

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

INCOME TAX APPEAL NO.303 OF 2013

The Commissioner of Income Tax-II .. Appellant.
V/s.
Shri Vijay G. Patil .. Respondent.

Mr. N. N. Singh, for the Appellant.
Mr. Mandar Vaidya, for the Respondent.

**CORAM: M.S.SANKLECHA, &
G.S.KULKARNI, JJ.**

DATE : 16th FEBRUARY, 2015.

PG:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 29th August, 2012 passed by the Income Tax Appellate Tribunal (the ITAT) for the Assessment Year 2007-08.

2 The Revenue has formulated the following questions of law for our consideration:

“(a) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in law in upholding the claim of the assessee for exemption under section 10(10C) by erroneously relying on the decision given in Commissioner of Income Tax v/s. Koodathi Kallyatan Ambujakshan (reported in 219 CTR 80) given in the context of Exit Option Scheme for R. B. I. employees wherein the Hon'ble Bombay High Court had examined the scheme, and found it to be complaint with all the conditions laid down in rule 2BA of I. T. Rules, 1962 whereas, in the instant case the Exit Option Scheme of S. B. I. employees do not fulfill all the conditions laid down in Rule 2BA r.w.s. 10(10C) of the I. T. Act, 1961?”

(b) *Whether or not, partial satisfaction of Rule 2BA of the I. T. Rules 1962 would entitle an assessee to relief under section 10(10C)?”*

3 The Respondent-Assessee was an employee of State Bank of India who retired voluntarily as per the Exit Option Scheme announced by the Bank. For the Assessment Year 2007-08, the Respondent-Assessee filed its return of income, claiming exemption under Section 10(10C) of the Act in respect of amount received by the Respondent-Assessee on his voluntarily retirement.

4 O 18th December, 2009, the Assessing Officer by order passed under Section 143(3) of the Act rejected the Petitioner's claim for exemption under Section 10(10C) of the Act by placing reliance upon the circular dated 8th October 2009 issued by the Central Board for Direct Tax (CBDT) wherein it has been observed as under:-

“ It has been observed that the State Bank of Patiala and State Bank of India are offering Exit Option Schemes to employees of various grades in the management of the Bank. These schemes clearly lay out that they are not eligible for deduction under section 10(10C) of the Income Tax Act, 1961. Some of the employees who have availed of these schemes are nevertheless claiming exemption of the benefits received from such scheme under section 10(10C)”

5 In appeal, the Commissioner of Income Tax (Appeals) [CIT(A)], by order dated 16th June, 2011 set aside the order of the Assessing Officer by holding that issue stands covered by the decision of this Court in *CIT v/s. Koodathil Kallyatan Ambujakshan 309 ITR 113* and the decision of the Supreme Court in *Chandra Ranganathan and others v/s. CIT 326 ITR 49*. Besides, reliance was also placed upon the decisions of the Tribunal, inter alia, upon one *Petric I. Britto & Others*

v/s. ITO ITA No. 4413/Mumbai/2006 wherein it has been held that even when the voluntarily separation scheme is not in conformity in the requirement of Rule 2 AB of the Income Tax Rules 1962, yet assessee was entitled to its benefit.

6 On further appeal, the Tribunal by the impugned order upheld the order of the CIT(A) after making a reference to the CBDT circular dated 8th October, 2009 and placing reliance upon its decisions in a case of a ex-employee of State Bank of India in *ITO v/s. Javerilal D. Chhajed (ITA No.326/PN/2010)* rendered on 8th November, 2011 and dismissed the Revenue's appeal.

7 This appeal was called out for admission on 4th February, 2015. At that time, Mr. Singh, learned Counsel appearing for the Revenue sought time to find out whether or not the Revenue has filed appeal from the decision of the Tribunal in *Javerilal D. Chhajed (supra)* dated 8th November, 2011 or accepted the same. If accepted, to take instructions to withdraw. Today, Mr. Singh, learned Counsel appearing for the Revenue states that no appeal was filed from the decision of the *Javerilal D. Chhajed (supra)* as at that point of time, the decision of the Supreme Court rendered in *CIT v/s. Surya Herbal 350 ITR 300*, according to him was not available. We are unable to understand the above submission as the the Supreme Court rendered its decision in *Surya Herbal (supra)* on 29th August, 2011 i.e. much before its decision on 8th November, 2011 in *Javerilal D. Chhajed (supra)*. Thus, even though the decision of the Apex Court in *Surya Herbal (supra)* was very much available, Revenue chose to accept the order of the Pune Bench Tribunal in *Javerilal D. Chhajed (supra)* and not challenge the same before this Court.

8 In the above view, without going into the other contentions, (although prima facie we are of the view that the Respondent-Assessee is entitled to the benefit) we dismiss the appeal only on the ground that the Revenue having accepted the decision of the Tribunal in Javerilal D. Chhajed (supra), then in an identical matter, it is not open to the Revenue to challenge a subsequent order. The Supreme Court in *U.O.I. v/s. Kamudini N. Dalal 247 ITR 219* has held that the Revenue must be consistent and it cannot differentiate between different assessees. This was in the context of a High Court order. The same principle should apply in case of jurisdictional Tribunal order. We are of the view that it is not open to the Revenue to pick and chose the Assessee's against whom they would filed appeal in this Court. The law should be uniformly applied, its application cannot change, depending upon the person affected.

9 We had in fact indicated in our order in *CIT v/s. Veena G. Shroff (ITA No.71 of 2013) rendered on 27th January, 2015* that whenever there is a decision of the Tribunal on an identical issue and the Revenue has accepted by not preferring an appeal, then if they seek to file further appeal to this Court from a subsequent order, they must set out the reasons pointing out the distinguishing features in the present case which would warrant filing of appeal notwithstanding the acceptance of an earlier order on the same issue passed by the Tribunal. In this case, the reason made out by the Court for not filing the appeal from order of Tribunal in Javerilal D. Chhajed (supra), was the low tax effect in that case and the decision of the Supreme Court in Surya Herbal (supra) not being available when the decision was rendered in Javerilal D. Chhajed (supra) as pointed out above is factually incorrect.

10 We make it clear that where the Jurisdictional Tribunal has decided the issue by following its earlier decision and no appeal from the earlier decision is filed, unless the memo of appeal or an affidavit filed prior to the hearing indicates the reasons for taking a different view, we shall be constrained to not only dismiss the appeal but also impose costs on the Commissioner of Income Tax who continues to press such appeals.

11 Accordingly, **appeal dismissed.** No order as to costs.

(G.S.KULKARNI,J.)

(M.S.SANKLECHA,J.)