IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.04.2018
Coram

The Hon'ble Mr.Justice T.S.Sivagnanam
&
The Hon'ble Mr.Justice N.Seshasayee

T.C.(A).No.901 of 2008

The Commissioner of Income Tax
Tamil Nadu- III, Madras. ...Appellant

Vs.

M/s. Ormed Medical Technology Ltd.,
162 Sidco Industrial Estate, Ambattur,
Chennai - 600 098. ...Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, "B" Bench, Chennai, dated 31.12.2007, passed in I.T.A.No.2116/Mds/2006.

For Appellant : Mr.M.Swaminathan
and
Mr. T.Ravikumar
Senior Standing Counsel

For Respondent : Mr.M.P.Senthil Kumar

JUDGEMENT

(Judgement of the Court was delivered by **T.S.Sivagnanam, J.,***)*

This Tax Case Appeal filed by the Revenue is directed against the order passed by the Income Tax Appellate Tribunal, "B" Bench, Chennai, (ITAT, for brevity) dated 31.12.2007, in I.T.A.No.2116/Mds/2006.

2. The Appeal has been admitted on the following substantial question of law:-

> Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law, in holding that the assessee is entitled to deduction under Section 80-O of the Act is valid law?

3. At the time, when the Appeal was taken up for hearing, the learned counsel for the respondent/assessee raised an objection to the hearing of this Appeal by placing reliance on Circular No.21 of 2015, dated 10.12.2015, which prescribed monetary limits for preferring the Appeal, or pursuing the pending Appeals by the Revenue, if the tax effect is less than Rs.20,00,000/-. In support of the said contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court, in **Director of Income Tax, New Delhi Vs. M/s. S.R.M.B. Diary Farming (P) Ltd.**, reported in **[(2018) 4 9 (SC)].** It is pointed out that, the tax effect in the present Appeal would be only Rs.3,50,000/-, and the monetary limit is only Rs.9,00,000/- far below Rs.20,00,000/-, the monetary limit fixed in Circular No.21 of 2015, dated 10.12.2015. Therefore, the learned counsel submits that the Appeal is liable to be rejected.

4. Mr. T.Ravikumar, the learned Senior Standing Counsel for the appellant/Revenue has placed before this Court a compilation consisting of Circulars/Instructions and Judgments on this issue and pyramids his argument by referring to Circular/Instruction one by one.

4.1) By referring to the Instruction No.1979 issued by the Central Board of Direct Taxes (CBDT), dated 27.03.2000, it is submitted that the monetary limit was fixed at Rs.2,00,000/- for filing Appeals under Section 260-A of the Act, subject to the condition contained in clause 3 and the

Instruction to take effect from 01.04.2000. It is submitted that, subsequently, Instruction No.2 of 2005, dated 24.10.2005 was issued, increasing the tax effect to Rs.4,00,000/-, making it clear that the said Circular, dated 24.10.2005, would come into effect from 31.10.2005 and not retrospectively, and for the earlier period, Instruction No.1979, dated 27.03.2000 would govern the proceeding. By referring to Circular No.5 of 2008, dated 15.05.2008, it is further submitted that, while retaining the monetary limit of Rs.4,00,000/-, and imposing usual conditions, it is stated that Instruction will apply to Appeals filed on or after 15.05.2008. However, the cases, where, the Appeals have been filed before 15.05.2008, they will be governed by the instructions on the subject operative at the time when the Appeals were filed.

4.2) The learned Senior Standing Counsel drew the attention of the Court to the Instruction No.5 of 2007, dated 16.07.2007, wherein, the Central Board, while reiterating Para 3 of the Instruction No.2 of 2005, has substituted Instruction No.1979, dated 27.03.2000 and stated that, the subsequent Instruction No.1985, dated 29.06.2000 and Instruction No.2 of 2005, dated 24.10.2005, will continue to govern the decision for filing of

Departmental Appeals. The said Instruction No.5 of 2007, dated 16.07.2007 will come into effect from 16.07.2007.

4.3) The learned Senior Standing Counsel referred to the Circular, dated 02.09.2011, for the purpose that, Appeals filed on or after 09.02.2011, would be governed by the old instructions operative at the time of filing of Appeal. It is further submitted that, in Instruction No.3 of 2011, dated 09.02.2011, the monetary limit for filing Appeals under Section 260A was increased to Rs.10,00,000/-, however, it was made applicable only prospective and the earlier Instruction would govern the Appeals filed on or after 2011. The learned Senior Standing Counsel also invited the attention of this Court to Instruction No.5 of 2014, dated 10.07.2014, where, the monetary limit, while being retained at Rs.10,00,000/-, held that, it will be applicable to the Appeals filed on or after 10.07.2014.

4.4) After referring to the above Circulars, the learned Senior Standing Counsel for the Revenue has drawn the attention of this Court to the decision of the Hon'ble Supreme Court, in **Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries**, reported in

[(2008) 13 SCC 1], for the proposition that, Circulars and Instructions issued by the Central Board of Excise and Customs (CBEC) are, no doubt, binding in law on the Authorities under the respective statutes, but, when the Hon'ble Supreme Court, or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the Circular should be given effect to and not the view expressed in a decision of the Hon'ble Supreme Court, or the High Court.

