$~
* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

2.

\+ **ITA 275/2015**

PR. COMMISSIONER OF INCOME TAX,
DELHI-2 NEW DELHI ..... Appellant

Through: Kamal Sawhney, Senior Standing Counsel.

versus

CITI FINANCIAL CONSUMER FINANCE INDIA PVT. LTD. ..... Respondent

Through: Mr C. S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R
% 17.07.2015

1. The Revenue impugns the decision of the Income Tax Appellate Tribunal dated 26th September, 2014 in ITA No.5205/Del/2013 (hereafter 'the impugned order') in this Appeal under Section 260A of the Income Tax Act, 1961 (hereafter 'the Act'). By the impugned order, the Income Tax Appellate Tribunal (hereafter the 'Tribunal') dismissed the appeal filed on behalf of the Revenue against an order dated 15th July, 2013 passed by the Commissioner of Income Tax (Appeals) ['CIT(A)'], which had allowed the appeal filed by the Assessee against the Assessment Order dated 19th

November, 2010 passed by the Assessing Officer ('AO') under Section 254 read with Section 143(3) of the Act for the Assessment Year ('AY') 1998-99. The CIT(A) accepted the contention that the said Assessment Order dated 19th November, 2010 was without jurisdiction as the AO had already passed an Assessment Order under Section 254 read with Section 143(3) of the Act for the AY 1998-99 on 21st January, 2010. The CIT(A) held that the said Assessment Order dated 21st January, 2010 for AY 1998-99 had attained finality and thus, the AO had no jurisdiction to pass another Assessment Order for the same Assessment Year. The Tribunal upheld the aforesaid decision.

2. Briefly stated, the relevant facts are that the Assessee had claimed a deduction of ₹48,38,636/-, being the amount paid to Direct Selling Agents, as selling expenses, although, in its books the same had been considered as deferred revenue expenditure. AO had passed an Assessment Order dated 28th February, 2000 disallowing the Assessee's claim in respect of commission paid to Direct Selling Agents. In addition, the AO also disallowed an expenditure of ₹35,91,227/- incurred by the Assessee for purchase of software. The AO held that the nature of these expenses was capital and not revenue.

3. The Assessee appealed against the aforesaid additions/disallowances made by the AO before the CIT(A). However, the Assessee was not successful and the CIT(A) confirmed the disallowances made by the AO. Aggrieved by the aforesaid decision, the Assessee preferred an appeal before the Tribunal, being ITA No.263/Del/2004. By an order dated 31st July, 2009, the Tribunal remanded the matter to the AO to re-examine the nature of the expenditure pertaing to software and commission paid to Direct Selling Agents.

4. On remand, the AO passed an order dated 20th January, 2010, allowing the expenditure incurred by the Assessee on account of commission paid to Direct Selling Agents and for purchase of software.

5. Mr Sawhney, learned counsel appearing for the Revenue, contends that the order dated 20th January, 2010 was a mistake, as the AO had not implemented the directions of the Tribunal to re-examine the nature of relevant expenditure incurred by the Assesse. He submitted that, subsequently, the AO rectified the said mistake by once again passing an order on 19th November, 2010. Mr Sawhney contends that the Tribunal erred in not examining the issues on merits and failed to consider that the

order dated 19th November, 2010 was passed to implement the directions issued by the Tribunal by its order dated 31st July, 2009. He also referred to Section 292B of the Act and submitted that by virtue of the said Section, any mistake in the Assessment Order was liable to be overlooked if the order subserved the purposes of the Act.

6. Mr C. S. Aggarwal, learned senior counsel appearing on behalf of the Assessee, submitted that the AO's order passed on 19th November, 2010 was an afterthought and there was no mistake or error in the AO's order dated 20th January, 2010. He submitted that at the material time when the order dated 20th January, 2010 was passed, the Tribunal had already examined the issues regarding expenditure incurred on commission paid to Direct Selling Agents and on purchase of software, in the context of the assessment framed in the AYs 2001-02 and 2002-03; the Tribunal in its order dated 18th December, 2009, passed in ITA No.461/Del/2005 and 2473/Del/2006 for the AY 2001-02 and 2002-03 respectively, had allowed the claim of the Assessee for deduction of the aforesaid expenditure. Consequently, the AO had also allowed the expenditure in its order dated 20th January, 2010. The learned senior counsel also stated that, subsequently, the decision of the Tribunal for the AY 2001-02 and 2002-03 was upheld by this Court in an

appeal preferred by the Revenue under Section 260A and the Special Leave Petitions preferred by the Revenue were also dismissed by the Supreme Court.

7. Mr Aggarwal also referred to the decision in ***Caltex Oil Refining (India) Pvt. Ltd. v. Commissioner of Income Tax 1993 202 ITR 375 Bom*** in support of his contention that the nature of the order passed by the AO in consequence of the order of the Tribunal was not administrative.

