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IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.47/2014
AND
TAX APPEAL NO.49/2014

COMMISSIONER OF
INCOME TAX, "Aaykar Bhavan",
Patto, Panaji, Goa. ⋯ APPELLANT

Versus

V. M. SALGAONKAR AND
BROTHERS PRIVATE LIMITED,
Salgaonkar House, Vasco-da-Gama,
Mormugao, Goa
PAN NO. AAACV5950B ⋯ RESPONDENT

Ms Amira Razaq, Advocate for the Appellant.

Mr Percy Pardiwala, Senior Advocate with Mr Ryan Menezes and Mr Nigel Fernandes, Advocates for the Respondent.

CORAM: **M. S. KARNIK &**
NIVEDITA P. MEHTA, JJ.

DATE: **9th DECEMBER 2024**

ORDER: (Per M. S. Karnik, J.)

1. The present appeals pertain to the Assessment Years 2006-07 and 2007-08. The appeals were admitted in terms of an order of this Court on 07.07.2014 and 11.07.2014 respectively. Following questions were formulated by this Court:

In Income Tax Appeal No.47/2014:

(A) Whether on the facts and circumstances of the case, the learned ITAT is correct in holding that the AO should pass speaking order giving finding that the value of stock will be allowed as deduction when the same is returned to the party as per family settlement?

(B) Whether on the facts and circumstances of the case, the learned ITAT is right in holding that the payments made by the assessee towards sales and marketing services rendered outside are not liable for deduction of TDS by the assessee?

In Income Tax Appeal No.49/2014:

(A) Whether on the facts and circumstances of the case, the learned ITAT is correct in holding that the AO should pass speaking order giving finding that the value of stock will be allowed as deduction when the same is returned to the party as per family settlement?

(B) Whether on the facts and circumstances of the case, the learned ITAT is right in holding that the payments made by the assessee towards sales and marketing services rendered outside India are not liable for deduction of TDS by the assessee?

2. A perusal of the averments made in paragraph 9 of the memo of appeals in the respective income tax appeals reveals that according to the Revenue the tax effect involved in these appeals is Rs.1,99,09,905/- and Rs.1,97,10,369/- respectively. The Revenue contended that in view of

clause 3.1.l of Circular No.5 of 2024 dated 15.03.2024 even though monetary threshold was not crossed, the appeal could be prosecuted.

3. Mr Percy Pardiwala, learned Senior Advocate for the respondent-assessee submitted that when the appeals were filed in May 2014, the monetary limits for filing appeals before the High Court was Rs.10 lakhs in terms of a Circular issued by the Board being Instruction No.3 of 2011 dated 09.02.2011. Paragraph 8 of the said Circular specifically provided that adverse judgments related to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limit specified in paragraph 3 or there is no tax effect. There were three circumstances mentioned in the said Circular, viz.:-

> (i) Whether the constitutional validity of the provisions of an Act or Rules are under challenge; or
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> (ii) Where the Board's Order, Notification, Instruction or Circular has been held to be illegal or ultra vires; or
>
> (iii) Whether the revenue audit objection has been accepted by the department.

4. This instruction was superseded by another Instruction No.5 of 2014 dated 10.07.2014 whereby the monetary limits in respect of appeals filed before the Tribunal was increased but the monetary limits in respect of the appeals to be filed before the High Courts and before the Supreme Court remained the same. Both these Instructions specifically provided that the

instructions would apply only to appeals filed on or after the date of the circular and in cases where the appeals were filed before the date of the instruction, the cases will be governed by the instruction on the subject operating at the time when such appeal was filed.

5. Thereafter, by Circular No.3 of 2018 dated 11.07.2018 not only were the monetary limits enhanced but one more exception was introduced, viz. where the addition relates to undisclosed foreign assets/bank accounts. This circular once again clarified that it would apply to appeals which would be filed henceforth but also additionally provided that it will apply to pending appeals and such pending appeals below the specified tax limits should be withdrawn/not pressed.

6. Subsequently an amendment was made to paragraph 10 of Circular No.3 of 2018 by an instruction dated 20.08.2018 and two further exceptions were added, viz., where the addition, is based on information received from external sources in the nature of law enforcement agencies and cases where prosecution has been filed by the Department and is pending in the Court. However, this instruction made it clear that the modification shall come into effect only from 20.08.2018.