4.5) Reliance was placed on the decision of the Hon'ble Full Bench of Punjab and Haryana High Court, in **Commissioner of Income Tax III, Ludhiana Vs. Varindera Construction Co. Baghapurana**, reported in **[(2011) 331 ITR 449 (P & H)]**, wherein, Instruction No.5 of 2008, dated 15.05.2008, was dealt with, and, it was held that, the Circular, laying down monetary limit controls the filing of the Appeals and not their hearing.

4.6) Further, the learned Senior Standing Counsel referred to the decision of the Hon'ble Supreme Court, in **Commissioner of Income Tax Vs. Century Park** reported in **[(2015) 373 ITR 32 (SC)]**, wherein, the effect of Instruction No.3 of 2011, dated 09.02.2011, was examined, and it is pointed out that, Circulars cannot be mechanically made applicable. Referring to yet another decision of the Hon'ble Supreme Court, in **Commissioner of Income Tax, Bangalore Vs. Gemini Distilleries**, reported in **[(2017) 398 ITR 343(SC)],** it is submitted that the Hon'ble Supreme Court has held that, CBDT cannot issue any Circular, having retrospective operation.

4.7) Further, the learned Senior Standing Counsel has referred to the decision of the Hon'ble Supreme Court, in **CIT Vs. Surya Herbal Ltd.,** reported in **[(2013) 350 ITR 300],** and submitted that, in the said decision, the Hon'ble Supreme Court pointed out two caveats, where, the retrospective applicability of the Circular was not interfered with viz., (i) the Circular should not be applied by the High Courts *ipso facto*, when the matter had a cascading effect (ii) Where common principles may be involved in subsequent group of matters or a large number of matters. With these two caveats, the Hon'ble Supreme Court observed that, in such cases, the attention of the High Court would be drawn and the Department was even given liberty to move the High Court within a time frame.

5. Thus, it is submitted that the Circular cannot have retrospective effect and can only be prospective and the Circulars only speak about the filing of Appeals and not hearing of Appeals.

6. Mr.M.P.Senthilkumar, the learned counsel appearing for the respondent/assessee has drawn the attention of the Court to the decision of the Hon'ble Supreme Court, in the case of **S.R.M.B.Diary Farming (P) Ltd.**,(supra) which has dealt with the effect of Circular No.3 of 2011, dated 09.02.2011, and after taking note of the certain decisions on the point has held that the Circulars/Instructions would apply to appeals to be filed as well as pending appeals and the judgment puts at rest all controversies on the issue and the judgment is a straight answer to the contentions advanced by the learned Senior Standing Counsel for the Revenue.

7. To decide the point in issue, we wish to first take note of the decision of the Apex Court in the case of **S.R.M.B.Diary Farming (P) Ltd.**,(supra), more particularly, para No.24, which is as follows:-

> " 24. We are of the view that the matter needs to be put to rest and a clarity be obtained in view of the impact of this issue on pending cases before the High Courts as well as the cases which have been disposed of by various High Courts by applying the Circular of 2011 to pending litigations. In our view the matter has been squarely put to rest taking further care of the interest of the Revenue by the order passed by the three Judges Bench of this Court in ***Surya Herbal Ltd.*** case (supra), which had put two caveats even to the retrospective application of the Circular. The subsequent orders have been passed by the two Judges Bench without those orders being brought to the notice of the Court, a duty which was cast on the Department to have done so to avoid the ambiguity which has arisen. Thus, the said view of the three Judges Bench would hold water and the Circular would apply even to pending matters but subject to the two caveats provided in ***Surya Herbal Ltd.*** case (supra)."

8. As rightly pointed by the learned counsel appearing for the respondent/assessee, the judgment delivered by the Hon'ble three Judges Bench of the Hon'ble Supreme Court, in **Surya Herbal Ltd.** case (*supra*), which was followed by the Hon'ble two Judges Bench in the case of **Gemini**

Distilleries (*supra*) was not brought to the attention of the Apex Court, in **CIT Vs. Suman Dhamija** reported in **[(2015) 60 taxmann.com 460 (SC)],** and the Hon'ble Supreme Court also noted that, in **Century Park** case (*supra*), the line adopted by the three Judges Bench in **Surya Herbal Ltd.** case (*supra*) has been followed. It is relevant to point out that, Circular No.21 of 2015, dated 10.12.2015 makes the matter explicit and is useful to reproduce the operative portion of the Circular :-

> "This instruction will apply retrospectively to pending Appeals and appeals to be filed henceforth in High Courts/Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time, when such appeal was filed."

9. Thus, the above Circular, dated 10.12.2015 makes it clear that the instruction will apply retrospectively to pending appeals and the Appeals to be filed henceforth before the High Courts and the Tribunals. We wish to add that, this condition contained in the Circular, dated 10.12.2015, was not contained in the earlier Circulars, which stated that the circulars were prospective in operation and the Appeals filed earlier were to be governed by respective instructions, which were holding the field at the time of filing of Appeals.

