
(2007) 11 AP CK 0017

In the Andhra Pradesh High Court

Case No : Income-tax Tribunal Appeal No's. 261, 269, 270, 292, 293, 307, 312, 315, 318, 319, 326 and 334 of 2003, 2, 4, 5, 9, 10, 77, 87, 88, 90, 92 and 93 of 2004, 234, 272, 722, 726 and 802 of 2006 and 58, 145, 146, 150, 158 and 165 of 2007

Commissioner of Income Tax

APPELLANT

Vs

A. Raajendra Prasad

RESPONDENT

Date of Decision : 23-11-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 116, 118, 119, 119(2), 120

Citation : (2008) 215 CTR 511 : (2008) 299 ITR 227

Hon'ble Judges : Bilal Nazki, Acting C.J.; Nooty Ramamohana Rao, J

Bench : Division Bench

Advocate : S.R. Ashok and B. Narasimha Sharma, for the Appellant; A.V. Krishnakoundinya in I.T.T.A. Nos. 93 of 2004 and 165 of 2007, C. Kodanda Ram in I.T.T.A. Nos. 234 of 2006 and 145, 150 and 158 of 2007, N.R. Siva Swamy in I.T.T.A. Nos. 272, 722 and 802 of 2006 and N. Narasimha Rao in I.T.T.A. No. 726 of 2006, for the Respondent

Final Decision : Dismissed

Judgement

Bilal Nazki, Actg. C.J.

1. This batch of appeals raise the same questions of law and fact and are being disposed of by this common judgment.

2. These appeals relate to the interpretation and enforceability of the instructions issued by the Central Board of Direct Taxes (for short "the Board") and the instructions which are the subject-matter of these appeals were first issued on March 27, 2000, being Instruction No. 1979 and, thereafter, they were updated and the instructions were issued on June 29, 2000, being Instruction No. 1985 and the latest for the purposes of the present cases are Instruction No. 2 of 2005 issued on October 24, 2005.

3. The contention of Mr. N.R. Siva Swamy, learned Counsel for the respondents, is that these instructions are enforceable by courts of law and if courts of law do not enforce them, then the instructions would become redundant and the Department can use the instructions with arbitrariness, holding in some cases that appeals should be filed and holding in some cases that appeals should not be filed. These instructions, as a matter of fact, have been issued with a view to reduce the litigation at various fora where the amounts claimed by the Revenue do not exceed a particular limit. The instructions issued on March 27, 2000, laid down that appeal shall be filed only in cases where the tax effect exceed Rs. 1,00,000 if appeals were to be filed before the Appellate Tribunal and it should exceed Rs. 2,00,000 if appeals were to be filed before the High Court and it should exceed Rs. 5,00,000 if appeals were to be filed in the Supreme Court. These instructions were modified by Instruction No. 1985, dated June 29, 2000, clarifying certain aspects of the scheme, with which we will deal with later and on October 24, 2005, Instruction No. 2 of 2005 was issued to enhance the monetary limit for filing of appeals. Now, the appeal could be filed before the Appellate Tribunal if the amount exceed Rs. 2,00,000 and the appeal before the High Court could be filed if the amount exceed Rs. 4,00,000 and an appeal before the Supreme Court could be filed if the amount exceed Rs. 10,00,000.

4. There is no dispute in the present batch of cases that the amounts did not exceed the amounts relevant for the purposes of filing appeals before the Appellate Tribunal and the Appellate Tribunal has dismissed the appeals on the ground that Instructions Nos. 1979, 1985 and 2 of 2005 were violated. Therefore, the appeals have now been filed before this Court by the Department. The Department has framed a question in their memo of appeal in the following terms:

Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in holding that Instruction No. 1979 issued by the Central Board of Direct Taxes stipulating monetary ceiling for institution of appeals acquires the character of circular/instruction within the purview of Section 119(2) (a) of the Income Tax Act and militate against institution of appeals by the Department contrary to such instruction ?

