

(2012) 08 GUJ CK 0012
In the Gujarat High Court

Case No : Special Civil Application No's. 6914 and 6869 of 2012

GSPL India Transco Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 22-08-2012

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35Q
Companies Act, 1956 — Section 4, 4(1), 4(1)(c), 617
Constitution of India, 1950 — Article 136, 14, 19(1)(g), 226, 227
Customs Act, 1962 — Section 28F
Finance Act, 1994 — Section 94, 96A, 96A(b), 96A(b)(ii), 96A(b)(iii)
Income Tax Act, 1961 — Section 2, 2(36A), 245N, 245R(2)

Citation : (2013) 255 CTR 287 : (2012) 56 VST 19

Hon'ble Judges : V.M. Sahai, J;N.V. Anjaria, J

Bench : Division Bench

Advocate : Sujit Ghosh with D.K. Rana and Maulik G. Nanavati, for the Appellant; Y.N. Ravani, for the Respondent

Final Decision : Allowed

Judgement

V.M. Sahai, J.—Rule Service of rule is waived by Mr. Y.N. Ravani, learned counsel appearing for the respondents. Since affidavits have been exchanged, with the consent of the learned counsel for the parties, we have taken up both the writ petitions for final hearing. The petitioners, M/s. GSPL India Transco Ltd., Gandhinagar, Ahmedabad and M/s. GSPL India Gasnet Ltd., Gandhinagar, Ahmedabad are subsidiary companies of Gujarat State Petronet Ltd. which is a subsidiary company of Gujarat State Petroleum Corporation Ltd. The petitioners are Government companies under the provisions of the Companies Act, 1956 and have obtained service tax registration from the Commissioner of Central Excise, Ahmedabad (for short the Commissioner).

2. The petitioners propose to provide service that would be taxable under the category of "transport of goods through pipeline or other conduit service" u/s 65(105)(zzz) of the Finance Act, 1994 (for short the Finance Act). For providing

service, the petitioners are required to lay pipeline for which they would be procuring pipes, get the pipes installed and commissioned along the identified route so as to connect the source to the destination. In this regard, the petitioners propose to grant various turnkey engineering procurement and construction contracts (for short the EPC contracts) to EPC contractors. The contracts would involve supply of pipelines as well as installation and commissioning of the pipes to bring into existence the desired pipeline connecting the source to the destination. The petitioners would also require service of other contractors for inspection, consulting, engineering, etc., which would be required to bring into existence the pipeline.

3. Under the contract, a composite price would be agreed between the parties, however, the same would be divided into two key components, namely, price and supply of goods and price for provision of service.

4. Under the EPC contracts, the petitioners propose to procure the pipes from the EPC contractors under a "bill to ship to" arrangement whereby the pipes purchased by EPC contractors from pipe manufacturers would be directly shipped by such manufacturers to the petitioners' project site under the cover of appropriate statutory documents/invoice. Upon receipt of the pipes at the project site, the petitioners would issue the same to the EPC contractors free of cost under bailment for provision of the services of installation and commissioning by putting together the pipes and bringing into existence the desired pipeline along the identified route. The service by the EPC contractors would essentially consist of putting together the individual pipes issued free of cost by the petitioner by welding/using nuts and bolts/other means and bringing into existence a pipeline along the identified route. Once the services of laying the pipelines would be completed by the EPC contractors/other construction contractors and other service providers, the petitioners would use the pipeline for transporting the gas to its proposed customers, on the basis of the contract entered into between the petitioners and its proposed customers.

5. The petitioners propose to avail of the Cenvat credit of excise duty of the pipes and valves paid by them to the contractors used for bringing into existence the desired pipeline in accordance with the provisions of the Cenvat Credit Rules, 2004 and utilising the same for discharging its output service tax liability.

6. That the petitioners filed separate applications on December 13, 2011 u/s 96C of the Finance Act before the Authority for Advance Rulings (Central Excise, Customs and Service Tax) (for short the AAR) and sought to obtain advance ruling from AAR on the following question :

Whether the petitioner is eligible to avail of Cenvat credit of excise duty paid by it on pipes and valves to the manufacturer, against the petitioner's output service tax liability under the taxable service category of "transport of goods through pipeline or conduit" ?

The Authority by letter dated November 25, 2012 informed the petitioners that

the matter has been fixed on February 10, 2012 for hearing on the admissibility of the application and forwarded the comments dated December 22, 2011 received from the Commissioner, wherein the Commissioner had raised an objection to the maintainability of the application filed by the petitioner on the ground that an identical issue raised by the petitioners holding company was pending before the Customs, Excise and Service Tax Appellate Tribunal, (for short the CESTAT). The petitioner filed the rejoinder on February 8, 2012 to the preliminary comments of the Commissioner. Additional comments were also submitted by the Commissioner on January 30, 2012. In response to the queries made by the Authority on February 10, 2012 the petitioners filed additional submissions on February 15, 2012 wherein the petitioners submitted that the matter was not pending before the CESTAT in the petitioners' own case as required by the proviso to section 96D(2) of the Finance Act.