10. An argument was advanced by the learned Senior Standing Counsel for the Revenue that the circular can have effect only, while filing the appeal and not while hearing of the appeal and would have no impact on the appeals, which are admitted and pending. However, in the Circular issued in the year, 2015, it has been made clear that, it will apply to pending appeals as well. In respect of the earlier circulars, it would be relevant to take note of the decision of the Hon'ble Supreme Court in **Mathew M. Thomas Vs Commissioner Of Income-Tax [(1999) (III) ELT 4 SC]** wherein, the Hon'ble Supreme Court, while considering the effect of Circular No.445, dated 16.05.1986, pointed out that Circular No. 455 dated 16.5.1986 issued by the C.B.D.T. is applicable to all pending proceedings which have not attained finality under Section 269 I of the Act as defined in the explanation to the said Section.

11. Thus, subject to the two caveats, which have been pointed by the Hon'ble Supreme Court, in **Surya Herbal Ltd.** case (supra), the Circular issued in the year, 2015 will apply to all the pending Appeals. It appears that, despite Circular beings issued and more particularly, the Circular, dated 10.12.2015, appeals have been filed by the Revenue and when this came to the notice of the CBDT, Circular No.5 of 2017 dated 23.01.2017 was issued and the operative portion of which is as follows :-

> "3. However, it has been noticed that para 8 (c) of Circular No.21/2015, regarding cases where addition made on account of Revenue Audit Objection is deleted, is being erroneously interpreted and appeals are being mechanically filed by the Department without proper examination of the case on merits. This is contrary to the instructions contained in Circular No.21/2015 and Circular No.8/2016. It is, therefore, clarified that the import and intent of para 8 of the Circular No.21/2015 is that even on issues mentioned in the said para, appeals against the adverse judgment should only be filed on merits.
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> 4. Accordingly, henceforth, appeals should not be filed by the Department in violation of instructions

mentioned above. Further, appeals that may have been filed in violation of these instructions may be withdrawn.

5. The above may be brought to the notice of all concerned."

12. The Appeal before us was filed in the year, 2008, precisely, on 09.06.2008, and the Instruction, which was holding the field at the relevant period was Instruction No.5 of 2008, dated 15.05.2008. Under the said Instruction, this Appeal could not have been filed, because, the monetary limit fixed in the circular was Rs.4,00,000/-. This is a valid reason to reject the appeal.

13. Thus, for the above reasons, we find that the Circulars have retrospective effect. At this stage, we wish to point out that, even the expression "retrospective effect" as worded in the impugned circular, has been misunderstood, as if, to mean the retrospective effect of a Statute or a Rule or Section in a statute. The word 'retrospective' used in the Circular could at best mean that it is for the Department not to prosecute the matters when the tax effect is less than the threshold limit prescribed in the respective Circulars. If this interpretation is given, much of the confusion, which has revolved around the interpretation of the Circular would stand effaced.

14. Therefore, the Circular has to be understood as part of the litigation policy of the Government of India to reduce the litigation and to bring down the number of Appeals, which are pending before the Court and also ensure that the Appeals are not preferred by the Department without proper examination of the case on merits. Having held so, we will have to examine as to whether, in the instant case, any of the two caveats, which were pointed by the Hon'ble Supreme Court, in **Surya Herbal Ltd.,** case (supra) would apply, viz., the circular, if applied, would have a cascading effect and where common principles may be involved in subsequent group of matters or a large number of matters. Mr. M.Swaminathan, the learned Senior Standing Counsel for the Revenue does not dispute that none of the two caveats would stand attracted to the facts of the case on hand. Thus, the circular issued by the CBDT would apply to the present case.

15. As per the Circular/Instruction issued by CBDT, the present Appeal should be not pressed by the Revenue. If, at the time of filing of the Appeal, decision has to be taken whether to file an Appeal or not and the Authority by due application of mind and bearing the two caveats laid down by the Hon'ble Supreme Court, in **Surya Herbal Ltd.,** case (*supra*) should take a decision. In cases, where, the Appeals are pending before the Court, appropriate Officer has to take a decision. In the instant case, it appears that, no such specific instruction is issued to Mr.M.Swaminathan, the learned Senior Standing Counsel to withdraw the Appeal, nor, can we compel the learned counsel to withdraw the Appeal.

16. Having held that the Circular issued by CBDT is applicable to the case on hand and the tax effect being less than the threshold limit prescribed in the Circular. Therefore, we dismiss the present Appeal by applying the law laid down by the Hon'ble Supreme Court, in **Surya Herbal Ltd.,** case (*supra*), as the two caveats mentioned thereunder does not arise in the instant case.

17. In the result, the Tax Case Appeal is dismissed for the above reasons. Consequently, the question of law, which is raised for consideration in this Appeal is left open. No costs.

T.S.S.J., N.S.S.J.,
18.04.2018

sd
Index : yes/no
Speaking Order/Non speaking

To
The Income Tax Appellate Tribunal,
Madras 'A' Bench, Chennai.

T.S.Sivagnanam,J.,
&
N.Seshasayee, J.,

sd

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