

(2011) 08 MAD CK 0402

In the Madras High Court

Case No : Writ Petition No. 14921 of 2011 and M.P. No. 1 of 2011

Verizon Data Services India P. Ltd.

APPELLANT

Vs

Authority for Advance Rulings and Others

RESPONDENT

Date of Decision : 09-08-2011

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 32

Income Tax Act, 1961 — Section 192, 195, 245I, 245O, 245S

Citation : (2012) 346 ITR 489

Hon'ble Judges : M. Jaichandren, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : Anita Sumanth, for the Appellant; J. Narayanasamy, for the Respondent

Final Decision : Allowed

Judgement

Mrs. Chitra Venkataraman, J.—The writ petitioner assessee herein is a private limited company, incorporated under the provisions of the Companies Act, 1956. It is a wholly owned subsidiary of Verizon Data Services LLC, U.S. The petitioner herein is engaged in providing services in relation to development and maintenance of telecom software, (operations and business support) solutions as well as information on technology enabled services. The petitioner states that the services rendered by it are exported to its parent company, in the U.S. It is stated by the petitioner that the entire Verizon group follows the practice of sharing employees in the various companies to ensure that operating costs are kept to a minimum and that available resources are utilised in an effective manner. It is stated that the group companies second their own employees to other legal entities within the group, who are in need of individuals, for discharge of certain immediate functions. In terms of the set up of these companies, on April 1, 2008, the petitioner herein entered into a personnel secondment agreement with GTE Overseas Corporation, U.S. A, referred to as "GTE-OC", an affiliate company of Verizon U.S. The agreement reads that the said company GTE-OC has the capability of providing services in various fields. Accordingly,

GTE-OC agreed to provide services of three of its employees to the petitioner herein pursuant to certain terms and conditions. These employees were identified keeping in mind the specific function to be performed for the petitioner. Thus, Mr. Rahul Saxena, Mohan Moghe and Ms. Satya Datle were rendered to discharge specific problem. While Rahul Saxena was taken on board as managing director, Mohan Moghe and Satya Datla provided supervision and direction as regards the manner in which the activities of the petitioner-company should be carried on and to liaise between the petitioner and Verizon-Data Services L. L. C, a U.S. affiliate of the Verizon group. The agreement specifically stated in clause 2 that the employee seconded shall at all times remain employees of GTE-OC and shall not, at any time, become an employee of the petitioner company. During the tenure, they are to act exclusively under the direction and supervision of the petitioner and are subject to the guidelines applicable to the petitioners employees. Clause 2(b) of the agreement provided that GTE-OC would not be responsible for the work of any of the three named employees. The agreement further states that the agreement shall not prohibit either GTE-OC or any employee from terminating his or her employment with GTE-OC at any time, with or without cause. On such termination, the employment of the employee, whose services are given to the assessee-company, would come to an end. So long as these employees are under the disposal of the Indian company, namely, the petitioner-assessee it shall have competence or authority to control and have guidelines as regards the functioning of these employees. Clause 3 provides for provision of compensation and other items, one of which happens to be that at the expense of the petitioner, the salaries of the employee shall be paid by GTE-OC and the assessee herein shall reimburse the American company on the items paid or provided under clause 3. The petitioner states that the amount raised by GTE-OC in the debit notes are an exact match of the amount of salary and emoluments paid by GTE-OC to each of the three employees. Thus, the actual amount remitted by the petitioner represented the actual amount paid by the U.S. company and, hence, the same is towards the reimbursement of the expenses incurred by GTE-OC in respect of these employees. In terms of the agreement thus entered into and the fact that the company had reimbursed whatever the American company had paid to the employees herein by way of salary, the assessee moved an application before the Advance Rulings Authority for a decision on the following questions of law ([2011] 337 ITR 192, 196 (AAR)) :

1. On the facts and in the circumstances of the case whether the amounts (representing salary and benefits payable by GTE-OC to expatriate employees) reimbursed by the applicant to GTE Overseas Corporation, (GTE-OC) is income accruing to GTE-OC and, there fore, whether the same is liable to deduction of tax in accordance with the provisions of section 195 of the Income tax Act, 1961 (the Act) ?

2. If the answer to question. No. 1 is in the affirmative, then whether the same is taxable as fees for included services (FIS) under the Act read with the India-USA

Double Taxation Avoidance Agreement (the DTAA) ?.....

