) of the Act. After discussing the clarification given in various questions and answers of Board’s Circular No. 8 of 2005 dated 29th August, 2005, it was further held that the applicant was liable to Fringe Benefit Tax.

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CHAPTER XIXB¹**RELEVANT PROVISIONS OF INCOME-TAX
ACT, 1961 (ADVANCE RULING)****Definitions.**

245N. In this Chapter, unless the context otherwise requires,—

²[(a) “advance ruling” means—

- (i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant; or



1. Chapter XIX-B, consisting of sections 245N to 245V, inserted by the Finance Act, 1993, w.e.f. 1-6-1993.

2. Clauses (a) and (b) substituted by the Finance Act, 2000, w.e.f. 1-6-2000. Prior to their substitution, clauses (a) and (b), as inserted by the Finance Act, 1993, w.e.f. 1-6-1993 and later on substituted by the Finance (No. 2) Act, 1998, w.e.f. 1-10-1998, read as under :

‘(a) “advance ruling” means—

- (i) a determination by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant and such determination shall include the determination of any question of law or of fact specified in the application;
- (ii) a decision by the Authority in relation to an assessment which is pending before any of the Income-tax Authority or the Tribunal in case of an applicant who is a resident in India and such decision shall include the decision on question of law or fact arising out of the orders of assessment in respect of which an application has been made by a resident applicant;

(b) “applicant” means any person who—

- (i) is a non-resident; or
- (ii) is a resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette, specify in this behalf;
- (iii) makes an application under sub-section (1) of section 245Q;’

- (ii) a determination by the Authority in relation to ³[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 ⁴[such] non-resident,

and such determination shall include the determination of any question of law or of fact specified in the application;

- (iii) a determination or decision by the Authority in respect of an issue relating to computation of total income which is pending before any income-tax authority or the Appellate Tribunal and such determination or decision shall include the determination or decision of any question of law or of fact relating to such computation of total income specified in the application :

⁵[**Provided** that where an advance ruling has been pronounced, before the date on which the Finance Act, 2003 receives the assent of the President, by the Authority in respect of an application by a resident applicant referred to in sub-clause (ii) of this clause as it stood immediately before such date, such ruling shall be binding on the persons specified in section 245S;]

- (b) “applicant” means any person who—

- (i) is a non-resident referred to in sub-clause (i) of clause (a); or
- (ii) is a resident referred to in sub-clause (ii) of clause (a); or
- (iii) is a resident falling within any such class or category of persons as the Central Government may, by notification in the Official Gazette⁶, specify in this behalf; and
- (iv) makes an application under sub-section (1) of section 245Q;]

3. Inserted by the Finance Act, 2003, w.r.e.f. 1-6-2000.

4. Substituted for “a”, *ibid*.

5. Inserted by the Finance Act, 2003, w.e.f. 14-5-2003.

6. For notified class or category of persons, see Taxmann’s Master Guide to Income-tax Act.

- (c) “application” means an application made to the Authority under sub-section (1) of section 245Q;
- (d) “Authority” means the Authority for Advance Rulings constituted under section 245-O;
- (e) “Chairman” means the Chairman of the Authority;
- (f) “Member” means a Member of the Authority and includes the Chairman.

Authority for Advance Rulings.

245-O. (1) The Central Government shall constitute an Authority for giving advance rulings, to be known as “Authority for Advance Rulings”.

(2) The Authority shall consist of the following Members appointed by the Central Government, namely :—

- (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.

(3) The salaries and allowances payable to, and the terms and conditions of service of, the Members shall be such as may be prescribed.

(4) The Central Government shall provide the Authority with such officers and staff as may be necessary for the efficient exercise of the powers of the Authority under this Act.

(5) The office of the Authority shall be located in Delhi.

Vacancies, etc., not to invalidate proceedings.

245P. No proceeding before, or pronouncement of advance ruling by, the Authority shall be questioned or shall be invalid on the ground merely of the existence of any vacancy or defect in the constitution of the Authority.



Application for advance ruling.

245Q. (1) An applicant desirous of obtaining an advance ruling under this Chapter may make an application in such form and in such manner as may be prescribed⁷, stating the question on which the advance ruling is sought.

(2) The application shall be made in quadruplicate and be accompanied by a fee of two thousand five hundred rupees.

(3) An applicant may withdraw an application within thirty days from the date of the application.

Procedure on receipt of application.

245R. (1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner and, if necessary, call upon him to furnish the relevant records :

Provided that where any records have been called for by the Authority in any case, such records shall, as soon as possible, be returned to the Commissioner.

(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application :

⁸**Provided** that the Authority shall not allow the application where the question raised in the application,—

- (i) is already pending before any income-tax authority or Appellate Tribunal [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N] or any court;
- (ii) involves determination of fair market value of any property;

7. See rule 44E and Form Nos. 34C to 34E for application for obtaining advance ruling in quadruplicate.

8. Substituted by the Finance Act, 2000, w.e.f. 1-6-2000. Prior to its substitution, proviso, as amended by the Finance (No. 2) Act, 1998, w.e.f. 1-10-1998, read as under :

“Provided that the Authority shall not allow the application except in the case of a resident applicant where the question raised in the application,—

- (a) is already pending in the applicant's case before any income-tax authority, the Appellate Tribunal or any court;
- (b) involves determination of fair market value of any property;
- (c) relates to a transaction which is designed *prima facie* for the avoidance of income-tax:”

- (iii) relates to a transaction or issue which is designed *prima facie* for the avoidance of income-tax [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N].]

Provided further that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

Provided also that where the application is rejected, reasons for such rejection shall be given in the order.

(3) A copy of every order made under sub-section (2) shall be sent to the applicant and to the Commissioner.

(4) Where an application is allowed under sub-section (2), the Authority shall, after examining such further material as may be placed before it by the applicant or obtained by the Authority, pronounce its advance ruling on the question specified in the application.

(5) On a request received from the applicant, the Authority shall, before pronouncing its advance ruling, provide an opportunity to the applicant of being heard, either in person or through a duly authorised representative.

Explanation.—For the purposes of this sub-section, “authorised representative” shall have the meaning assigned to it in sub-section (2) of section 288, as if the applicant were an assessee.

(6) The Authority shall pronounce its advance ruling in writing within six months of the receipt of application.

(7) A copy of the advance ruling pronounced by the Authority, duly signed by the Members and certified in the prescribed manner⁹ shall be sent to the applicant and to the Commissioner, as soon as may be, after such pronouncement.

9. See rule 44F for certification of copies of the advance rulings pronounced by the Authority.

¹⁰[Appellate authority not to proceed in certain cases.]

245RR. No income-tax authority or the Appellate Tribunal shall proceed to decide any issue in respect to which an application has been made by an applicant, being a resident, under sub-section (1) of ¹¹[section 245Q].]

Applicability of advance ruling.

245S. (1) The advance ruling pronounced by the Authority under section 245R 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.

Advance ruling to be void in certain circumstances.

245T. (1) Where the Authority finds, on a representation made to it by the Commissioner or otherwise, that an advance ruling pronounced by it under sub-section (6) of section 245R has been obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such ruling to be void *ab initio* and thereupon all the provisions of this Act shall apply (after excluding the period beginning with the date of such advance ruling and ending with the date of order under this sub-section) to the applicant as if such advance ruling had never been made.

(2) A copy of the order made under sub-section (1) shall be sent to the applicant and the Commissioner.

10. Inserted by the Finance (No. 2) Act, 1998, w.e.f. 1-10-1998.

11. Substituted for "section 245R" by the Finance (No. 2) Act, 2004, w.r.e.f. 1-10-1998.

Powers of the Authority.

245U. (1) The Authority shall, for the purpose of exercising its powers, have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908) as are referred to in section 131 of this Act.

(2) The Authority shall be deemed to be a civil court for the purposes of section 195, but not for the purposes of Chapter XXVI, of the Code of Criminal Procedure, 1973 (2 of 1974) and every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code (45 of 1860).

Procedure of Authority.

245V. The Authority shall, subject to the provisions of this Chapter, have power to regulate¹² its own procedure in all matters arising out of the exercise of its powers under this Act.]

12. See Authority for Advance Rulings (Procedure) Rules, 1996.



CHAPTER XIV

**RELEVANT PROVISIONS OF
PROCEDURE FOR ASSESSMENT****Time limit for completion of assessments and reassessments.**

153. ¹[(1) No order of assessment² shall be made under section 143 or section 144 at any time after the expiry of—

- (a) two years from the end of the assessment year in which the income was first assessable; or
- (b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139,

whichever is later :]



³[**Provided** that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2004 or any subsequent assessment year, the provisions of

1. Substituted by the Finance Act, 1989, w.e.f. 1-4-1989. Earlier sub-section (1) was substituted by the Direct Tax Laws (Amendment) Act, 1987, with effect from the same date. Prior to its substitution, sub-section (1) [as it stood before its substitution by the Direct Tax Laws (Amendment) Act, 1987] was substituted by the Finance Act, 1968, w.e.f. 1-4-1968 and later on amended by the Taxation Laws (Amendment) Act, 1984, w.e.f. 1-10-1984.
2. For the meaning of the expression “order of assessment”, see Taxmann’s Direct Taxes Manual, Vol. 3.
3. Inserted by the Finance Act, 2006, w.e.f. 1-6-2006.

clause (a) shall have effect as if for the words two years, the words twenty-one months had been substituted.]

