
(2013) 05 GAU CK 0074
In the Gauhati High Court
Case No : Income Tax A. No. 5 of 2012

CIT

APPELLANT

Vs

Jugal Kishore Mahanta

RESPONDENT

Date of Decision : 09-05-2013

Acts Referred:

Citation : (2013) 05 GAU CK 0074

Hon'ble Judges : P.K. Musahary, J; Iqbal Ahmed Ansari, J

Bench : Division Bench

Advocate : G.K. Joshi and S. Sharma, for the Appellant; R. Goenka and A. Goenka, for the Respondent

Judgement

Iqbal Ahmed Ansari, J.—This is an appeal preferred u/s 260A of the income tax Act, 1961 (hereinafter referred to as "the Act") against the order dated 5-9-2007, passed in I.T.A. No. 40 (Gau) of 2005, by the learned income tax Appellate Tribunal, Guwahati Bench, for the assessment year 2001-02. By the order, which stands impugned in the present appeal, the appeal of the assessee-respondent has been allowed. While admitting the appeal, the substantial question of law framed was as under:

Whether, on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in deleting the penalty imposed on the assessee u/s 271B of the income tax Act, 1961, when it was mandatory to get the accounts audited u/s 33B of the said Act, even if the books of account have not been properly maintained?

2. Before, however, the appeal could be heard on the merits, the maintainability of the present appeal has been put to challenge, at the very threshold, by the assessee-respondent deriving strength from Instruction No. 5 of 2008, dated 15-5-2008, issued by the Central Board of Direct Taxes (in short, "the CBDT").

3. We have heard Mr. G.K. Joshi, learned senior counsel for the appellant, and Mr. R. Goenka, learned counsel, for the respondent.

4. Relying upon section 268A and the Central Board of Direct Taxes instructions, which has been referred to above, it has been submitted by Mr. R. Goenka, learned counsel, that in terms of the instructions contained in Instruction No. 5 of 2008, dated 15-5-2008, no appeal shall be filed by the Revenue, u/s 260A of the Act, from an order of a income tax Appellate Tribunal if the "tax effect" is less than Rs. 4,00,000. Thus, according to Mr. R. Goenka, learned counsel, since the "tax effect", in the present case, is less than Rs. 4,00,000, which is fixed as monetary limit for preferring an appeal u/s 260A, the present appeal is per se not maintainable in law and deserve to be dismissed in limine.

5. Mr. R. Goenka, learned counsel, in support of his above contention, submits that the instruction issued by the Central Board of Direct Taxes u/s 268A, as in the case at hand, is binding on the Revenue.

6. Mr. Goenka seeks to reinforce this plea by pointing to the Memorandum explaining the objective behind the enactment of section 268A of the Act and contending that as section 268A aims at regulating the conditions for preferring an appeal, under the Act, contemplated by the Revenue, the Revenues right to prefer an appeal, in terms of the provisions embodied in section 260A, has to be treated as circumscribed by the limitation, which has been imposed with the help of the enactment of section 268A, and since the Central Board of Direct Taxes has issued instructions, in exercise of its power u/s 268A, the Revenues right to prefer an appeal is limited by instructions issued by the Central Board of Direct Taxes.

7. Mr. Joshi, learned senior counsel, appearing for the appellant, does not dispute the fact that the instructions issued by the Central Board of Direct Taxes, have binding effect on the Department of the Revenue and that in the relevant year, the limit fixed by the Central Board of Direct Taxes for preferring an appeal by the Revenue, u/s 260A was Rs. 4,00,000 and in the case at hand the "tax effect" being less than Rs. 4,00,000, the appeal, in the light of the instructions issued by the Central Board of Direct Taxes, could not have been filed, when the "tax effect" is less than Rs. 4,00,000.

8. At the same time and in the same breadth, Mr. Joshi learned senior counsel, however, submits that the assessee-respondent had taken inconsistent stand before the income tax authority, on the one hand, and the income tax (Appellate) Tribunal, on the other, and, hence, this appeal may, perhaps, be required to be decided on the merits.

9. We have given our anxious consideration to the rival submissions made before us. There is no dispute that Instruction No. 5 of 2008, dated 15-5-2008, imposes a monetary limit of Rs. 4,00,000 for preferring an appeal u/s 260A of the Act nor is it in dispute before us that the net tax effect in the case at hand, is less than Rs. 4,00,000. It is also not in question before us in view of a catena of decisions of the Supreme Court on the issue, that the instructions issued by the Central Board of Direct Taxes, are binding on the Revenue except where (a) the

constitutional validity of the provisions of an Act or Rule is under challenge; (b) the Boards order, notification, instruction or circular has been held to be illegal or ultra vires; and (c) a Revenue audit objection in the case has been accepted by the Department.

