

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD A BENCH, AHMEDABAD**

**[Coram: Pramod Kumar AM and S.S. Godara JM]**

I.T.A. Nos.: 2850 and 2144/Ahd/11  
Assessment years: 1995-96 and 1996-97

***Jupiter Corporation Services Limited*** .....**Appellant**  
*[PAN: AAACJ5265F]*

***Vs.***

***Deputy Commissioner of Income Tax*** .....**Respondent**  
***Central Circle 1(1), Ahmedabad***

I.T.A. No.: 2145/Ahd/11  
Assessment year: 1996-97

***Sulochana V Gupta*** .....**Appellant**  
*[PAN: ADHPG1324P]*

***Vs.***

***Deputy Commissioner of Income Tax*** .....**Respondent**  
***Central Circle 1(1), Ahmedabad***

**Appearances by:**

**Tushar P Hemani, for the appellant**  
**Subhash Bains, for the respondent**

Date of concluding the hearing : April 22, 2015

Date of pronouncing the order : April 24, 2015

**O R D E R**

**Per Pramod Kumar AM:**

1. When these appeals were originally heard by the Tribunal, there was a difference between the Judicial Member and the Accountant Member then constituting this division bench. To come out of this *cul-de-sac*, the following question was referred for the esteemed opinion of a Third Member, to be nominated by Hon'ble President of this Tribunal, under section 255(4) of the Income Tax Act, 1961:

**Whether, under the facts and circumstances of the case, learned CIT(A) was justified in confirming the penalty under section 271(1)(c) of the Act?**

2. It was in this backdrop that Hon'ble Shri I P Bansal, Judicial Member, was finally nominated as a Third Member, and, vide his order dated 16<sup>th</sup> July 2014, concluded as follows:

**.....I concur with the view taken by Hon'ble Accountant Member that on the facts and circumstances of the case, deletion of penalty was not justified. Therefore, my answer to the question ..... is that under the facts and circumstances of the case, learned CIT(A) was justified in confirming the penalty levied under section 271(1)(c) of the Act....**

3. The opinion so expressed by the Hon'ble Third Member as also the respective separate orders passed by then Judicial Member and the then Accountant Member constituting this division bench are now placed before us for giving effect to the majority opinion.

4. Shri Tushar P Hemani, learned counsel for the assessee, seeks adjournment on the ground that the quantum proceedings are pending before Hon'ble Gujarat High Court and are likely to come up for final hearing soon. When we expressed our disinclination to accept his request for adjournment, he made elaborate submissions on why the third member effect, even on merits, cannot given in this case at this stage. It is submitted that it is a fit case in which even the third member effect proceedings should be referred to a special bench of three or members since the learned Third Member, in his opinion, has disregarded the division bench orders. Our attention is invited to a recent judgment of the Hon'ble jurisdictional High Court, in the case of **CIT Vs Vallabhdas Vithaldas [(2015) 56 taxmann.com 300 (Guj)]** wherein it is held

that the decisions of the division benches must bind the single member benches. Learned counsel then points out that a third member decision cannot be equated with a special bench decision of three members, which may not be fettered by the division bench rulings, and, therefore, learned Third Member was clearly in error in disregarding the earlier division benches, directly on the issue, in favour of the assessee. In case learned Third Member had any doubts on the correctness of the division bench decisions, according to the learned counsel, all he could have done was to refer the matter for constitution of a special bench of three or more Members. He further submits that as on now the opinion expressed by the Third Member is nothing more than an opinion but our giving effect to such an opinion will result into an order of the Tribunal coming into existence but then this order will be directly contrary to the decision of Hon'ble jurisdictional High Court. Our attention is also invited to the judicial precedents in the cases of **Sayaji Iron & Engg Co Ltd Vs CIT [(2002) 253 ITR 749 (Guj)]**, **Union of India Vs Paras Laminates Pvt Ltd [(1990) 186 ITR 722(SC)]**, **Pradip Chndar Parija Vs Pramod Chandra Patnaik [(2002) 254 ITR 99 (SC)]**, **Agarwal Warehousing and Leasing Ltd Vs CIT [(2002) 257 ITR 235 (MP)]** and **CIT Vs L G Ramamurthi & Ors [(1977) 110 ITR 453 (Madras)]**. Learned counsel fairly admits that the in the Third Member order, the judicial precedent in the case of Sayaji Iron (*supra*) has been dealt with and distinguished but not only he submits that the Third Member decision was erroneous on merits, he also submits that it is not open to a lower forum like this Tribunal to disregard a decision of the Hon'ble high Court that it has not taken into account an earlier decision on the same issue. We are thus urged to desist from such an exercise and from passing an order which is wholly unsustainable in law and in complete disregard to binding judicial precedents. It is learned counsel's prayer that the matter should be referred to Hon'ble President for constitution of a special bench to resolve this issue.