⁴[**Provided further** that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2005 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA—

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words “two years”, the words “thirty-three months” had been substituted.]

⁵[(1A) No order of assessment shall be made under section 115WE or section 115WF at any time after the expiry of ⁶[twenty-one months] from the end of the assessment year in which the fringe benefits were first assessable.

(1B) No order of assessment or reassessment shall be made under section 115WG after the expiry of ⁷[nine months] from the end of the financial year in which the notice under section 115WH was served.]

⁸[(2) No order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of ⁹[one year] from the end of the financial year in which the notice under section 148 was served :

¹⁰[**Provided** that where the notice under section 148 was served on or after the 1st day of April, 1999 but before the 1st day of April,

4. Inserted by the Finance Act, 2007, w.e.f. 1-6-2007.

5. Sub-sections (1A) and (1B) inserted by the Finance Act, 2005, w.e.f. 1-4-2006.

6. Substituted for “two years” by the Finance Act, 2006, w.e.f. 1-6-2006.

7. Substituted for “one year”, *ibid*.

8. Substituted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989.

9. Substituted for “two years” by the Finance Act, 2001, w.e.f. 1-6-2001.

10. Proviso substituted, *ibid*. Prior to its substitution, proviso read as under :

“**Provided** that where the notice under section 148 was served on or before the 31st day of March, 1987, such assessment, reassessment or recomputation may be made at any time up to the 31st day of March, 1990.”

2000, such assessment, reassessment or recomputation may be made at any time up to the 31st day of March, 2002:]

¹¹[**Provided further** that where the notice under section 148 was served on or after the 1st day of April, 2005, the provisions of this sub-section shall have effect as if for the words one year, the words nine months had been substituted:]

¹²[**Provided also** that where the notice under section 148 was served on or after the 1st day of April, 2006 and during the course of the proceedings for the assessment or reassessment or recomputation of total income, a reference under sub-section (1) of section 92CA—

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007,

the provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words “one year”, the words “twenty-one months” had been substituted.]

¹³[(2A) Notwithstanding anything contained in sub-sections (1)

¹⁴[(1A), (1B)] and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year,

11. Inserted by the Finance Act, 2006, w.e.f. 1-6-2006.

12. Inserted by the Finance Act, 2007, w.e.f. 1-6-2007.

13. Substituted by the Finance Act, 2001, w.e.f. 1-6-2001. Prior to its substitution, sub-section (2A), as inserted by the Taxation Laws (Amendment) Act, 1970, w.e.f. 1-4-1971 and later on amended by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988, read as under :

“(2A) Notwithstanding anything contained in sub-sections (1) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment under section 146 or in pursuance of an order, under section 250, section 254, section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of two years from the end of the financial year in which the order under section 146 cancelling the assessment is passed by the Assessing Officer or the order under section 250 or section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner.”

14. Inserted by the Finance Act, 2005, w.e.f. 1-4-2006.

an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 or section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner:



Provided that where the order under section 250 or section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner, on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such an order of fresh assessment may be made at any time up to the 31st day of March, 2002:]

¹⁵[**Provided further** that where the order under section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Commissioner on or after the 1st day of April, 2005, the provisions of this sub-section shall have effect as if for the words one year, the words nine months had been substituted:]

¹⁶[**Provided also** that where the order under section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Commissioner on or after the 1st day of April, 2006, and during the course of the proceedings for the fresh assessment of total income, a reference under sub-section (1) of section 92CA—

- (i) was made before the 1st day of June, 2007 but an order under sub-section (3) of section 92CA has not been made before such date; or
- (ii) is made on or after the 1st day of June, 2007,

15. Inserted by the Finance Act, 2006, w.e.f. 1-6-2006.

16. Inserted by the Finance Act, 2007, w.e.f. 1-6-2007.

the provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words “one year”, the words “twenty-one months” had been substituted.]

(3) The provisions of sub-sections (1) ¹⁷[(1A), (1B)] and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, ¹⁸[subject to the provisions of sub-section (2A),] be completed at any time—

- (i) ¹⁹[***]
- (ii) where the assessment, reassessment or recomputation is made on the assessee or any person²⁰ in consequence of or to give effect to²⁰ any finding or direction²¹ contained in an order under section 250, 254, 260, 262, 263, or 264²² [or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act] ;
- (iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.

^{22a}[(4) Notwithstanding anything contained in the foregoing provisions of this section, sub-section (2) of section 153A and sub-section (1) of section 153B, the order of assessment or reassessment, relating to any assessment year, which stands revived under sub-section (2) of section 153A, shall be made within one year from the end of the month of such revival or within the period specified in this section or sub-section (1) of section 153B, whichever is later.]

²³[Explanation 1.—In computing the period of limitation for the purposes of this section—

17. Inserted by the Finance Act, 2005, w.e.f. 1-4-2006.

18. Inserted by the Taxation Laws (Amendment) Act, 1970, w.e.f. 1-4-1971.

19. Omitted by the Finance Act, 2001, w.e.f. 1-6-2001. Prior to its omission, clause (i) read as under :

“(i) where a fresh assessment is made under section 146;”

20. For the meaning of expressions “any person” and “in consequence of or to give effect to”, see Taxmann’s Direct Taxes Manual, Vol. 3.

21. For the meaning of the term “finding or direction”, see Taxmann’s Direct Taxes Manual, Vol. 3.

22. Inserted by the Direct Taxes (Amendment) Act, 1964, w.e.f. 6-10-1964.

22a. Inserted by the Finance Act, 2008, w.r.e.f. **1-6-2003**.

23. Substituted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1-1-1976 as regards clauses (i), (ii) and (iv) and w.e.f. 1-4-1976 as regards clauses (iii) and (v).

- (i) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to section 129, or
- (ii) the period during which the assessment proceeding²⁴ is stayed by an order or injunction of any court, or
- ²⁵[(iii) the period commencing from the date on which the Assessing Officer intimates the Central Government or the prescribed authority, the contravention of the provisions of clause (21) or clause (22B) or clause (23A) or clause (23B) or sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, under clause (i) of the proviso to sub-section (3) of section 143 and ending with the date on which the copy of the order withdrawing the approval or rescinding the notification, as the case may be, under those clauses is received by the Assessing Officer,] or
- (iii) the period commencing from the date on which the ²⁶[Assessing] Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending with ²⁷[the last date on which the assessee is required to furnish] a report of such audit under that sub-section, or
- (iv) ²⁸[* * *]
- ²⁹[(iva) the period (not exceeding sixty days) commencing from the date on which the ²⁶[Assessing] Officer received the declaration under sub-section (1) of section 158A and ending with the date on which the order under sub-section (3) of that section is made by him, or]



24. For the meaning of the expression "assessment proceeding", see Taxmann's Direct Taxes Manual, Vol. 3.

25. Inserted by the Finance Act, 2002, w.e.f. 1-4-2003.

26. Substituted for "Income-tax" by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988.

27. Substituted for "the date on which the assessee furnishes" by the Finance (No. 2) Act, 1996, w.e.f. 1-4-1997.

28. Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1989.

29. Inserted by the Taxation Laws (Amendment) Act, 1984, w.e.f. 1-10-1984.

- (v) in a case where an application made before the Income-tax Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section, ³⁰[or]

³⁰[(vi) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of section 245Q and ending with the date on which the order rejecting the application is received by the Commissioner under sub-section (3) of section 245R, or

- (vii) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of section 245Q and ending with the date on which the advance ruling pronounced by it is received by the Commissioner under sub-section (7) of section 245R,]

shall be excluded :

³¹[**Provided** that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in sub-sections (1), ³²[(1A), (1B),] ^{32a}[(2), (2A) and (4)] available to the Assessing Officer for making an order of assessment, reassessment or recomputation, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly:]

^{32b}[**Provided further** that where a proceeding before the Settlement Commission abates under section 245HA, the period of limitation available under this section to the Assessing Officer for making an order of assessment, reassessment or re-computation, as the case may be, shall, after the exclusion of the period under sub-section (4) of section 245HA, be not less than one year; and where such period of limitation is less than one year, it shall be deemed to have been

30. Inserted by the Finance (No. 2) Act, 2004, w.e.f. 1-10-2004.

31. Inserted by the Finance (No. 2) Act, 1991, w.e.f. 27-9-1991.

32. Inserted by the Finance Act, 2005, w.e.f. 1-4-2006.

32a. Substituted for "(2) and (2A)" by the Finance Act, 2008, w.r.e.f. **1-6-2003**.

32b. Inserted by the Finance Act, 2008, w.r.e.f. **1-6-2007**.

extended to one year; and for the purposes of determining the period of limitation under sections 149, 153B, 154, 155, 158BE and 231 and for the purposes of payment of interest under section 243 or section 244 or, as the case may be, section 244A, this proviso shall also apply accordingly.]

