IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION (REVIEW) NO.8 OF 2011
AND
TAX APPEAL NO. 16 OF 2007

The Commissioner of Income Tax
having Office at
Aayakar Bhavan,
Patto Plaza, Panjim. ……. **Applicant.**

V/s

M/s. Velingkar Brothers
Veling, Mardol, Goa. …..... **Respondent.**

Ms. Amira Razaq, Junior Central Govt. Standing Counsel for the Applicant.

Mr. S. M. Singbal, Advocate for the respondent.

CORAM :- ANOOP V. MOHTA &
NUTAN D. SARDESSAI, JJ.

Date :- 15/03/2017.

ORAL JUDGMENT :- (PER ANOOP V. MOHTA, J.)

This is a review application under the Income Tax Act, 1961 (the Act). By common order dated 12^{th} August, 2016, in view of its earlier order in ***Commissioner of Income Tax, G vs. Meghalaya Steels Ltd.,*** 377 ITR 112, after considering the position of law and specifically referring to Section 260A(7) of the Act, the Supreme Court has concluded as under :

> "3. Before this Court, an affidavit has been filed by the Revenue explaining how the notional tax effect is far beyond the amount of Rs.2,00,000/- (Rupees two lakh). Moreover, in ***Commissioner of Income Tax, G vs. Meghalaya Steels Ltd.,*** decided on 5th August, 2015 a view has been taken by this Court that the review would be available in respect of the orders passed under Section 260A of the Income Tax Act, 1961.
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> 4. In view of the above, we allow the appeals and set aside both the orders dated 25th August, 2010 and 28th March, 2012 passed by the High Court in Tax Appeal No.7 of 2004 and Civil Application (Review) No.26 of 2010 respectively and request the High Court to decide the review petition and thereafter the appeal itself, if so required, on merits. We also make it clear that we have expressed no opinion on the merits of any of the contentions of the parties."

2. The matters are, accordingly, listed today with other connected matter i.e. Civil Application (Review) No.26 of 2010 in Tax Appeal No. 7/2004. Heard Ms. A. Razaq, learned Counsel appearing for the applicant and Mr. S. Singbal, learned Counsel appearing for the respondent, finally.

3. Admit. Learned Counsel appearing for the respondent

waives service. Heard forthwith, with the consent of the learned Counsel.

4. The basic event and the back-ground, are as under :

On 30/10/2000, the assessee-respondent filed its return of income for Assessment Year 2000-01, with all statutory and other documents/particulars and claimed deduction under Section 10B of the Act to the tune of Rs.1,25,48,077/-. They declared net loss of Rs.15,39,000/- in mining division and a profit of Rs.1,40,48,077/- under EOU Division and claimed deduction of Rs. 1,25,48,077/-. The total income was nil and refundable was shown as Rs.21,779/-, plus interest. By order dated 15.11.2000, the Assessing Officer (AO) accepted the tax returns filed by the respondent, ordered refund of Rs.23,515/- towards tax and interest, as claimed in the return under Section 143(1) of the Act. On 28/08/2003, the Assistant Commissioner of Income Tax Circle 2(1), Panaji, issued Notice under Section 148 of the Act to the respondent alleging that the respondent's income of Rs.30,80,513/- for the Assessment Year 2000-01 had escaped assessment within the meaning of Section 147 of the Act and therefore issued a notice. The respondent filed its reply dated 19th September, 2003 to notice dated 28th August, 2003 informing the

ACIT that the respondent had already filed return of income for the Assessment Year 2000-01 on 30th October, 2000 which may be treated as having filed in response to the notice. The AO passed order dated 15th February, 2005, under Section 147 of the Act, computing taxable income at Rs.3,51,292/- after allowing deductions under Section 10B of Rs.97,33,337/- and the tax payable had been shown as Rs.2,26,062/- under reassessement under Section 143(3), read with Section 147 of the Act. Though the respondent did not claim depreciation under Section 32(1) of the IT Act, but the AO allowed the same stating that depreciation allowance under Section 32 is mandatory and it is bound to allow whether the respondent claims it or not. The respondent considered the Bank interest as business income and business loss from mining division and it has been reduced. However, the AO stated that this income was not business income and the same had been shown as income from other sources. On 11th April, 2005, the respondent filed an appeal challenging order dated 15th February, 2005 before the Commissioner of Income Tax (Appeals) on the grounds mentioned in the appeal.

The Commissioner of Income Tax vide order dated 8th November, 2005 dismissed the respondent's appeal. In the order, the Commissioner of Income Tax allowed depreciation in the mining division not claimed by the respondent and rejected the claim of the respondent that the interest on bank deposits was business income.