7. The Authority exercising its discretionary power by the order dated March 30, 2012 See 2013 (29) S.T.R. 642 rejected the application filed by the petitioners u/s 96C as not maintainable on the ground that an identical issue was pending before the CESTAT in the case of the petitioners' holding company on account of which, if the contention of the petitioners is accepted then it would lead to incongruous situation. In the opinion of the Authority, any order passed by it could lead to incompatible decision by different authorities on an identical transaction and identical issue.

8. Both the writ petitions have been filed by the petitioners under articles 226 and 227 of the Constitution challenging the order dated March 30, 2012¹ passed by the Authority. Since the writ petitions raise common questions of law and the facts are similar, therefore, we have taken up the writ petitions together.

9. We have heard Mr. Sujit Ghosh, the learned counsel assisted by Mr. R.D. Rana and Mr. Maulik. G. Nanavati, appearing for the petitioners and Mr. Y.N. Ravani, learned counsel appearing for the respondents at length.

10. The learned counsel for the petitioners has urged that the Authority has committed an error of fact in assuming that the issue pending before the CESTAT in the case of the petitioners holding company and the question raised by the petitioners in the application u/s 96C of the Finance Act were identical. He vehemently urged that the Authority has wrongly presumed that the question raised by the holding company before the CESTAT and by the petitioners before the Authority were identical though the transaction details of the matter pending before the CESTAT were not available with the Authority. Merely because the nature of the proposed business of the petitioners was similar to that of the holding company, an inference cannot be drawn that the proposed transaction of the petitioners would be identical to that undertaken by the holding company. In the absence of transaction details of the holding company, the Authority committed an error in holding that the transaction of the holding company and transaction of the petitioners company were identical as the petitioners has not yet entered into any transaction till date. He further urged that the applications

filed by the petitioners were maintainable as the petitioners were subsidiary to subsidiary company of a Government company. The learned counsel lastly urged that the Authority had no discretionary power u/s 96D(2) of the Finance Act, and the word "may" should be read as "shall" otherwise the proviso to the sub-section would become redundant. Once the bar of the first proviso was not applicable to the applications of the petitioners, the Authority was bound to decide the applications which could not be dismissed under the assumed discretionary power by the Authority. On the other hand, the learned counsel for the Revenue has raised a preliminary objection that the order of the Authority can only be challenged directly before the apex court in a SLP and not before this court in writ petitions. He further urged that the impugned order passed by the Authority under its discretion cannot be challenged or interfered with. He has supported the impugned order of the Authority.

Preliminary objection

11. We may consider the preliminary objection raised by the learned counsel for the respondent. Mr. Ravani, the learned counsel appearing for the Revenue has fervently urged that these writ petitions are not maintainable and the order of the Authority could only be challenged directly before the apex court in a SLP and consequently, the writ petitions are to be dismissed for lack of jurisdiction. This argument of Mr. Ravani is devoid of any merit. The apex court in *Columbia Sportswear Company Vs. Director of Income Tax, Bangalore*, in paragraph 10 had held as under (page 173 of 346 ITR) :

We have, therefore, no doubt in our mind that the Authority is a body exercising judicial power conferred on it by Chapter XIX-B of the Act and is a Tribunal within the meaning of the expression in articles 136 and 227 of the Constitution.

In the aforesaid decision the apex court was considering the question whether the advance ruling pronounced by the Authority for Advance Rulings (income tax) constituted under Chapter XIX-B of the income tax Act, 1961, could be challenged under article 226/227 of the Constitution before the High Court or under article 136 before the Supreme Court and whether the Authority is a court or Tribunal. The apex court in paragraph 12 had held as under (page 175 of 346 ITR) :

Therefore, to hold that an advance ruling of the Authority should not be permitted to be challenged before the High Court under articles 226 and/or 227 of the Constitution would be to negate a part of the basic structure of the Constitution.

The apex court further held that the advance ruling pronounced by the Authority for Advance Rulings should be heard by a Division Bench hearing income tax matters. Therefore, we do not find any substance in the preliminary objection raised by the learned counsel for the respondents. We are of the veritable opinion that the writ petitions filed by the petitioners are maintainable and the preliminary objection is rejected.

First question

12. The first question which arises for consideration in these writ petitions is whether a subsidiary to subsidiary company of a Government company would also be a Government company ? If yes, then a further question arises that whether such subsidiary to subsidiary company could maintain an application u/s 96C of the Finance Act ? Before the Authority, the Commissioner had raised an objection that the petitioners being a subsidiary to subsidiary company of a Government company did not fall within the definition of the "applicant" in terms of section 96A of the Finance Act and, therefore, the petitioners were not entitled to obtain advance ruling from the Authority and the applications filed by them u/s 96C were not maintainable. The Authority in its impugned order had considered the objection and reply given by the petitioners but the Authority refused to decide the question as to whether a subsidiary to subsidiary company of a Government company would also be a Government company and it could maintain an application u/s 96C of the Finance Act. The Authority rejected the applications filed by the petitioners holding that it had the discretion u/s 96D(2) of the Finance Act to allow or disallow an application for an ultimate ruling u/s 96D(4) of the Finance Act, relying on the decision of the Authority for Advance Rulings constituted under the income tax Act, 1961, (2009) 310 ITR 408 . We propose to deal with this decision and the discretionary power of the Authority for Advance Rulings a little later. For deciding the first question it is necessary to extract section 96A of the Finance Act as under :

96A. Definition.--In this Chapter, unless the context otherwise requires,-

(a) "advance ruling" means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay service tax in relation to a service proposed to be provided, by the applicant;

(b) "applicant" means,-

(i) (a) a non-resident setting up a joint-venture in India in collaboration with a non-resident or a resident; or

(b) a resident setting up a joint-venture in India in collaboration with a non-resident; or

(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India;

(ii) a joint-venture in India; or

(iii) 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 who or which, as the case may be, makes application for advance ruling under sub-section (1) of section 96C.

