

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL No. 2213 of 2010**

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COMMISSIONER OF INCOME TAX CENTRAL-II - Appellant(s)
Versus
SHAMBHUBHAI MAHADEV AHIR - Opponent(s)

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Appearance :

MRS MAUNA M BHATT for Appellant(s) : 1,
MRS SWATI SOPARKAR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**and****HONOURABLE MS.JUSTICE HARSHA DEVANI****Date : 12/09/2012****ORAL ORDER****(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Brief facts necessary for this order may be noted.
2. Appeal is filed by the Revenue calling in question the judgment of the Income Tax Appellate Tribunal("the Tribunal" for short) dated 31.5.2010 raising various questions. Appeal was filed on 13.10.2010. It is not in dispute that the tax effect involved in this appeal exceeded Rs.4 lac which was the threshold limit permitting the Revenue to prefer appeal before the High Court as provided by Central Board of Direct Taxes ('CBDT' fort short), in its instructions

dated 15.5.2008(here-in-after to be referred to as "instructions of 2008"). It is equally not in dispute that such tax effect however, does not exceed Rs.10 lac, a revised limit provided by the Board in its later instructions dated 9.2.2011(here-in-after to be referred to as "instructions of 2011").

3. In view of the above facts, counsel for the assessee at the outset raised a preliminary objection of the maintainability of the appeal on the ground that the tax effect involved is less than the minimum threshold limit provided by the CBDT in its instructions dated 9.2.2011.

4. The precise contention of the counsel for the assessee was that though at the time of filing of the appeal the limits prescribed by the Board in its instructions of 2008 applied and as per such provisions, the appeal was then maintainable, the revised limits contained in the instructions of 2011 should be applied when the appeal is taken up for hearing. Counsel for the assessee in fact contended that such limit would apply to all pending cases irrespective of the date of filing. In short, contention of the counsel was that instructions of 2011 would govern maintainability of all pending appeals of the Revenue.

4.1) For the purpose of above contention, counsel placed heavy reliance on a recent decision of Division Bench of this Court dated

24.08.2012 in case of **the Commissioner of Income-tax v. Sureshchandra Durgaprasad Khatod(HUF)** in Tax Appeal No.1404/2010. In such decision, the counsel pointed out that this Court relying on decision of the Bombay High Court in case of **Commissioner of Income Tax vs. Madhukar K. Inamdar (HUF)** reported in 318 ITR 149 and certain other decisions of Karnataka and Delhi High Court held that the instructions of 2011 would also apply to pending appeals. Counsel submitted that independent of the said decision of this Court in case of **Sureshchandra Durgaprasad Khatod(HUF)** (supra), the instructions of 2011 should be held applicable to all pending cases. He supported said contention on following arguments :

i) The Government of India published National Litigation Policy issued by the Ministry of Law and Justice. Paramount consideration was to reduce delay and pendency. The instructions of the Board should be interpreted in tune with such policy.

ii) If the instructions of 2011 are applied only prospectively, the same would lead to absurd situation. For example, in case of the same assessee, the appeal may be terminated as non maintainable since the same may have been filed after the cut-off date whereas for earlier years appeals of the same assessee raising identical questions may be entertained only on the ground that such appeal was filed prior to issuance of

the instructions of 2011. According to the counsel, such interpretation which would lead to anomalous and absurd situation should be avoided.

iii) Counsel also submitted that various High Courts have taken a view that the instructions of 2011 will apply to all pending cases.

5. On the other hand, learned counsel for the Revenue repelled the contentions submitting that the Board in terms of section 268A of the Income-tax Act, 1961 ("the Act" for short) has been issuing instructions from time to time laying down the monetary limits for permitting the Revenue to file appeals before the Tribunals, High Courts and Supreme Court, as also providing for the conditions on which such limits may be ignored. He submitted that such instructions have to be interpreted on the basis of language used therein. The plain language of the instructions of 2011 did not permit any ambiguity. It would therefore, be not open for the Court to adopt any interpretation other than one emerging from the plain language used. Counsel further submitted that in plain terms the instructions of 2011 were made applicable prospectively. It was also submitted that various decisions of different High Courts holding that the instructions would apply prospectively and not to pending cases filed before the instructions were issued, were not noticed by this Court in case of **Sureshchandra Durgaprasad**

Khatod (HUF)(supra).Counsel therefore, submitted that decision in the said case requires reconsideration.

