

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

INCOME TAX APPEAL NO.778 OF 2015

The Pr. Commissioner of Income Tax Central-I .. Appellant.  
v/s.  
M/s. Grasim Industries Ltd., .. Respondent.

Mr. Anil Singh, ASG with Mr. P. C. Chhotaray and Ms. Geetika Gandhi, for the Appellant.

Mr. Jehangir D. Mistri, Sr. Advocate with Mr. A. K. Jasani, for the Respondent.

**CORAM: M.S.SANKLECHA &  
SANDEEP K. SHINDE, JJ.**  
**DATE : 18<sup>th</sup> APRIL, 2018.**

**P.C:-**

On 12<sup>th</sup> February, 2018, the following order was passed:-

“1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 22<sup>nd</sup> December, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2001-02.

2. The Revenue has urged the following substantial questions of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the technical knowhow expenditure (technical assistance fees) is revenue expenditure ignoring the fact that as per amended provisions of Section 32, technical knowhow is an intangible asset and the fee for obtaining the same is a capital expenditure and not revenue expenditure?

(ii) Whether on the facts and in the circumstances of the case and in

law, the Tribunal was justified in holding that the profit of US and UK branches is not taxable in India and should be excluded from the taxable profit of the assessee?

(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in restoring the issue of taxability of the sale tax exemption benefit of Rs.58 crores availed by the assessee to the file of the Assessing Officer for deciding afresh which has not been accepted by the Revenue?

3. After Mr. Chhotaray, in support of the appeal read the aforesaid three questions of law, we specifically asked Mr. Chhotaray in respect of the question no.(iii), whether the Assessing Officer passed any order after the impugned order dated 22<sup>nd</sup> October, 2014 of the Tribunal, restoring the issue to him for fresh consideration. Mr. Chhotaray, learned Counsel for the Revenue, on instructions from the Assessing Officer, informed us that no effect has been given to the impugned order of the Tribunal and the matter is still pending with the Assessing Officer. This was disputed by the learned Senior Counsel appearing for the respondent. However, as the statement was made on instructions of the Assessing Officer and the learned Counsel for the Revenue persisted with his stand of no order passed (inspite of the objection), we proceeded to hear the appeal for admission of question no.(iii).

4. We spent about 30 minutes trying to understand the grievance of the Revenue on question no.(iii) and the opposition by the respondent assessee to the question being entertained. After hearing the parties as we were to commence dictating our order, that Mr. Mistri, learned Senior Counsel appearing for the respondent pointed out that he has during the time the appeal was being heard for admission, obtained from his client, a copy of the order dated 29<sup>th</sup> July, 2015 passed by the Assessing Officer giving effect to the impugned order dated 22<sup>nd</sup> October, 2014 on this issue. In support, he tenders a copy of the same across the bar.

5. On examination of the order dated 29<sup>th</sup> July, 2015, we enquired of Mr. Chhotaray as to why we were informed that no order consequent to the impugned order of the Tribunal dated 22<sup>nd</sup> October, 2014 has been passed by the Assessing Officer on this issue. Mr. Chhotaray again informs us that the Assessing Officer, who has instructed him in this matter, met him twice and had specifically told him that no order has been passed consequent to the impugned order dated 22<sup>nd</sup> October, 2014 of the Tribunal in respect of this issue. We thereafter commenced dictation of this order. At this stage of our dictation, Mr. Chhotaray interjected to mention that it should be Assessing

*Officer / Inspector and not Assessing Officer alone. This is contrary to what was stated to us during the hearing. In fact, we were categorically told by Mr. Chhotaray that he has met the Assessing Officer twice and he was informed by him that no order has been passed. Mr. Chhotaray, now states that he was receiving instructions both from Assessing Officer as well as Inspector. In any case, the Assessing Officer who has instructed Mr. Chhotaray has to ensure that the facts are correctly briefed to the Counsel for the Revenue appearing before this Court.*

6. *The least that is expected of a State is fairness. Facts are sacred. We are unable to understand why the incorrect instructions are given to the Counsel, which in turn leads taking up time, which is otherwise scarce considering the quantum of pending income tax appeals. Moreover, the absence of the Assessing Officer being fully updated with all facts may lead to waste of time and effort on all sides. This for the reason that in case, we hold in favour of the Revenue on the present question no.(iii) in this appeal, then, the entire exercise done consequent to the impugned order of the Tribunal i.e. passing of an order dated 29<sup>th</sup> July, 2015 of the Assessing Officer and further orders in appeal therefrom would all be rendered infructuous. This as the basis / foundation of the order dated 29<sup>th</sup> July 2015 and subsequent orders in appeal will be set aside. Besides, being most unfair to the respondent assessee.*

7. *In the above view, we direct the Assessing Officer to file an affidavit pointing out the circumstances which led to his giving incorrect fact to the Counsel for the Revenue leading to unnecessary waste of time and effort.*