Explanation.--For the purposes of this clause, "joint-venture in India" means a

contractual arrangement whereby two or more persons undertake an economic activity which is subject to joint control and one or more of the participants or partners or equity holders is a non-resident having substantial interest in such arrangement;

(c) "application" means an application made to the Authority under sub-section (1) of section 96C;

(d) "Authority" means the Authority for Advance Rulings, constituted under sub-section (1), or authorised by the Central Government under sub-section (2A) of section 28F of the Customs Act, 1962 (52 of 1962);

(e) "non-resident", "Indian company" and "foreign company" have the meanings respectively assigned to them in clauses (30), (26) and (23A) of section 2 of the income tax Act, 1961 (43 of 1961);

(f) words and expressions used but not defined in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder shall apply, so far as may be, in relation to service tax as they apply in relation to duty of excise.

13. Sub-clause (iii) of clause (b) of section 96A defines the applicant to be 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. The Central Government had issued a notification specifying public sector companies as class of persons. Notification No. 27/2009-ST, dated August 20, 2009 is extracted below :

Notification No. 27/2009-ST, dated August 20, 2009.

G.S.R. In exercise of the powers conferred by sub-clause (iii) of clause (b) of section 96A of the Finance Act, 1994 (32 of 1994), the Central Government hereby specifies any public sector company as class of persons for the purposes of the said clause.

Explanation.--For the purpose of this notification, a "public sector company" shall have the same meaning as is assigned to it in clause (36A) of section 2 of the income tax Act, 1961 (43 of 1961).

14. Since, the notification dated August 20, 2009, talks about section 2(36A) of the income tax Act, 1961, therefore, it is necessary to extract the section which reads as under :

2(36A) of income tax Act, 1961

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 (1 of 1956)

Thus, this section of the income tax Act, 1961 links it to the Companies Act, 1956 (for short the Companies Act). Section 617 of the Companies Act is extracted below :

For the purposes of this Act, Government company means any company in which not less than fifty one per cent. of the paid up share capital is held by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary of a Government company as thus defined.

15. Section 4 of the Companies Act, explains the meaning of "holding company" and "subsidiary". Section 4(1) of the Companies Act, along with the statutory illustration is extracted below :

4. (1) For the purposes of this Act, a company shall, subject to the provisions of sub-section (3), be deemed to be a subsidiary of another if, but only if,-

(a) that other controls the composition of its Board of Directors; or

(b) that other-

(i) where the first mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting right in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Illustration

Company B is a subsidiary of company A, and company C is a subsidiary of company B. Company C is a subsidiary of company A, by virtue of clause (c) above. If company D is a subsidiary of company C, company D will be a subsidiary of company B and consequently also of company A, by virtue of clause (c) above and so on.

16. In the affidavit-in-reply filed by the respondents it had been stated that the petitioners are twice removed subsidiary of subsidiary of a Government company, in which the Government of Gujarat has share holding, therefore, the petitioners will not qualify as a Government company u/s 617 of the Companies Act. It is also stated that there is a common management, having common sources of finance and the petitioners are artificially created companies with the intention to circumvent the taxing provisions. The holding company and the subsidiary company have to be treated as one. u/s 96A(b) of the Finance Act only wholly owned subsidiary of a Government company would be eligible and the petitioners being a twice removed subsidiary of subsidiary would not be eligible to obtain advance ruling from the Authority. It is stated that Circular No. 98/01/2008-ST, dated January 4, 2008 had clarified taxable service. While filing the affidavit-in-reply, the respondents had overlooked the fact that the Commissioner in his comment dated December 22, 2011, in paragraph 2(i) had stated that the

petitioners were Government companies and were valid applicants within the meaning of section 96A(b)(iii) of the Finance Act.

17. In the affidavit-in-rejoinder the petitioners have stated that tax evasion or tax avoidance was never the reason for creating separate legal entities. The area of operations of holding company and that of the petitioner companies are distinct and separate. The holding company is engaged in transportation of gas only within the State of Gujarat, whereas the petitioner companies were created for implementing free cross country pipelines projects awarded to the petitioners pursuant to an open tender floated by the Petroleum and Natural Gas Regulatory Board. The advance ruling given by the Authority will be binding only between the petitioners and the tax authorities in view of section 96E of the Finance Act, and will not help the cause of the holding company. It has also been stated that by virtue of section 617 of the Companies Act, the petitioner being a subsidiary company had been given the status of Government company. However, for the purpose of filing the applications before the Authority the petitioners are separate taxpayers and separate legal entities. The petitioners have every legal right to maintain the application before the Authority for obtaining advance ruling. And the petitioners were eligible applicants before the Authority being qualified as a Government company u/s 617 of the Companies Act.

