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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P. (C) 5668/2020 & CM APPL. 20511/2020

COMMISSIONER OF INCOME TAX
1 (INT TAX), DELHI & ORS. ..... Petitioners
Through: Mr. Sunil Agarwal, Advocate.

versus

AUTHORITY FOR ADVANCE RULING,
INCOME TAX, NEW DELHI & ANR. ..... Respondents
Through: Mr. Divyanshu Agrawal, Advocate for respondent No. 2.

% Date of Decision: 27th August, 2020

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

MANMOHAN, J: (Oral)

1. The petition has been heard by way of video conferencing.

2. Present writ petition has been filed challenging the order dated 24th June, 2019 passed by Authority for Advance Rulings on the ground that it is in violation of the jurisdictional bar under proviso to Section 245R(2) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Petitioner also prays for a declaration to the effect that only the petitioner has the jurisdiction to deal with the case of respondent No. 2 [Crocs Europe BV] and Respondent No. 1 has no jurisdiction to deal with the same. Petitioner further prays for a stay on the operation of the impugned order. The relevant

portion of the impugned order is reproduced hereinbelow:-

> "*…….It is vehemently urged before us that the question on which notice under Section 143(2) of the Act was issued was "taxable income shown in revised return is less than the taxable income shown in the original return and large refund has been claimed" and the question whether royalty is taxable on paid basis has direct repercussion on the determination of refund. It is submitted that therefore the question raised by the applicant is pending before the Assessing Authority.*
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> *At the cost of repetition, we must state that notice under Section 143(2) merely asks the applicant to produce any evidence on which it may like to rely in support of its return. It does not even remotely disclose any application of mind to the return filed by the applicant. It is clear from the judgments of the High Court of Delhi referred to hereinabove that if there is no application of mind to the question raised by the applicant in the notice under Section 143(2), the said question cannot be stated to be "pending" to attract clause (i) of the proviso to Section 245R(2) of the Act. Hence this objection raised by the Departmental Representative is rejected."*

3. Mr. Agarwal, Learned counsel for the petitioners submits that the impugned order is liable to be quashed as the application of respondent No. 2 was not maintainable before respondent No. 1 because of non-existence of "Jurisdictional Fact". He refers to the report under Section 245R(2) filed by the Deputy Commissioner of Income Tax to point out that the main issue before the Assessing Officer in the scrutiny proceedings is the same as before the Authority for Advance Rulings namely whether the royalty is taxable in the hands of the petitioners at the time of actual receipt or otherwise. He argues that since the questions raised in the Application before the Respondent No 1 were already pending before the Assessing Officer, the Respondent No 1 was barred from assuming jurisdiction in view

of the threshold bar enshrined in clause (i) under Proviso to section 245 R (2) of the Act.

4. Learned counsel further submits that the Authority for Advance Rulings is bound to follow the mandatory statutory procedure and if the entire record and notice alone had not been examined by it, then the conclusion of the Authority would have been different. He states that though the notice under Section 143(2) is in a standard pre-printed format, yet it is in accordance with the specific language used in Sections 142(1) and 143(2) of the Act. In support of his submissions, learned counsel for the petitioners relies upon the judgment of the Supreme Court in the case of ***Sudhir Chandra Nawn Vs. Wealth Tax Officer, Calcutta & Ors., (1969) 1 SCR 108***. The relevant portion of the judgment relied upon by learned counsel for the petitioners is as under:-

> *"3……The tax which is imposed by Entry 86 List I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on the capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the assessee: it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets, it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49 List II. But the legislative authority of Parliament is not determined by visualizing the possibility of exceptional cases of*

taxes under two different heads operating similarly on tax payers. Again Entry 49 List II of the Seventh Schedule contemplates the levy of tax on lands and buildings or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86 List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49 List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our judgment, make the fields of legislation under the two entries overlapping."

5. Having heard learned counsel for the petitioners and having perused the records on record, this Court finds that the revised return has been selected for scrutiny under computer aided selection system (CASS) and a notice dated 16th August, 2018 under Section 143(2) of the Act had been issued to the petitioners. The admitted reason for selection of respondents' case for scrutiny is *"taxable income shown in revised return is less than the taxable income shown in the original return and large refund has been claimed".* In contrast the question admitted for Ruling is "*Whether on the facts and circumstances of the case and in law, the Royalty receivable by the Applicant from Crocs India Private Limited ("Crocs India") for use of intellectual property rights ("IPR") relating to design, development, marketing, distribution etc would be taxable in the hands of Applicant only at the time of actual receipt under Article 12 of Agreement between India and Netherlands for avoidance of double taxation and prevention of fiscal*

evasion ("Treaty") ?

