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

INCOME TAX APPEAL NO.987 OF 2000

The Commissioner of Income Tax,
Central III, Mumbai. ...Appellant.
Vs.
M/s.Virendra & Co.,
274, New Darukhana, Mumbai-400010, ...Respondent.

Mr. D.K.Kamwal for the Appellant.
Mr. K.Shivaram along with Mr. Ajay Singh, Ms. Renu Choudhari i/by K.Gopal & P.K.Parida for the Respondent.

CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.

DATE : 20th July, 2012

JUDGMENT (Per M.S. SANKLECHA, J.) :

This appeal by the revenue under section 260A of the Income Tax Act, 1961 (hereinafter referred to as the "said Act") seeks to challenge the order dated 28th January, 2000 of the Income Tax Appellate Tribunal (hereinafter referred to as the "ITAT") relating to Assessment Year 1986-87. This appeal was admitted on 27th June, 2005 by this court on the following substantial questions of law.

1 Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.21,08,457/- having accepted that ins the line of business carried

on by the assessee, generation of scrap was always determined by the type of vessel borken by the assessee and in the absence of documentary evidence and records, the assessee's contentions with regard to the generation of non ferrous scrap could not be accepted?

2 Whether in the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.21,08,4578/- when the Assessing officer had made the addition on the basis of the report of a Committee appointed by the Ministry of Steel and Mines and was backed by cases engaged in the similar line of business?

3 Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in deleting the addition of Rs.21,08,457/- without bringing on record details and documentary evidences to show that the condition of the ships broken by the assessee justified the generation of scrap at 0.81% only?

2 Brief facts leading to this appeal are as under:

a) The respondent-assessee carries on business of ship breaking. In its return of income filed for the Assessment Year 1986-87 the respondent had claimed that scrap

generated and sold from the breaking of ships was in the aggregate of 7144 metric tons and out of which 0.81% i.e. 57.95 metric tons was non ferrous metal. The Assessing officer while determining the respondent's income for the Assessment Year 1986-87 by an order dated 30th March, 1989 was of the view that the non ferrous metal which was generated and sold was 2% of the total recovery of scrap i.e. 142.88 metric tons and for this purpose the Assessing officer relied upon the scrap generated by the three other ship breaking units being assessed by him. Consequently, the Assessing Officer concluded that the excess non ferrous metal as determined by him had been sold generating an income of Rs.21.08 lacs which had not been disclosed. This amount of Rs.21.08 lacs was added to the respondent-assessee's income as income from undisclosed sources.

b) The Commissioner of Income Tax (Appeals) by an order dated 3rd August, 1990, upheld the order of the Assessing officer.

c) The ITAT by its order dated 20th January,2000 allowed the respondent's appeal. The ITAT held that there cannot be any standard measure of generation of scrap while carrying out the activity of ship breaking. This is because generation of scrap would always depend upon the type of the vessel being broken. In the circumstances, there cannot be any objective standard. Further, the ITAT also held that the cases of other ship breakers being relied upon by the

Assessing officer to conclude that generation of non ferrous scrap is in excess of 2% cannot be relied upon as the same was never put to the respondent-assessee so as to enable the respondent assessee to deal with the same.

3) The ITAT on the basis of the evidence before it has come to the conclusion that 0.81 % of the total recovery being attributed to non ferrous scrap generated during the course of ship breaking by the respondent assessee was correct. It is pertinent to note that the respondent assessee had maintained excise record and its books were audited and the department does not challenge the purchases and sales reflected in the respondent's books of accounts. It is important to note that between 0.90% to 1.40% of non ferrous scrap being generated out of the total scrap on the activity of ship breaking has been accepted by the department upto the Assessment Year 1990-91.The Advocate for the respondent-assessee points out that even for subsequent assessment years 1992-93 to 1996-97, generation of non ferrous scrap at 0.81% had been accepted by the department.

4) The finding of the ITAT is one of fact and the same cannot be said to be perverse. No substantial question of law therefore, arises for the determination by this Court.

5) It must also be pointed out that though we have dismissed the appeal filed by the Revenue on merits, the appeal itself would not be entertainable as the tax effect in the present appeal would be only Rs.5.69 lacs. The appeal was filed in June, 2000. Our Court in the matter of **CIT Vs. Vijay V.Kavekar in Income Tax Appeal No.78 of**

2007 dated 29th July, 2011 held that the CBDT Circular No.2/2011 issued on 9th February 2011 directing the Revenue not to file appeals under Section 260A in cases where the tax effect is less than Rs.10/- lacs. The said circular has retrospective effect and would also apply in respect of pending appeals. Consequently, the appeal would also not be entertained on the ground that the tax effect is less than Rs.10/- lacs.