18. When a company is registered and a certificate of incorporation is issued by the registrar, the company becomes a separate legal entity. Section 4 of the Companies Act lays down that a company is a subsidiary of another if such other company (a) controls the composition of its Board of Directors; or (b) holds half of the nominal value of its equity shares; or (c) if it is a subsidiary of any company which is subsidiary of other company. The respondents have stated that the petitioners are twice removed subsidiary of subsidiary of a Government company. The expression, "twice removed" is, normally, used to describe the relationship and it means that there is a two-generation gap. Subsidiary of subsidiary of a principal holding company are known as step-down subsidiary. The statutory illustration to section 4(1)(c) clearly explains it. If we apply the statutory illustration to the facts of this case we find that the Gujarat State Petroleum Corporation Ltd. (for short the GSPC) is the principal holding company and its subsidiary company is the Gujarat State Petronet Ltd. (for short the GSPL), and the petitioners will be step-down subsidiary of Gujarat State Petroleum Corporation Ltd. The step-down subsidiary means subsidiaries of direct subsidiary.

19. In the affidavit-in-reply it is not disputed by the respondents that the petitioners are Government companies. However, from the statutory illustration and section 4(1)(c) read with section 617 of the Companies Act, 1956, it is clearly established that the petitioners are Government companies being subsidiaries of Gujarat State Petronet Ltd. The holding company and each subsidiary company are separate and distinct legal entities and every company has an independent right to file an application before the Authority for

pronouncement of an advance ruling on the questions raised in the applications. Section 96A(b)(ii) and (iii) support the case of the petitioners that a joint-venture company could be an applicant. Further a resident falling within the class mentioned in sub-clause (iii) could also maintain an application. The petitioners fall within the ambit of section 96A(b)(iii), therefore, we hold that the petitioners being a step-down subsidiary company of a Government company are covered within the definition of the "applicant" in terms of section 96A(b) of the Finance Act. The applications filed by the petitioners before the Authority u/s 96C were maintainable.

Second question

20. We may now take up the second question whether the Authority had been conferred with any discretionary power to either allow or reject the application on the ground other than those prescribed by the proviso to sub-section (2) of section 96D of the Finance Act or the Authority should have decided the applications filed before it u/s 96C if the embargo contained in the proviso to section 96D(2) were absent ? The learned counsel for the petitioners had urged that section 96D(2) read along with its proviso establishes that the Authority may after examining the application and records called for, by order, either allow or reject the application. The proviso carves out an exception that the Authority may not allow the application in two situations. First, where in applicant's own case, the question raised in the application is already pending before any Central excise officer, the Appellate Tribunal or any court. The second circumstance in which the Authority may reject the application is where the question raised in the application is same as in a matter already decided by the Appellate Tribunal or any court. There is no third situation or circumstance provided by the proviso under which the Authority could reject the application u/s 96D(2). He urged that the Authority has no absolute discretionary power. He vehemently urged that the Authority had not been conferred with any discretionary power by the Legislature to refuse to exercise powers in the absence of embargo created by the proviso to section 96D(2).

21. The Authority for Advance Ruling (Central Excise, Customs and Service Tax) had been constituted and a new concept of advance ruling had been introduced by the Legislature, initially, for the benefit of non-residents. In view of section 96A(b) of the Finance Act, now a resident can also apply for obtaining advance ruling. The advance ruling would enable a nonresident or a resident to obtain in advance, a binding view from the Authority under the Act on issues which could arise in determining his tax liability. The Finance Act in Chapters V and VA on Service Tax, provides a complete mechanism and procedure for advance ruling. The object of the scheme as spelt out is, avoidance of litigation and promoting better relationship. In the era of globalisation of business, the purpose for creating the Authority was expeditious disposal and determination of question of law or fact specified in the application regarding the liability to pay service tax in relation to a service proposed to be provided by the applicant for which the

Authority is required to give advance ruling. The Authority has been created to promote better compliance with the provisions of the Customs Act, Service Tax and Central Excise Act, on the lines of a similar Authority already working under the income tax Act, 1961.

22. It would be beneficial to extract the procedure u/s 96D, to be followed by the Authority on the receipt of an application u/s 96C. Section 96D(1) to (7) of the Finance Act along with its proviso is reproduced as under :

96D. Procedure on receipt of application.--(1) On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the Commissioner of Central Excise 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 of Central Excise.

(2) The Authority may, after examining the application and records called for, by order, either allow or reject the application : Provided that the Authority shall not allow the application where the question raised in the application is,--

(a) already pending in the applicant's case before any Central excise officer, the Appellate Tribunal or any court;

(b) the same as in a matter already decided by the Appellate Tribunal or any court :

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 of Central Excise.

(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 purpose of this sub-section, "authorised representative" has the meaning assigned to it in sub-section (2) of section 35Q of the Central Excise Act, 1944 (1 of 1944).

(6) The Authority shall pronounce its advance ruling in writing within 90 days 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 manner shall be sent to the applicant and to the Commissioner of Central Excise as soon as may be, after such pronouncement.