3. Is there a permanent establishment of GTE-OC in India under the DTAA and if so, is the amount received by GTE-OC from the applicant in the nature of business profits attributable to such permanent establishment in India under the DTAA ?

4. If the answer to question No. 3 is in the affirmative/ is the amount of taxable income nil, inasmuch as the reimbursements are at actual ?

5. If the answer to question No. 1 is in the affirmative, then what is the rate at which tax is to be deducted at source on the payments made by the applicant to GTE-OC ?

2. The assessee took the plea that having regard to the nature of services rendered by the seconded employees and the amount paid by the employer had also been reimbursed by the assessee and the salaries and emoluments of the employees are also subjected to tax in India by way of TDS u/s 192 of the income tax Act, the question of deducting TDS u/s 195 of the income tax Act in respect of reimbursement of the expenditure to the US company did not arise. The assessee further took the plea that the amounts paid by the assessee to GTE-OC under the agreement are only reimbursement of the costs incurred by GTE-OC and hence, no portion of this amount represented income liable to tax; that the services of the three employees are as employees of the petitioner and GTE-OC was only a legal employer and the petitioner, as the economic and substantive employer, have domain and control over the employees. Even if the services of the employees are to be treated as services rendered by GTE-OC, being in the nature of managerial services, the same could not be brought under any of the clauses under article 12(4) (a) or (b) of the Double Taxation Avoidance Agreement (hereinafter referred to as "the DTAA"), as article 12(4) would come into operation only on rendering of services that are technical and consultancy in nature.

3. On the submissions thus made as regards the first question as to whether the amount reimbursed by the assessee to GTE-OC is income accruing to GTE-OC and hence liable for deduction of tax u/s 195 of the income tax Act, the Advance Rulings Authority pointed out that in view of the specific agreement indicating the control of GTE-OC with their employees, it was clear that the sums that are remitted by the assessee accrued and arose to the U.S. company for providing services to the assessee. The application of income by the U.S. company while disbursing the salary had nothing to do with the accrual of the money. Pointing out to the specific stand taken by the assessee that there was one to one correlation the money reimbursed by the assessee and the salary paid by the U.S. company, the Advance Rulings Authority pointed out that such correlation would not justify the stand of the assessee that it was only a reimbursement of the expense. It held that two payments are distinct and different and thus taxable in the separate entities. The sums remitted to GTE-OC are taxable at its

hands for the services rendered by it to the petitioner and the amount paid to the seconded employees arose on account of their employment with GTE-OC. Thus, going by the terms of the agreement, the Advance Rulings Authority came to the conclusion that the amount paid by the assessee to GTE-OC represented income at the hands of GTE-OC.

4. Having thus answered the first question against the assessee that the amount was to be treated as income and hence liable for tax deduction at source in accordance with section 195 of the income tax Act, the Advance Rulings Authority considered the question as to whether the same is taxable as "fees for included services" under the Act read with the India-USA Double Taxation Avoidance Agreement. The Advance Rulings Authority pointed out that even though the personnel secondment agreement did not give the exact details as to the nature of services to be rendered by the three seconded employees, yet, annexure II to the application filed before the Authority indicated the nature of services to be rendered. It pointed out that while one of the seconded employees was to perform the function as managing director and other two were to supervise and provide directions and the manner through which the activities of the applicant are to be carried out, the Authority agreed with the assessee that the managerial services are not technical in nature. However, it went on to consider as to whether the managerial services could be consultancy services to satisfy the requirement under article 12(4) of the DTAA. The assessee took the stand that the managerial services rendered by the seconded employees would not fall under article 12(4) (b) of the DTAA which relates to "included services". This is defined under article 12(4) to mean technical or consultancy services (including through the provision of services of technical or other personnel) if such services are ancillary or subsidiary to the application or enjoyment of the right, property or information for which a payment is received as defined in the DTAA; if such services make available technical knowledge, experience, skill, know-how, or processes, or consist of the development; and transfer of a technical plan or technical design. At the end of paragraph 16, the Authority held that the functions performed by the seconded employees were purely managerial in nature. After referring to the memorandum of understanding and the DTAA, the Authority came to the conclusion that even though the services are not technical in nature, the services provided are managerial in nature, payments made by the assessee answered the description of "fees for included services" under article 12(4) of the DTAA. In the light of the above, the Authority answered the second question in the affirmative. Having regard to the abovesaid reasoning, the Advance Rulings Authority held that questions Nos. 3 and 4 had become academic in nature and the "fees for included services" was taxable at 20 per cent, under article 12(4) (b) of the DTAA. Aggrieved by the same, the assessee has come before this court.