Explanation 2.—Where, by an order ³³[referred to in clause (ii) of sub-section (3)], any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

Explanation 3.—Where, by an order ³³[referred to in clause (ii) of sub-section (3)], any income is excluded from the total income of one person and held to be the income of another person³⁴, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed.

Time-limit for completion of assessment under section 153A.

153B. (1) Notwithstanding anything contained in section 153, the Assessing Officer shall make an order of assessment or reassessment,—

- (a) in respect of each assessment year falling within six assessment years referred to in clause (b) of ^{34a}[sub-section (1) of] section 153A, within a period of two years from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed;
- (b) in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition

33. Substituted for “under section 250, 254, 260, 262, 263 or 264” by the Direct Taxes (Amendment) Act, 1964, w.e.f. 6-10-1964.

34. For the meaning of the expression “another person”, see Taxmann’s Direct Taxes Manual, Vol. 3.

34a. Inserted by the Finance Act, 2008, w.r.e.f. **1-6-2003**.

is made under section 132A, within a period of two years from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed :

³⁵[**Provided** that in case of other person referred to in section 153C, the period of limitation for making the assessment or reassessment shall be the period as referred to in clause (a) or clause (b) of this sub-section or one year from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under section 153C to the Assessing Officer having jurisdiction over such other person, whichever is later:]

³⁶[**Provided further** that in the case where the last of the authorisations for search under section 132 or for requisition under section 132A was executed during the financial year commencing on the 1st day of April, 2004 or any subsequent financial year,—

- (i) the provisions of clause (a) or clause (b) of this sub-section shall have effect as if for the words “two years” the words “twenty-one months” had been substituted;
- (ii) the period of limitation for making the assessment or reassessment in case of other person referred to in section 153C, shall be the period of twenty-one months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed or nine months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under section 153C to the Assessing Officer having jurisdiction over such other person, whichever is later:]

³⁷[**Provided also** that in case where the last of the authorisations for search under section 132 or for requisition under section 132A was executed during the financial year commencing on the 1st day of

35. Inserted by the Finance Act, 2005, w.r.e.f. 1-6-2003.

36. Inserted by the Finance Act, 2006, w.e.f. 1-6-2006.

37. Inserted by the Finance Act, 2007, w.e.f. 1-6-2007.

April, 2005 or any subsequent financial year and during the course of the proceedings for the assessment or reassessment of total income, a reference under sub-section (1) of section 92CA—

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of section 92CA has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007,

the provisions of clause (a) or clause (b) of this sub-section shall, notwithstanding anything contained in clause (i) of the second proviso, have effect as if for the words “two years”, the words “thirty-three months” had been substituted:

Provided also that in case where the last of the authorisations for search under section 132 or for requisition under section 132A was executed during the financial year commencing on the 1st day of April, 2005 or any subsequent financial year and during the course of the proceedings for the assessment or reassessment of total income in case of other person referred to in section 153C, a reference under sub-section (1) of section 92CA—

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of section 92CA has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007,

the period of limitation for making the assessment or reassessment in case of such other person shall, notwithstanding anything contained in clause (ii) of the second proviso, be the period of thirty-three months from the end of the financial year in which the last of the authorisations for search under section 132 or for requisition under section 132A was executed or twenty-one months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under section 153C to the Assessing Officer having jurisdiction over such other person, whichever is later.]

Explanation.—In computing the period of limitation for the purposes of this section,—

- (i) the period during which the assessment proceeding is stayed by an order or injunction of any court; or
- (ii) the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section; or
- (iii) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee of being re-heard under the proviso to section 129; or
- (iv) in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of section 245D is received by the Commissioner under sub-section (2) of that section; ³⁸[or]
- ³⁸[(v) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of section 245Q and ending with the date on which the order rejecting the application is received by the Commissioner under sub-section (3) of section 245R; or
- (vi) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of section 245Q and ending with the date on which the advance ruling pronounced by it is received by the Commissioner under sub-section (7) of section 245R; or]
- ^{38a}[(vii) *the period commencing from the date of annulment of a proceeding or order of assessment or reassessment referred to in sub-section (2) of section 153A till the date of the receipt of the order setting aside the order of such annulment, by the Commissioner,*]

shall be excluded :

38. Inserted by the Finance (No. 2) Act, 2004, w.e.f. 1-10-2004.

38a. Inserted by the Finance Act, 2008, w.r.e.f. **1-6-2003**.

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in clause (a) or clause (b) of this section* available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.

(2) The authorisation referred to in clause (a) and clause (b) of sub-section (1) shall be deemed to have been executed,—

- (a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued;
- (b) in the case of requisition under section 132A, on the actual receipt of the books of account or other documents or assets by the Authorised Officer.

*Words “this section” should be read as “sub-section (1)”.



1[PART IX-B

**EXTRACT FROM INCOME TAX RULES, 1962
(ADVANCE RULINGS)****Form of application for obtaining an advance ruling.**

44E²[(1)) An application for obtaining an advance ruling under sub-section (1) of section 245Q shall be made in quadruplicate,—

- (a) in Form No. 34C in respect of a non-resident applicant;
- ³[(b) in Form No. 34D in respect of a resident applicant seeking advance ruling in relation to a



1. Inserted by the IT (Nineteenth Amdt.) Rules, 1993, w.e.f. 2-11-1993.

Resident Indian who is party to contract with applicant cannot be made a party to the application - *Steffen, Robertson & Kirsten Consulting Engineers & Scientists v. CIT* [1997] 95 Taxman 598 (AAR - New Delhi). Rulings will be given only on questions relating to Income-tax Act, and not to other Acts - *Advance Ruling No. P-12, In re* [1997] 228 ITR 61/94 Taxman 157 (AAR - New Delhi). While computing period of stay in India, day of arrival and day of departure should both be included - *Advance Ruling P. No. 7 of 1995, In re* [1997] 223 ITR 462 (AAR - New Delhi).

2. Substituted by the IT (Tenth Amdt.) Rules, 1999, w.e.f. 28-5-1999. Prior to its substitution, sub-rule (1) read as under :

“(1) An application for obtaining an advance ruling under sub-section (1) of section 245Q shall be made in quadruplicate in Form No. 34C and shall be verified in the manner indicated therein.”

3. Substituted by the IT (Thirteenth Amdt.) Rules, 2000, w.e.f. 3-8-2000. Prior to their substitution, clauses (b) and (c) read as under :

“(b) in Form No. 34D in respect of a person seeking advance ruling in relation to the tax liability of a non-resident arising out of transaction undertaken or proposed to be undertaken by him with a non-resident; and

(c) in Form No. 34E in respect of a resident falling within any such class or category of person as notified by Central Government in exercise of powers conferred by sub-clause (ii) of clause (b) of section 245N,”

transaction undertaken or proposed to be undertaken by him with a non-resident; and

- (c) in Form No. 34E in respect of a resident falling within any such class or category of person as notified⁴ by the Central Government in exercise of the powers conferred by sub-clause (iii) of clause (b) of section 245N,]

and shall be verified in the manner indicated therein.]

(2) The application referred to in sub-rule (1), the verification appended thereto, the annexures to the said application and the statements and documents accompanying it, shall be signed,—

- (a) in the case of an individual, —

- (i) by the individual himself;

- (ii) where, for any unavoidable reason, it is not possible for the individual to sign the application, by any person duly authorised by him in this behalf:

Provided that in a case referred to in sub-clause (ii), the person signing the application holds a valid power of attorney from the individual to do so, which shall be attached to the application;

- (b) in the case of a Hindu undivided family,—

- (i) by the karta thereof, and

- (ii) where, for any unavoidable reason, it is not possible for the karta to sign the application, by any other adult member of such family;

- (c) in the case of a company,—

- (i) by the Managing Director thereof, or where for any unavoidable reason such Managing Director is not able to sign and verify the application, or where there is no Managing Director, by any Director thereof;

- (ii) where, for any unavoidable reason, it is not possible for the Managing Director or the Director to sign the

4. Public sector company has been notified vide SO 725(E), dated 3-8-2000.

application, by any person duly authorised by the company in this behalf:

Provided that in the case referred to in sub-clause (ii), the person signing the application holds a valid power of attorney from the company to do so, which shall be attached to the application;

- (d) in the case of a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign and verify the application or where there is no managing partner as such, by any partner thereof, not being a minor;
- (e) in the case of an association of persons, by any member of the association or the principal officer thereof; and
- (f) in the case of any other person, by that person or by some person competent to act on his behalf.



Certification of copies of the advance rulings pronounced by the Authority.

44F. The copy of the advance ruling pronounced by the Authority to be sent to the applicant and to the Commissioner having jurisdiction over his case, shall be certified to be true copy thereof by the Commissioner or Deputy Commissioner, Authority for Advance Rulings, as the case may be.]