6. We may notice that the legislature introduced section 268A in the Act through the Finance Act of 2008, however, with retrospective effect from 1.4.1999. Section 268A reads as under :

"268A. (1) The Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income-tax authority under the provisions of this Chapter.

(2) Where, in pursuance of the orders, instructions or directions issued under sub-section(1), an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of -

(a) the same assessee for any other assessment year; or

(b) any other assessee for the same or any other assessment year.

(3) Notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders or instructions or directions issued under sub-section(1), it shall not be lawful for an assessee , being a party in any appeal or reference, to contend that the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

(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.

(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.]."

7. Even before the introduction of section 268A in the Act, the Board had been issuing instructions from time to time to govern filing of appeals by the Revenue before the Tribunals, High Courts and Supreme Court principally with a view to limiting appeals involving low tax effect and to filter out frivolous appeals of the Revenue. With introduction of section 268A of the Act, such instructions received statutory force. It is therefore, not possible, not even argued before us that such instructions are not only binding on the Revenue, they have a statutory effect. Any appeal therefore, which the Revenue files before this Court ignoring such instructions would not be maintainable. The question however, is should such instructions be given prospective effect or would such instructions govern all pending appeals before the High Court irrespective of the date of filing. In the present case, we are concerned with the instructions of 2011. However, it may be useful to take note of different instructions issued by the Board in the year 2000 and onwards.

A) Under the instructions of 1.4.2000, the Board provided for a minimum tax effect of Rs. 1 lac for appeal to the Tribunal, Rs.2 lac for appeal or reference to the High Court and Rs.5 lac for appeal to the Supreme Court. Paragraph 3 of the instructions however, provided for four exceptions where adverse judgments should be contested irrespective of revenue effect. It was provided that the instructions shall come into effect from 1.4.2000.

B) Such limits were revised to Rs. 2 lacs, Rs. 4 lacs and Rs. 10 lacs respectively under the instructions of 24.10.2005. Para. 3 thereof once again provided for certain exceptions on the basis of which appeals could be presented irrespective of the monetary limits.

C) The next set of instructions came from the Board on 15.5.2008 in which though the monetary limits remained unchanged, certain other changes were made in earlier instructions. For the first time, the term "tax effect" was explained. Insofar as income tax is concerned, same would include only the tax without any computation of interest thereon. Paragraph 11 of the instructions provided as under:

"11. This instructions will apply to appeals filed on or after May 15, 2008. However, the cases where appeals have been filed before May 15, 2008 will be governed by the instructions on this subject, operative at the time when such appeal was filed."

This was a major departure from the language used in earlier instructions. These instructions for the first time specifically provided that the instructions will apply to appeals filed on or after 15.5.2008. It further clarified that appeals filed before such date, will be governed by the instructions on the subject, operative at the time when such appeals were filed.

D) In the instructions of 2011, the monetary limits were revised to Rs. 3 lac for appeal to Tribunal, Rs.10 lac for appeal or reference to the High Court and Rs.25 lac for appeal to the Supreme Court. Paragraph 8 of the instructions provided for exceptions where appeals could be presented irrespective of tax effect and reads as under :

"8. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect.

(a) Where the Constitutional validity of the provisions of an Act or Rule are under challenge, or

(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or

(c) Where Revenue Audit objection in the case has been accepted by the Department."

Paragraph 11 contained a similar provision as

in case of instructions of 2008 and provided as under :

"11. This instructions will apply to appeals filed on or after 9th February 2011. However, the cases where appeals have been filed before 9th February 2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed."

8. We are of the view that the issue requires consideration by a larger Bench. Number of decisions of various High Courts on the subject were not brought to the notice of this Court in case of **Sureshchandra Durgaprasad Khatod(HUF)** (supra). We, independently also have serious doubts if the instructions of 2011 can be applied to cases filed earlier. We may notice how different High Courts have viewed the situation.

a) In case of **Commissioner of Income-tax v. Kodananad Tea Estates Co.** reported in 275 ITR 244, Revenue challenged the decision of the Tribunal which had dismissed its appeal on the basis of low tax effect applying the instructions of 2000. The High Court reversed the decision of the Tribunal holding that such instructions were made effective from 1.4.2000 before the appeal was filed. The High Court held that the Tribunal therefore, committed an error in not considering the appeal on merit.

b) Full Bench of Punjab and Haryana High Court in case of **Commissioner of Income-tax v.**