6) Appeal is dismissed. No order as to costs.

(M.S. SANKLECHA, J.) **(S. J. VAZIFDAR, J.)**

IN THE HIGH COURT OF JUDICATURE OF BOMBAY,
BENCH AT AURANGABAD

TAX APPEAL NO. 78 OF 2007

The Commissioner of Income Tax, "Aayakar Bhavan", Near Holy Cross School, Cantonment, Aurangabad.

..APPELLANT

-VERSUS-

Smt. Vijaya V. Kavekar, L/H. of Late Shri Vijaykumar B. Kavekar, Deshpande Colony, Ausa Road, Latur, Dist. Latur.

..RESPONDENT

WITH

TAX APPEAL NO. 76 OF 2007

The Commissioner of Income Tax, "Aayakar Bhavan", Near Holy Cross School, Cantonment, Aurangabad.

..APPELLANT

-VERSUS-

Smt. Vijaya V. Kavekar, L/H. of Late Shri Vijaykumar B. Kavekar, Deshpande Colony, Ausa Road, Latur, Dist. Latur.

..RESPONDENT

.....

Shri Alok Sharma, Advocate for appellant.
Shri R.R. Chandak with Shri M.K. Kulkarni, Advocate for the respondent.

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(CORAM : SMT. NISHITA MHATRE AND M.T. JOSHI, JJ.

Judgement reserved on : 12th July, 2011
Judgement pronounced on : 29th July, 2011

JUDGMENT (PER SMT. MHATRE, J.)

1. Both these Tax Appeals are being heard together, as a common question arises in these appeals.

2. The Revenue has filed these appeals against the orders passed by the Income Tax Appellate Tribunal. The appeals have been filed for various assessment years against the same Assessee. A contention is raised on behalf of the Assessee in these appeals that since the tax effect in each appeal is less than the monetary limit of ₹ 10 Lacs prescribed in the Instruction no.2/2011 issued on 9th February, 2011 by the Central Board of Direct Taxes ('CBDT', for short), the appeals are not maintainable. According to the Assessee, there is a specific bar on the revenue to file appeals in view of the CBDT Instructions.

3. Shri Kulkarni, the learned Advocate appearing for the Assessee in these Tax Appeals has submitted before us that the CBDT Instructions, fixing the monetary limits for the revenue to file appeals before the High Court have been issued in consonance with the provisions of Section 268A(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). According to him, similar instructions had been issued by the CBDT at various points of time even prior to the insertion of Section 268A(1) in the Act. He submitted that these CBDT Instructions have been interpreted by this Court in various decisions and it has been held that they are applicable not only to new cases,

which may be filed by the revenue but also to the pending appeals. He submits, therefore, that since the tax effect in both these appeals is less than ₹ 10 Lacs, the appeals are not maintainable. The Tax effect in Tax Appeal no. 76 of 2007 for the assessment year 1989-90 is ₹. 5,29,625/- whereas the tax effect in Tax Appeal no. 78 of 2007 in respect of the assessment year 1988-89 is ₹ 2,28,040/-. He, therefore, submits that the appeals should be dismissed as the issue whether such appeals which are pending and are within the monetary limits set by the CBDT, are covered by the latest CBDT Instructions, is no longer *res integra*.

4. Prior to the amendment of the Income Tax Act, whereby Section 268 A has been inserted with retrospective effect on 1st April, 1999, the CBDT issued instructions from time to time, revising the monetary limits for filing departmental Appeals/ References before the Income Tax Appellate Tribunal, the High Courts and the Supreme Court as a measure of reducing litigation. For that purpose, the CBDT issued instructions on 27th March, 2000 that appeals under Section 260A or References under Section 256(2) before the High Court should be filed only when the tax effect was less than ₹. 2 Lacs. In clause no.3 of that Instruction, the revenue was directed to contest or appeal against the orders irrespective of the tax effect where (i)the Revenue Audit objection in the case has been accepted by the Department; (ii)the Board's order, notification, instruction or circular is the subject matter of an adverse order; (iii)prosecution proceedings are contemplated

against the assessee; and (iv)the constitutional validity of the provisions of the Act are under challenge. Clause 7 mentions that this instruction would come into effect from from 1st April, 2000.