ADVANCE RULINGS (RELEVANT FORMS)

¹FORM NO. 34C**(See rule 44E)**

**Form of application for obtaining an advance ruling
under section 245Q(1) of the Income-tax Act, 1961**

**(PLEASE READ THE NOTES CAREFULLY BEFORE FILLING THIS
FORM)**

BEFORE THE AUTHORITY FOR ADVANCE RULINGS

Application No. of

1. Full name and address of the applicant
2. Telephone and Fax number
3. Country of which he is resident
4. Status
5. Basis of claim for being a non-resident
6. The Commissioner having jurisdiction over the applicant (only in the case of existing assessees)
7. Permanent Account Number (only in the case of existing assessees)
8. Question(s) relating to the transaction on which the advance ruling is required
9. Statement of the relevant facts having a bearing on the aforesaid question(s)
10. Statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the aforesaid question(s)

1. Inserted by the IT (Nineteenth Amdt.) Rules, 1993, w.e.f. 2-11-1993.

11. List of documents/statements attached
12. Particulars of account payee demand draft accompanying the application
13. Name and address of authorised representative in India, if any

.....
(Signed Applicant)

Verification

I, (name in full and in block letters), son/daughter/wife of do hereby solemnly declare that to the best of my knowledge and belief what is stated above and in the annexure(s), including the documents accompanying such annexure(s), is correct and complete. I further declare that I am making this application in my capacity as (designation) and that I am competent to make this application and verify it.

I also declare that the question on which the advance ruling is required is not pending in my case before any income tax authority, the Appellate Tribunal or any court.

Verified today the day of

Place

.....
(Signed Applicant)

Notes :

1. The application must be filled in English or Hindi in quadruplicate.

2. The number and year of receipt of the application will be filled in the office of the Authority for Advance Rulings.
3. If the space provided for answering any item in the application is found insufficient, separate enclosures may be used for the purpose. These should be signed by the applicant.
4. The application must be accompanied by an account payee demand draft of two thousand five hundred Indian rupees drawn in favour of Authority for Advance Rulings, payable at New Delhi. Particulars of the draft should be given in reply to item No. 12.
5. In reply to item No.3, if the applicant is a company, association of persons or Hindu undivided family, etc., the country of residence thereof is to be given and not of the individual who is filing the application on behalf of such person.
6. In reply to item No.4, the applicant must state whether he/it is an individual, Hindu undivided family, firm, association of persons or company.
7. For item No.5, the reply must be given in the context of the provisions regarding 'residence' in India as contained in section 6 of the Income-tax Act. The position in this regard is as follows:

An individual is said to be 'resident' in any financial year, if he has been in India during that year:

- for a period or periods of 182 days or more; or
- for a period or periods of 60 days or more and has also been in India within the preceding four years for a period or periods of 365 days or more.

However, the period of 60 days is increased to 150 days in the case of a citizen of India or a person of Indian origin who has been outside India and comes on a visit to India, and to 182 days in a case when a citizen of India leaves India for purposes of employment outside India, or as a member of the crew of an Indian ship.

An association of persons or a Hindu undivided family is resident in India in every case except where the control and management of its affairs is situated wholly outside India.

A company is resident in India, if it is an Indian company or the control and management of its affairs is situated wholly in India.

A person who is not resident in India as above, is non-resident in India.

8. Regarding item No.8, the question(s) should be based on actual or proposed transactions, Hypothetical questions will not be entertained.
9. In respect of item No.9, in Annexure I, the applicant must state in detail the relevant facts and also disclose the nature of his business or profession and the likely date and purpose of the proposed transaction(s). Relevant facts reflected in documents submitted along with the application must be included in the statement of facts and not merely incorporated by reference.
10. For item No.10, in Annexure II, the applicant must clearly state his interpretation of law or facts in respect of the question(s) on which the advance ruling has been sought.
11. The application, the verification appended thereto, the annexures to the application and the statements and documents accompanying the annexures, must be signed,—
 - (a) in the case of an individual,—
 - (i) by the individual himself, and
 - (ii) where, for any unavoidable reason, it is not possible for the individual to sign the application, by any person duly authorised by him in this behalf:
Provided that in a case referred to sub-clause (ii) the person signing the application holds a valid power of attorney from the individual to do so, which shall be attached to the application;
 - (b) in the case of a Hindu undivided family,—
 - (i) by the karta thereof, and

- (ii) where, for any unavoidable reason, it is not possible for the karta to sign the application, by any other adult member of such family;
- (c) in the case of a company,—
 - (i) by the Managing Director thereof, or where for any unavoidable reason such Managing Director is not able to sign and verify the application, or where there is no Managing Director, by any Director thereof;
 - (ii) where, for any unavoidable reason, it is not possible for the Managing Director or the Director to sign the application, by any person duly authorised by the company in this behalf:

Provided that in the case referred to in sub-clause (ii), the person signing the application holds a valid power of attorney from the company to do so, which shall be attached to the application;

- (d) in the case of a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign and verify the application, or where there is no managing partner as such, by any partner thereof, not being a minor;
 - (e) In the case of an association of persons, by any member of the association or the principal officer thereof; and
 - (f) in the case of any other person, by that person or by some person competent to act on his behalf.

Annexure I

Statement of the relevant facts having a bearing on the question(s) on which the advance ruling is required.

.....
.....

Place
Date

.....
(Signed Applicant)

Annexure II

Statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the question(s) on which advance ruling is required.

.....
.....

.....
(Signed Applicant)

Place

Date

ACTION POINTS

1. This Form is applicable to a non-resident only, who seeks an advance ruling in respect of a transaction that he has undertaken or proposed to undertake. The matter must relate to a matter under the Income-tax Act, and not under any other direct tax laws. Only a non-resident can apply.
2. While calculating the number of days during which the applicant stayed in India in order to determine whether he is a non-resident, the day of arrival in India and the day of departure from India will both be included.
3. Resident Indian with whom applicant has entered into agreement cannot be made a party to this application.
4. The points enumerated in the 'Notes' should be kept in view while filling up this form.
5. The applicant may withdraw this application within 30 days from the date of application.

¹FORM NO. 34D

(See rule 44E)

²[Form of application by a resident applicant seeking advance ruling under section 245Q(1) of the Income-tax Act, 1961 in relation to a transaction undertaken or proposed to be undertaken by him with a non-resident]

(PLEASE READ THE NOTES CAREFULLY BEFORE FILLING THIS FORM)

BEFORE THE AUTHORITY FOR ADVANCE RULINGS

Application No. of

1. Full name and address of the applicant with telephone and Fax number
2. Status
3. Commissioner and Assessing Officer having jurisdiction over the applicant
4. Permanent Account Number
5. Name, address, telephone/fax number of the non-resident with whom the transaction is undertaken or proposed to be undertaken
6. Basis of claim that the person referred to in serial number 5 with whom the transaction is undertaken or proposed to be undertaken is a non-resident
7. Question(s) of law or fact relating to ³[***] a transaction undertaken or proposed to be undertaken on which the advance ruling is required
8. Statement of the relevant facts having a bearing on the aforesaid question(s)
9. Statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the aforesaid question(s)
10. List of documents/statements attached

1. Inserted by the IT (Tenth Amdt.) Rules, 1999, w.e.f. 28-5-1999.

2. Substituted by the IT (Thirteenth Amdt.) Rules, 2000, w.e.f. 3-8-2000.

3. Words "the tax liability of a non-resident arising out of" omitted, *ibid*.

11. Particulars of account payee demand draft accompanying the application

.....
(Signed Applicant)

Verification

I, (name in full and in block letters), son/daughter/ wife of do hereby solemnly declare that to the best of my knowledge and belief what is stated above and in the annexure(s), including the documents accompanying such annexure(s), is correct and complete. I further declare that I am making this application in my capacity as (designation) and that I am competent to make this application and verify it.

⁴[I also declare that the question(s) on which the advance ruling is sought is/are not pending in my case before any income-tax authority, the appellate tribunal or any court.]

Verified today the day of
.....
Place (Signed Applicant)

Notes :

1. The application must be filled in English or Hindi in quadruplicate.
2. The number and year of receipt of the application will be filled in in the office of the Authority for Advance Rulings.
3. If the space provided for answering any item in the application is found insufficient, separate enclosures may be used for the purpose. These should be signed by the applicant.
4. The application must be accompanied by an account payee demand draft of two thousand five hundred rupees drawn in favour of Authority for Advance Rulings, payable at New Delhi. Particulars of the draft should be given in reply to item No. 11.

4. Inserted by the IT (Thirteenth Amdt.) Rules, 2000, w.e.f. 3-8-2000.

5. In reply to item No.2, the applicant must state whether he/it is an individual, Hindu undivided family, firm, association of persons or company.
6. For item No.5, the reply must be given in the context of the provisions regarding 'residence' in India as contained in section 6 of the Income-tax Act. The position in this regard is as follows:

An individual is said to be 'resident' in any financial year, if he has been in India during that year:

- for a period or periods of 182 days or more; or
- for a period or periods of 60 days or more and has also been in India within the preceding four years for a period or periods of 365 days or more.

