

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 2145 OF 2013

The Commissioner of Income Tax 6,
Mumbai

.. Appellant

v/s.

M/s. Goodlas Nerolac Paints Ltd.

.. Respondent

Mrs. S.V. Bharucha for the appellant

Ms. A. Vissanji a/w S.J. Mehta i/b M/s. S.P. Mehta & Co. for the
respondent

**CORAM : M.S. SANKLECHA &
B.P. COLABAWALLA, J.J.**

DATED : 19th JANUARY, 2016.

PC.

1. This appeal under Section 260A of the Income Tax Act (the Act) challenges the order dated 12th January, 2016 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2003-04.

2. The Revenue has raised the following three questions of law for our consideration :-

(a) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in directing the Assessing Officer to recompute the disallowance u/s 14A on a reasonable basis after relying on the judgment of Hon'ble Bombay High Court in

the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT (2010), (328 ITR 81) (Bom) without appreciating the fact that the judgment of Bombay High Court has not been accepted by the Revenue and is challenged by filing an SLP in the Hon'ble Supreme Court?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the disallowance of Rs.1,19,498/- incurred by the assessee on Kavesar Unit in total disregard to the proposition laid down by the Hon'ble Supreme Court in the case of Chhabda & Sons (L.M.) V/s. Commissioner of Income Tax, 65 ITR 638 ?

(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the disallowance of Rs.1,27,678/- being depreciation in respect of assets of Kavesar without appreciating the fact that assessee has discontinued its pigment operation at Kavesar from 01.04.1999 and the assets in question were never put to use ?

3. This appeal was on board on 12th January, 2016. At that time, we passed an order indicating that question (a) according to the Revenue itself stands concluded against the Revenue as the Apex Court had dismissed the challenge of the Revenue to the decision of this Court in **Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT, 328 ITR 21** and the impugned order has merely followed the order of the jurisdictional

High Court in *Godrej & Boyce (Supra)*. Consequently question (a) as formulated does not give rise to any substantial question of law. Hence, in the face of the issue now being concluded according to the Revenue by the decision of the Apex Court, we enquired of Mrs. Bharucha the reason for pressing this appeal given the fact that the aggregate tax effect in the other questions viz. (a) and (b) are only Rs.2.46 lakhs i.e. less than the minimum of Rs.20 lakhs prescribed in Circular No.21 of 2015 dated 10th December, 2015. She sought time to take instructions.

4. So far as question nos. (b) and (c) are concerned, we find that the impugned order of the Tribunal has merely followed its decisions rendered in the Respondent Assessee's case itself for the Assessment Year 2002-03 in ITA No.3858/Mum/2006 to grant benefit to the Respondent Assessee. On the last occasion i.e. on 12th January, 2016 as the Memo of Appeal did not indicate any challenge to the earlier order of the Tribunal for Assessment Year 2002-03 nor any other reason justifying an appeal of the above two questions. Further, no affidavit to the above effect was also filed nor was Mrs. Bharucha, learned Counsel appearing for the Revenue briefed by Officers of the Revenue on the above issues, we had adjourned the appeal to today.

5. We had in our order dated 12th January, 2016 expressed our displeasure of the manner in which this appeal and numerous other appeals are being prosecuted by the Revenue. This improper presentation of the case on the part of the Revenue seems to arise on account of non furnishing all the necessary information by the Officers of the Revenue to the learned Counsel who appear on their behalf as in this case. In our order dated 12th January, 2016 we had recorded as under :-

“5. We have in numerous orders held that whenever the Tribunal follows its own order to grant a relief to assessee and that earlier order has been accepted by the Revenue, then the Appeal Memo must set out the reasons why notwithstanding the acceptance of the earlier order of the Tribunal, the Revenue seek to prefer an appeal against the impugned order which has merely followed the earlier order. In case the same is not reflected in the Memo of Appeal then an affidavit must be filed indicating the reason for challenging the order of the Tribunal before the appeal comes up for admission.

6. In DIT (IT) v/s. Credit Agricole Indosuez 377 ITR 102, we had observed as under:-

*“
In matters of tax, justice requires that there must be certainty of law which presupposes equal application of law. Thus, where the issue in controversy stands settled by the decisions of this court or the Tribunal in any other case and the Revenue has accepted that decision then in that event the Revenue ought not to agitate the issue further unless there is some cogent justification such as change in law or some later decision of an higher forum, etc. then in such cases*

appropriately the appeal memo itself must specify the reasons for preferring an appeal failing which at least before admission the officer concerned should file an affidavit pointing out the reasons for filing the appeal. It is only when the court is satisfied with the reasons given, that the merits of the issue need the examine of purposes for admission (please see I.T.A. No. 37 of 2013 CIT v/s. Procter and Gamble Home Products Ltd. Dated January 19, 2015 (2015) 377 ITR 66 (Bom); ITA No.269 of 2013 CIT v/s. SBI dated February 4, 2015 (2015) 375 ITR 20 (Bom); ITA No.330 of 2013 DIT v/s. Citibank N. A. dated March 11, 2015 – (2015) 377 ITR 69 (Bom).