5. This instruction was interpreted by the Division Bench of this Court in the case of ***"Commissioner of Income Tax V/s Pithwa Engg. Works"*** reported at ***"(2005) 197 CTR (Bom) 655.*** The contention of the learned Counsel for the Revenue in that case was that the instructions would be applicable only with respect to new cases and not pending ones, which is the same argument advanced by the learned Counsel for the Revenue in the present appeals. The Court noted that the corridors of the superior Courts were choked with a huge pendency of cases. It was therefore of the opinion that there was no justifiable reason to proceed with the References having a negligible tax effect, as the policy contained in the said instructions was applicable even to the old references, which were undecided by the Court till the issuance of the instructions.

6. Thereafter, on 24th October, 2005, Instruction No.2 of 2005 was issued by the CBDT. The earlier instruction of 27th March, 2000 and 29th June, 2000 were modified partially and the monetary limit was raised. Accordingly, appeals under Section 260A to the High Court could be filed, if the tax effect was below ₹. 4 Lacs. The Board also decided that in cases where there was substantial question of law of

importance and in cases where the same question of law would repeatedly arise, either in the case concerned or in similar cases, appeals should be filed on merits, without being hindered by the monetary limits imposed by the instruction. This instruction came into effect from 31st October, 2005.

7. The Division Bench of this Court in Tax Appeal no. 22 of 2004 decided on September 28, 2007 in the case of "***the Commissioner of Income Tax-II V/s Chhajer Packaging & Plastics Pvt. Ltd.,*** construed this circular, to mean that only such appeals, which were filed after the issuance of the instruction no 2 of 2005 would be governed by the Instruction. The Court held that the Instruction would not be applicable to pending appeals. It was observed that the Department is not prohibited from filing and pursuing appeals, where a substantial question of law arises or where the question of law, which is likely to recur in future, is raised. Thus, it was held that the Instruction would not apply to pending appeals.

8. In case of ***"Commissioner of Income Tax V/s Polycott Corporation" reported at "(2009) 138 ITR 144 (Bom),*** a another Division Bench of this Court construed the same instruction no. 2 of 2005, dated 24th October, 2005. The Division bench observed while construing the paragraph no.5 of the circular, as thus :

> "9. Having considered the contentions, in our opinion, the instructions cannot be interpreted as a statute though

it is pursuant to the power conferred under Section 268A of the IT Act. What the Court has to consider is the plain language of the para and the object behind the said provisions. The object appears to be not to burden Courts and Tribunals in respect of matters where the tax effect is less than the limit prescribed. Even before this Instruction, CBDT has been issuing instructions, the last one being on 24th Oct., 2005 where the monetary limit has been fixed. In those instructions the only exception had been that in cases involving substantial question of law of importance as well as in cases where the same question of law will repeatedly arise, either in the case concerned or in similar case, appeal should be filed without being hindered by the monetary limits. The present instructions seem even to limit the issues insofar as the same question of law or recurring issue except to the extent provided in para 5.

On a proper reading of para 5 of the instructions it would be clear that a duty is cast on the AO that even if the disputed questions arise for more than one assessment year then an appeal should be filed only in respect of those years where the monetary limit as specified in para 3 of the instructions. The exception, however, is carved out in respect of a composite order of the High Court or appellate authority. In other words where the High Court or Tribunal has passed a composite order in respect of the same assessee on the same question and/or on different question and for one of the assessment years, the tax effect is more than the monetary limit then the appeal shall also be filed in respect of all the assessment years. The submission on behalf of the assessee is that the composite order must relate to a common issue. We beg to disagree on a plain and literal construction of the instruction. The expression "which involves more than

> one year" would have no meaning if it was restricted only to the expression "common issues". The expression, therefore, of a composite order will have to be read to mean an order in respect of the same assessee for more than one year. An (order) disposing of several appeals on a common question of law by appellate authority, cannot be said to be a composite order as the order involves appeals by different persons, which appeals for the sake of convenience have been only clubbed together for the purpose of disposal on that issue. In our opinion, this would be the correct reading of para 5 of the instruction."