23. In the case in hand, we find that the Authority had rejected the application of the petitioner filed u/s 96C of the Finance Act on the ground that the Authority has discretionary power u/s 96D(2) to reject the application on unspecified grounds. For exercising discretionary power, the Authority had relied on the decision dated February 27, 2009 rendered by the Authority for Advance Rulings (income tax) constituted under the income tax Act, 1961, (2009) 310 ITR 408 . In this decision, while considering the provisions of section 245R(2) of the income tax Act, 1961, the Authority had interpreted the words "may allow or reject" and has come to a conclusion that since the section uses permissible language which admits the element of discretion to the statutory body while passing an order u/s 245R(2), therefore, the discretion is implicit in the provision and an application can be rejected by the Authority under its discretionary power. The relevant observations made by the Authority for Advance Rulings (income tax) in paragraph 25 are extracted below (page 418 of 310 ITR) :

However, it does not follow that the application is bound to be admitted and heard on the merits once the factors set out in the proviso do not come in the way of admission. Still, the Authority has the discretion to reject the application, of course, on germane and weighty considerations. That discretion has to be exercised judiciously keeping in view the spirit and purpose of the provisions concerning advance ruling. The discretion may be invoked in exceptional cases but power to reject on the grounds not expressly spelt out by the statute cannot be ruled out. In other words, the proviso to section 245R(2) does not have the effect of taking away the discretion to reject the application on other unspecified grounds. However, as said earlier, the exercise of discretion must be canalised on proper lines. Avoiding abuse of legal process, incompatible decisions concerning the same parties and anomalous situation are relevant considerations that guide the exercise of discretionary power to reject the application.

24. For better understanding the aforesaid decision it is necessary to reproduce section 245R(2) of the income tax Act, 1961, as below :

245R. Procedure on receipt of application.-...

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

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 subclause (iii) of clause (b) of section 245N or any court;

(ii) involves determination of fair market value of any property;

(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.

25. If we read section 245R(2) with section 96D(2) in juxtaposition we find that section 245R(2) uses the expression, "that the Authority shall not allow the application where the question raised in the application is already pending before any income tax authority or Appellate Tribunal". Whereas section 96D(2) uses the expression, "that the Authority shall not allow the application where the question raised in the application is already pending in the applicant's case before any Central excise officer, the Appellate Tribunal or any court; the same as in a matter already decided by the Appellate Tribunal or any court". We find that in both the sections use different words. u/s 96D(2) proviso (a) the important words used are, "in the applicant's case", which clearly explains that if in the applicants own case any matter is pending or had been decided then the Authority could dismiss the application. Whereas u/s 245R(2) of the income tax Act, 1961, the words, "in the applicant's case" now does not exist in the statute, which means that if in any identical or similar matter the question had been raised by any person 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 then such question cannot be decided by the Authority for Advance Rulings (income tax). However, the Authority for Advance Rulings (income tax), in A.A.R. Nos. 858 to 861 of 2009, (2011) 337 ITR 35 , decided on July 26, 2010, had considered that the words, "in the applicant's case" were deleted by the Finance Act, 2000, from section 245R(2) of the income tax Act, 1961. But the Authority for Advance Rulings (income tax) in LS Cable went on to hold that in spite of the deletion it can still be construed that the question already pending is relatable to the same or identical transaction between the same parties as the ruling is binding on the applicant and the Department only in respect of the transaction in relation to which the ruling had been sought. The Authority for Advance Rulings (income tax) rejected the argument of the Revenue on the ground that the Legislature never envisaged a situation that roving inquiries would have to be made whether any question is pending anywhere in the country at the assessment or appellate stage and whether the contracts are of similar nature having similar terms. However, the provisions of section 245R(2) of the income tax Act, 1961 is not pari materia with section 96D(2) of the Finance Act, and as they stand, are different.

26. We are in complete agreement with the view taken in (2009) 310 ITR 408

that the Authority has discretionary power, which could be exercised on germane and weighty considerations. The discretion has to be exercised judiciously keeping in view the spirit and purpose of the provisions concerning advance ruling. The discretion may be invoked in exceptional cases on the grounds not expressly spelt out by the statute. The Finance Act had contemplated only two situations in which the application for advance rulings can be rejected. The first clause of the proviso to section 96D(2) of the Finance Act clearly suggests that the legislative intent was to avoid two parallel proceedings by an applicant before the adjudicating authorities, namely, any Central excise officer, the Appellate Tribunal and court as well as before the Authority simultaneously, The second clause of the proviso restricts an application before the Authority if the same issue had already been decided by the Tribunal or any court. There is no third clause in the proviso. Section 96D(2) gives discretionary power to the Authority in exceptional cases to reject an application but does not confer absolute discretionary power on the Authority.

27. In the impugned order dated March 30, 2012 See 2013 (29) S.T.R. 642 passed by the Authority, in paragraph 7, the Authority had held as under (page 479 of 13 GSTR) :

For the purpose of these applications, we do not think that it is necessary to finally adjudicate on the question whether a subsidiary of a subsidiary Government company could invoke the jurisdiction of this Authority for advance ruling or not. We prefer to rest our decision on the discretion we have u/s 96D(2) of the Finance Act, 1994 to allow or disallow an application for an ultimate ruling u/s 96D(4) of the Act.

