(2008) 08 GUJ CK 0004

In the Gujarat High Court

Case No : Tax Appeal No''s. 1322, 1434 and 1872 of 2005, 46 to 51, 701, 702, 1348, 1419, 1496 and 1501 of 2006, 231, 279, 280, 295, 375, 395, 402, 410, 411, 465, 477, 499, 511, 533, 543, 545, 547, 548, 550, 635, 638, 684, 687, 688, 689, 702 to 704, 743, 744, 747, 7

Commissioner of Income Tax — APPELLANT

Vs

Concord Pharmaceuticals — RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Income Tax (Appellate Tribunal) Rules, 1963 — Rule 10, 11, 12, 13, 14
Income Tax Act, 1961 — Section 119, 2, 253(2), 260A, 263
Income Tax Rules, 1962 — Rule 47

Citation : (2008) 220 CTR 117 : (2009) 317 ITR 395

Hon'ble Judges : K.A. Puj, J;Bankim N. Mehta, J

Bench : Division Bench

Advocate : Manish R. Bhatt, Mauna M. Bhatt, B.B. Naik, Pranav G. Desai and Ketan M. Parikh, for the Appellant; S.N. Soparkar, S.N. Divetia, Raju K. Patel, B.D. Karia, Manish J. Shah, Tushar P. Hemani, Sudhir Mehta, Tanvish Bhatt and Sudhir Mehta, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Revenue has filed tax appeals Nos. 1402 to 1405 of 2007 u/s 260A of the IT Act 1961 for asst. yrs. 1995-96 and 1996-97 proposing to formulate the following substantial question of law for determination and consideration of this Court. The same question is formulated in all the four tax appeals.

Whether the Tribunal is right in law and on facts in dismissing the appeals filed by the Revenue without adjudicating the same on merits on the ground that since in the appeals, tax effect was below Rs. 2 lakhs, the Revenue could not have preferred the same in view of the instructions of the CBDT, thereby entitling the Tribunal not to decide the same on merits?

2. Along with these four appeals, several other appeals involving identical

question of law were heard by this Court and learned Counsel appearing for the parties have made their submissions in great detail. On behalf of the Revenue, Mr. Manish R. Bhatt, Mr. B.B. Naik, Mrs. Mauna Bhatt, Mr. Pranav Desai and Mr. Ketan Parikh, learned standing counsel have made their submissions, whereas on behalf of the assessees Mr. S.N. Soparkar, Mr. S.N. Divetia, Mr. RK. Patel, Mr. Manish J. Shah, Mr. B.D. Karia, Mr. Tushar Hemani, Mr. Tanvish Bhatt and Mr. Sudhir Mehta have made their submissions. Since purely a legal question arises in all these appeals, the Court does not go into the facts of each and every appeal and considered the respective submissions of the parties in the present appeals. However, for the sake of convenience, the facts in brief are taken from the tax appeal No. 1402 of 2007.

3. In the present case the order of the AO was challenged in appeal before CIT(A) who allowed depreciation on Rs. 17,69,953 i.e. on preoperational expenses of Phase-I and on Rs. 59,05,497 i.e. being cost of assets in Phase-II. In further appeal, the Tribunal, considering the fact that the assessed income in asst. yr. 1995-96 was nil and that there was a loss of Rs. 34,28,460 for asst. yr. 1996-97, held that both the appeals of Revenue are not maintainable and dismissed in limine relying on the decision of the Tribunal, Special Bench, Kolkatta, in the case of (2006) 104 TTJ 741 wherein it was held that tax effect being nil as there are losses, the appeals of Revenue are not maintainable.

4. It is urged on behalf of the Revenue that the decision of Tribunal is erroneous on this ground as the CBDT Instruction No. 2 of 2005, dt. 24th Oct., 2005 1(2005) 198 CTR (St) 41] on which heavy reliance is placed, is only an administrative instruction and the-same does not take away the statutory right to appeal under IT Act, 1961. It is also contended that the CBDT Instruction No. 1985, dt. 29th June, 2000 clarifies the Instruction No. 1979/F. No. 279/126/1998-ITJ, dt. 27th March, 2000 and explains that the monetary limit in the context of ''seach ease taken singly'' would mean each assessment year for each assessee. In the case of assessee for asst. yrs. 1995-96 and 1996-97, the monetary limit as prescribed in Instruction No. 1979 would apply taking together the asst. yrs. 1995-96 and 1996-97. Further, in Instruction No. 2 of 2005, dt. 24th Oct., 2005 the CBDT, in partial modification of Instruction No. 1979 dt. 27th March, 2000 and Instruction No. 1985, dt. 29th June, 2000, has stipulated that the Board has also decided that the cases involving substantial question of law of importance as well as in cases where the same question of law repeatedly arises, either in the case concerned or in similar cases, should be separately considered on merits without being hindered by the monetary limits. While dismissing the Department''s appeals, the Tribunal has not considered this aspect of the matter.

5. The broad submissions made on behalf of the Revenue are that;

(i) The instructions contained in the circular are not absolute. There are exceptions and the Tribunal is required to examine the matter in the light of the exceptions.