9. As stated earlier, the Income Tax Act was amended and Section 268A has been introduced on the Statute book with retrospective effect. Section 268A carves out an exception for filing of appeals and References under Section 260 A of the Act. The legislature has prescribed that the CBDT is empowered to issue circulars and instructions from time to time, with regard to filing of appeals depending on the tax effect involved. Thereafter, in 2008, CBDT Instruction No. 5 of 2008 dated 15th May, 2008 was issued. This Court in the case of ***"Commissioner of Income Tax V/s Madhukar K. Inamdar (HUF)*** reported in ***"(2010) 229 CTR (Bom) 77,*** interpreted the aforesaid Circular. The Circular was issued in supersession of all earlier instructions issued by the Board. The monetary limit was increased and appeals were to be filed under Section 260A, thereafter, only in cases where the tax effect exceeded ₹ 4 Lacs. Paragraph 11 of that instruction stipulated that it was applicable to appeals filed on or after

15th May, 2008. It was further provided that in cases, where appeals were filed before 15th May, 2008, they would be governed by the instructions on this subject which were operative at the time when such appeals were filed. The instruction was issued under Section 268A(1) of the Act. The argument of the learned Counsel for the revenue in that case was, that the instruction issued on 15th May, 2008 did not preclude the department from continuing with the appeals and/or Petitions filed prior to 15th May, 2008, if they involved a substantial question of law of a recurring nature, notwithstanding the fact that the total cumulative tax effect involved in the appeals was less than ₹. 4 Lacs. It was submitted, such appeals which were filed prior to the issuance of Instruction and where substantial questions of law were raised, were required to be decided on merits. The Court, while considering the issue observed that paragraph 5 of the Circular made it clear that no appeals would be filed in the cases involving tax effect less than ₹ 4 Lacs notwithstanding the issue being of recurring nature. Relying on the judgement in ***"CIT V/s Polycott Corporation,*** the Court observed as follows :

> "6 The aforesaid judicial verdict makes it clear that the circular dt. 15th may, 2008 in general and para (5) thereof in particular lay down that even if the same issue, in respect of same assessee, for other assessment years is involved, even then the Department should not file appeal, if the tax effect is less than Rs. 4 Lakhs. In other

words, even if the question of law is of recurring nature even then, the Revenue is not expected to file appeals in such cases, if the tax impact is less than the monetary limit fixed by the CBDT.

7. One fails to understand how the Revenue, on the face of the above clear instructions of the CBDT, can contend that the circular dt. 15th May, 2008 issued by the CBDT is applicable to the cases filed after 15th May, 2008 and in compliance thereof, they do not file appeals, if the tax effect is less than Rs. 4 Lakhs; but the said circular is not applicable to the cases filed prior to 15th May, 2008 i.e. to the old pending appeals, even if the tax effect is less than Rs. 4 Lakhs. In our view, there is no logic behind this belief entertained by the Revenue."

The Court has further held that the prevailing instructions fixing the monetary limit for the tax effect would hold good even for pending cases. Accordingly, the Court dismissed all the appeals having a tax effect of less than ₹ 4 Lacs.

10. The new CBDT instructions have been issued on 9th February, 2011, being Instruction no. 3 of 2011. The monetary limit has been raised again and clause 3 of the instructions provides that appeals shall not be filed in cases where the tax effect does not exceed the

monetary limits prescribed, henceforth. The monetary limits prescribed for filing an appeal under Section 260 A before the High Court has been raised to ₹ 10 Lacs. This instruction is identical to the CBDT Instruction no. 5 of 2008. Clause 10 of this circular indicates that monetary limits would not apply to writ matters and direct tax matters other than income tax. It further provides that where the tax effect is not quantifiable, the Department should take a decision to file appeals on merits of each case. Clause 11, again provides that the instruction would apply to appeals filed on or after ....., 2011 and appeals filed before ....., 2011 would be governed by the instructions on this subject, operative at the time when such appeals were filed.

11. In our opinion, when a similar clause has been interpreted by the Division Bench of this Court in ***CIT V/s Madhukar Inamdar (Supra)***, the same principles must apply in the present cases also, as we have found that the instruction of 15th May, 2008 is *para-materia* with the instruction of 9th February, 2011.

12. In case of ***CIT V/s Ashok Kumar Manibhai Patel & Co.*** reported in ***(2008) 214 CTR (MP) 344***, the Madhya Pradesh High Court considered the CBDT Instruction 2 of 2000 and relying on the judgement in the case of ***CIT V/s Pithwa Engg. Works (Supra)*** held that the circular would apply to pending cases also.