5. On notice, respondents Nos. 2 and 3 have filed their common counter-affidavit.

6. Learned counsel appearing for the assessee initially touched on the

maintainability of this petition before this court by placing reliance on the decision reported in *Fosters Australia Ltd., In re* [2008] 219 CTR 9, learned counsel appearing, for the petitioner touched on the width of this court's power on a writ petition filed under article 226 of the Constitution of India to interfere with the order of the Advance Rulings Authority and placed reliance on the decisions of the apex court reported in *R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another, Jyotendrasinhji Vs. S.I. Tripathi and others*, and *Indian Airlines Ltd. Vs. Prabha D. Kanan*, to submit that even though the jurisdiction of this court under article 226 of the Constitution of India is not that of an appellate authority, yet, when the order is writ with perversity or where the Authority failed to consider the questions raised in terms of the annexure, this court has every jurisdiction to interfere with such an order. She submitted that even though the assessee had approached the Advance Rulings Authority for a decision and the decision is binding on the assessee and the Department, nevertheless, in the light of the flaws in the reasoning of the first respondent, which involve substantial questions of law, the writ petition is maintainable. While agreeing with the contention of the Revenue that on the factual findings rendered, this court does not sit as a court of appeal, yet, she is quick enough to submit that when the findings ignore or overlook the vital clauses in the agreement the findings thus suffer a perversity. Thus, seen in the background of the above facts, she placed reliance on the decision of the Delhi High Court reported in *U.A.E. Exchange Centre Ltd. Vs. Union of India (UOI) and Another*, for the proposition that courts have the power to issue a writ of certiorari in respect of an error apparent on the face of the record.

7. As regards the substantive aspect of her contentions, taking us through the various clauses in the agreement, learned counsel for the assessee pointed out that as far as the first issue is concerned given the fact that the assessee had reimbursed the U.S. company to the exact amount of what was made by the U.S. company as by way of salary to their employees, whose services were given to the assessee, the nature of payment is only by reimbursement of expenses. Thus, the payment made by the petitioner to the U.S. company matching in its absolute terms, the Authority committed a serious error in holding that the amount paid by the assessee to GTE-OC represented income at the hands of the GTE-OC for TD5. Laying great stress on clause 3 as well, as clause 2(b) of the personnel secondment agreement, she pointed out that the petitioner-assessee herein being the economic employer of the three employees it had reimbursed the money to the American company, which is a principal employer. However, this does not mean that the amount paid by the assessee to GTE-OC as by way of reimbursement of the expense would take the character of an income for TDS. Consequently, the remittances made equal to the payment of salary by GTE-OC cannot be brought under the scope of section 195 of the income tax Act. In this connection, learned counsel also placed reliance on the decisions reported in *Commissioner of Income Tax Vs. Siemens Aktiengesellschaft*, *COMMISSIONER OF*

Income Tax Vs. INDUSTRIAL ENGINEERING PROJECTS PVT. LTD., and (2009) 309 ITR 356 that reimbursement is not taxable as income. In the context of the Authority holding in the concluding paragraph that the payment was by way of reimbursements she said that the Authority grossly erred in holding that the amounts are taxable as income and had to go for TDS.