(ii) Even as per the circular, appeals are maintainable in a case where circular is required to be interpreted. As, in this case also, the circular was required to be interpreted, the appeal was maintainable,

(iii) The judgment in Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, is required to be read in the context in which it was rendered.

(iv) The assessee concedes that circular is not binding on the appellate authority. As per the say of the assessee, circular is issued by the CBDT directing the AO not to file appeal and, therefore, as per the say of the assessee, appeal filed in Tribunal is not a valid appeal. This contention is misconceived as the requirements of a valid appeal are enumerated in Section 253(2) of the Act read with Rule 47 of IT Rules, read with Rules 6 to 15 of ITAT Rules, 1963.

(v) In the event, directions of the CBDT are not obeyed by a Revenue officer, it may, at the most, tantamount to dereliction of duty but would not tantamount to the appeal being treated as an invalid appeal.

(vi) The Tribunal does not have writ jurisdiction to hold that the AO had acted beyond the CBDT instructions and, therefore, his action is wrong.

(vii) The consequences of appeal not being filed in a recurring issue will have disastrous consequences. If in the main matter due to low tax effect appeal is not preferred and in the subsequent matter where the tax effect is substantial, appeal is preferred, relying upon the judgment of the Hon''ble Supreme Court in Commissioner of Income Tax Vs. Narendra Doshi, the appellate authority may reject the subsequent appeal on the ground that in the main matter appeal has not been preferred by the Revenue.

6. To substantiate the above grounds of challenge, the learned Counsel has referred to and relied upon certain circulars and/or instructions issued by CBDT on the issue in question. The Instruction No. 1328, dt. 5th April, 1980 refers to the prevailing practice on that day and observes that the Board is generally reluctant to advise reference unless the tax effect is more than Rs. 10,000 or a general question of law affecting a large number of cases is involved. In supercession of previous instructions on the subject, the Board has taken a fresh decision vide Instruction No. 1382, dt. 5th April, 1980. In para 3.1, it is stated that the present monetary limits of Rs. 10,000 for reference to the High Court and of Rs. 30,000 for appeal to the Supreme Court laid down in Instruction No. 284. dt. 10th Jan., 1975 will continue. The limit of Rs. 10,000 for reference to the High Court however shall be relaxed where the question of law is repetetive and the cumulative tax effect in a number of cases is bound to be substantial.

7. Instruction No. 1777, dt. 4th Nov., 1987 states that filing of Departmental appeal/reference should be selective. Guidelines were issued laying down monetary limits of revenue effect of Rs. 10,000 for filing appeals before Tribunal, Rs. 30,000 for reference before High Court and Rs. 60,000 for appeals to the

Supreme Court (Instruction Nos. 1573, dt. 12th July, 1984 and 1612, dt. 6th April, 1985). The Board has, however, clarified that these guidelines should be adhered to subject to the exceptions given below. For the purpose of working out monetary limit, the cumulative revenue effect of the issue in the assessee''s case for all the years upto the year for which returns have been filed should be taken into consideration. Where the same issue is involved in different cases of a group (e.g. industrial house, family, connected cases etc.), the revenue effect of the group and not the individual case should be taken into account for the purpose of the monetary limit. While applying the monetary limits, the effect of carry forward, effect of consequential addition/deletions in other years should be kept in view. In cases of firms/AOP the revenue effect in cases of partners/members be also taken into account. The Board has also clarified that where a question of law arises for the first time before the High Court concerned, it should be contested irrespective of revenue involved. Where an adverse judgment is delivered by a High Court, in such cases, stay of the operation of the judgment should be obtained either from the High Court itself or from the Supreme Court. Other adverse judgments which need to be contested irrespective of the revenue effect.

(a) Where prosecution proceedings are contemplated against the assessee;

(b) Where strictures have been passed against the Department or its officers.

(c) Where Revenue audit objection in the case has been accepted by the Department.

(d) Where Board''s order, notification, instruction or circular is the subject-matter of adverse order.

(e) Where in respect of one assessment year the order is contested in the case of an assessee for any reason, the adverse judgment for other years in the issue in that case should also be contested irrespective of the amount involved so that Department''s case on the issue is not prejudiced on the ground that in respect of some year the Department has already accepted the assessee''s case.

8. In Instruction No. 1985, dt. 29th June, 2000, the Board has revised the monetary limits for filing Department appeals/reference before various appellate authorities and certain clarifications were made in respect of Instruction No. 1979, dt. 27th March, 2000. The following clarifications were made by the Board:

(i) the monetary limits in the context of ''seach case taken singly'' would mean each assessment year for each assessee. For instance, in the case of XYZ Ltd. for the asst. yrs. 1995-96 and 1996-97, the monetary limit as prescribed in Instruction No. 1979 would apply taking together the asst. yrs. 1995-96 and 1996-97.

(ii) even if the issues involved In an appeal under consideration are already pending in appeal before the appellate authorities, all subsequent appeals will now be filed for particular assessment year only as indicated in (i) above, if the tax effect exceeds the prescribed monetary limit.