13. In the case of "***Commissioner of Income Tax V/s Kironmoy***

Roy Choudhary" reported in "***(2011) 53 DTR (Gau) 143"***, the Gauhati High Court has also interpreted the CBDT Instruction no. 5 of 2008, dated 15th May, 2008, and has observed as thus :

> "10 We have extended our anxious consideration to the rival submissions made by the parties. Instruction No. 5 of 2008 dt. 15th May, 2008, is not in dispute. Thereby the monetary limit of Rs. 4,00,000 has been prescribed vis-a-vis appeals under S. 260A before this Court. It stipulates that appeals of the category as mentioned in para 3 would be preferred only in cases where the tax effect exceeds monetary limits as provided therein. The "tax effect" has been defined as difference between the tax on the total income assessed and 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.
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> 11. Having regard to the tax liability of the respondent-assessee, assessed originally, the instant appeal is within the coil of the monetary limits prescribed by the CBDT circular. Sec. 268A was inserted in the Act w.e.f. 1st April, 1999, by the Finance Act, 2008. The Memorandum Explaining the Provisions of the Finance Bill, 2008 highlights the underlying objective of S. 268A to reduce litigation in small cases and regulate the right of Revenue to file or not to file appeal.
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> 12. Sec. 260A demonstrates the condition precedent of preferring an appeal before this Court to be the existence of a substantial question of law. Noticeably, it does not contemplate any monetary limit in addition. As has been

> stipulated in the CBDT Instruction No. 5 of 2008 dt. 15th May, 2008, para 8 covers eventualities whereunder an appeal can be filed by the Revenue irrespective of the tax effect. These being where (a) the constitutional validity of the provisions of an Act or Rules is under challenge, (b) the Board's order, notification, instruction or circular has been held to be illegal or *ultra vires*, (c) a revenue audit objection in the case has been accepted by the Department."

14. Similarly, the Delhi High Court in the case of "***Commissioner of Income Tax V/s Delhi Race Club Ltd.",*** decided on ***March 03, 2011,*** by relying on its earlier Judgement "***Commissioner Income Tax Delhi-III V/s M/s P.S. Jain and Co.*** decided on 2nd August, 2010 has held that the CBDT circular raising the monetary limit of the tax effect to ₹ 10 Lacs would be applicable to pending cases also.

15. The position of law, therefore, emerging from the aforesaid judgements, is that the circulars or instructions issued under Section 268A of the Income Tax Act by the Central Board of Direct Taxes, are applicable not only to new cases but to pending cases as well. Such circulars have been issued under Section 268A of the Income Tax Act, which is an exception to the provisions of Section 260 of the Act. The CBDT being mindful of this position has issued the aforesaid instructions. In our opinion, therefore, the instructions would be applicable to pending cases as well. We have already found that the Instruction no. 5 of 2008 and Instruction no. 3 of 2011 are *para-materia*.

The Instruction no. 5 of 2008 has already been interpreted by this Court in ***CIT V/s Madhukar Inamdar (supra)***. It is not disputed that this judgement has not been challenged by the Revenue and therefore still holds the field.

16. The learned Counsel, Mr. Sharma for the revenue has tried to distinguish these cases by relying on the judgement in the case of "***CIT V/s Chhajer Packaging and Plastics Pvt. Ltd., 300 ITR 180***. In that case a substantial question of law of importance was raised and since the circular itself provided that such tax appeals were maintainable, despite the monetary limit on the tax effect imposed by that circular it was held that the appeal was required to be decided on merit.

17. It is true that this judgement in ***Chhajer's*** case (supra) was not brought to the notice of the Division Bench, while deciding either ***Madhukar's*** case (supra) or the case of ***Polycot Corporation*** (supra). However, the instruction of 2005 which was considered in ***Chhajer's*** case has also been interpreted in ***Polycot Corporation*** (supra). The consistent view of the Court has been that the CBDT instruction would apply to pending cases as well. The main objective of such instructions is to reduce the pending litigation where the tax effect is considerably small. Therefore, in our opinion, the tax appeals are required to be dismissed, as they are not maintainable in view of the provisions of Section 268A of the Income Tax, and the CBDT Instruction No. 3 of 2011.

18. Appeals dismissed accordingly.

(M.T. JOSHI, J.) (**SMT. NISHITA MHATRE, J.)**

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