5. Learned senior counsel Mr. S.R. Ashok, appearing for the appellants, has contended that the instructions in question are not instructions within the scope of Section 119 of the Income Tax Act, 1961 (for short "the Act"), and, therefore, are not enforceable by courts and, secondly, he has contended that there are exceptions created in these instructions which were not looked into by the Tribunal. On the other hand, learned Counsel appearing for the other side submits that the circulars are binding on the Department as has been held by various judgments of the Supreme Court and the exceptions could be looked into only if there was a factual basis and the Tribunal was of the view that there was no factual basis laid down by the Department in the appeals that the appeals were covered by exceptions.

6. Now, dealing with the first argument of Mr. S.R. Ashok that the circulars do not come u/s 119 of the Act, he submits that u/s 119 of the Act, all circulars issued by the Board must be published and circulated in the prescribed manner for general information. Mr. N.R. Siva Swamy submits that there is nothing on the record that these circulars were neither published nor were circulated for general information. As a matter of fact, all these circulars were publicly known to everybody and, therefore, they cannot be held to be non-enforceable as they were not published. In any case, there is no restriction imposed by Section 119(2) of the Act that these circulars should be published in the Official Gazette. He also contends that if these instructions do not come under Sections 119 and 120 of the Act, then there is no power with the Department to issue such instructions and these instructions, if held to be unenforceable, that will give power to the Income Tax authorities to use these circulars selectively. In some cases, they will not file appeals on the ground that the tax effect does not exceed the monetary limit prescribed by the circular, but in some cases, the authority may decide to file appeals on the ground that the circulars were not enforceable. Such a situation could not be envisaged by the Board and cannot be permitted by the courts. Mr. S.R. Ashok, on the other hand, contends that the appeals can be filed u/s 253 of the Act before the Appellate Tribunal against an order passed by the Deputy Commissioner (Appeals) in the cases mentioned in Section 253 of the Act and if the appeal falls within the criterion laid down u/s 253 of the Act, then no other restrictions can be imposed by a circular. As such, the circular would be in contradiction to the statute and would be ultra vires the statute. Mr. Swamy contends that Section 253 of the Act is subject to control by Sections 116, 118 and 119 of the Act. The highest Income Tax authority u/s 116 of the Act which falls under Chapter XIII relating to appointment and control, is the Central Board of Direct Taxes, and, in terms of Section 119 of the Act, the Board can issue, from time to time, orders, instructions and directions to other Income Tax authorities as it may deem fit for the proper administration of the Act and such authorities and all other persons employed in the execution of the Act would observe such orders, instructions and directions of the Board. Therefore, if the Board decides that in certain matters no appeals be filed even if the Department feels aggrieved, the authorities below the Board would not be competent to file appeals. He further submits that even if the instructions of the Board are ultra vires the provisions of the Act, they are still enforceable and the Department cannot refuse to implement those instructions on the ground that those instructions were ultra vires the Act.

7. In this connection, Mr. N.R. Siva Swamy refers to a judgment of the Supreme Court reported in *Paper Products Ltd. Vs. Commissioner of Central Excise*, . The Supreme Court, in this case held (page 130):

It is clear from the abovesaid pronouncements of this Court that, apart from the fact that the circulars issued by the Board are binding on the Department, the Department is precluded from challenging the correctness of the said circulars even on the ground of the same being inconsistent with the statutory provision.

The ratio of the judgment of this Court further precludes the right of the Department to file an appeal against the correctness or the binding nature of the circulars. Therefore, it is clear that so far as the Department is concerned, whatever action it has to take, the same will have to be consistent with the circular which is in force at the relevant point of time.

8. To the same effect, there is a judgment of this High Court reported in Commissioner of Income Tax Vs. Andhra Pradesh State Road Transport Corporation, , where this Court held (headnote):

The Department has no right to challenge a circular issued by the Board on any ground whatsoever, including the ground that it was inconsistent with the statutory provision.