9. Vide Instruction No. 2 of 2005, dt. 24th Oct., 2005 the Board has made partial modification and appeals will be filed only in cases where the tax effect exceeds the revised monetary limits as under:

(i) Appeal before Tribunal - Rs. 2,00,000.

(ii) Appeal u/s 260A - Rs. 4,00,000.

(iii) Appeal before the Supreme Court - Rs. 10,00,000.

The Board has, however, clarified that cases involving substantial question of law of importance as well as cases where the same question of law will repeatedly arise, either in the case concerned or in similar cases, should be separately considered on merits without being hindered by the monetary limits.

10. The Board has further clarified the issue vide Instruction No. 5, dt. 16th July, 2007 that the tax effect means the tax only, i.e. tax excluding interest. The Board has further clarified that cases where the questions of law involved or raised in appeal are of a recurring nature to be decided by the Court, should be separately considered on merits without being hindered by the monetary limits.

11. The Board has issued Instruction No. 5 of 2008, dt. 15th May, 2008 superceeding all previous instructions and deciding monetary limits and conditions specified below.

(1) Appeals will henceforth be filed only in cases where the tax effect exceeds monetary limits given hereunder;

(i) Appeal before Tribunal - Rs. 2,00,000.

(ii) Appeal u/s 260A - Rs. 4,00,000.

(iii) Appeal before the Supreme Court - Rs. 10,00,000.

(2) For this purpose, ''tax effect'' means the difference between the tax on which such total income be reduced by the amount of income in respect of the issue against which appeal is intended to be filed (i.e. the disputed issues). However, the tax will not include any interest thereon. Similarly, in loss cases notional tax effect should be taken into account. In the case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the case to be appealed against.

(3) The AO shall calculate the tax effect separately for every assessment year in respect of the disputed issue in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal shall be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issue exceeds the monetary limit specified above. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified. In other words, henceforth,

appeals will be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one year, appeal shall be filed in respect of all assessment years even if the ''tax effect'' is less than the prescribed monetary limits in any of the year, if it is decided to file appeal in respect of the year in which ''tax effect'' exceeds the monetary limit prescribed.

12. Based on the above instructions issued by the Board from time to time, the learned Counsel strongly urged that the tax effect is not the only criteria for deciding the maintainability of appeal. The circular issued by the Board from time to time will have to be read in the light of the exceptions contained in such circulars or instructions. The Tribunal has committed a grave error in blindly applying the monetary limit only without considering the fact as to whether the exceptions are applicable to the facts of each case. It is. therefore, submitted that the orders passed by the Tribunal in all these appeals are required to be quashed and set aside and the matter will have to be sent back to the Tribunal for deciding as to whether matters on hand fall within the scope of exceptions contained in applicable circulars.

13. In support of their submissions, the learned Counsel for the Revenue relied on the following judgments:

(i) In Commissioner of Income Tax (CNTL), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana, , it was held that circular can bind the ITO but will not bind the appellate authority or the Tribunal or the Court or even the assessee.

(ii) In Commissioner of Income Tax Vs. Rajasthan Patrika Ltd., it was held that if, in spite of administrative instructions in a circular of the CBDT to the effect that no appeal should be filed when the tax effect is not more than Rs. 50,000, the Department prefers to file an appeal or takes a reference to the High Court, on such administrative instructions the High Court ought not to dismiss the appeal or reject the reference. There is no Infirmity in disposing of the appeal or reference on the merits.

(iii) In CIT v. Shivaji Works Ltd. (2007) 213 CTR (Bom) 571 : (2007) 295 ITR 542 , the facts were to the effect that the Revenue filed an appeal against the order of the Tribunal holding that repairs to the guest-house was not an expenditure incurred on the maintenance of the guest-house u/s 37(4) of the IT Act, 1961, and was therefore an admissible deduction. The assessee challenged the maintainability of the appeal considering the valuation for the purpose of filing appeal and the notifications by the CBDT. The Court further held that under para 3 of the circular dt. 24th Oct., 2005, cases involving substantial question of law of importance as well as cases involving a question of law which would repeatedly arise, should be separately considered on the merits without being hindered by the monetary limits. Therefore, the circular itself makes out an exception, when appeals could be preferred. The question raised being covered in favour of the Department by the Supreme Court decision in Britannia

Industries Ltd. Vs. Commissioner of Income Tax, West Bengal, Kolkata and Another, , the appeal was to be allowed.

The Court further held that the supervisory jurisdiction of the High Court is always available to correct errors of law apparent on the face of record. The mere fact that there is a circular prescribing monetary limits for litigation by the Department would not stand in the way of the High Court exercising its jurisdiction. The Court also held that in those cases where the issue is not covered by a judgment of the Supreme Court or of the High Court, the circular will apply and the Revenue would be bound by the circulars and the appeals as filed will have to be rejected, unless they fall within the exceptions as contained in the circular. In all those matters where appeals have been preferred and the issue of law arising therein is covered either by a judgment of the High Court or of the Supreme Court, it will be open to the High Court to exercise its jurisdiction and dispose of the appeals in terms of the law declared by the Supreme Court or by the High Court.