7. On 08.08.2019 the monetary limits were further enhanced. Thereafter, on 15.03.2024 Circular No. 5 of 2024 superseded the earlier Circulars/Instructions and specified fresh monetary limits in paragraph

No.4. Further, the scope of the exceptions was considerably enhanced. Paragraph 3.1 sets out the circumstances in which the requirement to withdraw the appeal on account of the tax effect was lower than the monetary limits was inapplicable.

8. Ms Amira Razaq, learned counsel for the appellant-Revenue submitted that the CBDT has from time time issued instructions, circulars and directions regulating the filing of appeals on behalf of the Department, the tax effects and the exceptional cases in which monetary limits will not apply. In time, by Finance Act 18 of 2008, Section 268A was introduced into the Income Tax Act 1961. The said Section 268A reads as follows:-

> "[Filing of appeal or application for reference by income-tax authority. [Inserted by Act 18 of 2008, Section 51 (w.r.e.f. 1.4.1999).]
>
> (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.]"

9. Ms Razaq submitted that in exercise of powers under Section 268A, the Board has issued Circulars No.5/2024 and 9/2024. She submitted that the said Circular was issued in supersession of the Board's earlier Circulars No.3/2018, 17/2019 and the Board's letter dated 20.08.2018. Paragraphs 3.1, 4.1 and 10 of the said Circular which are material were referred to by the learned counsel reading thus:-

"*3.1 Monetary limits given in paragraph 4 with regard to filing appeal/SLP shall be applicable to all cases including those relating to TDS/TCS under the Act with the following exceptions where the decision to appeal/file SLP shall be taken on merits, without regard to the tax effect and the monetary limits:-*

a. Where any provision of the Act or the Rules or notification issued thereunder has been held to be constitutionally invalid, or

b. Where any order, notification, instruction or circular of the Board or the Government has been held to be illegal or ultra vires the Act or otherwise constitutionally invalid, or

c. Where the assessment is based on information in respect of any offence alleged to have been committed under any other law received from any of the law enforcement or intelligence agencies such as CBI, ED, DRI, SFIO, NIA, NCB, DGGI, state law enforcement agencies such as State Police, State Vigilance Bureau, State Anti-Corruption Bureau, State Excise Department, State Sales/Commercial Taxes or GST Department, or

d. Where the case is one in which prosecution has been filed by the Department in the relevant case and the trial is pending in any Court or conviction order has been passed and the same has not been compounded, or

e. Where strictures/adverse comments have been passed and/or cost has been levied against the Department of Revenue, CBDT or their officers, or

f. Where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under sections 10(23C), 12A/12AA/12AB of the Act, order passed u/s 263 of the Act etc. The

reference to cases involving sections referred here, where it is not possible to quantify tax effect or tax effect is not involved, is for the purpose of illustration only.

g. Where addition relates to undisclosed foreign income/undisclosed foreign assets (including financial assets)/undisclosed foreign bank account, or

h. Cases involving organized tax evasion including cases of bogus capital gain/loss through penny stocks and cases of accommodation entries, or

i. Where mandated by a Court's directions, or

j. Writ matters, or

k. Matters related to wealth tax, fringe benefit tax, equalization levy and any matter other than the Income Tax Act, or

1. In respect of litigation arising out of disputes related to TDS/TCS matters in both domestic and International taxation charges:-

i. Where dispute relates to the determination of the nature of transaction such that the liability to deduct TDS/TCS thereon or otherwise is under question, or

ii. Appeals of International taxation charges where the dispute relates to the applicability of the provisions of a Double Taxation Avoidance Agreement or otherwise.

m. Any other case or class of cases where in the opinion of the Board it is necessary to contest in the interest of justice or revenue and specified so by a circular issued by Board in this regard.