However, the period of 60 days is increased to 150 days in the case of a citizen of India or a person of Indian origin who has been outside India and comes on a visit to India, and to 182 days in a case when a citizen of India leaves India for purposes of employment outside India, or as a member of the crew of an Indian ship.

An association of persons or a Hindu undivided family is resident in India in every case except where the control and management of its affairs is situated wholly outside India.

A company is resident in India, if it is an Indian company or the control and management of its affairs is situated wholly in India.

A person who is not resident in India as above, is non-resident in India.

7. Regarding item No.7, the question(s) should be based on actual or proposed transactions. Hypothetical questions will not be entertained.
8. In respect of item No.8, in Annexure I, the applicant must state in detail the relevant facts and also disclose the nature of his business or profession and the likely date and purpose of the

- proposed transaction(s). Relevant facts reflected in documents submitted along with the application must be included in the statement of facts and not merely incorporated by reference.
- 9. For item No.9, in Annexure II, the applicant must clearly state his interpretation of law or facts in respect of the question(s) on which the advance ruling has been sought.
 - 10. The application, the verification appended thereto, the annexures to the application and the statements and documents accompanying the annexures, must be signed as per sub-rule (2) of rule 44E of the Income-tax Rules, 1962.

Annexure I

Statement of the relevant facts having a bearing on the question(s) on which the advance ruling is required.

.....
.....
.....
(Signed Applicant)

Place
Date

Annexure II

Statement containing the applicant’s interpretation of law or facts, as the case may be, in respect of the question(s) on which advance ruling is required.

.....
.....
.....
(Signed Applicant)

Place
Date

ACTION POINTS

1. This Form must be used by a resident applicant seeking advance ruling in relation to tax liability of a non-resident arising out of a transaction undertaken or proposed to be undertaken by him with such non-resident.
2. The application in this Form must relate to a matter under the Income-tax Act, and not under any other direct tax law.
3. It must first be ensured that the transaction is only with a non-resident. Transactions with residents are excluded, though the person seeking the advance ruling may be a resident.
4. The wordings of the heading of the Form make it clear that the application can be made either before or after the transaction is entered into; however, it is doubtful whether the application will be valid if it is made after the transaction is completed.
5. The 'Notes' in the form should first be studied and complied with. In particular, it must be noted that the application in quadruplicate must be accompanied by a demand draft for Rs.2500 drawn in favour of the Authority for Advance Ruling.
6. The applicant may withdraw the application within 30 days from the date of application.

FORM NO. 34E**(See rule 44E)**

Form of application by a person falling within such class or category of persons as notified by Central Government in exercise of powers conferred for obtaining an advance ruling under section 245Q(1) of the Income-tax Act, 1961

(PLEASE READ THE NOTES CAREFULLY BEFORE FILLING THIS FORM)

BEFORE THE AUTHORITY FOR ADVANCE RULINGS

Application No. of

1. Full name and address of the applicant, telephone and Fax number
2. Status
3. Permanent Account Number
4. Commissioner and Assessing Officer having jurisdiction over the applicant
5. Particulars of the appeal number and date of appeal before the Commissioner (Appeals) or the Tribunal ²[, whenever applicable]
6. Assessment year, date of assessment order and section under which the original order was passed by the Assessing officer where ever applicable (enclose copy of the assessment order and appellate order)
7. Question(s) of law or of fact involved on which the advance ruling is required
8. Statement of the relevant facts having a bearing on the aforesaid question(s)
9. Statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the aforesaid question(s)
10. List of documents/statements attached.

1. Inserted by the IT (Tenth Amdt.) Rules, 1999, w.e.f. 28-5-1999.

2. Inserted by the IT (Thirteenth Amdt.) Rules, 2000, w.e.f. 3-8-2000.

11. Particulars of account payee demand draft accompanying the application

Verification

I, (name in full and in block letters), son/daughter/wife of do hereby solemnly declare that to the best of my knowledge and belief what is stated above and in the annexure(s), including the documents accompanying such annexure(s), is correct and complete. I further declare that I am making this application in my capacity as (designation) and that I am competent to make this application and verify it.

^{2a}[I also declare that the question(s) on which the advance ruling is sought is/are not pending in my case before any court.]

Verified today the day of

.....
(Signed Applicant)

Place :

Notes:

1. The application must be filled in English or Hindi in quadruplicate.
2. The number and year of receipt of the application will be filled in in the office of the Authority for Advance Rulings.
3. If the space provided for answering any item in the application is found insufficient, separate enclosures may be used for the purpose. These should be signed by the applicant.
4. The application must be accompanied by an account payee demand draft of two thousand five hundred rupees drawn in favour of Authority for Advance Rulings, payable at New Delhi. Particulars of the draft should be given in reply to item No. 11.

2a. Inserted by the IT (Thirteenth Amdt.) Rules, 2000, w.e.f. 3-8-2000.

- 5. In reply to item No.2, the applicant must state whether he/it is an individual, Hindu undivided family, firm, association of persons or company.
- ³[6. Regarding item No.7, the question(s) of law and fact raised should be precise and should directly relate to the computation of total income.]
- 7. In respect of item No.8, in Annexure I, the applicant must state in detail the relevant facts. The tax effect on each question should also be spelt out.
- 8. For item No.9, in Annexure II, the applicant must clearly state his interpretation of law or facts in respect of the question(s) on which the advance ruling is being sought.
- 9. The application, the verification appended thereto, the annexures to the application and the statements and documents accompanying the annexures, must be signed as per sub-rule (2) of rule 44E of the Income-tax Rules, 1962.

Annexure I

Statement of the relevant facts having a bearing on the question(s) on which the advance ruling is required.

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(Signed Applicant)

Place

Date

3. Substituted by the IT (Thirteenth Amdt.) Rules, 2000, w.e.f. 3-8-2000.

Annexure II

Statement containing the applicant's interpretation of law or facts, as the case may be, in respect of the question(s) on which advance ruling is required.

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.....

.....

(Signed Applicant)

Place

Date

ACTION POINTS

1. This Form must be used by a resident falling within any such class or category of person as notified by Central Government under section 245N(b)(iii). Vide SO 725(E), dated 3-8-2000, 'public sector companies' have been so notified.
2. The application in this Form must related to a matter under the Income-tax Act, and not under any other direct tax law.
3. The 'notes' may be studied carefully and complied with. In particular, it may be ensured that the application (in quadruplicate) is accompanied with a demand draft for Rs.2500 in favour of the Authority for Advance Rulings.
4. The applicant may withdraw the application within 30 days from the date of the application.



**AUTHORITY FOR ADVANCE RULINGS
(PROCEDURE) RULES, 1996
[GSR 426(E), DATED 17-9-1996]**

In exercise of the powers conferred by section 245V of the Income-tax Act, 1961 (43 of 1961), the Authority for Advance Rulings hereby makes the following rules, namely:—

Short title and commencement.

1. (1) These rules may be called the Authority for Advance Rulings (Procedure) Rules, 1996.

(2) They shall come into force with immediate effect.

Definitions.

2. In these rules, unless the context otherwise requires,—

- (a) “Act” means the Income-tax Act, 1961 (43 of 1961);
- (b) “Advance Ruling” means an advance ruling as defined in sub-clause (a) of section 245N of the Act;
- (c) “Applicant” means an applicant as defined in clause (b) of section 245N of the Act;
- (d) “Application” means an application under sub-section (1) of section 245Q of the Act but shall include, where the context permits, all applications, petitions and representations of the nature referred to in rule 5;



- (e) "Authorised Representative",—
 - (i) in relation to an applicant shall have the meaning assigned to it in sub-section (2) of section 288 of the Act as if the applicant were an assessee;
 - (ii) in relation to the Commissioner, means a person authorised by the Commissioner in writing to appear, plead and act for the Commissioner in any proceedings before the Authority;
- (f) "Authority" means the Authority for Advance Rulings constituted under section 245-O of the Act;
- (g) "Case" means any proceedings under Chapter XIX-B of the Act in respect of an applicant;
- (h) "Chairman" means the Chairman of the Authority;
- (i) "Commissioner" means,—
 - (1) the Commissioner as defined in clause (16) of section 2 of the Act in respect of an applicant assessed under the Income-tax Act,
 - (2) the Commissioner designated by the Central Board of Direct Taxes in this behalf in respect of an applicant not hitherto assessed,
- (j) "Member" means a member of the Authority and includes the Chairman;
- (k) "Order" includes any order, direction or ruling of the Authority;
- (l) "Rule" means a Rule of the "Authority for Advance Rulings (Procedure) Rules, 1996";
- (m) "Secretary" means a Commissioner of Income-tax designated as the Secretary of the Authority and includes an Additional Commissioner of Income-tax and Deputy Commissioner of Income-tax appointed to assist the Secretary in his functions where the context so requires;
- (n) "Section" means a section of the Act;
- (o) Words and expressions used and not defined herein but defined in the Act, shall have the meanings respectively, assigned to them in the Act.

Language of the Authority.