(iv) In Rani Paliwal Vs. Commissioner of Income Tax, it was held, while dismissing the appeals, (i) that the Board''s Circular No. F/279/126/1998-IT, dt. 27th March, 2000, was only an instruction issued to the IT authorities not to file appeals where the tax effect is less than Rs. 1,00,000. The Tribunal was not bound by any such instruction and once the Department filed an appeal, the Tribunal was bound to decide the same on merits. The Court therefore held that no substantial question of law arose from the admission of the appeal.

(v) In Commissioner of Income Tax Vs. Kodananad Tea Estates Co. and Others, , the appeal filed by the Revenue before the Tribunal had been dismissed without going into the merits on the basis of Circular Instruction No. 1903 dt. 28th Oct., 1992 and Instruction No. 1777, dt. 4th Nov., 1987 by which a monetary limit for filing of the appeal by the Department before the Tribunal was laid down. Under the circular, the monetary limit was revised to Rs. 1 lakh. As the tax effect in these cases was less than Rs. 1 lakh, the appeal was dismissed relying on the instructions. On further appeal to the High Court, it was held that the instruction came into force only w.e.f. 1st April, 2000. The assessment years involved in these appeals were earlier to the date from which the notification was given effect. Hence, the application of the notification for dismissing the appeal was not legally sustainable. Apart from that Clause (ii) of para 3 of Instruction No. 1979 provides that where the Board''s order, notification, instruction or circular is the subject-matter of an adverse order irrespective of the revenue effect, the appeal has to be decided on the merits. When the applicability of the notification, which is given effect from 1st April, 2000, is questioned before the Tribunal, the question comes within the ambit of Clause (ii) of para 3 of Instruction No. 1979. The Tribunal was, therefore, directed to hear appeal on the merits.

(vi) In Jugal Kishore Arora Vs. Deputy Commissioner of Income Tax, , the Court held that the instructions of the CBDT 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 was clearly maintainable before the Tribunal on behalf of the Department u/s 253(2) of the IT Act and this right to file an appeal was a statutory right and could not be taken away or prohibited by executive instructions.

(vii) In Commissioner of Income Tax-I Vs. Abhishek Industries Ltd., it was held that the circular issued by the CBDT can bind the ITO, but will not bind the appellate authority or the Tribunal or the Court or even the assessee. The Court further held that the Tribunal must examine the material on record before rendering a decision on any issue raised by the parties. The Tribunal being the last fact-finding authority a higher responsibility is cast by the legislature on it to decide the cases by recording complete facts and assigning cogent reasons. It is the duty of the Tribunal to decide the cases on the basis of the law laid down by the Supreme Court/High Court and not what the Tribunal decides on the particular issue. Every effort must be made by the Tribunal to decide the issue by taking help from the decisions of the Supreme Court and if there is no direct authority of the Supreme Court on the point then of the jurisdictional High Court and lastly, of any other High Court. Not taking note of the facts of the case, nor the legal position and not even referring to the facts of the case involved in those decisions on which reliance is placed for deciding the appeal amounts to non-exercise of the appellate powers by the Tribunal.

(viii) In Bengal Iron Corporation and another Vs. Commercial Tax Officer and others, , it was held that clarifications/circulars issued by the Central Government and/or State Government regarding taxability of certain item represent merely their understanding of the statutory provisions. They are not binding upon the Courts. Though those clarifications and circulars were communicated to the concerned dealers but even so nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law. There can be no estoppel against the statute. The understanding of the Government, whether in favour or against the assessee, is nothing more than its understanding and opinion, It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Law is what is declared by the Supreme Court and the High Court. It is for the Supreme Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament/legislature never speaks or explains what does a provision enacted by it means.

(ix) In CIT v. Chhajer Packaging & Plastics (P) Ltd. (2008) 214 CTR (Bom) 389, it was held by the Bombay High Court that Instruction No. 2 of 2005, dt. 24th Oct., 2005, is applicable only prospectively and it makes no reference to pending matters; appeal is also saved by para 3 of the instruction since it involves a question of law regarding interpretation of Section 275(1)(c), particularly the manner in which the limitation should be computed.

Based on the aforesaid judicial pronouncements and considering the true scope and ambit of the circulars it was forcefully contended by all the learned Counsel appearing for the Revenue that the substantial question of law raised before this Court be answered in favour of the Revenue and the Tribunal be directed to decide all these matters on their own merits.