The Authority has further recorded findings in paragraphs 8 and 9 which are extracted as under (page 480 of 13 GSTR) :

In this case, admittedly, the questions sought to be raised before us are pending before the Customs, Excise and Service Tax Appellate Tribunal, though at the instance of the holding company of the applicants. If we go by the arguments of the applicants before us, our ruling to be given, will only bind the applicants and the authorities under the Act would be bound to implement the ruling only in the case of the applicants. That would mean that in the appeal filed by the holding company of the applicants involving the identical questions, the Customs, Excise and Service Tax Appellate Tribunal is free to render a ruling ignoring what is being ruled by this Authority. That according to us, could lead to incompatible decisions concerning the same question, being rendered by two different authorities on the identical transactions. In the facts and circumstances of this case, we think that such situation should be avoided. This will be in furtherance of the spirit of enacting the bar to the jurisdiction of this authority to entertain an application for advance ruling, when the identical question is pending before an authority under the Act, the Tribunal or court.

We are in respectful agreement with the view taken by the Authority for Advance

Rulings (income tax) in the above quoted ruling and applying the principle accepted therein, hold that we should exercise our discretion not to allow this application u/s 96D(2) of the Act for the purpose of giving a ruling u/s 96D(4) of the Act. We thus, reject these applications in exercise of our discretion.

28. The question arises that where either of the two conditions laid down in the proviso to section 96D(2) barring the jurisdiction of the Authority are absent whether the Authority could reject the application filed u/s 96C under its discretionary power, even though there was no exceptional circumstances ? We have already held that the petitioners and the holding company were separate and distinct legal entities and had independent rights and the Authority does not possess absolute discretionary power. u/s 96D(2) proviso (a) the important words used are, "in the applicant's case", which clearly explains that if in the applicants own case any matter is pending or had been decided then the Authority could dismiss the application. It is not disputed by the Authority in the impugned order that in the instant case that the question raised in the applications filed by the petitioners u/s 96C were either pending in the petitioner's own case before any Central excise officer, Appellate Tribunal or any court or the question raised in the applications filed by the petitioners had been decided by the Appellate Tribunal or any court. Therefore, the embargo mentioned in the two clauses of the proviso to section 96D(2) were not existing which could oust the jurisdiction of the Authority. The questions raised by the holding company or the transaction details of the holding company or the records of the CESTAT were not available with the Authority. Merely because the proposed business of the petitioners was similar to that of the holding company, it would not give rise to an inference that the proposed transaction of the petitioners would be identical to that undertaken by the holding company. The Authority has completely lost sight of the fact that the petitioners had not yet entered into any transaction till date. Therefore, in our considered opinion, the Authority was required to decide the questions raised by the petitioners in their application. Merely because the questions, if answered by the Authority would bind the petitioner and the tax authorities only or the CESTAT might give a different decision in the matter of petitioners holding company could not result in passing incompatible decision by the Authority as the decisions of the Authority under the scheme of the Finance Act and section 96E is binding only between the petitioner and the tax authorities. The finding of the Authority that its decision could be ignored by the CESTAT defeats and frustrates the very object of establishing the Authority for Advance Rulings. The Authority committed an error of fact in coming to the conclusion that there were two identical transactions which may lead to two incompatible decisions on the same question, is not based on any material on record as the petitioner has not yet entered into any transaction. We are also of the considered opinion that the view taken by the Authority is not supported by material on record and the questions raised by the petitioners in their applications were liable to be decided by the Authority as there was no exceptional circumstance under which the Authority could have

exercised its discretion to reject the application of the petitioners on unspecified grounds. The petitioners neither abused the legal process, nor if the Authority would have taken a decision would have resulted in incompatible decisions concerning the same parties. Further, the decision of the Authority would not have resulted in anomalous situations. The questions raised in the applications of the petitioners were required to be decided by the Authority.

Consideration of facts on record

29. We may now consider the facts on record. In the application filed by the petitioners u/s 96C of the Finance Act, the petitioners have stated that the proposed business activity is at a preliminary stage of development and the necessary authorisations are being obtained. The Commissioner in his comments dated December 22, 2011 submitted before the Authority in paragraphs 2 and 3 stated as under :

2. In this regard, the point-wise compliance report of paragraph 4 of the said letter is as under :

(i) As per available information it is to report that M/s. Gujarat State Petronet Ltd., Gandhinagar is a subsidiary of M/s. Gujarat State Petroleum Corporation Ltd. (a Government of Gujarat undertaking). Further, M/s. GSPL India Transco Limited, Gandhinagar (applicant) is a subsidiary of M/s. Gujarat State Petroleum Ltd., Gandhinagar. Therefore, as per section 617 of the Companies Act, 1956 read with section 4 of the Companies Act, 1956 M/s. GSPL India Transco Limited is a Government company and accordingly is a valid "applicant" within the meaning of section 96A(b)(iii) of the Finance Act, 1994 read with Notification No. 27/2009-ST, dated August 20, 2009.

(ii) The activity/service in respect of which an advance ruling has been sought is a "proposed" one.