10. Coupled with the above, it is also not in dispute that a similar question was raised in Commissioner of Income Tax Vs. Kironmoy Roy Choudhury, and a Division Bench of this court, speaking through Amitava Roy J. (as his Lordship, then, was) held that an appeal, where "tax effect" was less than Rs. 4,00,000, would not be maintainable, because of the instruction issued by the Central Board of Direct Taxes which is also the instruction which has been relied upon by the assessee-respondent in this appeal.

11. We may point out that the Memorandum containing the instruction has defined "tax effect" to mean the difference between the tax on the total income assessed and tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issue against which appeal is intended to be filed.

12. Though what has been indicated above is sufficient to dispose of the present appeal as not maintainable inasmuch as the appeal runs counter to the instructions, which have been issued by the Central Board of Direct Taxes, we deem it appropriate to point out that section 268A has been inserted in the Act, with effect from 1-4-1999, by the Finance Bill, 2008. The Memorandum Explaining the Provisions of the Finance Bill, 2008, while highlighting the underlying object of section 268A, clearly reflected the anxiety of Parliament to reduce the litigation in small cases and regulate the right of the Revenue to file or not to file an appeal u/s 260A. Consequently, there is an inherent limitation on the Revenue's right to file appeal under section 260A inasmuch as the condition precedent for preferring an appeal is existence of a substantial question of law. Section 260A does not, however, contemplate any monetary limit. This monetary limit has been imposed as indicated above by the Central Board of Direct Taxes in exercise of its power u/s 268A.

13. It is worth pointing out that section 268A enjoys the same legislative status as section 260A, both having been enacted by Parliament. Undisputedly, section 268A is later in point of time. Having known and being conscious of the right of appeal, which has been provided to the Revenue u/s 260A, Parliament has nevertheless deemed it necessary to vest in the Central Board of Direct Taxes, by enacting section 268A, the power to regulate appeal by prescribing the monetary limit.

14. When, thus, the Central Board of Direct Taxes has prescribed a monetary limit, no appeal u/s 260A can be filed by the Revenue except in the circumstances, which we have indicated above. The mere fact that the assessee-respondent has taken two distinctly different stands, one, before the income tax authority, and the other, before the income tax Appellate Tribunal, we do not

deem it proper that such a conflict can be of such a grave nature, which would allow the Revenue to override the prescription of section 268A.

15. In the facts and attending circumstances of the present case, therefore, we are clearly of the view that the present appeal cannot be sustained and must fail.

16. We must, however, point out that in an appropriate case, the High Court may, perhaps, not apply the instructions, as regards the monetary limits, ipso facto and may choose nevertheless to examine the substantial questions of law raised in an appeal. The present one, however, is in our considered view, not such a case, where the High Court shall enter into determination of the substantial question of law, which has been framed. We are in this regard, conscious of the Supreme Courts order, dated 29-8-2011, passed in Special Leave to Appeal (CM) No. 24562 of 2011 (13694 of 2011) Commissioner of Income Tax Central-III Vs. Surya Herbal Ltd., wherein the court has observed:

Delay condoned.

Liberty is given to the Department to move the High Court pointing out that the Circular dated February 9, 2011, should not be applied ipso facto, particularly, when the matter has a cascading effect. There are cases under the income tax Act, 1961, in which a common principle may be involved in subsequent group of matters or large number of matters. In our view, in such cases, if attention of the High Court is drawn, the High Court will not apply the Circular ipso facto. For that purpose, liberty is granted to the Department to move the High Court in two weeks.

17. The above observations, made in Commissioner of Income Tax Central-III Vs. Surya Herbal Ltd., show that where a common principle is involved in a large number of appeals, having cascading effect, the High Court may choose not to apply the Central Board of Direct Taxes Circular ipso facto.

18. In the result and for the reasons discussed above, this appeal fails and the same shall accordingly stand dismissed.

19. No order as to costs. Before parting with this appeal, we make it clear that we express no final opinion on the question as to whether an assessee can take two distinctly different stands, one before the income tax authority, and the other, before the income tax (Appellate) Tribunal, and we leave, therefore, this question for determination in some other appropriate case.