14. The learned Counsel appearing for the respondent assessees, on the other hand, strongly submitted that the Tribunal has rightly dismissed all these appeals on the ground of low tax effect relying upon the circulars issued by the CBDT from time to time and hence no question of law much less any substantial question of law, arises out of any of these tax appeals. Since this Court has framed the substantial question of law, the same shall be answered in favour of the assessees and all these appeals be dismissed. It is further submitted that circulars issued by the CBDT are binding to the Department and the Departmental authorities cannot act nor can they file appeals before the Tribunal contrary to such circulars. The Tribunal is well within its power to dismiss such appeals filed contrary to the circulars issued by the CBDT. It is further submitted that whether any particular case is covered by exceptions curved out in the circular, must specifically be pleaded in the appeal memo or at the time of hearing of appeal before the Tribunal. If no such contentions were raised by the Departmental Representative before the Tribunal, the same cannot be raised for the first time before this Court. It is further submitted that simply because an appeal is filed by the Department contrary to the circulars, it is not obligatory on the part of the Tribunal to dispose of such appeal on merits. Suffice it for the Tribunal to dismiss any of such appeals simply on the ground of low tax effect. There are catena of judgments laying down the principle that the circulars are binding to the Department. The Court''s attention is invited to the provisions contained in Section 268A of the Act inserted by the Finance Act, 2008, with retrospective effect from 1st April, 1999. Sub-section (4) of Section 268A clearly states that the Tribunal or Court, hearing such appeal or reference, shall have to record orders, instructions or directions issued under Sub-section (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case. Till now there are only judicial pronouncements which state that the circular issued by the CBDT are binding to the Department and the Tribunal or the Court are not bound by such circulars. Sub-section (4) of Section 268A now casts an obligation on the Tribunal or the Court to consider the orders, instructions or directions issued by the Board under Sub-section (1) of Section 268A of the Act and shall decide the appeal or application filed before it. Sub-section (5) of Section 268A makes it further clear that every order, instruction or direction which has been issued by the Board fixing monetary limit for filing an appeal or an application for reference shall be deemed to have been issued under Sub-section (1) and the provisions of Sections 2, 3 and 4 shall apply accordingly. By virtue of this Sub-section (5), the controversy is resolved once and for all which is prevalent prior to this amcndment. One view was that only the circulars issued u/s 119 of the Act are having binding effect and other

circulars, instructions or directions are not having any binding effect. This amcndment now gives statutory force to all orders, instructions or directions issued by the Board under Sub-section (1) of Section 268A of the Act, fixing monetary limit for the purpose of regulating filing of appeal/application for reference by any IT authorities under the provisions of Chapter-XX of the Act. It is, therefore, urged that the Tribunal has rightly dismissed all these tax appeals on the ground of low tax effect and no question of law, much less any substantial question of law, has arisen out of the order of the Tribunal and hence these appeals deserve to be dismissed.

It is further contended that apart from plethora of decisions taking a view that appeals filed in contravention of circular issued by the Board fixing the monetary limit, are not maintainable and they are deserved to be dismissed, the Under Secretary to the Government of India has issued office memoranda, dt. 5th June, 2007, pursuant to the order passed by the Bombay High Court. The Bombay High Court in ITA(L) No. 118 of 2003 in the case of CIT v. Vitessee Trading Ltd. dt. 23rd April, 2007 made observation that the Department has not been following the instructions issued by the CBDT while filing appeals and has directed that wherever the appeals already filed fail to meet the criteria of monetary limits the same should be withdrawn, unless the question of law involved or raised in appeal or referred to the Court is of a recurring nature required to be settled by the Court. The directions are issued in this office memoranda that all appeals already filed by the Department before the Bombay High Court should be examined on case to case basis and in cases where the criteria of monetary limit as per the prevailing instruction is not satisfied, the appeal should be withdrawn unless a question of law involved or raised in appeal or referred to the High Court is of a recurring nature requires to be settled by the Court.

In support of their submissions the learned Counsel relied upon the following judgments of different High Courts including this Court as well as the Hon''ble Supreme Court:

(i) In CIT v. Ashok Kumar Manibhai Patel & Co. (2008) 214 CTR (MP) 344, it was held that the tax impact of the issue involved is hardly Rs. 40,000 and hence reference made at the instance of the Revenue is not to be entertained by the Court in view of the circulars issued by the CBDT.

(ii) In CIT v. Smt. Madhu Bai Lodha (2007) 213 CTR (MP) 496, it was held that where tax liability of the assessee is below the monetary limit prescribed, Revenue cannot file an appeal in transgression of the circular by which it is bound. However, in a case which falls within the excepted category, it would always be open to the Department to bring it to the notice of the forum approached and to insist that the question being covered by the exceptions contained in Clause 3 of the circular dt. 24th Oct., 2005, as modified by the Instruction No. 5 of 2007, dt. 16th July, 2007, the same deserves to be considered by the superior forum, the circular of the CBDT notwithstanding. In view of the above, the question raised in these appeals is answered against the Department subject to the liberty that if a case falls within the excepted category, it would be open to the Department to bring the said fact to the notice of the Court or the Tribunal so that the appropriate authority/Court applies its mind to the necessity of formulating the question of rendering the decision thereon.

(iii) In The Commissioner of Income Tax Vs. Pithwa Engg. Works, , it was held that the Court can very well take judicial notice of the fact that by passage of time money value has gone down, the cost of litigation expenses has gone up, the assessees on the file of the Departments have increased; consequently, the burden on the Department has also increased to a tremendous extent. The corridors of the superior Courts are choked with huge pendency of cases. In this view of the matter, the Board has rightly taken a decision not to file references if the tax effect is less than Rs. 2 lakhs. The same policy for old matters needs to be adopted by the Department. The Board''s Circular dt. 27th March, 2000, is very much applicable even to the old references which are still undecided. The Department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no jurisdiction to proceed with decades old references having negligible tax effect.