5. Shri Subhash Bains, learned Commissioner (DR), vehemently opposes these submissions advanced by the assessee. He submits that the valuable time of the bench is being wasted again and again even by causing delay in giving

effect to the Third Member decision. He urges us to reject the request for yet another reference to Hon'ble President for constitution of a special bench, and submits that in this case the proceedings are being dragged without any valid reason. It is pointed out that this is a case in which Hon'ble Member nominated as Third Member has been changed once and that, even almost one year after the Third Member opinion is expressed, the disposal of these appeals is being avoided due to dilatory tactics employed by the assessee. It is not the case that the decisions of the coordinate benches have not been followed without any reasons, according to the learned Commissioner (DR), but the learned Third Member, in a very erudite and detailed order, has given specific reasons as to why these decisions do not hold good in the present case. Learned Commissioner (DR) submits that as to whether or not the reasoning of the Third Member is correct is something to be adjudicated by Hon'ble Courts above, and that we should not even sit in judgment over the same. He submits that this Tribunal is not the end of the road so far as this litigation is concerned, and in case the assessee is aggrieved of what has been decided by the majority in this case, it is certainly open to him to challenge the decision before the higher forums. He submits that the two out of three Members have already given their views in favour of the stand of the Assessing Officer and all that we are required to do at this stage is to give effect to the majority views.

6. We have heard the rival submissions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. As Shri Hemani rightly points out, the legal position as it exists now, post **Vallabhdas Vithaldas decision** (*supra*) by Hon'ble jurisdictional High Court, is that the decisions of the division benches bind the single member bench, even when such a single member bench is a third member bench. In coming to this conclusion, His Lordship Hon'ble Justice Kureshi, who was himself sitting as a referral judge to express his views on a point on which the division bench had disagreed in this case, has, after an elaborate survey of judicial guidance and academic literature on this issue, concluded as follows:

**“It can thus be seen that the law of precedent heavily relies on the collective decision making process where multiple legal minds are simultaneously applied assisted by legal research and presentation of legal arguments. When such materials and legal contentions are processed by several judges, the decision that is rendered even if not unanimous has the advantage of input from larger number of legally trained minds. In the present case, unlike a case of larger Bench where three or more judges would be simultaneously hearing a question of law, with the assistance of same set of arguments, I am as a referral judge left to choose between one of the two opinions of the differing judges which, in my opinion, is closer to the correct legal position. This completely robs the process of plurality in the decision making which is the foundation of law of precedent where a judgment of a Bench would bind the Bench of equal or lesser number of judges even if it is not a unanimous opinion. Under the circumstances, I feel bound by the decisions of the later Division Benches on the point which arises directly in the present reference”**

8. Viewed thus, a larger bench decision binds the bench of a lesser strength because of the plurality in the decision making process and because of the collective application of mind. In simple words, as held by Their Lordships, what three minds do together, even when the result is not unanimous, is treated as intellectually superior to what two minds do together, and, by the same logic, what two minds do together is considered to be intellectually superior to what a single mind does alone. Let us not forget that the dissenting judicial views on the division benches as also the views of the third member are from the same level in the judicial hierarchy and, therefore, the views of the third member cannot have any edge over views of the other members. Of course, when division benches itself also have conflicting views on the issues on which members of the division benches differ or when majority view is not possible as a result of a

single member bench, such as in a situation in which one of the dissenting members has not stated his views on an aspect which is crucial and on which the other member has expressed his views, it is possible to constitute third member benches of more than one members. That precisely could be the reason as to why even while nominating the Third Member under section 255(4), Hon'ble President of this Tribunal has the power of referring the case "**for hearing on such point or points (of difference) by one or more of the other members of the Appellate Tribunal**". Viewed from this perspective, and as held by Hon'ble jurisdictional High Court, the Third Member is bound by the decisions rendered by the benches of greater strength. That is the legal position so far as at least the jurisdiction of Hon'ble Gujarat High Court is concerned post **Vallabhdas Vithaldas (supra)** decision, but, even as we hold so, we are alive to the fact that Hon'ble Delhi High Court had, in the case of **P C Puri Vs CIT [(1985) 151 ITR 584 (Del)]**, expressed a contrary view on this issue which held the field till we had the benefit of guidance from Hon'ble jurisdictional High Court. The approach adopted by the learned Third Member was quite in consonance with the legal position so prevailing at that point of time. For the sake of completeness of discussion, we set out the views so taken by Hon'ble Delhi High Court and leave it at that:-

