
(2011) 02 P&H CK 0410
In the Punjab And Haryana At Chandigarh
Case No : ITA No. 209 of 2003

Commissioner of Income Tax

APPELLANT

Vs

Varindera Construction Co.

RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Constitution of India, 1950 — Article 136
Finance Act, 2008 — Section 268A, 54F
Income Tax Act, 1961 — Section 268(1)

Citation : (2011) 239 CTR 1 : (2011) 331 ITR 449 : (2011) 198 TAXMAN 42

Hon'ble Judges : Alok Singh, J;Ajay Kumar Mittal, J;A.K. Goel, J

Bench : Full Bench

Judgement

Adarsh Kumar Goel, J.—As per office report, file was not available on account of fire in the Court premises. The file has been reconstructed on the basis of paper book furnished by learned Counsel for the Appellant.

2. The matter has been placed before this bench in pursuance of order of reference dated October 5, 2010 to the following effect:

When this appeal was taken up, learned Counsel for the Assessee raised a preliminary objection relying on a judgment of this Court in CIT v. Abhinash Gupta, (2010) 41 DTR (P&H) 129. He submitted that the tax effect involved in the appeal was below the limit prescribed for filing of appeal by circular issued in the year 2008.

Learned Counsel for the revenue submitted that the circular issued in the year 2008 did not have retrospective effect and did not control the appeal already filed which had to be decided according to the policy at the time the appeal was filed.

In the judgment relied upon on behalf of the Assessee, after referring to judgment of Bombay High Court in CIT v. Madhukar K. Inamdar (HUF), (2009) 318 ITR 149 (Bom.) , it was observed that though the circular was not

retrospective, it applied to pending appeals.

We are prima-facie of the view that the circular about filing of appeals cannot apply to appeals already filed prior to the date of the circular. In our opinion, the view already taken in the judgment relied upon by learned Counsel for the Assessee may require consideration by a larger bench.

Let the matter be placed before Hon"ble the Chief Justice for constituting a larger bench.

3. We have heard learned Counsel for the parties.

4. Question for consideration is whether circular issued in the year 2008 laying down monetary limit for filing of the appeal by the department will govern all pending appeals irrespective of prescribed monetary limit applicable at the time of filing.

5. Learned Counsel for the revenue submits that current circular dated 15.5.2008 prescribing monetary limit for filing of appeals cannot apply to appeals filed prior to the date of the said circular. View to the contrary taken in judgment of this Court in Abhinash Gupta following the judgment of Hon"ble the Bombay High Court in Madhukar K. Inamdar needs reconsideration. In Madhukar K. Inamdar, Hon"ble the Bombay High Court wrongly followed the reasoning of circular dated 5.6.2007 without appreciating the distinction in the scheme of the two circulars i.e. circular dated 5.6.2007 and 15.5.2008. Infact, the document referred to as circular dated 5.6.2007 was an office memorandum to comply with direction of Bombay High Court dated 23.4.2007 in ITA(L) No. 118 of 2003 CIT, Mumbai v. M/s Vitessee Trading Limited, requiring review of pending cases to check whether prescribed monetary limit had been followed. From that it was wrongly inferred that all pending appeals must be in conformity with the current monetary limit. A pending appeal could not be governed by a subsequent circular unless it is specifically so provided. The object of circular u/s 268A is to regulate filing of appeal and not to regulate appeals already filed. Once an appeal is properly filed, hearing is not in the hands of a party. If such appeal is controlled by new monetary limit applicable at the time of hearing, there will always be uncertainty. Such an interpretation would also be against the accepted principle that act of Court will not prejudice anyone (*actus curiae neminem gravabit*). A particular case where the Court may not go into merits on account of smallness of the amount may stand on different footing.

6. Learned Counsel for the Assessee opposed this submission. It is submitted that the view taken in Madhukar K. Inamdar as followed by this Court in Abhinash Gupta should be followed and all pending appeals should be governed by circular dated 15.5.2008. If the tax effect involved is less than the monetary limit now specified, the said appeal should not be considered on merits even if appeal was properly filed as per prescribed monetary limit at appropriate time.

7. To appreciate the rival submissions, it will be appropriate to refer to the

relevant provision and circulars:

S.268A: Filing of appeal or application for reference by income tax authority.

The Board may, from time to time, issue orders, instructions or directions to other income tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income tax authority under the provisions of this Chapter.

(2) Where, in pursuance of the orders, instructions or directions issued under Sub-section (1), an income tax authority has not filed any appeal or application for reference on any issue in the case of an Assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of-

(a) the same Assessee for any other assessment year;

or

(b) any other Assessee for the same or any other assessment year.

(3) Notwithstanding that no appeal or application for reference has been filed by an income tax authority pursuant to the orders or instructions or directions issued under Sub-section (1), it shall not be lawful for an Assessee, being a party in any appeal or reference, to contend that the income tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the 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.

