
(2011) 06 GUJ CK 0105
In the Gujarat High Court
Case No : Tax Appeal No. 2315 of 2009

Commissioner of Income Tax-I	Vs	APPELLANT
CLP Power P. Ltd		RESPONDENT

Date of Decision : 30-06-2011

Acts Referred:

Income Tax Act, 1961 — Section 268A, 268A

Citation : (2011) 06 GUJ CK 0105

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Mauna M. Bhatt, for the Appellant; Swati Soparkar, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Akil Kureshi

1. Revenue has challenged the judgment of the Tribunal dated 8th May 2009. We had admitted the appeal and framed following substantial question of law for consideration :

Whether the Appellate Tribunal is right in law and on facts in dismissing the appeal of the revenue on the ground of low tax effect, though the notional tax effect exceeded the monetary limit prescribed by the board ?

2. In short, the controversy arose in following factual background. Before the Assessing Officer, the assessee claimed to have suffered loss in the assessment year in question. The Assessing Officer, however, disallowed the claim made by the assessee. Issue ultimately, reached the Tribunal in appeal filed by the Revenue. The Tribunal by the impugned judgment dismissed the appeal holding it as not maintainable on the ground that in either case assessee had suffered loss and in that view of the matter, CBDT's circulars providing monetary limit for filing further appeal would render the Revenue's appeal not competent.

3. We notice that the notional tax was Rs. 5,28,00,000/- which was admittedly higher than the limit prescribed by the Board's circular applicable at the relevant time.

4. Under similar circumstances, a group of tax appeals being Tax Appeal No. 1601 of 2009 and connected appeals came to be decided by us by judgment dated 9th May 2011 making following observations:

34. From the above circulars, two fold questions arise. Firstly, we are required to answer the question if circulars ranging from 27.3.2000 till 16.7.2007, debarred the department from filing appeals in cases of negative income of the assessee. The second aspect of the matter is whether when the Board in its subsequent circular dated 15.5.2008 provided that " Similarly, in loss cases notional tax effect should be taken into account", did the Board desire for the first time that the appeals be permitted to be presented in cases of loss only on and from 15.4.2008 and not before. In other words, the question is whether above quoted portion in the Board circular dated 15.4.2008 is clarificatory in nature or not?

35. Close perusal of the circulars issued prior to 15.5.2008 noted hereinabove, would reveal that such circulars provided for different conditions on which the Revenue could prefer appeals before the Tribunal and Courts which included the monetary limits specified from time to time. Nowhere do these circulars, specify that irrespective of the degree of divergence between the Assessing Officer and CIT merely because in either case the assessee is held to have suffered loss, appeal before the Tribunal would not be presented. Starting with circular dated 27.3.2000, we find that the said circular provided for limits for preferring appeals to the Tribunal, reference before the High Court and appeal before the Supreme Court as long as the tax effect exceeded Rs. 1,00,000/-, Rs. 2,00,000/- and Rs. 5,00,000/- respectively. Paragraph 3 of the said circular specified the categories where irrespective of the revenue effect, such appeals could be pursued. The term " tax effect" specified in circular dated 27.3.2000 is nowhere defined and explained in any of the preceding and succeeding circulars. We must, therefore, understand this term in the context of the intention of the Board in limiting the Tax Appeals.

36. We must also remind ourselves that Board circulars are not statutes though by virtue of Section 268A, it may have certain statutory force. Common thread running through all the circulars presented before us is that the Board desired that subject to certain exceptions, Tax Appeals in which effect of tax is lower than the prescribed limit such appeals whether before the Tribunal, High Court or the Supreme Court, should not be presented. For example in Circular dated 27.3.2000 it is provided that appeals will be filed only in cases where tax effect exceeds the revised monetary limits i.e.Rs. 2,00,000/- for the appeal to be file before the appellate Tribunal Rs. 4,00,000/- for the appeal or reference before the High Court and Rs. 10,00,000/- in case of appeals to the Supreme Court. Such limit came to be revised by Circular dated 24.10.2005 which provided for monetary limits of tax effect of Rs. 2,00,000/-, Rs. 4,00,000/- and Rs.

10,00,000/- for appeals to the Tribunal, High Court and the Supreme Court respectively. None of these circulars provided that by virtue of assessment of loss by the Assessing Officer, different from that declared by the assessee, even if the possible tax effect is huge, no appeals should be presented before the Tribunal, High Court or the Supreme Court; merely because ultimately the income of the assessee was negative. We have no hesitation in coming to the conclusion that none of the circulars presented before us intended to bar the tax appeals even where potential tax effect would be enormous, simply because in the year in question, the assessee had earned negative income.

37. The issue can be looked from a slightly different angle. In absence of the Board's circulars issued, which now can be stated to be covered u/s 268A of the Act, there are no limitations on Revenue carrying the issue in appeal either before the appellate Tribunal, the High Court, the Supreme Court. To hold that a particular appeal is not maintainable by virtue of the limitations imposed by the Board in its circular, such limitation must be traced into circular itself. In other words unless and until the appeal is found to be opposed to the directives issued by the Board in its different circulars prevailing from time to time, such an appeal cannot be categorized as not maintainable.

38. Circulars of the Board nowhere provide that in case of return of loss automatically per se irrespective of difference in the Assessing Officer's perception and that of the CIT (Appeals) of the computation of loss, further appeal would be shut out.

39. The contention that by virtue of subsequent clarifications contained in circulars dated 15.5.2008 and 9.2.2011 the position prevailing prior to such circulars gets amplified and that therefore in cases of loss returns the Board's instructions did not envisage further appeal also does not impress us. We may recall that in the circular dated 15.5.2008 it is provided that in the case of loss, notional tax effect should be taken into account. This clarification to our mind, contained in circular dated 15.5.2008 and absence of any such clarification in the previous circulars, is of no consequence. Such a clause can, at the best, be seen as clarificatory declaration by the Board to put the controversy beyond any shadow of doubt or debate. It cannot, however, be stated that only on and from 15.5.2008 the Board desired that on the basis of notional tax effect in cases of loss the appeals should be filed. In the previous circulars to reiterate, no such intention emerges. Only because clarification came in the subsequent circular dated 15.5.2008, would not mean that previously the Board desired that such appeals should be filtered out.

xxxxx

43. In the result common question, framed in all appeals, is answered in favour of the Revenue and against the assessees. It is held that merely because even as per the Assessing Officer's order, ultimately income of the assessee is negative, the Revenue's appeal before the appellate Tribunal would not be barred by the

Board's circular u/s 268A of the Act. It is, however, clarified that the notional tax effect would have to be above the limits prescribed by the Board from time to time for presentation of such appeals. In all these cases since it is stated that the notional tax effect would be higher than the limits prescribed by the Board in different circulars, we are of the view that the Tribunal committed an error in dismissing the Revenue's appeals as being not maintainable. We may record that none of the appeals came to be decided by the Tribunal on merits.

5. In the result, Tax Appeal is allowed. Judgment of the Tribunal is quashed. Questions are answered in favour of the Revenue. The proceedings are remanded to the Tribunal for consideration of appeal on merits.