(iii) No case is pending involving issue raised by the applicant, as the applicant has not started such activity/service yet. However, it is to bring to your kind notice that on an identical issue one show-cause notice has been issued to M/s. Gujarat State Petronet Ltd. (GSPL), a holding company of the applicant, for denial of Cenvat credit availed of on capital goods (pipe and valve) which was decided vide Order-in-Original No. 10/COMMR/2010, dated March 25, 2010 in which the adjudicating authority has decided the issue against M/s. GSPL. Being aggrieved, M/s. GSPL has filed an appeal before the hon'ble Tribunal, Ahmedabad which is pending for decision. Further, two show-cause notices issued for subsequent period to M/s. GSPL are pending for decision by the adjudicating authority. The copies of the order-in-original and the show-cause notice are enclosed for ready reference.

3. The compliance report as mentioned above is with respect to maintainability only. The compliance report with respect to merits will be submitted in due course. At this juncture, it is pertinent to mention that the applicant has sought

advance ruling for eligibility of Cenvat credit of excise duty paid on pipes and valves as "capital goods" for providing output service, i.e., "transport of goods to pipelines or conduit" as a service provider. As per section 96C(2)(e) of the Finance Act, 1994 advance ruling may be sought for "admissibility of credit of service tax". Therefore, the issue raised by the applicant for advance ruling for admissibility of Cenvat credit of capital goods is not covered u/s 96C(2) of the Finance Act, 1994.

30. The Commissioner submitted further comments on January 30, 2012, to the Authority wherein in paragraph 7 it was stated as under :

5. It is pertinent to mention that the applicant is a subsidiary of M/s. Gujarat State Petronet Ltd. (GSPL), and identical issue is pending against GSPL before the hon"ble CESTAT, Ahmedabad. With sole intention for getting advance ruling on the same issue a subsidiary company of GSPL in the name of M/s. GSPL India Transco Ltd. was created. Therefore, the issue could not fall under the purview of advance ruling.

31. The petitioner filed a rejoinder to the preliminary comments submitted by the Commissioner before the Authority, wherein in paragraphs 2(i), 3.4 and 3.7, it had been stated as under :

2. That the learned Commissioner has essentially stated the following in his comments :

(i) In paragraph 2(i) of the comments, the learned Commissioner accepts that the applicant would qualify as an "applicant" within the meaning of section 96A(b)(iii) of the Finance Act, 1994 read with Notification No. 27/2009-ST...

3.4. That it is an undisputed fact that the question raised in the application is neither pending in GSPL India Transco Limited's case before any Central excise officer, but the Appellate Tribunal or any court (as the learned Commissioner specifically admits) nor is it same as in a matter already decided by the Appellate Tribunal or any court especially since the appeal filed by the applicant's holding company is pending before the hon"ble CESTAT.

3.7. However, the learned Commissioner fails to take cognisance of section 96C(2)(d) which provides for allowing advance ruling applications on the question of "applicability of the notifications issued under Chapter V. Given that this application pertains to the eligibility of Cenvat credit of excise duty paid on pipes and valves as "capital goods" for providing output service, i.e., "transport of goods through pipelines or conduit" as a service provider as per the Cenvat Credit Rules, 2004 and the fact that the Cenvat Credit Rules, 2004 were introduced vide Notification No. 23/2004-CE (NT.) issued, inter alia, u/s 94 of the Act which forms a part of Chapter V of the Act, this application would qualify u/s 96C(2)(d) which provides for allowing advance ruling applications on the question of "applicability of the notifications issued under Chapter V...

However, the learned Commissioner in paragraph 2(iii), without raising any

objection, also points out the existence of show-cause notice, order-in-original and appeal on an identical issue with respect to the applicant's holding company, i.e., M/s. Gujarat State Petronet Limited ("GSPL").

32. It is also relevant to point out over here that during the hearing of applications filed by the petitioners, the Authority raised certain queries on February 10, 2012 which were replied by the petitioners on February 15, 2012 wherein in paragraph 2.1, the petitioners have stated as under :

2.1. The language used u/s 96C(2)(d) of the Act has to be interpreted without artificially importing restrictive covenants. It is humbly submitted that, section 96C(2)(d) of the Act provides for allowing advance ruling applications on the question of "applicability of notifications issued under Chapter V. Since this application pertains to the eligibility of Cenvat credit of excise duty paid on pipes and valves as "capital goods" for providing output service, i.e., "transport of goods through pipelines or conduit" as a service provider as per the Cenvat Credit Rules, 2004 and the fact that the Cenvat Credit Rules, 2004 were introduced vide Notification No. 23/2004-CE (N.T.) issued, inter alia, u/s 94 of the Act which forms a part of Chapter V of the Act, this application would qualify u/s 96C(2)(d) which provides for allowing advance ruling applications on the question of "applicability of notifications issued under Chapter V"...