Varindera Construction Co. reported in (2011) 331 ITR 449(P&H)(FB), considered a similar question of applicability of instructions of 2008. The Court held that the instructions laying down the monetary limits control the filing of the appeals and not hearing of the appeals. The appeals filed in accordance with the applicable limit at the time of filing cannot be governed by a circular applicable at the time of hearing. Such decision was rendered by the Full Bench in view of the reference made by the Division Bench finding it unable to agree to the view adopted in case of **Commissioner of Income-tax v. Abhinash Gupta** reported in (2010) 327 ITR 619((P&H). The Full Bench of the High Court took note of decision of Bombay High Court in case of **Madhukar K. Inamdar (HUF)**(supra) but differed from the view of Bombay High Court making following observations :

"10. After due consideration of rival contentions, we are in agreement with the contention raised on behalf of the revenue. Circular laying down monetary limit controls the filing of the appeals and not their hearing. Appeals filed as per applicable limit at the time of filing cannot be governed by circular applicable at the time of hearing. We respectfully differ from the view taken by Bombay High Court as followed by this Court. The object of circular under section 268A as already mentioned is only to govern monetary limit for filing of the appeals. There is no scope for reading the circular as being applicable to pending appeals. Even Hon'ble the Bombay High Court held that the circular was not retrospective. It only observed that having regard to the falling money value and choking Court docket, policy of monetary limit was

needed to be adopted for pending matters. The document referred to as circular dated 5.6.2007, in our view, has not been properly appreciated. It only says that the department was not following instructions as to monetary limit while filing the appeals and should examine whether pending appeals which did not conform to prescribed monetary limit should be withdrawn. The said memorandum was purportedly issued on a direction of the High Court and was applicable only to cases pending in Bombay High Court. The same cannot be read to mean that in all High Courts, all pending appeals were to be examined in the light of monetary limit applicable on the date of hearing and not on the date of filing."

c) Issue also came up before Chhattisgarh High Court in case of **Commissioner of Income-tax v. Navbharat Explosives Co. P. Ltd.** reported in (2011) 337 ITR 515 (Chhattisgarh). In the said decision once again the instructions of 2008 came up for consideration in the context whether the same would apply to the pending appeals which were filed before the date of instructions. Decision of Bombay High Court in case of **Madhukar K. Inamdar (HUF)**(supra) was also noticed. The Court ultimately ruled that :

"26. Thus, following the decision of the Madras High Court in the matter of Kodananad Tea Estates Co.(2005) 275 ITR 244(Mad) and the decision of the Kerala High Court in the case of John L. Chackola(2011)337 ITR 385(Ker), we hold that maintainability of appeals/references at the instance of Revenue is to be considered on the basis of circulars/instructions prevailing at the relevant time when the appeal/reference was made and Instruction issued vide circular dated 15th May, 2008 is prospective and it has no application whatsoever to any proceedings initiated before 15th May, 2008 and the same

remain undecided and pending after 15th May, 2008."

d) Such issue once again came up before the Kerala High Court in case of **Commissioner of Wealth-tax v. John L. Chackola** reported in (2011) 337 ITR 385(Ker), where also High Court was unable to adopt the view of Bombay High Court in case of **Madhukar K. Inamdar (HUF)**(supra). Referring to paragraph 11 of the instructions of 2008, the Court noted that such para specifically provided that maintainability of appeals prior to the date of instructions should be considered with reference to the instructions in force at the time of filing the appeals. In view of such language, the Court held that the case of the assessee would be governed by earlier instructions.

9. We are not oblivious to the counter view adopted by the Bombay High Court and certain other High Courts following the view of Bombay High Court in case of **Madhukar K. Inamdar (HUF)**(supra).

a) In case of **Commissioner of Income-tax v. Pithwa Engg. Works** reported in (2005) 276 ITR 519(Bom), the Bombay High Court held that the instructions of 2000 would apply to pending cases also.

We may however, recall that in the instructions of 2000 the language used in

paragraph 11 of the instructions of 2008 or paragraph 11 of the instructions of 2011 was not found. Such judgement therefore, is not an authority that the instructions of 2008 or 2011 would apply to all pending cases.

b) In case of **Commissioner of Income-tax v. Polycott Corporation** reported in (2009) 318 ITR 144(Bom), the Bombay High Court held that the instructions of 2008 would apply to pending cases also.