8. As far as the second issue is concerned, on the alternative submission, she pointed out that when article 12(4) of the DTAA clearly speaks about payment as regards consultancy and technical services and on facts, the Authority found that the managerial services rendered were not technical and that the seconded employees were purely in managerial service, the Authority went into a tangent to ultimately hold that article 12(4) of the DTAA stood attracted to the facts of the case. She pointed out to the inconsistencies in the reasoning of the Authority that having held that the seconded employees are only in managerial service, the Advance Rulings Authority committed serious error in holding that the payment would nevertheless fall under "fees for included services" as stated under article 12(4) of the DTAA and that the payments would also be considered under "fees for technical services" as defined in Explanation 2 to section 9(l)(vi) of the Act. She further contended that the findings given in paragraph 17 does not fit in with the description or "fees for included services" under article 12(4) of the DTAA. She also submitted that in the light of the patent illegality in the order of the Advance Rulings Authority both on account of treating the reimbursement as income, which is contrary to the decisions of the various other High Courts and the ultimate finding as regards question No. 2 that the managerial services would fit in with the consultancy services as given under article 12(4) of the DTAA the order of the Advance Rulings Authority has to be quashed. She also pointed out that the failure to answer the other two questions treating them as academic also, could not be sustained. So too the rate of tax applied at 20 per cent. She submitted that in the face of the reasoning of the Authority on the taxability of the reimbursement as income under the domestic law as well as under the DTAA, the rate of tax has to be in accordance with section 90(2) of the income tax Act and the petitioner is entitled to the application of the more beneficial of the two tax rates, viz., one under the domestic law and the one prescribed under the DTAA at 10 per cent.

9. Learned standing counsel appearing for the Revenue supporting the order of the Advance Rulings Authority, reiterated the contentions as stated in the counter, particularly to the scope of interference that is available under article 226 of the Constitution of India. He pointed out that given the fact that the Authority had interpreted the various clauses in the agreement and the decision is binding on the petitioner, the question of this court drawing a different conclusion does not arise. As regards the answer to the second question given by the Advance Rulings Authority, he pointed out that in paragraph 15 of the order, even though the Authority held that it is not technical services, yet, going by the nature of duties discharged by the seconded employees, it really fitted in with consultancy services. Thus, in the context of the nature of duties discharged as

consultancy in character, it has to fall under article 12(4) (b) of the DTAA.

10. The sum and substance of the argument of the learned standing counsel appearing for the Revenue is that no exception could be taken to the reasoning given under paragraph 17 to hold that the nature of services provided by the American company are in the nature of managerial services to fit in with what is provided for as "fees for included senders", to come under article 12(4) of the DTAA. In the light of the answers given to the first two questions, rightly, the Advance Rulings Authority held that the other two questions are academic. Thus, he submitted that the binding character of the order of the Advance Rulings Authority cannot, in any manner, be disturbed by this court under article 226 of the Constitution of India, as though it is an appeal court.

11. Heard the learned counsel appearing for the assessee-petitioner and the learned standing counsel appearing for the Revenue.

12. As far as the scope of interference of this court is concerned, the provisions of the Act, which enable the assessee to go before the Advance Rulings Authority, need to be seen.

13. Chapter XIX-B of the income tax Act is a separate Chapter to deal with cases, wherein the assessee, who has undertaken a transaction with a nonresident moves the Authority constituted u/s 245-O of the income tax Act for an early determination on a question of law and fact. An applicant desirous of obtaining an advance ruling under this Chapter has to make an application as provided u/s 245-O of the income tax Act and on such, application made, after giving an opportunity to the Revenue, the Authority passes its ruling, section 245S of the income tax Act touches on the effect of the order passed by the Advance Rulings Authority, viz., (i) that the ruling shall be binding only on the applicant who had sought it, (ii) in respect of the transaction in relation to which the ruling had been sought, and (iii) on the Commissioner, and the income tax authorities subordinate to him, in respect of the applicant and the said transaction. Sub-section (2) to section 245S of the income tax Act states that unless there is a change in law or facts on the basis of which the advance ruling was given the ruling given under sub-section (1) shall be binding on the parties as mentioned therein.

14. Placing emphasis on this, learned standing counsel submitted that it is no longer open to the petitioner to challenge the said decision and there is a finality attached to the ruling. We do not think that such a contention could have the support of law.

15. Questions similar to the one raised by the Revenue herein came up for consideration before the apex court. In the decision reported in *Jyotendrasinhji Vs. S.I. Tripathi and others*,) relied on by the assessee, the apex court considered the effect of the finality clause contained in section 245-I to the order of the Settlement Commission and the scope of interference by the High Court under article 226 of the Constitution of India. The apex court considered the

width of the High Courts writ jurisdiction in such matters. The apex court pointed out that (page 622) : "It is true that the finality clause contained in section 245-I does not and cannot bar the jurisdiction of the High Court under article 226 or the jurisdiction of this court under article 32 or under article 136, as the case may be". The apex court further pointed out that (page 623) : "The scope of enquiry, whether by the High Court under article 226 or by this court under article 136 is also the same--whether the order of the Commission is contrary to any of the provisions of the Act and if so, apart from ground of bias, fraud and malice which, of course, constitute a separate and independent category has it prejudiced the petitioner-appellant. Reference in this behalf may be had to the decision of this court in R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another, , which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji J., speaking for the Bench comprising himself and S. R. Pandian J., observed that in such a case this court is concerned with the legality of procedure followed and not with the validity of the order. The learned judge added judicial review is concerned not with the decision but with the decision-making process".