9. Reliance has also been placed by Mr. Swamy on the judgment reported in Union of India and Another Vs. Azadi Bachao Andolan and Another, . While dealing with the powers of the Central Board of Direct Taxes, the Supreme Court, in this judgment, considered the effect of circular u/s 119 of the Act and was of the view (page 727):

Section 119, strategically placed in Chapter XIII which deals with "income tax authorities" is an enabling power of the Central Board of Direct Taxes, which is recognised as an authority under the Income Tax Act u/s 116. The Central Board of Direct Taxes under this section is empowered to issue such orders, instructions and directions to other Income Tax authorities "as it may deem fit for proper administration of this Act". Such authorities and all other persons employed in the execution of this Act are bound to observe and follow such orders, instructions and directions of the Central Board of Direct Taxes. The proviso to Sub-section (1) of Section 119 recognises two exceptions to this power. The first, that the Central Board of Direct Taxes cannot require any Income Tax authority to make a particular assessment or to dispose of a particular case in a particular manner. The second is with regard to interference with the discretion of the Commissioner (Appeals) in exercise of his appellate functions. Sub-section (2) of Section 119 provides for the exercise of power in certain special cases and enables the Central Board of Direct Taxes, if it considers it necessary or expedient so to do for the purpose of proper and efficient management of the work of assessment and collection of revenue, to issue general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by other Income Tax authorities in the discharge of their work relating to assessment or initiating proceedings for imposition of penalties. The powers of the Central Board of Direct Taxes are wide enough to enable it to grant relaxation from the provisions of several sections enumerated in Clause (a). Such orders may be published in the Official Gazette in the prescribed manner, if the Central Board of Direct Taxes is of the opinion that it is so necessary. The only bar on the exercise of power is that it is not prejudicial to the assessee. We are not concerned with the provisions in Clauses (b) and (c) in the present appeals.

10. Mr. Swamy has also relied on a judgment of the Allahabad High Court reported in Commissioner of Income Tax Vs. Fazal Hussain and Sons, . In this judgment, the court held, (page 40):

Then the question is whether the Appellate Tribunal was right in holding that the aforesaid instruction of the Central Board of Direct Taxes was binding on the Commissioner of Income Tax. It is trite that instructions issued by the Central Board of Direct Taxes unless they are held contrary to the statute, are binding upon the Departmental authorities.

11. To the same effect, there is a judgment of the Calcutta High Court reported in Commissioner of Income Tax Vs. Savoy Enterprises Ltd., .

12. Learned senior counsel appearing for the appellants, on the other hand, submits that though the courts have consistently held that the instructions laid down by the Board are binding on the Department, but the question of enforceability of the circulars in question has come directly before various High Courts and there is a consistent view of various High Courts that these circulars do not take away the power of the Department to file appeals if the appeals do not fill up the monetary criteria laid down by those circulars. In this connection, he refers to a judgment of the Delhi High Court reported in Commissioner of Income Tax Vs. Blaze Advertising (Delhi) (P) Ltd., . This judgment was pronounced in altogether a different context where a circular was not in conformity with the judgment and, therefore, the Delhi High Court held, (page 466):

Circulars issued u/s 119 of the Act stand on a different footing. The Supreme Court in UCO Bank, Calcutta Vs. Commissioner of Income Tax, West Bengal, has held that circulars u/s 119 are meant for ensuring proper administration of the statutes and mitigate rigours of the provisions of law. These circulars are binding and enforceable against the Revenue. However, when the Supreme Court or the High Court has declared the law on a question, it is not open to the court to direct that a circular should be given effect to and not the decision.

13. In this connection, the High Court has also relied on the judgment reported in M/s. Hindustan Aeronautics Ltd., Bangalore Vs. Commissioner of Income Tax, Karnataka- I, Bangalore, .

14. Another judgment to which a reference has been made is from the Madras High Court reported in Commissioner of Income Tax Vs. P.S.T.S. Thiruvirathnam and Sons, . This was a judgment in which the High Court of Madras declined to interfere on the basis of a circular of the Board which had laid down that appeal could not be filed where the tax effect is not more than Rs. 30,000. This argument was not entertained on the ground that the circular in question was not an unqualified embargo on the Revenue to proceed in the matter where the amount of tax in issue is Rs. 30,000 or less. Several exceptions were set out in that circular. If the assessee wanted the benefit of that circular it should have put the Revenue on notice when the Revenue applied for having the question

referred so that the Revenue could gather the relevant material, if any, to show that the matter was within the excepted category. Therefore, the Madras High Court had not gone into the question whether the circular before it was enforceable or non-enforceable.