(iv) In Commissioner of Income Tax Vs. A. Raajendra Prasad, , the Andhra Pradesh High Court held that if an interpretation as pleaded by the Revenue 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. There is no material before the Court 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. The circulars in question are statutory in nature and are issued by the Board in, exercise of powers u/s 119. The first contention of senior counsel for Revenue that the circulars were not enforceable as they were not issued u/s 119 and even if issued u/s 119, could not take away the power of the Department to file an appeal created under the Act, cannot be accepted. The second contention is that the circulars create an exception and this aspect was not looked into by the Tribunal. 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. Therefore, these appeals deserve to be dismissed and are accordingly dismissed. The Court further held that in order to avoid any confusion, it is laid 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. On the basis of this judgment the conclusion can be drawn that CBDT instructions prohibiting the Department to file appeals before various for a where tax effect was below the limit specified were binding on the Department and so far as the exceptions provided in the aforesaid instructions are concerned, the Department should clearly plead in the memo of appeal itself that the appeal falls under the exceptions.

(v) In Commissioner of Income Tax Vs. Camco Colour Co., , it is held that Circular F. No. 279/126/1998-ITJ, dt. 27th March, 2000, reflected the policy decision taken by the CBDT not to raise questions of law where the effect is less than the amount prescribed in the instructions issued by the CBDT with a view to reduce litigations before the High Courts and the Supreme Court. The circular is binding on the Revenue. An appeal or reference contrary to the instructions issued in the circular will not be considered by the Courts. For the purpose of contending that the circular issued by the CBDT is binding on all the officers and CIT, reliance is placed on the decision of Hon''ble Supreme Court in the case of Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, ''D'' Range, Bombay, , K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, The same principle was reiterated by the Bombay High Court in the case of Commissioner of Income Tax Vs. Zoeb Y. Topiwala, , wherein it is held that the instruction of the CBDT dt. 27th March, 2000, reflects the policy decision taken by the Board not to raise questions of law where the tax effect is less than the amount prescribed in the instructions with a view to reduce litigation before the High Courts and the Supreme Court. The circular is binding on the Revenue.

(vi) In CIT v. Blaze Advertising (Delhi) (P) Ltd. (2002) 173 CTR (Delhi) 482 : (2002) 255 ITR 460 , wherein it is held that circulars issued u/s 119 of the IT Act, 1961 stand on a different footing and they 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 have 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. A statutory right of the Tribunal for making references to the Court cannot be taken away by the CBDT by issuing a circular.

(vii) In Commissioner of Income Tax Vs. Associated Electrical Agencies, , it is held that the CBDT Circular F. No. 279/126/1998-ITJ, dt. 27th March. 2000, prescribes monetary limits for appeals. An appeal cannot be filed by the Revenue ignoring the circular. The exceptions stand in the circular for filing an appeal irrespective of the revenue effect are: (i) where a Revenue audit objection in the case has been accepted by the Department, (ii) where the Board''s order, notification, instruction or circular is the subject-matter of an adverse order, (iii) where prosecution proceedings are contemplated against the assessee, and (iv) where the constitutional validity of provisions of the Act is under challenge, and the monetary limit would not apply to writ matters. The circular would come into effect from 1st April, 2000. The Court dismissed the appeal on the ground that the tax effect involved in the case was only Rs. 5,000. The Court has also considered the issue even de hors the circular and on facts found that no question of law, much less substantial question of law arose.

(viii) In State of Kerala and Ors. v. Kurian Abraham (P) Ltd. and Anr. decided on 8th Feb., 2008, the Hon''ble Supreme Court has held that the Circular No. 16/1998 issued by the Board of Revenue u/s 3(1A)(c), Kerala General Sales Tax Act, 1963, is binding on all the authorities administering the Tax Department. This circular is statutory in nature and hence it is binding on the Department though not on the Courts and the assessee. Completed assessment would not be reopened on the ground that the said circular was not binding. Such an approach is unsustainable in the eyes of law. If the State Government was of the view that such circulars are illegal or that they are ultra vires Section 3(1A), which it is not, it was open to the State to nullify/withdraw the said circular u/s 60 of the 1963 Act. If the circular is not withdrawn till this date, it is not open to the officers administering the law working under the Board of Revenue to say that the said circular is not binding on them. The Court further held that if such a contention is to be accepted, it would lead to chaos and indiscipline in the administration of tax laws. The Court further took the view that whenever such binding circulars are issued by the Board granting administrative relief, as long as circular remains in force it is not open to the subordinate officers to contend that the circular is erroneous and not binding on them.

(ix) In Commissioner of Income Tax Vs. Vikrant Crimpers, this Court has held that the CBDT has by Circular No. RA/1986-87/DIT, dt. 26th Aug., 1987, directed that no remedial action is necessary in summary cases. The CIT being bound by the directions of the CBDT cannot exercise powers u/s 263 of the IT Act, 1961, in the case of a summary assessment.