(5) Every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under Sub-section (1) and the provisions of Sub-sections (2), (3) and (4) shall apply accordingly.

Circular dated 5.6.2007

Government of India,

Ministry of Finance

Department of Revenue Central Board of Direct Taxes

New Delhi the June 5th, 2007

Office Memorandum

Sub: Compliance with the Board's instructions in filing appeals before the ITAT/ High Court/Supreme Court-reg.

The undersigned is directed to invite the attention to the Board's instruction Nos. 02/2005 and No. 1979 read with instruction No. 1985 whereby certain guidelines like monetary limits and other criteria laid down for filing appeals before the ITA Ts, High Courts and the Supreme Court have come to the notice of the Board that Hon''ble Bombay High Court has observed in the ITA (L) No. 118 of 2003 in the case of CIT Mumbai v. M/s Vitessee Trading Limited ITA (L) No. 118 of 2003 dated 23.4.2007 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 undersigned is therefore directed to request that all appeals already filed by the Department before the Bombay High Court should be examined case to case basis by the respective C CsIT/CsIT and in cases where the criteria of monetary limits as per the prevailing instruction is not satisfied, the appeal should be withdrawn unless the question of law involved or raised in appeal or referred to the High Court is of a recurring nature required to be settled by the Court.

(Sanjay K. Bharat)

Under Secretary to the Govt. of India"

Circular dated 15.5.2008

Revision of monetary limits for filing appeals by the Department before Income Tax Appellate Tribunals, High Courts and Supreme Court, measures for reducing litigation

INSTRUCTION No. 5/2008, DATED 15-5-2008

Reference is invited to Board's instructions No. 1979 dated 27.3.2000, No. 1985 dated 29.6.2000, No. 6 of 2003 dated 17.7.2003, No. 19 of 2003 dated 23.12.2003, No. 5/2004 dated 27.5.2004, No. 2/2005 dated 24.10.2005 and No. 5/2007 dated 16.7.2007, wherein monetary limits for filing departmental appeals (in income Tax matters) and other conditions were specified, for filing appeals before Appellate Tribunals, High Courts and Supreme Court.

2. In supersession of the above instructions, it has been decided by the Board that departmental appeals will be filed before Appellate Tribunals, High Courts and Supreme Court as per monetary limits and conditions specified below.

3. Appeals will henceforth be filed only in cases where the tax effect exceeds monetary limits given hereunder:

Sr. No. Appeals in income tax matters Monetary Limit in Rs.

1. Appeal before Appellate Tribunal 2,00,000/-

2. Appeal u/s 260A 4,00,000/-before High Court 3. Appeal before Supreme Court 10,00,000/-

4. For this purpose, "tax effect" means the difference between the tax on the total income Assessee and the 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 (hereafter referred to as "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 cases of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax separately for every assessment year in respect of the disputed issues 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 issues exceeds the monetary limit specified in para 3. 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 para 3. 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(s), if it is decided to file appeal in respect of the year(s) in which the "tax effect" exceeds the monetary limit prescribed.

6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of income tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the income tax Department has acquiesced in the decision on the disputed issues in the case of the same" Assessee for any other assessment year, or in the case of any other Assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

7. In the past, a number of instances have come to the notice of the Board, whereby an Assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the Assessee for any other assessment year or in the case of any other Assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/ counsel must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only by reason of the tax effect being less than the specified monetary limit and therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the

Tribunal or the Court that such cases do not have any precedent value.

8. Adverse judgments relating to the following should be contested irrespective of the tax effect.

a) where the constitutional validity of the provisions of an Act or Rule are under challenge.

b) Where Board's order, Notification, Instruction or circular has been held to be illegal or ultravires.

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

9. The proposal for filing Special Leave under Article 136 of the Constitution before the Supreme Court should, in all cases, be sent to the Directorate of Income Tax (Legal and research) New Delhi and the decision to file SLP shall be in consultation with the Ministry of Law and Justice.

10. The monetary limits specified in para 3 above will not apply to writ matters.

11. This instruction will apply to appeals filed on or after 15th of May 2008. However, the cases where appeals have been filed before 15th of May 2008 will be governed by the instructions on this subject, operative at the time when such appeal was filed.

12. This issues u/s 268A(1) of the Income Tax Act, 1961.

8. We may now refer to the judgment of the Bombay High Court where this issue was considered. Therein, it was observed:

10. At this juncture, it will be relevant to note that the CBDT has also issued a circular on 5th June, 2007 directing the Department to examine all appeals pending before this Court on case to case basis with further direction to withdraw cases wherein the criteria of monetary limits as per the prevailing instruction is not satisfied, unless the question of law involved or raised in appeal or referred to the High Court for opinion is of a recurring nature required to be settled by the higher Court.

11. The aforesaid circular makes it clear that on the date of issuance of circular, prevailing instructions fixing monetary limit will hold good even for pending cases. Adopting the same approach, we are of the considered view that the CBDT circular dated 15th May 2008 would be very much applicable to the pending cases requiring Department to withdraw cases wherein the tax effect is less than the prescribed monetary limits.