15. There is a judgment of the Rajasthan High Court reported in Commissioner of Income Tax Vs. Rajasthan Patrika Ltd., . This is a judgment in which the High Court refused to enforce a circular which laid down that appeal could not be filed where the tax effect is not more than Rs. 50,000. The High Court, relying on a judgment of the Supreme Court in Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, , held that the circular was binding on the Department, but was not binding on the court, Tribunal or the assessee. Even if this authority is taken in the perspective in which it was pronounced, even then, it would not make a difference for this Court because, we are dealing with a question whether the Income Tax Department could file an appeal in view of the applicability of circular to them. We are not concerned with whether the Tribunal should have entertained the appeal or not. Therefore, even this judgment would not help the appellants.

16. Another judgment on which reliance has been placed by Mr. S.R. Ashok is from the Allahabad High Court reported in Jugal Kishore Arora Vs. Deputy Commissioner of Income Tax, . This judgment has not dealt with the questions which have been raised during the arguments before this Court. It is true that it was considering the effect of a circular which laid down that no appeal could be filed where the tax effect was not more than Rs. 1,00,000. But what the High Court said was (page 140):

As regards the contention that the appeal should not have been entertained in view of the direction of the Central Board of Direct Taxes dated March 27, 2000, we are of the opinion that the instructions of the Central Board of Direct Taxes regarding filing of appeals are only internal matters of the Department, and the assessee cannot object to filing of an appeal despite such an instruction. The appeal is clearly maintainable before the Tribunal on behalf of the Department u/s 253(2) of the Income Tax Act, and this right to file an appeal is a statutory right and cannot be taken away or prohibited by executive instructions.

17. We very respectfully do not agree with this view because of the reasons which have been mentioned by us earlier and also during the course of this judgment that if such an interpretation is placed on the circulars, then the Department could use these instructions arbitrarily without any reason. They can file an appeal in matters in which they were instructed by the Board not to file appeals and in certain matters, they would not file appeal on the ground that the statutory power could not be limited by the circular and it will give rise to arbitrariness, which, obviously, could not be the purpose of the circular. The selection of the cases in which appeals should be filed and cases in which appeals should not be filed, cannot be left to the discretion of the concerned authority without any guidelines whatsoever.

18. Reference has also been made to a judgment reported in Rani Paliwal Vs. Commissioner of Income Tax, . In this case, the question related to the circular was not answered by the High Court on the ground that this question had not been raised before the Tribunal.

19. Mr. S.R. Ashok has also relied on a judgment of the Supreme Court reported in Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, . In this case, the Supreme Court was dealing with the powers of the Settlement Commission vis-a-vis the Central Board of Direct Taxes and as such, the interpretation to Sections 119 and 245D(4) and (6) of the Act also came for consideration by the court and it came to the conclusion that Section 119 of the Act was not available to the Commission. But in a way this judgment also goes in favour of the respondents rather than the Department. The court held (page 15):

...we would like to make it clear that every clarificatory note or press release issued by the Board does not have the statutory force like the circulars issued by the Board u/s 119 of the Act. It is only those circulars issued by the Board under the provisions of Section 119 of the Act, which will have the statutory force and will be binding on every Income Tax authority. Therefore, the press release relied upon by Shri Ramamurti not being a circular issued u/s 119 of the Act will not be of any assistance to the respondents in support of their contentions.

20. But, in the present case, we do not have any material before us and no material was placed even before the Tribunal to come to a conclusion that the circulars, which have been mentioned as "circulars" by the Board itself, were not circulars u/s 119 of the Act.

21. Mr. S.R. Ashok has also relied on a judgment of the Supreme Court reported in J.R. Raghupathy and Others Vs. State of A.P. and Others, . This judgment is relied on for canvassing the principle of law that under Article 226 of the Constitution, the High Courts could not issue writs to enforce administrative rules, regulations and instructions which have no statutory force. In the absence of exceptional circumstances, the Supreme Court held (page 1691):

It is well-settled that mandamus does not lie to enforce departmental manuals or instructions not having any statutory force, which do not give rise to any legal right in favour of the petitioner.