6. Two Division Benches of this Court in ***Hyosung Corporation vs. Authority for Advance Rulings & Ors., (2016) 382 ITR 371 (Delhi)*** and ***Sage*** Publication ***Ltd. Vs. Deputy Commissioner of Income-Tax (International Taxation), (2016) 387 ITR 437 (Delhi)*** have held that a question cannot be said to be pending under Clause (i) of proviso to Section 245R(2) upon issuance of a mere notice under Section 143(2) of the Act, especially when it has been issued in a standard pre-printed format and the questions raised before the authority for advance ruling do not appear to be forming the subject matter of the said notice. This is also more so when the notice fails to satisfy the particulars of claim of loss, exemption, deduction, allowance or relief as mandated by Section 143(2)(i) of the Act. The relevant portions of the said judgments are respectively reproduced hereinbelow:-

A) **Hyosung Corporation Vs. Authority for Advance Rulings & Ors.**

"*When can a question be stated to be "pending*"?

xxx xxx xxx

27. As far as the notice under Section 143(2) of the Act is concerned, that provision itself stipulates that such notice will be issued by the AO where he has reason to believe that any claim of such exemption, deduction, allowance or relief made in return is inadmissible. It mandates that the notice should specify the particulars of such claim, loss, exemption, deduction or relief. Turning to the notice issued in the instant case to the Petitioner under Section 143(2) of the Act, it is seen that it is in a standard pre-printed format which merely states that "there are certain points in connection with the return of income on which the AO would like some further information". The said notice fails to satisfy the particulars of claim of loss, exemption, deduction, allowance or relief as mandated by Section 143(2)(i)

of the Act. In any event the question raised in the applications by the Petitioner before the AAR do not appear to be forming the subject matter of the notices under Section 143(2) of the Act. Consequently, the mere fact that such a notice was issued prior to the filing of the application by the Petitioner before the AAR will not constitute a bar, in terms of clause (i) to proviso to Section 245R(2) of the Act, on the AAR entertaining and allowing the applications."

B) **Sage Publication Ltd. Vs. Deputy Commissioner of Income Tax (International Taxation)**

"It is evident on a plain reading of the notice that it does not address itself to any specific question; it does not even disclose application of mind to the returns save and except the fact that they conform to the instructions which compelled the Assessing Officer to issue a scrutiny notice on account of the international transaction reported by the assessee. The previous authority of this Court in Hyosung (supra) and L.S. Cable (supra) had the occasion to deal with identical notices. It was positively ruled that such notices ipso facto would be insufficient to attract the automatic rejection route under proviso to Section 245R(2) of the Act. Consequently, we have no hesitation in holding that the impugned order of the Ruling Authority in rejecting the application is untenable. Consequently, the order is quashed and set aside. The petitioner's application shall now be processed and independently dealt with on its merits in accordance with law by the Ruling Authority. The parties shall be present before the Advance Ruling Authority on 13.09.2016. The writ petition is allowed in the above terms."

7. The AAR has followed the above-noted decisions and held notice under section 143(2) merely asks the applicant to produce any evidence on which it may like to rely in support of its return. It does not even remotely disclose any application of mind to the return filed by the applicant. For this reason, AAR has held that that question cannot be said to be pending to

attract the bar under clause (i) of the proviso to Section 245R(2) of the Act.

8. Mr. Agarwal tried to impress upon us that the aforesaid judgments do not deal with the jurisdictional ground urged by him in the present petition and we should examine the matter afresh or refer the matter to a larger bench. We are not inclined to agree with Mr. Agarwal. The precise question urged by Mr. Agarwal has been answered against the Revenue in the above-noted decisions. It is also pertinent note that the Special Leave Petitions challenging the judgments of the Division Benches have been dismissed. Consequently, the issues of law and fact raised by the learned counsel for petitioners are no longer *res integra*. We do not any infirmity in the approach adopted by the AAR. We are therefore not inclined so as to exercise our jurisdiction under Article 226 and entertain the present petition to take a different view. Dismissed.

9. Before parting, we would like to add that the judgement in the case of ***Sudhir Chandra Nawn*** (supra) is clearly inapplicable to the facts of the present case as it only states that even if the formula for calculation of tax liability under two different statutes enacted under different entries in List III of Schedule VII of the Constitution is similar, that would not make the fields of legislation under the two entries overlapping.

10. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

SANJEEV NARULA, J

AUGUST 27, 2020/KA