**There is no difference, really speaking, between a Full Bench of three judges sitting together and this method of referring to the third judge in the case of a difference of opinion between the two judges. Whether the first method is adopted or the second, "opinion of the majority" will be decisive. In this case, there is a formal reference to a third judge to ascertain his opinion. His is the deciding voice. He turns the scales. The third judge is the Full Bench. Not alone. But along with the two others who first heard the case. Whether the three judges sit at the same time or at different times—two at one time, and the third hearing the matter later on a difference of opinion—does not make much difference. As has happened in this case, the two judges have differed. So the case has come to me, the**

third judge. The two judges have expressed their opinion. I am now called upon to give my opinion. The opinion of the majority will prevail. All that happens is that the third is segregated from the two and does not sit with them. He comes in later on when there is a difference of opinion between them. In all cases, it is the theory of numbers which is the foundation of the doctrine of stare decisis. Majority is a term signifying the greater number. Counting of heads underlies the theory of judicial precedents as in any majority decision. The constitutional requirement of a constitution Court of five judges is based on this theory. Similarly, the CPC, 1908, enacts that in the case of a difference of opinion, the matter has to be referred to a third judge. (see sec. 98, CPC). In my opinion, the reference was correctly made to me as the third judge.

9. However, before we address ourselves to the correctness of fundamental factual assumption underlying the contentions advanced by the learned counsel, that the decision of the learned Third Member is unsustainable in law inasmuch as it is contrary to the decisions of the division benches directly on the issue before the learned Third Member, we still have to deal with the issue, as was raised by the learned Commissioner (DR), as to whether at the stage of giving effect to the majority views under section 255(4), the division bench can take up any other issues, other than the simply implementing the majority views on the basis of the views already expressed by the division bench members and the third member, irrespective of relevance of such issues, even if any, to the appeal. We find that in the case of **B T Patil & Sons Belgaum Constructions Pvt Ltd Vs ACIT (ITA Nos, 1408 and 1409/PN/2003; order dated 28<sup>th</sup> February 2013)**, a coordinate bench of this Tribunal was *in seisin* of a situation in which by the time the division bench was called upon to give effect to the three member third member bench decision {reported as **B T Patil & Sons Belgaum Constructions Pvt Ltd Vs ACIT [1 ITR (Tribunal) 703]**}, the division bench also had the benefit of guidance from Hon'ble jurisdictional High Court on that issue, and the assessee did obtain a directions from the Hon'ble High Court

to take into account, *inter alia*, this judicial development as well. In the course of so giving effect to the majority views, the coordinate bench, *inter alia*, observed as follows:

4. While the said appeals are pending before the Hon'ble Tribunal to give effect to the opinion of the Third Member as per the provisions of section 255(4) of the Act, the Hon'ble Bombay High Court in the case of ABG Heavy Industries Ltd., passed an order granting deduction to the said assessee u/s. 80IA(4) of the Act. The said jurisdictional order is contrary to the opinion given by the Third Member of the Tribunal. Meanwhile the appeal filed by the assessee against the order of the Tribunal dismissing the appeals of the assessee *in limine*, before the Hon'ble Bombay High Court came up for hearing on 24/01/2013. In the course of hearing before the Hon'ble Bombay High Court the Counsel of the assessee brought to the notice of the Hon'ble High Court the fact that the Tribunal in the Miscellaneous Application filed by the assessee had recalled its order and the said matter was now fixed for hearing on 15/02/2013. As such the assessee requested to withdraw the said appeal. The assessee also drew attention of the Hon'ble High Court to the decision of ABG Heavy Industries and requested the Hon'ble Bombay High Court to direct the Tribunal to consider the ABG Heavy Industries decision on the issue while giving effect to the opinion of the Third Member as per the provisions of section 255(4) of the Act.