22. There is no quarrel with the principle laid down by the Supreme Court in this judgment, but, in the present cases, we are dealing with appeals and not exercising our power under Article 226 of the Constitution and, secondly, on the facts, we have found that the circulars in question are statutory in nature and are issued by the Board in exercise of powers u/s 119 of the Act.

23. Reference has also been made to a judgment of this Court reported in G. Ramaswamy and Others Vs. The State of Andhra Pradesh and Others, which we do not find relevant in the facts and circumstances of these cases.

24. Therefore, the first contention of learned senior counsel Mr. S.R. Ashok that

the circulars were not enforceable as they were not issued u/s 119 of the Act and even if issued u/s 119 of the Act, could not take away the power of the Department to file an appeal created under the Act, cannot be accepted for the reasons given by us hereinabove.

25. The second contention of Mr. S.R. Ashok is that the circulars create an exception and this aspect was not looked into by the Tribunal. The first in series of circulars on the present controversy relates to the circular issued on March 27, 2000, being Instruction No. 1979. This has created exceptions in paragraph 3, which were followed in subsequent circulars. Paragraph 3 of this circular lays down:

Adverse judgments relating to the following should be contested irrespective of revenue effect:

- (i) Where Revenue audit objection in the case has been accepted by the Department,
- (ii) Where Board's order, notification, instruction or circular is the subject-matter of an adverse order,
- (iii) Where prosecution proceedings are contemplated against the assessee,
- (iv) Where the constitutional validity of the provisions of the Act are under challenge.

26. Subsequent to it, another circular was issued on June 29, 2000, being Instruction No. 1985. It added the following:

In paragraph 3(iii) of the instruction, it has been stated that the adverse judgments should be contested irrespective of the revenue effect in a case where prosecution proceedings are contemplated against any assessee. However, it is possible that the prosecution proceeding may be contemplated against any assessee on points different from the issues disputed in appeal. For example, case under consideration may relate to assessment order u/s 143(3) whereas the prosecution proceedings may have been initiated on other point like TDS. It is clarified that the adverse judgment should be contested only if the prosecution proceedings contemplated relates to point under appeal and not on points unrelated to the issues in appeal.

27. In Instruction No. 2 of 2005 issued on October 24, 2005, in paragraph 3, it was also decided that in cases involved substantial questions of law of importance as well as in cases where the same question of law will repeatedly arises either in the cases concerned or in similar cases, should be separately considered on the merits without being hindered by the monetary limits. All these exceptions which have been created in these circulars, require consideration by the Department with reference to each case and after consideration, they should come to a conclusion that though the case was falling under the monetary limits, it was also covered by an exception. No such exercise

appears to have been done and, therefore, this argument would not be available at this stage to the Department. Even such an exercise was not made at the Tribunal. The Tribunal found:

No evidence, whatsoever, has been furnished before us to show that the appeals fall in "exceptions" provided in paragraph 3 of the instruction to show that the appeals were filed to meet the Revenue audit's objections or involving interpretations of some notifications ; etc., in spite of adequate opportunity provided to the Revenue. This amply shows that the appeals have been filed involving small amounts of tax effect in a routine manner in total disregard to the Central Board of Direct Taxes instruction.

28. Therefore, for the reasons mentioned by us hereinabove, these appeals deserve to be dismissed and are accordingly dismissed. But, in order to avoid any confusion, we would like to lay down that in case the Department finds a certain matter to be agitated by way of an appeal although it falls within the monetary limits of the circulars, the Department should clearly plead in the memo of appeal itself that the appeal falls under the exceptions. In the absence of such a pleading in the memo of appeal normally appeal should not be entertained. Learned senior counsel Mr. S.R. Ashok, appearing for the appellants, submits that in cases of the appeals which are covered by this judgment, liberty may also be given to file applications before the Tribunal, pleading exceptions. Liberty is granted. If any such applications are filed, the Tribunal shall decide them on their own merit. The original record be returned to learned Counsel for the appellants.