16. Thus, the Supreme Court pointed out that the only ground on which the court under article 226 or 136 can interfere in the writ petition is whether the order of the commission is contrary to the provisions of the Act and that such contravention had prejudiced the appellant.

17. In the light of the above, the Supreme Court held that even though there was no necessity to get into the correctness of the interpretation placed on the deeds, for the sake of completeness the apex court got into the correctness of the order passed, making a wrong interpretation of law on the provisions of the trust deed. Thus, the decisions cited by the assessee in respect of the scope of interference by the court under article 226 of the Constitution of India clearly show that as far as the merits of the order passed by the Commission is concerned, the court has a limited judicial review and restricted to such of those instances where there is violation of the principles of natural justice or where the order does not carry any reasoning to support its conclusion, thereby introducing an element of perversity, or in the alternative, where the order is patently contrary to the provisions of the Act to cause serious prejudice to the party.

18. The decisions cited above are also an authority for proposition that even though the Act may attach a finality to the order passed in the proceedings, yet given the scope of judicial review on grounds of perversity, violation of the principles of natural justice, malice, bias and patent illegality on account the order going against the provision of law or prejudice in not considering the various clauses in accordance with law, the constitutional right is always available to the party to test the same on the ground of error apparent on the face of the order. Even though learned standing counsel appearing for the respondents objected to the maintainability of the writ petition as against the order of the Advance Rulings Authority on the score that it is the assessee who sought for the

decision, hence, cannot have any grievance at all we do not think that it by itself, will close the doors of remedy that the assessee should be held to have sinned against sinning. Hence, we uphold the contention of the learned counsel appearing for the assessee, particularly in the context of the law declared by the apex court. Thus, as far as the maintainability of the writ petition is concerned, we overrule the contention of the Revenue.

19. As far as the first issue as to whether the payment made by the assessee could be termed as income is concerned, it is seen from the order of the Advance Rulings Authority that it went into the relevant clauses in the agreement between the assessee and the U.S. company only to come to a conclusion that the receipts by the American company are to be held as income hence, amenable to the provisions of the income tax Act. As already pointed out, going by the reasons given, which is on the basis of the interpretation of the various clauses therein, we do not find that there could be any ground for this court to substitute its view on the reasoning of the Advance Rulings Authority. Given the fact that the Advance Rulings Authority had considered the contentions therein with regard to the agreement we do not find there exists a case for this court to substitute its own reasoning, however good it may be, over that of the Advance Rulings Authority. As already pointed out, since the decision on the first question raised is on the terms of the agreement there is no reason to hold that the decision of the Advance Rulings Authority had gone against the provisions of the Act.

20. The question as to whether the receipt is really an income or reimbursement is a pure question of fact, which has to be arrived at based on the various clauses in the agreement between the parties. In the context of the discussion in paragraph 13 of the order of the Advance Rulings Authority, we have no hesitation in rejecting the plea of the assessee.

21. The fact that we have rejected the claim of the assessee in this regard, does not, however, tie our hands. As regards the view held on the second question, we hold that considering the findings given by the Advance Rulings Authority that the assessee had only rendered managerial services, the further conclusion, in paragraph 17 of the order, however, does not go well with the reasons given in the preceding paragraph.

22. Learned counsel appearing for the assessee pointed out that having agreed with the assessee that the services rendered by the three personnel were not technical and they were purely managerial in nature, the Authority should have taken the reasoning further on lines of what is provided for under article 12(4) of the DTAA to consider whether the transactions would not fall for consideration under article 12(4) (a) of the DTAA.