4.1 Appeals/SLPs, not falling in the exceptions as detailed in para 3 above, shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:

Sl. No.	*Appeals/SLP in Income-tax matters*	*Monetary Limit (Tax effect in Rs.)*
1.	*Before Income Tax Appellate Tribunal*	*50 lakh*
2.	*Before High Court*	*1 crore*
3.	*Before Supreme Court*	*2 crore*

10. This issues under section 268A of the Act and shall come into effect from the date of issue of this Circular. This Circular will apply to SLPs/appeals to be filed henceforth before the SC/HCs/Tribunals."

10. Ms Razaq then submitted that so far as Circular 9/2024 dated 17.09.2024 is concerned, the material portions which need to be considered read as follows:-

" Reference is invited to Circular No 5/2024 (F.No.279/Misc.142/2007-ITJ (PT.)), dated 15-3-2024 of Central Board of Direct Taxes (the 'Board') vide which monetary limits for filing of income tax appeals by the Department before Income Tax Appellate Tribunal, High Courts and SLP/appeals before Supreme Court have been specified. Further, exceptions to the monetary limits were also specified vide paras 3.1 and 3.2 of the said Circular.

2. As a step towards management of litigation, it has been decided by the Board to revise the monetary limits for filing of appeals in Income-tax cases as stated in Para 4.1 of the aforementioned Circular as follows:

Sl. No.	*Appeals/SLP in Income-tax matters*	*Monetary Limit (Tax effect in Rs.)*
1.	*Before Income Tax Appellate Tribunal*	*60 lakh*
2.	*Before High Court*	*2 crore*
3.	*Before Supreme Court*	*5 crore*

3. Monetary limits given in paragraph 2 above with regard to filing appeal/SLP shall be applicable to all cases including those relating to TDS/TCS under the Income-tax Act, 1961 with exceptions as per paras 3.1 and 3.2 of Circular No 5/2024, dated 15-3-2024, where the decision to appeal/file SLP shall be taken on merits, without regard to the tax effect and the monetary limits.

4. It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case. The officers concerned shall keep in mind the overall objective of reducing unnecessary litigation and providing certainty to taxpayers on their Income-tax assessments while taking a decision regarding filing an appeal.

5. The modifications shall come into effect from the date of issue of this Circular. This Circular will apply to SLPs/appeals to be filed henceforth in SC/HCs/Tribunal. It shall also apply to the SLPS/ appeals pending before Supreme Court/High Courts/Tribunal, which may accordingly be withdrawn."

11. Ms Razaq submitted that Circular No.9 was issued in furtherance of the earlier Circular No.5/2024 and introduced revised tax effects or monetary limits for pursuing/instituting fresh appeals. The exceptions to

the monetary limits as per clauses 3.1 and 3.2 of the said Circular No.5/2024 were referred to but were neither superseded by other exceptions nor modified.

12. In this view of the matter Ms Razaq submitted that the substantial questions of law on which both the present appeals were admitted clearly show that the dispute between the assessee and the Department relates to the nature of the transaction i.e. whether the payments made by the assessee towards sales and marketing services rendered outside India to Marriott International in terms of their contract, are amenable to tax in India and whether the assessee is liable to deduct such tax before payment of funds abroad to Marriott International. She submitted that the said substantial questions of law would involve interpretation of the contract between the parties as well as the provisions of the Income Tax Act 1961 and the Double Taxation Avoidance Agreements in place between India and the USA.

13. It is therefore submitted that the substantial questions of law in both the appeals would be within the exceptions carved out in paragraph 3.1(l) (i) and (ii) of the Circular No.5/2024. It is urged that without prejudice to the exceptions mentioned in paragraphs 3.1 and 3.2, as on the date of issuance of the said Circular No.5/2024, both the appeals in question were well within the monetary limits specified in the said circular.