(vi) Filing of appeal under Section 260-A of the Act is a serious issue. The parties who seek to file such appeals (which are normally after two tiers of appeal before the authorities under the Act) must do so after due application of mind and not raised frivolous/ concluded issues. This is certainly expected of the State.”

7. This has also been recorded in our order dated 21st December, 2015 in Commissioner of Income Tax Vs. Jsons Foundries Pvt. Ltd. (Income Tax Appeal No.2115 of 2013). We had occasion to comment on this even in our order dated 6th January, 2016 in CIT Vs. Russan Pharma Ltd. (Income Tax Appeal No.2354 of 2013) However, inspite of numerous orders being passed by us, we notice that the officers of the Revenue are not complying with our aforesaid directions. This leads to likelihood of arbitrary action on the part of the Revenue Officers to pick and choose the assessee in respect of whom, they would prefer an appeal to this Court. This is not expected of the State whose duty is to be fair to all assesseees and treat them equally. This infact is an essential of the Rule of Law.

8. The Registry is directed to serve a copy of this order upon the Chief Commissioner of Income Tax, who must explain by filing a necessary affidavit indicating the steps being taken by the Commissionerates to ensure that the

directions of this Court are complied. This only to ensure that the assesseees are not put to unnecessary harassment in view of likely arbitrary action on the part of the Officers of the Revenue. The affidavit must be filed before the next date of hearing.”

6. Consequent to the above directions, the Principal Chief Commissioner of Income Tax has filed an affidavit dated 18th January, 2016. The affidavit relies upon the order of this Court in ***The Commissioner of Income Tax-10 Vs. M/s. Synchem Chemicals (I) Ltd.*** in Income Tax Appeal No.1812 of 2013 rendered on 13th October, 2015 wherein we had observed as under :-

“7. One of the basic feature of Rule of Law is certainty of law and uniform application of law amongst all the assesseees i.e. equal treatment. Thus, where the Tribunal has taken a view on a legal issue and the Revenue has in turn either accepted it or challenged it in a higher forum, then where a subsequent order of the Tribunal follows the earlier order of the Tribunal, then the assessee must be treated in the same manner in which the assessee in the earlier case has been treated. However, there could be valid reasons for the Revenue to take a different view in this case, then that taken in the earlier case, then the reasons for the same must be set out in the memo of appeal or at least before the hearing in an affidavit filed by the Officer of the Revenue before the Court. The State cannot act arbitrarily to pick and chose the orders from which appeals would be filed.

8. In fact we have time and again in numerous orders (see DIT(IT) v/s. Credit Agricole Indosuzz 377 ITR 102, CIT v/s. Proctor and Gamble Home Production Ltd. 377 ITR 66, CIT v/s. SBI 375 ITR 20 and DIT v/s. Citi Bank 377 ITR 69) had emphasized the need for equal treatment at the hands of the State. In the circumstance, we had requested the State

that in case the order being challenged before the Court has merely followed its earlier order and the Revenue has accepted the same by not filing an appeal, then the Officer concerned must justify the filing of the appeal in this case either in its appeal memo or by filing a separate affidavit. However, to our dismay, no action is taken by the Revenue as is evident from the attitude of the Revenue to our above directions in this case. In fact, copies of some of the earlier orders were communicated not only to the Chief Commissioner of Income Tax but also to the Central Board of Direct Taxes but to no avail.”

7. Consequent to the above, it appears that the Commissioner of Income Tax (Judicial) had on 2nd November, 2015 issued a communication addressed to all the Principal Commissioners in Mumbai that the directions given in para 9 of this Court in *M/s. Synchem Chemicals (I) Ltd (Supra)* should be followed. The circular in particular states as follows :-

“Where the impugned order of the Tribunal relies upon its earlier order in another matter and follows it by stating that the facts are identical, then in such cases where an appeal is filed from the subsequent order, the memo of appeal should mention whether any appeal has been preferred from the earlier order.

If it is accepted, the reason for pursuing the impugned order in appeal before this Court must be indicated.

If it is not recorded in the appeal memo, the Officer should file an affidavit indicating the above facts.”

8. In spite of the aforesaid decision of this Court and the Circular being relied upon in the affidavit dated 18th January, 2016 filed by the

Principal Chief Commissioner of Income Tax, the fact is that the same is not being implemented by the Officers of the Revenue as evident from our order dated 12th January, 2016 as extracted hereinabove and the Commissioners seem to turn a Nelson's eye to it. We would have expected the Principal Chief Commissioner of Income Tax to point out as to what steps are being taken at the Commissionerate level to ensure that the Officers of the Revenue follow the decisions of this Court as recorded in the Communication dated 2nd November, 2015 issued by the Commissioner of Income Tax Officer (Judicial)-2, Mumbai. That issue has not been addressed at all in his affidavit dated 18th January, 2016.