8. *We adjourn the hearing of this appeal to 26<sup>th</sup> February, 2018 to enable the filing of the affidavit.*

9. *We also direct Mr. Chhotaray, learned Counsel appearing for the Revenue to serve a copy of this order upon the jurisdictional Chief Commissioner of Income Tax and also the other Chief Commissioners of Income Tax functioning within the jurisdiction of this Court. This with a hope that they will ensure that Officers who come to instruct the Counsel for the Revenue, instruct themselves on the facts of the case completely so as to brief the Counsel to represent the Revenue appropriately at the hearing of the appeal.*

10. *Stand over to 26<sup>th</sup> February, 2018.”*

2            Thereafter, on 23<sup>rd</sup> February, 2018, an Affidavit of Mr. Kiran Unavekar, Joint Commissioner of Income Tax was filed. The Affidavit specifically states that:

*“ I further say that the specific issue, whether the AO had given effect to the order dated 22-10-2014 of the Hon'ble ITAT, was not discussed with Shri P. C. Chhotaray, the Sr. Standing Counsel, either by the Inspector of the charge or by me.*

*I say that I met Shri P. C. Chhotaray, the Ld. Counsel for the Revenue only once i.e. 24-01-2018 and not twice as state by Shri P. C. Chhotaray in the Hon'ble Court.*

.... .... .... .... ....

*I say that the information given by Shri P. C. Chhotaray, the Sr. Counsel of the Revenue in the Hon'ble Court that “no effect was given to the order of the Hon'ble ITAT” may probably have been given as it was not the part of his record.*

*I say that I sincerely apologise to the Hon'ble Court for the incorrect information given by the Ld. Sr. Counsel for the Revenue due to communication gap, which led to unintended waste of time of the Hon'ble Court.”*

3            The learned ASG appearing on behalf of the Revenue points out that there was a misunderstanding on the part of its Counsel Mr. Chhotaray, on instructions received from the Assessing Officer. The ASG fairly states that it was a mistake which should not have happened. Henceforth, it is submitted that the Revenue would be more careful in respect of statements made in Court. In these circumstances, learned ASG requests that this matter be treated as closed.

4            We would have normally closed the matter, considering the events of 12<sup>th</sup> February, 2018 in our Court and as a bona fide mistake. However, it has been our experience that some Counsel for the Revenue,

time and again argue matters before us only for the sake of arguing even when the issue stands concluded or without taking proper instructions in respect of facts as existing i.e. post the passing of the impugned order of the Tribunal. The focus is not on the facts involved in the matter but on arguing point of law. In fact, recently in the case of CIT v/s. JCW Logistic Park Pvt. Ltd., (Income Tax Appeal No. 613 of 2015) decided on 11<sup>th</sup> April, 2018, we had occasion to observe as under:-

*“5:- We are pained to record this most unreasonable attitude on the part of the Advocate for the Revenue, seeking to re-argue settled concluded issues, without having obtained any stay from the Apex Court. This results in un-necessary wastage of the scarce judicial time available in the context of large numbers of appeals, awaiting consideration. We would expect .... an Advocate to act with responsibility as an Officer of the Court and not merely argue for the sake of arguing when an issue is clearly covered by the decision of a Co-ordinate bench of this Court and take up scarce judicial time. The Advocate must bear in mind that this a Court of law and not an University/ College debating Society, where debates as held for academic stimulation. We deal with real life disputes and decide them in accordance with the Rule of Law, of which an important limb is uniformity of application of law. This on the basis of judicial discipline and law of precedents.”*

The present insistence on the part of Counsel to argue the appeal, notwithstanding the fact that the opposing Counsel stating that an order has been passed on remand, making question (iii), now redundant. This conduct on the part of the Counsel, is a continuation of treating the Court of Law as place to score debating points. The only reasonable things to do in the above circumstances, would have been to take time to check and not insist that he has instructions twice over and contend that no order has been passed.

5 Moreover, if this conduct is permitted at the bar, then it would become a practice for an Advocate to make a statement, on

instructions and thereafter, when the events do not turn out as desired by litigants, the Advocate will turn around and state that he had misunderstood his client. This cannot be a norm. We accept statements made by Advocates on behalf of their client without demur, as an Advocate of this Court, we proceed on the basis that he would be more than a mere spokesman for his clients. Thus, every statement made by an Advocate on facts, affecting the case, would be made with responsibility after checking the fact. We are constrained/ compelled to take note of and pass this order as this arguing for the sake of arguing without taking into account the factual context is happening too often, even after we have made numerous attempts to impress upon the Advocates who appear for the Revenue, that they are appearing for the State and must act with responsibility. Thus we cannot now continue to ignore this manner of conducting the matters on behalf of the Revenue before us. We have on numerous occasions attempted to impress upon the Advocates of the Revenue that this manner of conducting the matter does not behove the State, but to no avail. Therefore, the message now needs to be sent, loud and clear that the Advocate must be more careful whilst making statement on instructions, as the same are accepted by the Court, without question. We, shudder to think, the day when in the carriage of judicial proceedings we will not be able to accept a statement made by the Advocate and would have to always insist that the statement be supported by an affidavit of the client. This would result in disruption of the administration of justice and only result in further delay. The Advocates should realize that domain expertise alone will not justify lapse in the standard of conduct expected of an Advocate.