On 16th January, 2006, the respondent challenged order dated 8th November, 2005 before the Income Tax Appellate Tribunal, on the grounds mentioned in said appeal. By an order dated 23/02/2006, the Tribunal allowed the appeal accepting the respondent's contention that the depreciation in mining division was optional and interest on bank deposit was business income.

Being aggrieved, the appellant (the Revenue Department) filed Tax Appeal No.29/2006 for the Assessment Year 2000-01 before this Court under Section 260A of the Act. By order dated 28/09/2010, this Court disposed of the Tax Appeal as the total amount of liability to tax was Rs.2,26,062/- and as per the Circular No.5/2008 dated 15/5/2008 of the C.B.D.T. and the decision of the Court in ***CIT vs. Pithwa Engg. Works***, 2005(5) Bom. C.R. 41, the appeals before the High Court were the tax effect is below Rs.4,00,000/- were not to be pursued. The Division Bench of this Court in ***CIT Vs. Madhukar K. Inamdar (HUF),*** while dealing with the CBDT Circular No.5 of 2008 dated 15.5.2008 and its retrospective effect, held that if the tax effect is less than Rs.4,00,000/- the Department should not file appeals in such cases and has recorded in paras 4 and 5 of the Judgment thus :

> “(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.
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> (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”

Being aggrieved, the appellant filed Review Petition No.8/2011 before this Court seeking review of order dated 28/09/2010 in Tax Appeal No.29/2006. In the application for review, the notional tax effect is shown as Rs.8,48,453/-. This Court vide order dated 28/3/2012, dismissed the review petition, along with four other petitions holding that the same were not maintainable and the Revenue could not seek review of the order passed by the Division Bench in the tax appeal.

Being aggrieved by orders dated 28/09/2010 and 28/03/2012, passed by this Court, the Commissioner of Income Tax filed Special Leave Petition (Civil) before the Supreme Court being SLP No.10603 – 10604 seeking review of the order of this Court. The appellant filed affidavit in rejoinder before the Hon'ble Supreme Court stating that in case the notional value is considered, the tax effect would be Rs.9,92,175/-. The Supreme Court vide Order dated 12/8/2016, allowed the appeal and set aside the said orders of this Court and directed to decide the review petition and thereafter appeal itself if so required, on merits. No opinion on merits of any of the contentions of the parties was expressed by the Supreme Court. The issue, therefore, with regard to applicability of such circular, keeping in mind that the tax liability in pending references and/or appeal, has already been concluded.

5. The learned Counsel appearing for the parties have placed on record the Circular No.21/2015 which is in reference to the Board's instruction No.5/2014 dated 10/07/2014 and basically referring the issue of monetary limits and other conditions for filing departmental appeals (in income tax matters) before the Appellate Tribunal and High Court and SLP before the Supreme Court with a view to take effective measures for reducing the litigation. The basic clauses of the Circular No.21/2015 are reproduced below :

> “3. Henceforth, appeals/ SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder: -

S.No.	Appeals in Income-tax matters.	Monetary Limit (in Rs.)
1	Before Appellate Tribunal	10,00,000/-
2	Before High Court	20,00,000/-
3	Before Supreme Court	25,00,000/-

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as "disputed issues"). However the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against."

This Circular was not placed before the Supreme Court, though in the field prior to the date of Supreme Court's order.

6. A Division Bench of this Court in ***Commissioner of Income Tax vs. Sunny Sounds P. Ltd.,*** (2016) 381 ITR 443 (Bom), after considering the Circular No.21/2015, referring to Section 260A of the Act and keeping in mind the tax effect not exceeding the monetary limits given under the Circular, so referred above, accepted the position, by giving effect to the Circular, in paras 6, 8 and 9, in following words :

> "6. We find that Circular Dt. 10 Dec, 2015 is identically worded to the Instructions No. 5, Dt. 10th July, 2014 save and except enhancement of the threshold limit for the purpose of Revenue pursuing its appellate remedies inter alia before the High Court, specifically providing for the retrospective operation of the 2015 Circular so as to apply to pending appeals and directing that the pending appeals be withdrawn and/or not pressed. In the above view, we follow our decisions in Computer Points (I) Ltd. (supra), Dempo Mining Corporation (supra) and Sanrit Hotel, Madgao, Goa (supra) and hold that even though the 2015 Circular does not specifically refer to references just as the Instruction No. 5, of 2014, it should apply even to pending references under s. 256 of the Act. This is so as the entire objective of the circular in having been made retrospective is that the Court should concern itself with grievances of the Revenue having substantial financial stake in terms of the tax involved and normally

the decision of the Tribunal upto the value of Rs. 20 lacs even if it is adverse to the Revenue should be accepted. The circular in para 6 thereof protects the interest of the Revenue by providing that where it does not pursue appellate remedies in view of the low tax effect as provided therein, it would not be held against the Revenue for any other assessment year in respect of the same assessee or even in respect of any other assessee, if the tax effect involved in those cases is higher than the threshold limits specified in the circular.