(x) In Union of India (UOI) and Another Vs. Azadi Bachao Andolan and Another, , it is held that Circular No. 789, dt. 13th April, 2000 [(2000) 160 CTR 5], issued by the CBDT providing clarification that, in the application of the provisions of the Indo-Mauritius Double Taxation Avoidance Convention, 1983 wherever a certificate of residence is issued by the Mauritian authorities, such certificate will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership of shares, is a circular within the meaning of Section 90, and, therefore, it must have the legal consequences contemplated by Section 90(2). In other words, the circular will prevail even if inconsistent with the provisions of the IT Act, 1961, insofar as assessees covered by the provisions of the convention are concerned. The Court further held that the Circular No. 789, dt. 13th April, 2000, issued by the CBDT falls well within the parameters of the powers exercisable by the CBDT u/s 119. The circular does not in any way crib, cabin or confine the powers of the AOs with regard to any particular assessment; it merely formulates broad guidelines to be applied in the matter of assessment of assessees covered by the provisions of the Indo-Mauritius Double Taxation Avoidance Convention, 1983.

(xi) In Berger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta, it is held that if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assessees, without just cause.

(xii) In Commissioner of Customs, Calcutta Vs. Indian Oil Corporation Ltd. and Another, , after considering the judgment of the Hon''ble Supreme Court in the case of Collector of Central Excise, Vadodra Vs. Dhiren Chemical Industries, , Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries, and Simplex Castings Ltd. Vs. Commr. of Cus., Vishakhapatnam, , the Hon''ble Supreme Court laid down the following ratio; (1) although a circular is not binding on a Court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular issued by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute; (2) despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board; (3) a show-cause notice and demand contrary to existing circulars of the Board are ab initio bad; and (4) it is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

(xiii) In CGT v. Executors and Trustees of the Estate of the Late Shri Ambalal Sarabhai, (1988) 170 ITR 144 (SC) this Court while accepting the contention of the Department, that the shares had to be valued on the basis of the dividend or profit method of valuation, but that the valuation made by the Tribunal and approved by the High Court ought not to be disturbed in view of the matter being two-and-a-half decades old and of the smallness of the tax involved.

(xiv) In Nandkishore Shantilal Parekh v. CIT (1993) 110 CTR (Guj) 109, this Court has held that the Tribunal having omitted to consider the relevant circumstances, i.e., affluent background of assessee and multiple sources of income, in coming to its conclusion that household expenses were understated, matter deserved to be remitted back; however, tax effect being small, reference was not answered.

(xv) In Commissioner of Income Tax Vs. Dineshchandra S. Shah, this Court had an occasion to consider the provisions contained in Section 268A of the IT Act, 1961 while deciding the application moved by the Revenue seeking leave to appeal to Supreme Court. Section 268A(1) says that the Board may, from time to time, issue orders, instructions or directions to other IT authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any IT authorities under the provisions of this chapter. The Court took the view that the tax effect in each of the three years is very low and is below the monetary limit prescribed by the Board and in this view of the matter, apart from the fact whether MCA/SLP is filed by the Revenue in any other cases, as per the Board''s instructions, no MCA could have been filed in assessee''s case, looking to the tax effect being very low. Accordingly, application for leave to appeal filed by the Revenue was rejected.

15. Having heard learned Counsel appearing for the respective parties and having gone through the relevant statutory provisions, judgments of various Courts and circulars issued by the Board from time to time, we are of the view that subject to certain directions, which are issued hereinafter, all these tax appeals deserve to be dismissed and they are accordingly dismissed as no question of law, much less any substantial question of law, arises out of the order of the Tribunal. In almost all cases the Tribunal has dismissed the appeals only on the ground of low tax effect, without entering into merits of the matter. While dismissing the appeals, the Tribunal has referred to the circulars issued by the CBDT prescribing the monetary limit. The appeals filed by the Department in contravention of such circulars prescribing the monetary limit were ordered to be dismissed. Almost all Courts are agreeable on this issue.

16. The real controversy arose when certain exceptions are carved out in the circulars and despite the fact that many of these cases before the Tribunal are covered by those exceptions, which require the Tribunal to go into the merits of the matter, the Tribunal has straightway dismissed those appeals. There is a cleavage of opinion amongst the different Courts on this issue. One view is that while applying the circular issued by the Board, the Tribunal has to take into consideration as to whether the exceptions carved out in the circular apply to the case on hand and if any of those exceptions is applicable in that case the Tribunal will have to ignore the monetary limit and decide the appeal on merits. In Kodananad Tea Estate Co''s case (supra), before the Tribunal, the applicability of the circular was questioned. The Madras High Court, therefore, took the view that the question comes within the ambit of exception and the Tribunal was directed to hear appeal on the merits.

17. Another view is that if any particular circular is pressed into service seeking dismissal of appeal on the ground of low tax effect and if no objection is raised by the Department either in the appeal memo or at the time of hearing of appeal, the Tribunal is not bound to consider as to whether exceptions are applicable or not. In Smt. Madhu Bai Lodha''s case (supra), the M.P. High Court took the view that in a case which falls within the excepted category, it would always be open to the Department to bring it to the notice of the forum approached and to insist that the question being covered by the exceptions contained in the circular, the same deserves to be considered.