9. We shall now take up the three questions raised in the present appeal.

10. So far as question (a) is concerned, the Tribunal has followed the decision of this Court in *Godrej & Boyce (Supra)*. The above decision according to the Revenue was subject to challenge by the Revenue before the Supreme Court and the same according to the Revenue has been dismissed on 28th October, 2013. Therefore, question (a) as raised does not survive. Thus, this question is not entertained.

11. So far as questions (b) and (c) are concerned, the Revenue has already accepted the earlier order of the Tribunal in case of the same respondent assessee for Assessment Year 2002-03 (ITA No.3858/Mum/2006) which has been merely followed by the impugned order. There is no justification shown warranting filing of an appeal from the impugned order, when it has merely followed the earlier orders in Assessee's own case for the Assessment Year 2002-03. Mrs. Bharucha states that the Department has accepted the decision of the Tribunal rendered in the case of Respondent Assessee for the Assessment Year 2002-03, which has been followed by the impugned order. Although no affidavit has been filed indicating the reasons as to why the Revenue has preferred the present appeal on the above two issues when the earlier order of the Tribunal for the Assessment Year 2002-03 has been accepted by the Revenue. The statement is made by Mrs. Bharucha is on the basis of instructions given by one Mr. Rajesh Kumar Yadav in his letter dated 15th January, 2016. The same is taken on record and marked "X" for identification. Accordingly, questions (b) and (c) also do not raise any substantial question of law and are not entertained.

12. The Revenue has mentioned no reasons for pursuing question (a)

when according to them, it is concluded by the Apex Court against them save that an SLP has been filed from an order of this Court for Assessment Year 2000-01.

13. We called for the order dated 28th October, 2013 of the Apex Court dismissing the Revenue's appeal against the order of this Court in Godrej & Boyce Mfg. Co. Ltd. (Supra). We find that the Supreme Court by its order dated 28th October, 2013 has only dismissed the Revenue's SLP from the order of this Court in Godrej & Boyce Mfg. Co. Ltd. (Supra). However, on perusal of the order dated 28th October, 2013 of the Supreme Court dismissing the Revenue's SLP, there is justification for the Revenue to prosecute this appeal on question (a) as only an SLP filed by the Revenue challenging the order of this Court in Godrej & Boyce Mfg. Co. Ltd. (Supra) has been dismissed. Thus, it is not a case where the order of this Court in Godrej & Boyce Mfg. Co. Ltd. (Supra) has merged into the order of the Apex Court dismissing the appeal after grant of leave. However, it would have been better if the above reason was taken by the Revenue and mentioned in an affidavit filed by it along with a copy of the order dated 28th October, 2013 of the Apex Court dismissing the Revenue's SLP from the order of this Court in Godrej & Boyce Mfg. Co. Ltd. (Supra). This would have

ensured that there is due application of mind on the part of the Officers of the Revenue including the impact of the order of the Apex Court to this appeal before pressing its appeal on the above issue. It appears that the question (a) was being pressed by the Revenue, even though it was accepted by them that the issue is concluded against them by the decision of the Apex Court dated 28th October, 2013. It is only when we called for the order dated 28th October, 2013 and perused the same, that we saw some justification in law on the part of the Revenue for pressing question (a) in the appeal.

14. So also issue at question nos. (b) and (c) stand concluded as noted above. The Officers could have instructed its Counsel not to press questions (b) and (c) before 12th July, 2016 when the appeal was first on board as they have now done in the letter dated 15th January, 2016.

15. We cannot help but note that all steps taken by the higher echelons of the executive to make the tax regime business friendly, would all come to a naught unless at the ground level the attitude changes. It appears that inspite of the fact that we have on numerous occasions made observation as reproduced in paragraph 5 and 6 above,

it has not made any difference to the Commissionerates. We once again direct the Commissionerates to follow our directions and make it clear that after this order is published on the website of this Court, if any appeal reaches hearing for admission and if the same raises question covered by earlier orders as is evident from the order of the Tribunal, we may be constrained to impose costs on the Assessing Officer concerned and also on the Commissioner heading the Commissionerate for not following our directions. Time, if any, given after the appeal reaches hearing to file an affidavit may be only on payment of personal costs by the Assessing Officer and Commissioner of Income Tax heading the Commissionerate.

16. The Registry is directed to serve a copy of this order not only to the Principal Chief Commissioner of Income Tax but also on the Central Board of Direct Taxes.

17. With the aforesaid observations, the appeal is dismissed.

(B.P. COLABAWALLA, J.)

(M.S. SANKLECHA, J.)