8. The need for the CBDT to issue the 15th Dec., 2015 Circular and to clarify that it would apply retrospectively to govern even pending appeals arose on account of the enormous increase in the number of appeals being filed by the Revenue over the years. ….Therefore, to enable the Revenue to focus on matters where the tax implication is above Rs. 20 lacs only such matters should be agitated in appeal before the High Court according to the circular. This policy of non-filing and of not pressing and/or withdrawing admitted appeals having tax effect of less than Rs. 20 lacs has been specifically declared to be retrospective by the Circular Dt. 10th Dec, 2015. There is no reason why the circular should not apply to pending references where the tax effect is less than Rs. 20 lacs as the objective of the circular would stand fulfilled on its application even to pending references more particularly bearing in mind that there are 1,149 number of references still awaiting disposal by this

Court and a large number of them would have tax effect of less than Rs. 20 lakhs.

9. In the above view, we hold that as admittedly, the tax effect is less than Rs. 20 lacs in the present reference application at the instance of the Revenue, the same is being returned unanswered. However, we make it clear that the question of law as raised for our opinion is left open to be considered in an appropriate case."

7. The Apex Court in ***Commissioner of Income-Tax vs. Surya Herbal Ltd.,*** (2013) 350 ITR 300 (SC) has recorded as under :

"Delay condoned.

Liberty is given to the Department to move the High Court pointing out that the Circular dated February 9, 2011, should not be applied inspo facto, particularly, when the matter has a cascading effect. There are cases under the Income-tax Act, 1961, in which a common principle may be involved in subsequent group of matters or a large number of matters. In our view, in such cases if attention of the High Court is drawn, the High Court will not apply the Circular ipso facto. For that purpose, liberty is granted to the Department to move the High Court in two weeks.

The special leave petition is, accordingly, disposed of."

In the present case, there is no issue of substantial nature or issue to have cascading effect.

8. In view of the position of law, as well as the facts so recorded above, we are inclined to dispose of the present review petition, basically in view of the order passed by the Supreme Court and the subsequent circular which was admittedly issued on 10th December, 2015, prior to the date of order passed by the Supreme Court 12/August/2016. There is no issue now that review is available under the Act.

9. After hearing the parties, we have noted that as rivals submissions and monetary value and/or the amount so involved even if it is accepted the case of the Department that it is more than Rs.4.00 lakhs, though the Counsel for the applicant based upon the event so recorded, submitted that it was always less than Rs.4.00 lakhs, the High Court therefore had taken note of the assessee's case and passed the order. The figure of Rs.8,48,453/- or Rs. 9,92,175/- was placed on record, treating it to be within the ambit of “notional tax effect”, as placed before the Supreme Court. This observation, as made, still keeping in mind the effect of the Circular No. 21/2015 and the law so laid down, we are of the view that there is no further discussion required to consider the case as the total tax effect is within the ceiling

of Rs.20.00 lakhs.

10. Admittedly, the review is maintainable and no further discussion is required on the maintainability of the review. However, the effect of Circular No.21/2015 just cannot be overlooked at the time of hearing of the review and even the appeal. The Circulars and the position of law on the date of hearing of this review petition and/or even otherwise, as clear and we are inclined to dispose of the present review petition, solely on the ground and the reasons so provided in ***Commissioner of Income Tax vs. Sunny Sounds P. Ltd. (supra)*** which is based upon Circular No. 21/2015. Based on the law and the facts so referred above, we have no option, but to dispose of this review application, solely on the foundation of the above circular as even the "notional tax" effect is not more than Rs. 20.00 lakhs.

11. Therefore, taking overall view of the matter and considering the position of law and record, without expressing anything on merits of the matter and specifically in view of the subsequent circulars which go to the root of the matter, we are disposing of the review accordingly. This, in no way overreaches the order passed by the Supreme Court as the direction is to hear the

review petition and if necessary to hear the appeal itself on merits as the review is maintainable. But, as the position of law referred above, in view of the circulars there is no option, but to pass appropriate orders in such review and even the appeals having tax effect including notional value of less than Rs.20.00 lakhs. We are inclined to dispose of this review petition & the appeal on this sole ground. This is also to avoid multiplicity and/or keeping the litigation pending. The instructions so reflected in the Circular No. 21/2015 of CBDT is in the interest of both, the Department, so also the assessee. We are just accepting the position basically on the facts and the record.

12. The review application and appeal dismissed accordingly. No costs.

NUTAN D. SARDESSAI, J. **ANOOP V. MOHTA, J.**

ssm.