We may however, notice that in such decision the High Court did not notice or at any rate did not refer to paragraph 11 of the instructions which made applicability thereof specifically prospective. Applicability or otherwise of the instructions to the pending appeals could not have been decided without having regard to paragraph 11 of the instructions.

c) In case of **Madhukar K. Inamdar (HUF)**(supra) reported in 318 ITR 149, the Bombay High Court following the decision in case of **Polycott Corporation** (supra) and further placing reliance on section 268A of the Act held that the instructions of 2008 would apply to all pending cases.

Once again we may record that in such decision, paragraph 11 of the instructions does not appear to have been noticed, at any rate such paragraph is not referred. With profound respect

therefore, such decision in our view was rendered without giving due weightage to the specific language of paragraph 11 of the instructions of 2008..

d) Decision of Bombay High Court in case of **Madhukar K. Inamdar (HUF)**(supra) was merely followed by Delhi Court in an order dated 3.3.2011 in Tax Appeal No.128/2008 without further discussion.

e) We may also note that Bombay High Court in case of **Commissioner of Income-tax v. Chhajer Packaging and Plastics P. ltd.** reported in (2008) 300 ITR 180 (Bom.) had doubted the view expressed in case of **Pithwa Engg. Works**(supra).

f) Karnataka High Court in case of **Commissioner of Income-tax v. Ranka & Ranka** reported in (2012) 19 taxmann.com65(Kar.) has taken a view that the instructions of 2011 should apply to all pending cases. This was on the basis of main two grounds. Firstly, that the National Litigation Policy to reduce the litigation and pendency should govern the interpretation of instructions and secondly that granting only prospective applicability of instructions would give rise to absurdity and Court would try to avoid any interpretation which leads to an absurd situation.

With respect the question of interpretation

of instructions which are other-wise not ambiguous on the basis of litigation policy, in our view, would not arise. Secondly, we are also of the view that prospective application of the instructions would not lead to any absurdity. If by applying the instructions prospectively, certain appeals would be decided on merits, because the appeals were filed prior to issuance of the new instructions, the same cannot be stated to be absurd. A counter situation also may arise if such instructions are applied with retrospective effect to all pending appeals whereby an appeal would be dismissed without examination on merits simply because the same survived for a longer period than the cognate appeals.

10. From the above, it can be seen that the various High Courts have taken a view that the instructions of 2011 cannot be applied to all pending appeals, particularly, having regard to the language used in paragraph 11 thereof.

11. We are of the opinion that the view adopted by this Court in case of **Sureshchandra Durgaprasad Khatod(HUF)**(supra) requires reconsideration for the following reasons :

1) The instructions of 2011 provide revised monetary limits permitting the Revenue to file appeals before the Tribunal, High Court and Supreme Court. Paragraph 11 thereof clearly

provides that such instructions will apply to appeals filed on or after 9th February 2011. It is further made clear that cases where appeals have been filed before 9th February 2011 will be governed by the instructions on the subject operative at the time when such appeal was filed. Any other interpretation to make the instructions of 2011 applicable to all pending appeals, in our opinion, would not be permissible and would be doing violation to the plain language used in the instructions. In fact the instructions of 2011 in paragraph 2 itself starts with an expression **"In supersession of the above instructions, it has been decided by the Board that departmental appeals may be filed on merits before Appellate Tribunal, High Courts and Supreme Court keeping in view the monetary limits and conditions specified below."** These instructions govern the filing of the appeals by the Revenue and were thus meant to limit the appeals arising after the cut-off date provided in the instructions. The language of paragraph 2 read with paragraph 11 plainly brings about the intention of the Board to limit the new appeals and not to terminate old appeals without consideration on merits.

2) These provisions contained in the instructions of 2011, in our opinion, have not been given due weightage by different High Courts taking a contrary view and in particular, our High Court in case of **Sureshchandra Durgaprasad Khatod(HUF)**(supra).