8. We have heard the counsel for the parties.

9. The Tribunal had upheld the view that the AO's order dated 20th January, 2010 had given effect to the directions of the Tribunal contained in the order dated 30th July, 2009 and in the circumstances, the assessment proceedings relating to the AY 1998-99 had attained finality. The Tribunal held that once the Assessment Order had attained finality, it could not be disturbed or reopened unless fresh proceedings were initiated and action was taken under Section 148/154/263 of the Act. The Tribunal was of the view that it was not open for the AO to *suo moto* pass another Assessment Order for the same AY. We find no infirmity with this view. Clearly, once the assessment proceedings have been finalised, the AO would have no jurisdiction to pass

a fresh order, except in specific circumstances and after following the procedure contemplated under the Act. Admittedly, no fresh proceedings either under Section 263, Section 154 or Section 147/148 of the Act were initiated. There is no provision in the Act permitting multiple Assessment Orders. Thus, the second Assessment Order dated 19th November, 2010, passed by the AO was wholly without authority of law.

10. The reliance placed by the Revenue on provisions of Section 292B of the Act is also miscplaced. The said section reads as under:-

> **"292B: Return of income, etc., not to be invalid on certain grounds.–**No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

11. A plain reading of the language of Section 292B of the Act indicates that it would have no application in the facts and circumstances of the present case. First and foremost, Section 292B of the Act cannot be read to confer jurisdiction on the AO where none exists. The said Section only protects return of income, assessment, notice, summons or other proceedings from

any mistake in such return of income, assessment notices, summons or other proceedings, provided the same are in substance and in effect in conformity with the intent of purposes of the Act. Learned counsel appearing for the Revenue has been unable to point out any mistake or omission in the AOs order dated 19th November, 2010. The issue involved is not about a mistake in the said Order but the power of the AO to pass the Order. Clearly, the said Order is not in accordance with provisions of the Act, as the AO has no power to frame the assessment in respect of an AY which has already been finalised and concluded. The language of Section 292B of the Act also offers no assistance to the Revenue in its contention that AO's order dated 20th January, 2010 was a mistake.

12. The contention that the Order dated 20th, January, 2010 was only an administrative Order, to give effect to the order dated 31st July, 2009 passed by the Tribunal is also without any merit. The AO, being an authority under the Act, performs the function as specified in the Act. The AO has the power to make an assessment under Section 143 or 144 of the Act. It is the said assessment which is examined by the Appellate Authority. The Appellate Authority has power either confirm, reduce, enhance or set aside the assessment. In the event, the Appellate Authority remands the matter to

the AO, the AO is required to commence proceedings in terms of the directions of the Appellate Authority. Such proceedings are not administrative but have to be conducted in accordance with the provisions of the Act and the order passed by the Assessing Officer would not be in the nature of Administrative Order but would be an Order of assessment under Section 143/144 of the Act. In ***Caltex Oil Refining*** (supra) a Division Bench of the Bombay High Court had explained the the above in the following words:-

> "So far as the first submission, which relates to the nature of an order passed by the ITO in consequence of orders of the appellate authorities with a view to giving effect to the direction contained therein, it is difficult to hold that such an order is an administrative order. The power of the ITO is to make assessment under section 143 or 144. It is that assessment which is the subject-matter of appeal. The appellate authority, on an appeal against an order of assessment has power to confirm, reduce, enhance or annul the assessment or to set aside the assessment and refer the case back to the ITO for making a fresh assessment in accordance with the directions given by such authority (section 251). Evidently the effect of an appellate order is that the assessment either stands confirmed, reduced or enhanced or it stands annulled or set aside. In case of confirmation, reduction or enhancement the original order of assessment stands modified to the extent of the directions given by the appellate authority. In the case of annulment the order becomes non est. In case an order is set aside, the authority has to start the entire process afresh and make a fresh order of assessment complying with the directions given by the appellate authority. It is, thus, clear that what remains as a final order after giving effect to the

> orders of the appellate authorities is an order of assessment under section 143 or 144. It cannot be anything else."

13. We concur with the aforesaid view and are unable to accept that the AO's order dated 20th January, 2010 was only an administrative order to give effect to the order of the Tribunal. At this stage, it is also relevant to note that the order dated 20th January, 2010 was captioned as "Order u/s 254/250/147/143(3) of the Income Tax Act, 1961". It is, thus, apparent that the Order itself indicated that it was not an administrative order but an Assessment Order under Section 143(3) of the Act. In the circumstances, it is not be open for the Revenue to contend to the contrary.

14. In our view, no substantial question of law arises and the Appeal is accordingly, dismissed. No order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

JULY 17, 2015
MK