23. In considering the above submissions, we need to look at how the Advance Rulings Authority proceeded in this regard. The assessee contended that having regard to the nature of services rendered by the seconded employees, it being

purely managerial in character, it cannot be presumed as technical services. While agreeing with the assessee that the managerial services rendered are not technical, it, however, rejected the assessee's contention that the consultancy services being managerial services, the requirement under article 12(4) must be satisfied. It pointed out that the assessee has to specify that the managerial services did not involve any consultancy services to fall under article 12(4) (b) of the DTAA. Thus, saying, the Advance Rulings Authority considered the nature of services rendered, which is enumerated in a summary manner in annexure II to the application submitted to the Advance Rulings Authority. It pointed out to article 12(4) of the DTAA as well as the memorandum of understanding and touched on what could be considered as consultancy services to fall under "included services" in terms of article 12(4) (b) of the DTAA. Article 12(4) reads as under (see [1991] 187 ITR (St.) 102, 116) :

(4) For purposes of this article, fees for included services means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(a) are ancillary or subsidiary to the application or enjoyment of the right, property or information for which a payment, described, in paragraph (3) is received;

(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

24. In the context of the above, the Advance Rulings Authority came to the conclusion that the managerial services also fit in with technical services to fall under Explanation 2 to section 9(1) (vii) of the Act.

25. A reading of the memorandums of understanding, which has been extracted in the order shows that even though the provision of services may require technical input by the person providing the services, it, however, does not, per se, mean that the person giving the consultancy service should make available the technical knowledge and skill also to the company purchasing the service, within the meaning of article 12(4) (b) of the DTAA. Thus, going by the memorandum and the DTAA, the Authority should have considered the nature of services rendered by the assessee, which are earlier characterised as purely managerial services to find out whether the same would fit in with paragraph (4) (b) of article 12 of the DTAA. As already noted, article 12(4) specifies the services that it seeks to consider as falling within the meaning of included services. If the nature of managerial services rendered are to fall under (a) or (b) of article 12(4), then the same should have been tested with reference to the qualification prescribed under article 12(4)(b). However, without considering the same, the Advance Rulings Authority pointed out that the services provided by the seconded employees are in the nature of managerial services hence, were

covered under "fees for included services" under article 12(4) (b) of the DTAA.

26. We feel that given the scope of article 12, the Advance Rulings Authority should have adverted to the various Categorisation under article 12, vis-?-vis, the character of the managerial services in the light of what had been stated in the agreement between the parties. Even though learned counsel appearing for the assessee pointed out that there is no reference at all in the memorandum of understanding as to the managerial services to be brought under paragraph (4) to article 12 of the DTAA, yet given the fact that the claim of the assessee has to be tested in the background of the Advance Rulings Authority, we feel, the proper course herein would be to remand the matter back to the first respondent for considering the said services rendered by the seconded employees in terms of what is provided for under paragraph (4)(b) of article 12 of the DTAA and in terms of the memorandum of understanding of the DTAA.

27. As rightly pointed out by the learned counsel appearing for the assessee, it is difficult to correlate the findings of the Advance Rulings Authority to the enumeration given under paragraph (4) (b) of article 12 of the DTAA. In the circumstances, we feel that this portion of the order of the Advance Rulings Authority merits to be set aside and has to be remanded back to the Advance Rulings Authority for fresh consideration on the issue as to whether the services rendered by the seconded employees, which are recorded by the Advance Rulings Authority as purely managerial in nature, could be fitted in with the consultancy services as given in paragraph (4) (b) of article 12 of the DTAA and as enumerated in the memorandum of understanding.

28. In the circumstances, we set aside the order of the Advance Rulings Authority with regard to question No. 2 and remit the matter back to the Advance Rulings Authority for giving an opportunity to the assessee to state its case as to the nature of services given by the seconded employee and for rendering a finding in terms of what is provided for in paragraph (4)(b) of article 12 of the DTAA and the memorandum of understanding. Since the said issue is remanded, we feel, in fitness of things, questions Nos. 3 and 5 also merit fresh consideration at the hands of the Advance Rulings Authority. Accordingly, the order of the Advance Rulings Authority with reference to questions Nos. 2 to 5 alone are set aside and remanded back to the Advance Rulings Authority for fresh consideration and for passing orders with reference to questions Nos. 2 to 5. The writ petition is partly allowed. No costs. Consequently, M. P. No. 1 of 2011 is closed.