14. Countering the submissions of the assessee that after notification of Circular No.5/2024 and raising of monetary limit to Rs.2 Crores, the present appeals ought to be withdrawn without reference to the exceptions in Circular No.5/2024 and that only the exceptions as existing on the date of the institution of the appeals (i.e. Instruction 3/2011 and 5/2014) ought to be considered, Ms Razaq urged that the submission is misconceived for the following reasons:-

i) The Board's Instructions no 3/2011 admittedly stand superceded by the subsequent Circulars. The Circulars no. 5/2024 and 9/2024 presently hold the field and govern the subject matter of filing appeals by the Departmental authorities.

ii) Without prejudice to the above, apart from the exceptions contained at para 8 of the said Instruction 3/2011 (which are referred to by the assessee in its written submissions), the said Instruction 3/2011 at para 5 had introduced another exception to the monetary limits as follows:

> *"...However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed."*

iii) The present appeals arise out of a composite order of the ITAT for the Assessment Years 2006-07 and 2007-08 and involve the question of taxability of the transaction relating to payments made to Marriott International USA by the Assessee, which was an issue of a recurring nature every year and as such has a cascading effect; thus coming within the exception laid down in the said Instruction no. 3/2011.

iv) The Boards' Instruction no. 3/2011 was Superseded by the Board's Instruction no. 5/2014 dated 10th July 2014. However, the appeals filed before 10th July 2014 were saved (vide para 11). The present appeals were filed - TXA no. 47/2014 on 7th May, 2014 and TXA no. 49/2014 also on 7th May, 2014."

15. Ms Razaq then submitted that the Hon'ble Supreme Court while interpreting the said Instruction 3/2011 in the case of ***Commissioner of Income Tax v/s. Surya Herbal Ltd. - [2011] 14 taxmann.com 142 (SC) (3J Bench)*** had expressly laid down that the said Instruction 3/2011 should not be applied when the matter has a cascading effect. Thus, the said Instruction no.3/2011 relied upon by the assessee also protects the right of the revenue to institute appeals in matters involving common issues arising in more than one assessment year. The issue regarding the nature of the transaction and the issue of taxability of the payments to Marriott International by the assessee has been arising every year including the assessment years in question in the present appeals and thus has a cascading effect.

16. It is then submitted that Instructions no. 5/2014 were superseded by instruction no. 21/15, which was in turn followed by Circular 3/2018. The said Circular no. 3/2018 vide clause 5 also saved appeals involving common questions without reference to the tax effect.

17. Ms Razaq submits that Circular 5/2024 supersedes the earlier circulars no. 3/2018, 17/2019 and the Board's letter dated 20th August, 2018 (vide para 2). The exception relating to appeals involving composite orders involving common issues in more than one assessment year stands omitted in the present Circulars 5/2024 and 9/2024. The exceptions introduced by Circular no.5/2024 are maintained in the Circular no.9/2024 which merely enhances the tax effects.

18. It is urged that the assessee's case falls within the exception to the monetary limits carved out in clause 3.1 (l)(i) and (ii) of Circular No.5/2024. As on the date of issuance of the said Circular 5/2024, the present appeals were well within the monetary limit specified and thus maintainable.

19. Learned counsel for the Revenue submitted that the import of the submissions of the assessee would be that from the cut off date (i.e. Circular 9/2024 dated 17.09.2024) all pending appeals falling below the monetary limits regardless of the exceptions in clauses 3.1 and 3.2 of Circular 5/2024, ought to be withdrawn. It thus attempts to bifurcate the

availability of the benefit of the exceptions to the Revenue between pending appeals and future appeals on such cut off date. This would mean that while pending appeals raising the same points of law are to be withdrawn, future appeals based on the same exceptions are maintainable. This would result in an anomalous situation, whereby appeals to be filed by the Department in future will stand saved regardless of tax effect in case of the exceptions carved out in Circular 5/2024 but not those filed prior thereto. This would also involve reading words into para 5 of the said Circular 9/2024 which discloses an intention to cover all modifications introduced by the Circulars 5/2024 and 9/2024 and makes the same applicable to pending as well as future appeals. Para 5 reads thus:-

> *"5. The modifications shall come into effect from the date of issue of this Circular. This Circular will apply to SLPs/appeals to be filed henceforth in SC/HCs/Tribunal. It shall also apply to the SLPs/ appeals pending before Supreme Court/High Courts/Tribunal, which may accordingly be withdrawn."*

20. Ms Razaq submitted that both the Circulars are to be read holistically and harmoniously. Emphasis is placed on Clauses 2, 3 and 5 of Circular 9/2024 which according to her should be read together.