33. The paragraphs 26.9.6 and 26.10 of Writ Petition No. 6914 of 2012 which are similar to paragraphs 26.9.6 and 26.9.7 in Writ Petition No. 6869 of 2012. In paragraph 26.9.6 and paragraph 26.10 of Writ Petition No. 6914 of 2012, it had been stated as under :

26.9.6 That the transaction involved in the dispute pending in the case of the holding company of the petitioner is not identical to the proposed transaction based on which the advance ruling has been sought by the petitioner. It is stated that the transaction details of the matter pending before the Tribunal were not available with the Authority and thus the Authority erred in holding that the two transactions are identical. The holding company and the petitioner are two separate and distinct legal entities. The petitioner has not even entered into any transaction till date, whereas, the holding company's transaction which is a subject matter before the Tribunal, is already completed. Merely because the nature of the proposed business of the petitioner is similar to that of the holding company, it does not imply that the proposed transaction of the petitioner would be identical to that undertaken by the holding company. Therefore, the finding of the Authority that the aforesaid transactions are identical is bad in law as well as on facts. The Authority has rejected the application filed by the petitioner in violation of article 14 and article 19(1)(g) of the Constitution.

26.10 In any case, the proviso to section 96D(2) provides that the Authority is bound to reject the application if the same question is pending before the Tribunal in the applicant's own case. While rejecting the application, the Authority in paragraph 8 of the impugned order has held that an identical issue

vis-?-vis an identical transaction is pending before the Tribunal. It is stated that the application can be rejected only if the identical issue is pending before the Tribunal in the context of an identical transaction pattern. The transaction on which the matter is pending before the Tribunal (in the holding company's case) and the transaction on which advance ruling is sought by the petitioner are not identical. It is stated that the contracting parties, proposed projects and contracts pertinent to the application would be different from the one pending in the Tribunal. Therefore, the mere fact that an issue of similar nature in the case of the petitioner's holding company might be pending before the Tribunal, does not have any impact on the application filed by the petitioner before the Authority. Thus, the rejection of application filed by the petitioner by the Authority is in violation of article 14 and article 19(1)(g) of the Constitution.

34. From the aforesaid facts, it is clear that the Commissioner in his comments dated December 22, 2011 submitted before the Authority had admitted that the petitioners are the Government companies and their application before the Authority was maintainable. The Authority was not required to go into the question as to whether the petitioners are the Government companies and whether application filed by them were maintainable or not. As a matter of fact, the Authority has not entered into this question.

35. The petitioners have sought advance ruling in respect of activity/service which is proposed one. No case is pending involving the issue raised by the petitioners in their application as the petitioners have not yet started any activity or service. The only objection of the Commissioner was that an identical issue was pending before the CESTAT. The petitioners in their rejoinder as well as on the questions raised by the Authority had answered that the question raised by the petitioners in their applications were not identical to that raised by the petitioners holding company, Gujarat State Petronet Ltd.

36. That the Authority has rejected the applications of the petitioners by which advance ruling was sought on the ground that the transaction of the petitioners and the holding company were identical. It appears that the Authority has lost sight of the fact that if the petitioners would have entered into any transaction, then their application for obtaining advance ruling was not maintainable. The advance ruling is sought on the question, before any activity or service as proposed by the applicant has commenced. Further, the petitioners had not yet entered into any transaction and this fact was not disputed by the Commissioner in his comments. Therefore, the view taken by the Authority that there were identical transactions of the petitioners and the petitioners' holding company and it would result in giving incompatible decisions on an identical question, is erroneous.

37. For the aforesaid reasons, we are of the considered opinion that the applications filed u/s 96C by the petitioners were rejected by the Authority on non-existent grounds. The Authority could not reject the applications of the petitioners under its discretionary power as there were no exceptional

circumstances, or abuse of the legal process or rendering incompatible decisions concerning the same parties or any anomalous situations would have arisen if the Authority would have pronounced advance ruling. The petitioners had not yet entered into any transaction and the advance ruling had been sought on the proposed activity or service, therefore, the petitioners' applications were maintainable and the Authority was required to pronounce advance ruling u/s 96D of the Finance Act. Even assuming *arguendo* that the question pending before the CESTAT in the matter of holding company and the question raised before the Authority by the petitioners were similar, if the Authority pronounces advance ruling on the question raised by the petitioners, then, in our opinion, it will not result in conflicting or incompatible decision between the same parties, as the order of the Authority would be binding only on the petitioners and the tax authorities in view of section 96E of the Finance Act. We are further of the considered opinion that the bar created by the proviso to section 96D(2) were absent and therefore, the petitioners applications filed u/s 96C for advance ruling was maintainable before the Authority. The order of the Authority deserves to be set aside and a direction is liable to be issued to the Authority for deciding the applications of the petitioners filed u/s 96C at the earliest.

Conclusion

For the aforesaid reasons both the writ petitions succeed and are allowed, Order No. AAR/ST/02-03/2012 in Applications Nos. AAR/44/ST/ 08/11 and AAR/44/ST/09/11, dated March 30, 2012 See 2013 (29) S.T.R. 642 passed by the Authority for Advance Rulings (Central Excise, Customs and Service Tax), New Delhi, annexure-P to the writ petitions are quashed. The Authority for Advance Rulings (Central Excise, Customs and Service Tax), New Delhi, to decide the questions raised in the petitioners applications, u/s 96C, on merits, u/s 96D of the Finance Act, 1994, preferably within a period of three months from the date a copy of this judgment is produced before the aforesaid Authority. Rule is made absolute. Parties shall bear their own costs.