In A. Rajendra Prasad and Ors. case (supra), the A.P. High Court took the view 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 absence of such a pleading in the memo of appeal, normally appeal should not be entertained.

In Kurian Abraham (P) Ltd.''s case (supra), the Hon''ble Supreme Court took the view that whenever any binding circular is issued by the Board granting administrative relief, as long as such circular remains in force, it is not open to the subordinate officers to contend that the circular is erroneous and not binding on them. If such a contention is to be accepted, it would lead to chaos and indiscipline in the administration of tax laws.

In Indian Oil Corporation''s case (supra), the Hon''ble Supreme Court laid down certain propositions of law in relation to the binding nature of circulars issued by the Board. The Court held that despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board and that it is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

18. There is also difference of opinion amongst the Courts with regard to the applicability of the circular. If, on the date of filing of an appeal, a circular is not in force or certain exceptions are not there or monetary limit is less than what was there at the time of deciding this appeal, in such cases, the Tribunal will have to give due weightage to the provisions contained in the circular prevalent on the date of filing of appeal and not on the date of the decision of the appeal. In Chhajer Packaging & Plastics (P) Ltd.''s case (supra), the Bombay High Court took the view that circulars/instructions issued by the Board are applicable only prospectively and if there is no reference to their applicability to the pending matters, such pending matters cannot be decided on the basis of circulars/ instructions.

In Pithwa Engineering Works'' case (supra), the Bombay High Court took the view that taking judicial notice of the money value having gone down and cost of litigation expenses having gone up as well as huge pendency of cases, the Board should evolve a policy of applying the circulars even to the old references which are still undivided. The Department should not have proceeded with the appeals/ references wherein the tax impact is minimal, irrespective of their date of filing.

19. There is no dispute about the fact that where substantial question of law of importance is involved or where question of law is repeatedly arising or where the issue is covered by the judgment of territorial High Court or the Supreme Court, the Tribunal will have to decide the appeal on merits and in terms of the law declared by the Supreme Court or by the territorial High Court. However, on this ground the matters cannot be remanded to the Tribunal directing the Tribunal to decide the same afresh. If no objections are raised by the

Departmental Representative at the time of hearing of the appeal against the applicability of the circular despite there being an exception, the Department has missed the bus and second inning cannot be granted for that purpose. However, in matters where such objections are raised and despite those objections or without dealing with those objections if the Tribunal has dismissed the appeal only on the ground of low tax effect, in such matter, an indulgence is required to be shown by this Court and for this limited purpose, the Department is permitted to move an appropriate application before the Tribunal for deciding the appeal on merits.

20. We are of the view that simply because the appeal is filed by the Department in contravention of the circular the Tribunal is not bound to decide the appeal on merits. Due weightage should invariably be given by the Tribunal to the circular issued by the Board. Even otherwise, the newly inserted provisions contained in Section 268A(4) make it obligatory for the Tribunal to consider such circular. It is not open for the Department to contend that circulars are internal matters of the Department and assessee cannot object to filing of an appeal on the basis of such circular. It is true that filing of an appeal is a statutory right but it can certainly be regulated by the Board by issuance of orders, instructions or circulars. This would not amount to taking away the right of filing of appeal or that such right is prohibited by executive instructions. Section 268A(1) of the Act now recognizes such right of the Board to regulate the filing of appeal or application before the Tribunal or the Court. It is also true that when the Hon''ble Supreme Court or the territorial High Court has declared the law on a question, it is not open to the Tribunal to direct that the circular issued by the Board prescribing the monetary limit should be given effect to and not the decision of Hon''ble Supreme Court or the territorial High Court. It is, however, equally true that the Tribunal''s attention must be drawn by the Departmental Representative to such decision of the Hon''ble Supreme Court or the High Court. An objection must be raised by the Departmental Representative.

21. Considering all the aforesaid issues, we dismiss all these tax appeals reserving liberty to the Department only on those cases to apply to the Tribunal to decide the appeal on merits where the objections were raised before the Tribunal either in the appeal memo or at the time of hearing of appeal raising a specific contention that a particular appeal is covered by an exception and despite this objection the Tribunal has not dealt with the said contention and dismissed the appeal on the ground of low tax effect. It is expected from the Tribunal to consider these broad parameters while applying the relevant circular to the facts of the case at the time of deciding appeals.

22. So far as tax appeal Nos. 496, 545, 547, 548, 550 and 704 of 2007 are concerned, this Court while admitting all these appeals on 10th Oct., 2007 has also framed one more substantial question of law which is as under:

Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the excise duty levied on closing stock should not be taken into account for valuation of the closing stock?

23. Since the Tribunal has dismissed all these appeals filed by the Department only on the ground of low tax effect and has not decided this issue on merits nor the Departmental Representative had raised any objection on this issue, we do not give any finding on this issue.

Subject to the aforesaid clarification and observations all these appeals are accordingly dismissed without any order as to costs.