21. Without prejudice to the aforesaid, it is submitted that assessee's submissions are also legally untenable as prima facie, the Board's Circular No.9/2024 expressly includes "pending" appeals (vide clause 5). Emphasis

is then placed on the expression "supersession" which came up for consideration before the Hon'ble Supreme Court in ***State of Orissa and Ors. v/s. Titaghur Paper Mills Company Limited and Anr. - AIR 1985 SC 1293***. The issue in the said case was that one of the notifications issued under the Sales Tax had been superseded by a subsequent notification. The Hon'ble Supreme Court held that the expression "in supersession of all previous notifications" amounts to repeal and replacement of the previous notifications by new notifications. The Supreme Court inter alia held as follows:-

> ""…….In the Notifications dated Dec. 29, 1977, the word "supersession" is used in the same sense as the word "repeal" or rather the words "repeal and replacement". The Shorter Oxford English Dictionary, Third Edition, at page 2084, defines the word 'supersession' as meaning "The action of superseding or condition of being superseded". Some of the meanings given to the word 'supersede' on the same page in that Dictionary which are relevant for our purpose are "to put a stop to; to render superfluous or unnecessary; to make of no effect; to annul; to take the place of (something set aside or abandoned); to succeed to the place occupied by; to supply the place of thing". Webster's Third New International Dictionary at page 2296 defines the word "supersession" as "the state of being superseded: removal and replacement". Thus, by using in the Notifications dated Dec. 29, 1977, the expression 'in supersession of all previous notifications' all that was done was to repeal and replace the previous notifications by new notifications……."

> In the case of Calcutta Municipal Corporation v. Pawan Kumar Saraf and another, reported in (1999) 2 SCC-400, the apex Court observed that when Section 13(3) says that the certificate of Director, CEL shall supersede the report, it means that the report would stand annulled or obliterated. The word "supersede" in law means "obliterate, set aside, annul, replace, make void or inefficacious or useless, repeal".

22. Ms Razaq therefore submitted that the Circulars 5/2024 read with 9/2024 replace all earlier Circulars referred to therein with all legal consequences. The same shall apply to future as well as pending appeals as apparent from a literal reading of the said Circulars (para 5 of Circular 9/2024). The Circulars when read together are sufficiently clear and unambiguous and do not leave any room for reading in any words or confining their scope and import only to the monetary limits while excluding the exceptions carved out in respect of pending appeals. Hence just as the monetary limits are to be applied to pending appeals, so also the benefit of the exceptions carved out in paras 3.1 and 3.2 of Circular 5/2024 would be available to the Revenue to pursue pending matters falling thereunder in appropriate cases.

23. In conclusion, Ms Razaq submitted that although the present appeals are below the monetary effects set down in Circular 9/2024, the same stand saved within the exceptions carved out in paragraph 3.1 (l) (i) and (ii) of the Circular 5/2024.

24. Before we proceed further, it would be significant to notice the decision of the High Court of Rajasthan in ***The Commissioner of Income Tax-I, New Central Revenue Building, Statue Circle, Jaipur, (Raj.) v/s. Satish Kumar Agarwal – D. B. Income Tax Appeal No.8/2011***. After referring to the relevant provisions of the Income Tax Act and the circulars on the subject, Their Lordships in paragraphs 17 to 20 observed thus:-

> "*17. Circular 9 of 2024 albeit, enhanced the monetary limits but retained the exceptions in Para 3.1 & 3.2 of Circular 5 of 2024. From perusal of Para 5 of Circular 9 of 2024, it is evident that the circular shall apply to the appeals to be filed henceforth and also to the appeals pending before the Supreme Court, High Court and the Tribunal. Thereby making monetary limit specified in it and exceptions in Para 3.1 & 3.2 of Circular 5 of 2024 applicable to all the pending appeals. In other words, Circular 5 of 2024 was applicable prospectively but Circular 9 of 2024 while enhancing the monetary limit, retaining the exceptions of Circular 5 of 2024 made it applicable to the pending appeals also.*
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> *18. The contention of learned counsel for the appellant that the Circular give retrospective effect only to the monetary limit lacks merit. In case the argument is accepted, the result would be of adding words to the clear and plain language of Para 5 of Circular 9 of 2024.*
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> *19. The reliance of the counsel for the appellant on the exceptions carved out in Circular 3 of 2018 cannot be sustained. Circular 3 of 2018 was superseded by Circular 5 and the exceptions of Circular 5*

with the enhanced monetary limits in Circular 9 of 2024 were made applicable to pending appeals.