3. (1) The language of the Authority shall ordinarily be English :

Provided that the Authority may, at the request of the parties, permit the use of Hindi in the proceedings before it to the extent it may consider appropriate and practical.

(2) Where any document is in a language other than English or Hindi, an English translation thereof should also be filed along therewith.

(3) The ruling of, and other orders passed by the Authority may, at the discretion of the Authority, be in Hindi or English.

Sittings of the Authority.

4. The Authority shall hold its sittings at its headquarters at Delhi or at such other place or places as may be authorised by the Chairman and the date and place of hearing shall be notified in such manner as the Chairman may by general or special order direct.

Powers of the Authority.

5. The Authority shall hear and determine the application made under sub-section (1) of section 245Q of the Act and such other applications, petitions and representations of an interlocutory, incidental or ancillary nature as may be necessary for a



complete and effective disposal of the application, as the Chairman may by general or special order direct.

Power to remove difficulty.

6. If any difficulty arises in giving effect to any order of the Authority, the Authority may, on its own motion or on an application made by the applicant or the Commissioner, remove the difficulty insofar as it is not inconsistent with the provisions of the Act.

Powers and functions of the Secretary.

7. (1) The Secretary shall have the custody of the records of the Authority and shall exercise such other functions as are assigned to him under these rules or by the Chairman by separate order.

(2) The official seal of the Authority shall be kept in custody of the Secretary.

(3) The Secretary shall also have the following powers and duties, namely :—

- (i) to receive all applications filed before the Authority;
- (ii) to scrutinise the applications to find out whether they are in conformity with the Act, the rules and the procedure;
- (iii) to point out defects in such application to the parties and require them to remove the defects by affording them a reasonable opportunity to do so and, where, within the time granted, the defects are not removed, to obtain necessary orders of the Authority;
- (iv) to fix the date of hearing for the applications in consultation with the Chairman and direct the issue of notices therefor;
- (v) to issue the service of notices or other processes and to ensure that the parties are properly served;
- (vi) to requisition records from the custody of any person including a Commissioner or any other Authority;
- (vii) to allow inspection of records of the Authority;
- (viii) to direct any formal amendment of the records of the Authority;
- (ix) to grant certified copies of the orders of the Authority to the parties;
- (x) to grant certified copies of documents filed in the proceedings to the parties in accordance with the rules; and
- (xi) to bring on record legal representatives, in case of death or retirement of any party to the proceedings and to make such appropriate amendments in the cause title as may become necessary in the other situations referred to in rule 15.

Signing of notices, etc.

8. (1) Any requisition, direction, letter, authorisation, or written notice to be issued by the Authority shall be signed by the Secretary or by an officer authorised by him.

(2) Nothing in sub-rule (1) shall apply to any requisition or direction which the Authority may, in the course of the hearing, issue to an applicant or a Commissioner or an authorised representative.

Mode of service of notices.

9. Every notice or other document required to be served on or delivered to any person, may be sent by hand through process server, or by registered post or by FAX to that person or his authorised representative at the address or FAX number furnished by him for service or at the place where the person or his authorised representative ordinarily resides or carries on business or personally works for gain.

Procedure for filing applications.

10. (1) An application shall be made in Form 34C of the Income-tax Rules, 1962 in quadruplicate and presented by the applicant in person or by an authorised representative to the Secretary or any other officer notified in writing by the Secretary or sent by registered post addressed to the Secretary along with a fee of two thousand five hundred Indian Rupees in the form of a Demand Draft drawn in favour of "Authority for Advance Rulings" payable at New Delhi.



(2) The application, its verification and the annexures, statements and documents accompanying it, shall be signed in the manner set out in sub-rule (2) of rule 44E of the Income-tax Rules, 1962 :

Provided that where a person signing the application and other documents claims to have been duly authorised in that behalf under the rules, the application shall be accompanied by a power of attorney, authorising him to append his signature and an affidavit setting out the unavoidable reason which entitles him to sign it.

(3) An application sent by registered post under sub-rule (1) shall be deemed to have been made on the date on which it is received in the office of the Authority.

(4) If the applicant is not hitherto assessed in India, he shall indicate in Annexure I to the application :

- (a) his head office in any other country,
- (b) the place where his office and residence is located or is likely to be located in India, and
- (c) the name and address of his representative in India, if any, authorised to receive notices and papers and act on his behalf.

(5) The Secretary may send the application back to the applicant if it is defective in any manner for removing the defects within such time as he may allow. Such application shall be deemed to have been made on the date when it is represented after correction.

Submission of additional facts before the Authority.

11. (1) The Authority may at its discretion permit or require the applicant to submit such additional facts as may be necessary to enable it to pronounce its advance ruling.

(2) Where in the course of the proceedings before the Authority, a fact is alleged which cannot be borne out by or is contrary to the record, it shall be stated clearly and concisely and supported by a duly sworn affidavit.

Questions contained in the application.

12. The applicant shall not, except by leave of the Authority, urge or be heard in support of any additional question not set forth in the application, but in deciding the application of the Authority shall at its discretion consider all aspects of the questions set forth as may be necessary to pronounce a ruling on the substance of the questions posed for its consideration.

Date and place of hearing to be notified.

13. (1) Where an application under section 245Q is received from an applicant not hitherto assessed and there is no Commissioner designated in respect thereof under rule 2(i)(2), a copy of the application and enclosures thereto shall be forwarded to the Board calling upon it to specify or designate, within a period of two weeks, the Commissioner for the purposes of the application, failing which the application may be decided without hearing the Commissioner.

(2) On receipt of an application under section 245Q in respect of which there is a Commissioner as defined in rule 2(i)(1) or a

Commissioner has been designated by the Board under rule 2(i)(2) or under sub-rule (1) of this rule, the Authority shall notify the applicant and the Commissioner of the date and place of hearing of the application and forward a copy of the application to the Commissioner calling upon him to furnish the relevant records of the case along with his comments, if any, on the contents of the application and nominate his authorised representative if he desires to be heard.

Authorisation to be filed.

14. An authorised representative appearing for the applicant at the hearing shall file, before the commencement of the hearing, a document authorising him to appear for the applicant and if he is a relative of the applicant, the document shall state the nature of his relationship with the applicant, or if he is a person regularly employed by the applicant the capacity in which he is at the time employed.



Continuation of proceedings after the death, etc., of the applicant.

15. Where the applicant dies or is wound up or dissolved or disrupted or amalgamated or succeeded to by any other person or otherwise comes to an end, the application shall not abate and may be permitted by the Authority, where it considers that the circumstances justify it, to be continued by the executor, administrator or other legal representative of the applicant or by the liquidator, receiver or assignee, as the case may be, on an application made in this behalf.

Hearing of application.

16. (1) On the day fixed, or any other day to which the hearing may be adjourned, the Authority shall hear the applicant or his authorised representative in cases where it is proposed to reject the application

or the applicant seeks/has sought an opportunity of being heard. The Authority may also hear the Commissioner or his authorised representative as well if it considers it necessary before pronouncing its advance ruling.

(2) In appropriate cases the Authority may call upon any person to supply such material as it may consider necessary to assist the Authority in arriving at a decision.

(3) The Authority may, on such conditions as the circumstances of the case may require, adjourn the hearing of the application.

Hearing of application *ex parte*.

17. Where on the date fixed for hearing or any other day to which the hearing may be adjourned, the applicant or the Commissioner does not appear in person or through an authorised representative when called on for hearing, the Authority may dispose of the application *ex parte* on merits :

Provided that where an application has been disposed of as above and the applicant or the Commissioner, as the case may be, applies within 15 days of receipt of the order and satisfies the Authority that there was sufficient cause for his non-appearance when the application was called upon for hearing, the Authority may, after allowing the opposite party a reasonable opportunity of being heard, make an order setting aside the *ex parte* order and restore the application for fresh hearing.

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 a 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.

Rectification of mistakes.

19. (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.

Amendment of the Record.

20. If at any stage of the proceedings before the Authority it appears that there is any factual or material error in the records the same shall be amended after hearing the applicant and the Commissioner.

Fees for supply of additional certified copies.

21. (1) The Secretary may order grant of additional certified copies of documents or orders to the applicant or the Commissioner on a written request made by either of them.

(2) Copying fees for supply of additional certified copies to the applicant shall be charged at rupees three per page and such fees shall be paid in advance in cash.



Inspection of records and fees thereof.

22. (1) The applicant or the Commissioner or an authorised representative may be allowed to inspect the records of the case on making an application in writing to the Secretary provided that only those documents shall be allowed to be inspected which have been relied upon in the proceedings before the Authority.

(2) The inspection shall be allowed only in the presence of an officer of the Authority and the applicant may be permitted to make notes of inspection but not to take copies of any document.

(3) Fees for inspecting records of the Authority shall be charged from the applicant as follows :

- (a) Rupees one hundred for the first hour or part thereof; and
- (b) Rupees fifty for every additional hour or part thereof.

(4) Fees for inspection shall be paid in advance in cash.

Declaration of advance rulings to be void in certain circumstances.