6 We also note with dismay that the affidavit dated 23<sup>rd</sup> April,

2018 of the Assessing Officer stating that as no questions were asked about giving effect to the order of the Tribunal dated 22<sup>nd</sup> October, 2014 by the Counsel for the Revenue, therefore, there was no occasion to discuss the same. This to say the least, is not expected on the part of the Assessing Officer as he is the person expected to brief and instructs the Revenue's Counsel. It is his primary duty to upgrade the Counsel with regard to all facts involved in the matter, more particularly facts which may have transpired after the passing of the impugned order of the Tribunal. The Assessing Officer must appreciate that as the Officer of the State, he is the client. Therefore, the Assessing Officer does not meet the Revenue's Counsel as a witness who is required only to answer the questions posed to him by the Advocate. It is, indeed the job of the Assessing Officer to inform Advocate appearing for the Revenue of all facts, so as to ensure that justice is done. We have observed that when matters are taken up, the Counsel for the Revenue do not have any assistance on facts available to them as none from the Revenue, is present. In fact, it appears that the Officers of the Revenue believe that once the matter is in Court, it is the sole responsibility of the Counsel for the Revenue to protect the interest of the State and their responsibility comes to end. This cannot be.

7 We understand that while appointing panel Advocates for the Revenue, the requirement of having practiced for some number of years is not insisted upon in case a person has domain expertise, such as retired Officers of Revenue. If this indeed be the practice, it would, in our view, need revisiting the same. This is so, as the skill and conduct required to appear as an Advocate, are honed by working in the chambers of an experienced Advocate, particularly that he is part of a system which seeks

to ensure that Justice is achieved, beyond the cause of the client. It is indeed for the CBDT to decide and take appropriate action. Undoubtedly, these retired Officers do have domain expertise and do render assistance. However, the conduct and role of an Advocate is much more than that of being an expert in tax matters. This has to be realized by the domain expert Advocates. An Advocate must have a broader vision and look upon themselves as Officers of the Court, assisting the Court to do justice and not right or wrong, my client is correct as now done by some of the Advocates for the Revenue. In fact, in this context, we had earlier also in 2015 had occasion to observe in ***Director of Income Tax (International Taxation) v/s. Credit Agricole Indouez 377 ITR 102***, as follows:

“ The manner in which sometimes the unmeritorious appeals are persisted by the Revenue, reminds us of the famous observations of Mr. Justice Crompton in *R. V. O'Connell (1844) 7 ILR 261 @ 362:-*

*Another doctrine broached by another eminent counsel, I cannot pass without a comment. The learned Counsel described the Advocate as the mere mouthpiece of his client, he told us the speech of the Counsel was to be taken as that of client; and, thence seemed to conclude that the client only was answerable for its language and sentiment. Such, I do conceive, is not the office of the Advocate. His Office is a higher one. To consider him in that light is to degrade him. I would say to him as I would say of a member of House of Commons – he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment, but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law, he will not willfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of the truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer.”*

In this case, the Counsel is appearing for the State. The



responsibility of an Advocate appearing for the State is much greater to ensure that justice is done and common people/ citizens are not harassed. This conduct on the part of the Revenue's Counsel of not taking proper instructions and arguing matters as they perceive a debatable point involved, does lead to un-due harassment of the tax payers-Respondent.

8 We have for a long time, taken into account that many of these are fresh entrants to the bar and in due course, would learn the standard expected of an Advocate. However, to our disappointment, many of them are refusing to learn. Therefore, the CBDT could consider holding of a training programme, where leading Advocates could address the domain-expert on the ethics, obligation and standard expected of Advocates before they start representing the State. This is only a suggestion and it is entirely for the CBDT to take appropriate steps to ensure that the Revenue is properly represented to serve the greater cause of justice and fair play.

9 In any case, we would expect the CBDT to lay down a standard procedure in respect of manner in which the Departmental Officer/ Assessing Officer assist the Counsel for the Revenue while promoting/ protecting Revenue's cause. We find in most cases, at-least during the final hearing, Revenue's Counsel are left to fend for themselves and that even papers at times are borrowed from the other side or taken from the Court Records. If the mind set of the Revenue Officer changes and they attend to the case diligently till it is disposed of, only then would it be ensured that the State is properly represented.

10 We direct the learned ASG and the Registry to forward a copy

of this order to the Chairman, CBDT. We would expect the learned ASG to interact and advice the CBDT in respect of the issues referred to herein above to enable proper representation by the Advocates on behalf of the Revenue.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)