20. The appeals are dismissed as non-maintainable in view of the Circular 9 of 2024."

25. Learned counsel for the Revenue submitted that the observations made in *The Commissioner of Income Tax-I, New Central Revenue Building, Statue Circle, Jaipur, (Raj.) v/s. Satish Kumar Agarwal (supra)* are not in support of the assessee. However, for the reasons hereafter mentioned we are also inclined to take a view that the present tax appeals deserve to be dismissed as withdrawn. We do not find favour in the submission of the learned counsel for the Revenue that in view of the exceptions, though the monetary threshold was not crossed, the appeal/s could be prosecuted.

26. Para 5.1 of the Circular No.5/2024 sets out how the tax effect will be calculated in case of appeals filed in the regular assessment order, the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed.

27. Para 5.4 sets out the manner of calculating the tax effect of cases involving TDS/TCS and it is provided that the cumulative effect of all orders passed for an assessment year of a deductor shall be taken into

account and shall include interest under Section 201(1A) of the Act. Paragraph 10 of the said instruction makes it abundantly clear that such Circular will apply to SLPs/appeals to be filed henceforth before the Supreme Court/High Courts/Tribunals and hence would apply only prospectively. The Board issued a fresh instruction on 17.09.2024 being Circular 9/2024 whereby only the monetary limits provided in Circular 5/2024 are enhanced. Para 2 of the Circular says that as a step towards management of litigation, it has been decided by the Board to revise the monetary limits for filing of appeals in Income-tax cases as stated in para 4.1 of the March Circular.

28. Para 5 of the Circular 9/2024 clarifies that the modification of the monetary limits shall come into effect from the date of issue of the Circular and the limits would apply to the SLPs/appeals pending before the Supreme Court/High Courts/Tribunal. It is further clarified that the revision of the monetary limits would also apply to the SLPs/appeals pending before the Supreme Court/High Courts/Tribunal which may, accordingly be withdrawn.

29. It is the submission of the assessee that having regard to the tenor of the said Circulars, which Circulars are binding on the Revenue, the present appeals would have to be withdrawn as admittedly the tax effect is less than the revised monetary limits specified in the Circular 9/2024 which revision

of limits has a retrospective effect.

30. In our opinion, the exceptions in terms of which the revenue seeks to prosecute the present appeals would have no application for two reasons. First of all, the exception which the revenue seeks to rely upon was created for the first time in the Circular dated 15.03.2024 and para 10 of the said Circular makes it abundantly clear that the Circulars would apply to appeals that would be filed henceforth which also stands to reason as a Circular which carves out additional exceptions can only have prospective effect because it is only on the issuance of such a circular that the various exceptions detailed in para 3.1 were enunciated. As noted earlier, initially the exceptions were only of three categories but subsequently increased to five and, thereafter, the present Circular increased the same to thirteen. The decision whether an appeal should be filed irrespective of the monetary limits involved has to be made when the appeal is filed and it is only the exceptions that are then prevalent that would be applicable. Any exception introduced thereafter would have no application whatsoever in determining whether an appeal should be filed. This would be a normal way of construing the circular and, in any event, the language of Para 10 makes it abundantly clear that such was the intention. In fact whenever the Board has enhanced the scope of the exception, it has always made it prospective. However, when it comes to increasing the monetary limits, the Board, having regard to the avowed objects of reducing litigation, has made

it explicitly clear both in Circular No. 9 of 2024 as well as in Circular No.3 of 2018 that the enhanced monetary limits will apply even in respect of all pending appeals. We are therefore of the view that having regard to the Circulars, the present appeals must be dismissed as withdrawn and the Revenue cannot prosecute the appeals by relying upon any exception created in para 3.1(l) of the Circular dated 15.03.2024 which by virtue of para 10 is to be applied only to appeals to be filed henceforth. The argument of the Revenue that both the Circulars dated 15.03.2024 and 17.09.2024 have to be read in a holistic manner and both must be given retrospective effect is contrary to the plain terms of the said Circulars.