5. The Hon'ble Bombay High Court permitted the Counsel of the assessee to withdraw the said appeals. While passing the order the Hon'ble High Court has kept all the contentions open and further directed the Tribunal to consider the decision of the ABG Heavy Industries and other decisions while passing their order giving effect to the opinion of the Third Member as per the provisions of section 255(4) of the Act. The relevant portion of the said order of Hon'ble jurisdictional High Court in ITA No.1307 of 2011 for A.Y. 2000-01 and 1640 of 2011 for A.Y. 2001-02 is as under:



***“1. Since the Tribunal has recalled the impugned order dated 23.03.2011, the appellant is withdrawing its appeal.***

***2. Further, while considering the matter afresh, the Tribunal will take into consideration all decisions including the decision of this court in the matter of CIT v. ABG Heavy Industries Ltd. reported in 322 ITR page 323. All contentions are kept open.***

***3. The appeal is dismissed of in above terms.”***

*6. The issue before us is whether the Tribunal while complying with the provisions of section 255(4) of the Act can consider the judgment of the Hon'ble High Court in the case of ABG Heavy Industries. In light of the clear directions given by the Hon'ble Bombay High Court in the appeals filed by the assessee for the impugned assessment years inter alia directed the Tribunal to consider the said decision of ABG Heavy Industries and all other decisions, we can consider the said judgments of ABG Heavy Industries and also the other judgments for allowing the deduction u/s. 80IA(4) of the Act while giving effect to the opinion of the Third Member as per the provisions of section 255(4) of the Act. Following the directions of the Hon'ble Bombay High Court being the Jurisdictional High Court, the Tribunal is bound to follow the directions and we do accordingly.*

10. It was thus a case in which specific directions were issued by the Hon'ble High Court to take into account the subsequent judicial developments by way of adjudication on the issue in appeal by Hon'ble Courts above. The division bench has, taking note of these directions and indicating their limitations in the light of these directions, have specifically observed that “the Tribunal is bound to follow the directions and we do so accordingly”. If the division bench had the powers to take note of the subsequent judicial developments, post the expression of views by different members constituting the division bench and the third member bench, at the stage of giving effect to the majority view, there

was no need to take note of Hon'ble High Court's directions and state that this is because of the Hon'ble High Court directions that the subsequent judicial developments are being taken note of. These directions were case specific and cannot be treated as a general interpretation of the scope of judicial work in the course of giving third member effect. No other judicial precedent, supporting the stand of the assessee, has been brought to our notice. In view of these discussions, and as Shri Bains rights contends, at the time of giving effect to the majority view, it cannot normally be open to the Tribunal to go beyond the exercise of giving effect to the majority views, howsoever mechanical it may seem. In the case of dissenting situations on the division bench, the process of judicial adjudication is complete when the third member, nominated by Hon'ble President, resolves the impasse by expressing his views and thus enabling a majority view on the point or points of difference. What then remains for the division bench is simply identifying the majority view and dispose of the appeal on the basis of the majority views. In the course of this exercise, it is, in our humble understanding, not open to the division bench to revisit the adjudication process and start examining the legal issues. Of course, we may hasten to add that all that the Tribunal does, remains, and shall always remain, subject to the directions of the Hon'ble Courts above, and, notwithstanding our humble understanding about the scope of work at this stage of proceedings under the scheme of the Income Tax Act, any directions from the Hon'ble Courts above, as in the case of **B T Patil** (*supra*), are to be loyally and unhesitatingly followed by us. That is a different situation altogether but then merely because such directions have been issued in one case, it cannot be inferred that, as a normal rule, adjudication process is to be started *de novo* at the stage of majority view effect proceedings. In case anyone has grievances with the majority view, the aggrieved party can seek appropriate remedy against the same. That situation will come only when the majority view is implemented and a formal order is passed on the appeal. However, just because one of the parties before us has a grievance with the majority view, notwithstanding the merits of such grievance, even if any, we must not delay the judicial process of giving effect to the majority view. The majority view in these appeals is that the learned CIT(A) was

correct in confirming the impugned penalties of Rs 54,82,239 and Rs 34,90,015 in the case of Jupiter Corporation Services Ltd for the assessment year 1995-96 and 1996-97 and of Rs 9,17,680 in the case of Smt Sulochana V Gupta for the assessment year 1996-97. We, accordingly, confirm the same.

11. In the result, the appeals are dismissed. Pronounced in the open court today on the 24<sup>th</sup> day of April, 2015.

Sd/-

**S. S. Godara**  
(Judicial Member)

Sd/-

**Pramod Kumar**  
(Accountant Member)

**Ahmedabad, the 24<sup>th</sup> day of April, 2015**

Copies to: (1) The appellant  
(2) Commissioner  
(3) Departmental Representative  
(4) Guard File

(1) The respondent  
(2) CIT(A)

By order etc

Assistant/Deputy Registrar  
Income Tax Appellate Tribunal  
Ahmedabad benches, Ahmedabad