3) The contention that the prospective application of the instructions would either lead to discrimination or absurdity also cannot be accepted. Firstly, introduction of cut-off date for the application of instructions is not under challenge before us. Any possible discrimination therefore, cannot be a ground for ignoring such cut-off date by using interpretative process. In face of such clear instructions, it would not be open for the assessee to contend that such instructions being discriminatory in nature, this Court should discard the portion of the instructions which leads to such discrimination. Second ground of absurdity also cannot be accepted for two reasons. Firstly, we are unable to see any absurdity in applying the instructions with prospective effect. Instructions are issued by the Board from time to time providing monetary limits bearing in mind value of the currency. If certain appeals are entertained on merits because they were filed before long number of years, may be 10 years in a given case before the instructions of 2011 were issued as against the appeals which arise newly, we do not see any absurdity in such a situation. It may be that certain appeals may survive longer than others. By applying the instructions to all pending appeals in fact we would be dismissing the appeals which survived longer without entering into the merits as against other appeals which might have been already been decided on merits

before the instructions of 2011 were issued. The so-called absurdity may arise in either case. In fact every government policy or change in policy would come with a cut-off date. Mere prescription of cut-off date is neither absurd nor discriminatory per-se.

4) Paragraph 11 of the instructions of 2011 is unambiguous and makes the instructions applicable only from a certain date and not to all pending appeals. The cardinal rule of interpretation is that any document or statute should be interpreted on the basis of language used by reading the statute or the document as it is avoiding any addition or substitution of words. Courts while interpreting would also avoid rejection of any word used in the document or the statute. The rule of literal construction also further requires that Court should adopt natural and grammatical meaning used by the draftsman. Of-course, on certain well recognized principles such as on mischief rule or Heydon's rule, a deviation from such literal construction is not impermissible. It is also well recognized that if a particular interpretation leads to absurdity, the Court would avoid such an interpretation. Such a question would arise when it is possible to interpret a certain statute or terms of the document which is otherwise possible of two interpretations. When the language is plain, it is not open for the Court to reject the expression used by the draftsman and adopt some

other interpretation not borne out from the plain language of the statute or the document.

5) Section 268A of the Act recognises statutorily the force of the Board's instructions to limit the appeals on certain grounds. In absence of such instructions, section 260A of the Act enables an aggrieved person including the Revenue to prefer an appeal before the High Court without any limitation of valuation. If restrictions are to be imposed on such statutory appeals, the same must be traced in the instructions issued by the Board under section 268A of the Act.

6) Number of decisions of various High Courts taking a contrary view were not cited before this Court in case of **Sureshchandra Durgaprasad Khatod(HUF)**(supra).

7) Two decisions of this Court also bearing some impact on the question were also not brought to the notice of the Court. In case of **Commissioner of Income-tax v. Concord Pharmaceuticals** reported in (2009) 317 ITR 395(Guj), in context of effect of Board's instructions under section 268A of the Act, made following observations:

“25. There is also difference of opinion amongst the Courts with regard to the applicability of the Circular. If, on the date of filing of an appeal, a Circular is not in force or certain exceptions are not there or monetary limit is less than what was there at the time of deciding this appeal, in such cases, the Tribunal will have to give due weightage to the provisions contained in the circular prevalent on the date of filing of appeal and not on the date of the decision of

the appeal.”

8) In the later decision, this Court in judgement dated 9.5.2011 in Tax Appeal No.1601/2009 and connected matters in case of **Commissioner of Income tax-II v. Good Luck Marketing Ltd.** in the context of monetary limits for filing the appeal in case of loss written, made following observations :

“37. The issue can be looked from a slightly different angle. In absence of the Board's circulars issued, which now can be stated to be covered under Section 268A of the Act, there are no limitations on Revenue carrying the issue in appeal either before the appellate Tribunal, the High Court, the Supreme Court. To hold that a particular appeal is not maintainable by virtue of the limitations imposed by the Board in its circular, such limitation must be traced into circular itself. In other words unless and until the appeal is found to be opposed to the directives issued by the Board in its different circulars prevailing from time to time, such an appeal cannot be categorized as not maintainable.”

12. In view of above discussions, we are of the view that the decision in case of **Sureshchandra Durgaprasad Khatod(HUF)** (supra) requires reconsideration.

13. Following question may be referred for consideration of larger Bench.

“Whether the view taken by this Court in case of **Sureshchandra Durgaprasad Khatod(HUF)** (supra) that the instructions of 2011 of the Board

providing for revised monetary limits for filing the appeals to the Tribunals, High Courts and Supreme Court, would apply to all pending cases irrespective of the date of filing of such appeals is correct, particularly, in view of express language used in paragraph 2 of the instructions which provides for revised monetary limits **for filing of the appeals** and paragraph 11 thereof which provides inter-alia that **such instructions will apply to appeals filed on or after 9th February 2011?**

14. The matter may be placed before Hon'ble Chief Justice for constituting a Bench for answering the reference.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(raghu)