31. In any event, in our opinion the Revenue's case does not fall in the exception carved out in para 3.1(l) of the Circular dated 15.03.2024 for the following reasons. According to us, Clause 3.1 (l) excludes appeals arising out of proceedings taken against a deductor for failure to deduct tax at source and recovery of the tax from the payer that was omitted to be deducted. If there is an obligation to deduct tax at source on a payer in terms of the provisions contained in Chapter XVII-B of the Act and the payer fails to discharge such obligation, it is liable for several consequences. The first and the foremost being that it could be treated as a Respondent in default for failing to deduct taxes and, accordingly, the tax which ought to have been deducted could be recovered from it by passing an order under section 201. Consequently, there would be a levy of interest in terms of

section 201(1A) as well as a levy of penalty under section 271C, if such failure was without reasonable cause. The amount of tax that could have been recovered from the payer would be equivalent to the amount that he would have had to deduct. Another collateral consequence that would flow is that the payer would suffer a disallowance of the expenditure that he had claimed as a deduction having regard to the provisions of section 40(a)(i) or section 40(a)(ia). In such circumstances for the assessment years that one is concerned with in the present appeals, the consequence would be that the expense that was claimed as a deduction on which tax was not deducted would be disallowed.

32. The present appeals raise one of the question as to whether the respondent is entitled to a deduction of the expenses incurred by it by way of making a payment to Marriott International Inc. because it had not deducted tax at source under section 195 on such payment. In our opinion, this issue would not fall within the scope and ambit of clause (l). This is brought out by the manner in which the tax effect has to be determined. The appeals arising from regular assessments where an expense is disallowed or a claim for an allowance is disallowed or an amount is sought to be assessed as income is dealt with in para 5.1. In these circumstances, the tax effect is calculated by taking the difference of tax on the total income assessed and the tax would have been chargeable had such total income been reduced by the amount of income in respect of the issues

against which the appeal is intended to be filed. The following example relied upon by the learned Senior Advocate for the assessee appealed to us. Learned Senior Advocate submitted that for example, say in the case of an assessee, it incurred an expenditure of Rs.20/- which it claims as a deduction and returns a total income of Rs.100/-. If the expenditure so claimed is disallowed, by invoking section 40(a) (i) for a failure to deduct tax at source, then, the assessee would be assessed on an income of Rs.120/-. If the prevalent rate of tax is 30%, the tax effect would be calculated by applying the rate of 30% on Rs.120/- i.e. Rs.36 and subtracting from it the tax on the total income returned of Rs.100/- i.e. Rs.30/- and, accordingly, the amount of Rs.6/- would be determined to be the tax effect. On the other hand, in the case of a litigation pertaining to TDS, suppose on the aforesaid payment of Rs.20/- tax at the rate of 15% would have to be deducted, then, in terms of clause 5.4 of the 15.03.2024 circular the tax effect would be calculated at Rs.3/-. We find force in the submissions of the learned Senior Advocate that this is indicative of the fact that what is covered by para 3.1.l are cases springing out of a litigation from orders passed under section 201, 201(1A) etc. In the present appeals, the original order which was passed arises from an assessment framed under section 143(3) and, therefore, the exclusion contemplated in para 3.1.l would not apply and, accordingly, the appeals must be dismissed as withdrawn.

33. Further, it is significant to notice that the litigation that commences from orders passed under section 143(3) and orders passed under section 201 is also under different provisions. Section 246A(1) gives a right to an assessee to file an appeal if it is aggrieved by any of the orders specified therein. Clause (a) of the said provision refers to inter alia an order of assessment under section 143(3). The right to file an appeal from an order passed under Section 201(1) is to be found in clause (ha). This again is indicative of the fact that the Act treats litigation commencing from disallowance in an assessment under section 143(3) and failure to deduct tax at source separately and, accordingly, the exception carved out in the instruction dated 15.03.2024 have to be construed accordingly.

34. Consequently, we have no hesitation in dismissing the appeals as withdrawn.

NIVEDITA P. MEHTA, J. **M. S. KARNIK, J.**