12. At this juncture, it will also be relevant to mention that it was necessary of the CBDT to put a caveat, while issuing instructions vide its circular dated 5th June 2007 that the appeals involving substantial question of law of recurring nature should not be withdrawn since provision like s.268A of the IT Act was absent. Now, in view of insertion of the provision of s.268A by the Finance Act,

2008 w.e.f Ist April 1999 in the IT Act, 1961, no prejudice could be caused to the revenue even if the cases involving legal issues of recurring nature are withdrawn, since the newly inserted provision takes care of the adverse eventuality which could have been put against the Revenue.

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13. In the aforesaid backdrop, we are of the considered view that the circular dated 15th May 2008 would be applicable to the cases pending before this Court either for admission or for final disposal and that it is binding on Revenue. In this view of the matter all these appeals, having tax effect less than Rs. 4 lakhs, are dismissed with no order as to costs.

9. Following the aforesaid judgment, this Court in Abhinash Gupta, observed:

7. After hearing the arguments of the learned Counsel for the parties, we find force in the preliminary objection raised by the learned Counsel for the Assessee with regard to maintainability of the appeal filed by the Department. During the course of arguments, it is not disputed before us that the tax effect in the instant case is less than Rs. 4 lacs. In the present case, the AO disallowed the claim of the Assessee of exemption of Rs. 4,04,664/- under s.54F of the Act on the ground that the investment made by the Assessee on construction of a residential house was not made within specified time of one year before the date when the long term capital gain arose. However, the said addition was deleted by the Tribunal while recording a finding of fact that the investment by the Assessee on construction of a residential house was made during the period Ist March 1999 to 26th March 1999. The said finding was recorded on the basis of the housing loan account. It has also been held that the transfer of the long term capital asset, i.e. shares and securities took place on Ist February 2000, therefore, the said investment was within one year prior to the date of transfer of the long term capital asset. In view of the said fact, it was held that the Assessee was fully eligible for the benefit of s.54F of the Act. Though the Tribunal has deleted the addition on the basis of the abovesaid finding of fact, yet in our opinion the dispute arising in this appeal is not of recurring nature. Even if it is taken that the alleged substantial question of law raised in this appeal is of recurring nature, in our opinion, the revenue cannot maintain the instant appeal in view of circular No. 5 of 2008 issued by the CBDT, as the total cumulative effect involved in this appeal is less than Rs. 4 lacs. In CIT v. Oscar Laboratories (P) Limited case (supra), it was held that the instructions/circulars issued by the CBDT laying down monetary limits for filing of appeals are mandatory and binding on the revenue. The contention of the learned Counsel for the revenue that Circular No. 5 of 2008 is not applicable to the appeals filed prior to 15th May 2008 cannot be accepted. The similar issue has been considered by the Bombay High Court in CIT v. Madhukar K. Inamdar (HUF)'s case (supra) wherein it was held that Circular No. 5 of 2008 is also applicable on the pending appeals, irrespective of the fact whether the same were filed before or after 15th May, 2008.....

8. While agreeing with the view taken by the Bombay High Court, we are of the view that Circular No. 5 of 2008 would be applicable to the cases pending before this Court either for admission or for final disposal and that the said circular is binding on the Revenue. Since admittedly the tax effect in this appeal is less than Rs. 4 lacs, therefore, in our opinion, the appeal filed by the revenue is not maintainable and the same is hereby dismissed with no order as to costs.

10. After due consideration of rival contentions, we are in agreement with the contention raised on behalf of the revenue. Circular laying down monetary limit controls the filing of the appeals and not their hearing. Appeals filed as per applicable limit at the time of filing cannot be governed by circular applicable at the time of hearing. We respectfully differ from the view taken by Bombay High Court as followed by this Court. The object of circular u/s 268A as already mentioned is only to govern monetary limit for filing of the appeals. There is no scope for reading the circular as being applicable to pending appeals. Even Hon"ble the Bombay High Court held that the circular was not retrospective. It only observed that having regard to the falling money value and choking Court docket, policy of monetary limit was needed to be adopted for pending matters. The document referred to as circular dated 5.6.2007, in our view, has not been properly appreciated. It only says that the department was not following instructions as to monetary limit while filing the appeals and should examine whether pending appeals which did not conform to prescribed monetary limit should be withdrawn. The said memorandum was purportedly issued on a direction of the High Court and was applicable only to cases pending in Bombay High Court. The same cannot be read to mean that in all High Courts, all pending appeals were to be examined in the light of monetary limit applicable on the date of hearing and not on the date of filing.

11. Accordingly, we hold that monetary limit laid down vide circular dated 15.5.2008 will apply only to filing of appeals. Appeals already filed and pending prior thereto will be governed by monetary limit laid down at the time of filing.

12. The question stands answered accordingly. The matter may now be placed before the appropriate bench for further proceedings.