23. (1) Where a representation is made under section 245T of the Act to the Authority by the Commissioner or otherwise that an advance ruling pronounced by it under sub-section (6) of section 245R has been obtained by the applicant by fraud or misrepresentation of facts, such representation shall be made in quadruplicate and shall be accompanied by a statement of facts incorporating the fraud or misrepresentation as also particulars of the evidence to substantiate the claim of fraud or misrepresentation of facts.

(2) On receipt of such representation a notice shall be issued to the applicant along with a copy of the representation for rebuttal and a reasonable opportunity shall be allowed to the applicant and the Commissioner for being heard before passing an order under section 245T.

Proceedings not open to the public.

24. Proceedings before the Authority shall not be open to the public and no person, other than the applicant, the Commissioner or their authorised representatives shall, without the permission of the Authority, remain present during such proceedings.

Publication of orders.

25. Such of the orders of the Authority, as the Chairman deems fit for publication in any authoritative report or the press, may be released for such publication on such terms and conditions as the Chairman may specify.

Authentication and communication of orders.

26. (1) Every order of the Authority under Chapter XIX-B shall be duly signed by the members and bear the official seal of the Authority.

(2) One certified copy of such order of the Authority shall be communicated to the applicant and the Commissioner under the signature of the Secretary or any other officer of the Authority authorised by him in this behalf and bear the official seal of the Authority.

Proceedings of the Authority.

27. (1) When one or both of the members of the Authority other than the Chairman is unable to discharge his functions owing to absence, illness or any other cause or in the event of occurrence of any vacancy or vacancies in the office of the members and the case cannot be adjourned for any reason, the Chairman alone or the Chairman and the remaining member may function as the Authority.

(2) Subject to the provisions of sub-rule (3), in case there is difference of opinion among the members hearing an application the opinion of the majority of members shall prevail and orders of the Authority shall be expressed in terms of the views of the majority but any member dissenting from the majority view may record his reasons separately.

(3) Where the Chairman and one other member hear a case under sub-rule (1) and are divided in their opinion, the opinion of the Chairman shall prevail.



Procedure in case of other application.

28. The provisions contained in these rules for the hearing and disposal of application under section 245Q(1) shall apply, *mutatis mutandis*, to the hearing and disposal of all other applications, petitions and representations before the Authority.

Dress regulations.

29. (1) An authorised representative shall appear before the Authority in dress prescribed for the members of his profession by the competent professional body, if any.

(2) All other persons appearing before the Authority shall be properly dressed.



IMPORTANT CIRCULARS & NOTIFICATIONS

1^{EXTRACT OF CIRCULAR NO. 657 DATED 30-8-1993}

Finance Act, 1993 - Explanatory Notes on the provisions relating to Direct Taxes.

Setting up of Authority for Advance Rulings in the case of non-residents

In his Budget Speech for 1992-93, the Finance Minister had assured that, in the interest of avoiding needless litigation and promoting better taxpayer relations a scheme for giving advance rulings in respect of transactions involving non-residents was being worked out and would be put into operation. In pursuance thereof, the Act inserts a new Chapter XIX-B on advance rulings in respect of transactions involving non-residents.



Under this Chapter, “advance ruling” has been defined to mean the determination, by an authority constituted by the Central Government and known as authority for advance rulings, of a question of law or fact in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident.

The authority for advance rulings will consist of a Chairman who will be a retired judge of the Supreme Court and two other members drawn from the Indian Revenue Service and Indian Legal Service. The headquarters of the Authority will be in Delhi. It has been provided that no proceeding of the Authority will be invalid merely on grounds of the existence of any vacancy or defect in the

1. Source : www.incometaxindia.gov.in

constitution of the Authority. Any non-resident desirous of obtaining an advance ruling can make an application in the form and manner to be prescribed by rules along with the payment of a fee of Rs. 2,500. Such an application can be withdrawn within thirty days. The Authority on receipt of an application will send a copy to the Commissioner concerned and, wherever considered necessary, also call upon the Commissioner to furnish relevant records. Such records will be returned to the Commissioner as soon as possible. The Authority may either allow or reject an application. However, it has been provided specifically that the Authority shall not allow an application where the question of law or fact raised is already pending in the case of the applicant, either before any income-tax authority, the Appellate Tribunal or any court. Applications are also not to be allowed where the transaction, in relation to which the question is raised, is designed for the avoidance of income-tax or where the question raised relates to the determination of the fair market value of any property. The applicant can, on request, appear either in person or can be represented through a duly authorised representative. A time limit of six months has been provided for the pronouncement of advance ruling after the receipt of the application by the Authority.

The advance ruling is to be binding only on the applicant who had sought it and in respect of the specific transaction in relation to which such advance ruling was sought. It is also to be binding on the Commissioner and the income-tax authorities subordinate to the Commissioner who have jurisdiction over the applicant. The advance ruling will continue to remain in force unless there is a change either in law or in fact on the basis of which the advance ruling was pronounced. It has also been provided that the advance ruling shall be void if it is subsequently found to have been obtained by fraud or misrepresentation of facts.

The Authority has all the powers of a civil court in respect of discovery and inspection, enforcing the attendance of any person including any officer of a banking company and examining him on oath, issuing commissions and compelling the production of books of account and other records. It also has the power to regulate its own

procedure in all matters arising out of the exercise of its powers under the Act. The Authority is deemed to be a civil court for the purposes of section 195 of the Code of Criminal Procedure, 1973, and every proceeding before the Authority shall be deemed to be a judicial proceeding under certain provisions of the Indian Penal Code.

This Chapter takes effect from 1st June, 1993.

EXTRACT OF CIRCULAR NO. 728, DATED 30-10-1995

Correct rates of tax applicable in case of remittance to a country with which Double Taxation Avoidance Agreement is in force

1. It has been represented to the Board that when making remittances of the nature of royalties and technical fees, tax is being deducted at source at the rates specified in the Finance Act of the relevant year, without taking into account the special rates for taxation of such income provided for under the Double Taxation Avoidance Agreement with the country concerned.

2. The expression rates in force has been defined in section 2(37A) of the Income-tax Act. Under sub-clause (iii) of section 2(37A), for purposes of deduction of tax under section 195, the expression is to mean the rate or rates of income-tax specified in this behalf in the Finance Act in the relevant year, or the rates of tax specified in a Double Taxation Avoidance Agreement entered into by the Central Government, whichever is applicable by virtue of the provisions of section 90 of the Income-tax Act, 1961.

3. It is hereby clarified that in view of the provisions of sub-section (2) of section 90 of the Act, in case of a remittance to a country with which a Double Taxation Avoidance Agreement is in force, the tax should be deducted at the rate provided in the Finance Act of the relevant year or at the rate provided in the DTAA, whichever is more beneficial to the assessee.



1^{EXTRACT OF CIRCULAR NO. 772, DATED 23-12-1998}

Finance (No. 2) Act, 1998 Explanatory Notes on the provisions relating to direct taxes

Extending the scope of Authority for Advance Ruling to resident applicants

Under the existing provisions, the scope of Authority for Advance Ruling is restricted to a determination of a question of law or fact in relation to a transaction which has been undertaken or is proposed to be undertaken by a non-resident applicant.

The act has amended clause (a) in section 245N whereby advance ruling will also mean a decision by the Authority in relation to an assessment pending before the Income-tax Authority or the Tribunal in respect of a resident applicant and such decision will include the decision on question of law or fact arising out of the assessment order for which application has been made. However, the resident applicant has to fall within the class or category of persons as notified by Central Government in this regard. The Act has also inserted a new section 245RR in the Income-tax Act which bars the Income-tax Authority or the Appellate Tribunal from deciding any issue in respect of which an application has been made by the resident applicant to the authority.

The amendment has taken effect from the 1st day of October, 1998.

**NOTIFICATION NO. 11456/IF. NO. 142/37/2000-TPL)
DATE OF ISSUE: 3/8/2000**

In exercise of the powers conferred by sub-clause (iii) of clause (b) of section 245N of the Income-tax Act, 1961 (43 of 1961), and in supersession of Notification No. S.O. 473(E), dated 21st June, 1999, the Central Government hereby specifies public sector company as defined in clause (36A) of section 2 of the Income-tax Act being such class of persons, as applicant for the purposes of Chapter XIX-B of the Income-tax Act.

2. It shall come into force on the date of its publication in the Official Gazette.

1. Source incometaxindia.gov.in

1^{EXTRACTS OF CIRCULAR NO. 794, DATED 9-8-2000}**Finance Act, 2000 - Explanatory Notes on the provisions relating to direct taxes****Provisions relating to the Authority for Advance Rulings rationalised for resident applicants**

The provisions relating to the Authority for Advance Rulings were extended to notified categories of resident applicants through amendments carried out by the Finance (No. 2) Act, 1998. The definition of 'advance ruling' was broadened to include decision on question of law or fact arising out of the order of assessment. The Central Government has already notified two classes of persons which are public sector companies and persons seeking advance ruling in relation to transactions undertaken or proposed to be undertaken by a resident with a non-resident.

These provisions needed to be further streamlined. There was an operational difficulty in determining the issue arising out of a transaction proposed to be undertaken by a resident with a non-resident within the existing definitions of "applicant" and "advance ruling", which require the application for advance ruling in such cases to be made by a non-resident. Further the definition of "advance ruling", for the resident applicants, was open to a possible interpretation that it provided an appeal against the assessment order in its entirety, which was not intended. The definition of "advance ruling", therefore, needed to be streamlined and broadened to include pre-assessment determination as well as post-assessment decision of issues relating to the computation of total income.



1. Source incometaxindia.gov.in

The Act amends section 245N to define the terms 'advance ruling' and 'applicant' as follows :

Advance ruling shall mean,—

- (i) a determination of any question of law or fact arising out of a transaction undertaken or proposed to be undertaken by a non-resident, and
- (ii) a determination of any question of law or fact arising out of a transaction undertaken or proposed to be undertaken by a resident with a non-resident, and
- (iii) a determination or decision of any question of law or fact relating to the computation of total income pending before any income-tax authority or the Appellate Tribunal.

Similarly, an applicant will include a non-resident, a resident in relation to a transaction with a non-resident and a resident falling in a class or category of persons notified by the Central Government.

Under the existing provisions contained in the proviso to sub-section (2) of section 245R, it is, *inter alia*, provided that the authority shall not allow an application if the question raised in the application is pending before any income-tax authority, the Appellate Tribunal or any Court. However, such exclusion does not apply to resident applicants.

The Act substitutes the first proviso in sub-section (2) of section 245R to provide that the authority shall not allow the application where the question raised is already pending in the applicant's case before any income-tax authority, the Appellate Tribunal or any Court in regard to a non-resident applicant, and, to a resident applicant in relation to a transaction with a non-resident. However, this bar would be operative for the notified category of resident applicants only when the issue is pending in a Court. The existing conditions in clause (b) relating to bar of determination of fair market value of any property will continue. The existing condition in clause (c) relating to an issue designed *prima facie* for avoidance of income-tax shall not be applicable to the notified category of resident applicants.

These amendments take effect from the 1st day of June, 2000.

1^{EXTRACTS OF CIRCULAR NO. 7/2003, DATED 5-9-2003}**Finance Act, 2003 - Explanatory Notes on provisions relating to Direct Taxes****Clarification in the definition of Advance Ruling**

Under the existing provision contained in sub-clause (ii) of clause (a) of section 245N, the expression advance ruling, *inter alia*, means determination of any question of law or of fact specified in the application by the Authority in relation to a transaction which has been undertaken or is proposed to be undertaken by a resident applicant with a non-resident.

The Finance Act, 2003 has amended the said sub-clause so as to clarify that the determination of any question of law or fact by the Authority shall be 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 a non-resident and not in relation to the tax liability of the resident.

It has further been provided that where an advance ruling has been pronounced by the Authority in respect of an application by a resident applicant referred to in sub-clause (ii) of the said clause (a) before the date of commencement of the Finance Act, 2003, such ruling shall be binding on persons specified in section 245S.

These amendments will take effect retrospectively from 1st June, 2000.

CIRCULAR NO. 5/2005, DATED 15-7-2005**Finance (No. 2) Act, 2004 - Explanatory Notes on provisions relating to Direct Taxes****Allowing for time taken by the Authority for Advance Rulings in rejecting an application or pronouncing an advance ruling to be excluded from the period of limitation for making an assessment**

The existing provisions contained in sections 245Q and 245R provide that the Authority for Advance Rulings shall on receipt of an

1. Source incometaxindia.gov.in

application for advance ruling, forward the same to the Commissioner and if necessary call for the relevant records. The authority may either reject the application or pronounce its advance ruling after examining the application and the records. The existing provisions of section 245RR provide that no income-tax authority or the Appellate Tribunal shall proceed to decide any issue in respect of which an application has been made by a resident to the Authority for Advance Rulings.



Finance (No. 2) Act, 2004 has inserted clause (vi) in *Explanation 1* to section 153 so as to provide that the period commencing on the date on which application has been filed to the Authority for Advance Rulings and ending on the date on which the order rejecting the application is received by the Commissioner shall be excluded for computing the period of limitation under this section.

Finance (No. 2) Act, 2004 has inserted clause (vii) in *Explanation 1* to section 153 so as to provide that the period commencing on the date on which application has been filed to the Authority for Advance Rulings and ending on the date on which the order pronouncing the advance ruling is received by the Commissioner shall be excluded for computing the period of limitation under this section.

Similarly, two new clauses (v) and (vi) in *Explanation* to section 153B have also been inserted so as to provide that the period commencing on the date on which application has been filed to the Authority for Advance Rulings and ending on the date on which the order rejecting the application or pronouncing the advance ruling is received by the Commissioner shall be excluded for computing the period of limitation under this section.

This amendment takes effect from 1st October, 2004.



AUTHORITY FOR ADVANCE RULINGS (SALARIES AND ALLOWANCES, TERMS AND CONDITIONS OF SERVICE OF CHAIRMAN AND MEMBERS) RULES, 1994

GSR 587(E), dated 15th July, 1994

In exercise of the powers conferred by sub-section (3) of section 245-O(3) of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby makes the following rules, regulating the salaries and allowances, terms and conditions of service of Chairman and Members of the Authority for Advance Rulings, namely:—

Short title and commencement.

1. (1) These rules may be called the Authority for Advance Rulings (Salaries and Allowances, Terms and Conditions of Service of Chairman and Members) Rules, 1994.

(2) They shall come into force on the date of their publication in the Official Gazette.



Definitions.

2. In these rules, unless the context otherwise requires,—

- (a) 'Act' means the Income-tax Act, 1961 (43 of 1961);
- (b) 'Authority' means the Authority for Advance Rulings constituted under section 245-O of the Act.
- (c) 'Chairman' means the Chairman of the Authority;
- (d) 'Member' means a Member of the Authority.

Salary, Allowances etc. of the Chairman.

3. (1) The Chairman shall be entitled to a monthly salary at the same rate as is admissible to a Judge of the Supreme Court :

Provided that such salary, which together with the pension and pension equivalent of any other form of retirement benefit, shall not exceed the last pay drawn by him before retirement as a Judge of the Supreme Court.

(2) The Chairman shall be entitled to such allowances and other benefits as are admissible to a serving Judge of the Supreme Court.

Pay and Allowances etc. of Members.

4. A Member shall receive pay in the scale of Rs. 7300-200-7500-250-8000¹ per month:

Provided that the aforementioned pay shall be reduced by the amount of pension and pension equivalent of gratuity, employer's contribution to the contributory fund or any other form of retirement benefits, if any, drawn or to be drawn by him.

Dearness Allowance and City Compensatory Allowance.

5. A Member shall receive dearness allowance and city compensatory allowance at the rates admissible to Group 'A' officers of the Central Government drawing an equivalent pay.

Leave.

6. A person appointed as Chairman or Member shall be entitled to such leave as is admissible to an officer of the Central Government under Central Civil Service (Leave) Rules, 1972 :

Provided that the encashment of leave taken on retirement from Government by a Member and the leave to be encashed at the end of the tenure in the Authority shall be restricted to a total of 240 days.

Leave Sanctioning Authority.

7. The Chairman shall be the authority competent to sanction leave to a Member and the President of India shall be the authority competent to sanction leave to the Chairman.

1. As recommended by the 5th Central Pay Commission CCS (Revised Pay) Rules, 1997.

Term of Office.

8. (1) The Chairman or Member shall hold office as such for a term of three years from the date on which he enters upon his office but shall be eligible for re-appointment for another term of three years:

Provided that no Chairman or Member shall hold office as such after he has attained—

(a) in the case of any Chairman, the age of seventy years, and

(b) in the case of any Member, the age of sixty two years.

(2) A person, when appointed as Member, shall seek retirement from Government service before he enters upon his office as a Member.

Contribution to Contributory Provident Fund.

9. The Chairman and Members shall be entitled to make contributions to the Contributory Provident Fund from the date of their appointment in accordance with the Contributory Provident Fund Rules (India), 1962, subject to such conditions as are applicable to re-employed Central Government servants.

Other Conditions of Service.

10. (1) The conditions of service of Chairman for which no provision is made in these rules, shall be governed by the Supreme Court Judges (Conditions of Service) Act, 1958 and the Supreme Court Judges (Travelling Allowance) Act, 1959 and the Rules framed thereunder. The Chairman shall also be entitled to all allowances, perquisites, privileges, amenities and facilities as are admissible to sitting Judges of the Supreme Court from time to time.



(2) The conditions of service of Members in respect of matters for which no provision is made in these rules, shall be the same as may be applicable to other equivalent officers of the Government of India.

Residuary Provisions.

11. Matters relating to the conditions of service of the Chairman or other Members with respect to which no express provision has been made in these rules shall be referred in each case to the Central Government for its decision and the decision of the Central Government thereon shall be binding on the Chairman or the other Members.

Power to Relax.

12. The Central Government shall have the power to relax the provisions of any of these rules in respect of any class or categories of persons.