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

INCOME TAX APPEAL NO. 130 OF 2016

The Pr. Commissioner of Income Tax-3 .. Appellant
v/s.
M/s. Starflex Sealing India Pvt. Ltd. . ..Respondent

WITH
INCOME TAX APPEAL NO. 151 OF 2016

The Pr. Commissioner of Income Tax-8 .. Appellant
v/s.
M/s. Starflex Sealing India Pvt. Ltd. . ..Respondent

WITH
INCOME TAX APPEAL NO. 293 OF 2016

The Pr. Commissioner of Income Tax-8 .. Appellant
v/s.
Associated Cables Pvt. Ltd. ..Respondent

Mr. N.C. Mohanty for the appellant in ITXA 130/16 and 151/16
Mr. Atul Jasani for the respondent in ITXA 293/16

CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.

DATED : 2nd AUGUST, 2018.

Not on Board. Taken on Production Board at 3.00 p.m.

P.C.

1. These appeals were on board yesterday and were adjourned to 3rd August, 2018. At that time, it was stated by the Addl. Solicitor General on behalf of the Revenue that a praecipe would be filed listing out all

appeals on the issue herein pending in this Court. All these appeals to be listed for final disposal on 3rd August, 2018 in line with the view taken by this Court in Commissioner of Income Tax Vs. Hindustan Unilever Ltd. (Income Tax Appeal No.1873 of 2013). The Revenue, he informed us, would carry our orders passed in these appeals to the Hon'ble Supreme Court to be listed along with the pending SLP filed from the order in Hindustan Unilever Ltd. (supra). However, as the praecipe filed by the Advocate was not in accord with the statement made by the learned Addl. Solicitor General, the Associate of this Court requested the Advocate Mr. Pinto, who had filed the praecipe to suitably modify the same. However, Mr. Pinto refused to do so and has made comments in an SMS sent to the Associate of this Court, which are not at all justified. Thus, we have informed the learned Addl. Solicitor General and Mr. Mohanty who were in Court at 11.00 a.m. that these appeals are being kept on board at 3.00 p.m. for passing appropriate orders.

2. On 27th June, 2018, the following order was passed in Income Tax Appeal No. 130 of 2016 and 151 of 2016 :-

"1. These two appeals under Section 260A of the Income-Tax Act, 1961 (the Act) challenge the order dated 8th June, 2015 passed by the Income-Tax Appellate Tribunal (the Tribunal) relating to Assessment Years 2009-10 and 2010-11.

2. In both the Appeals, the Revenue has urged the following questions of law for our consideration : -

"1. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in deleting the disallowance made under Section 36(1)(Va) read with Section 2(24)(x) of the Act on account of Employees' Contributions to ESIC paid by the assessee-Company beyond the due dates under ESIC Act?

2. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in allowing the claim of set-off of unabsorbed depreciation of assessment year 2000-01 beyond the period of 8 years ?"

3. Regarding Question no.1,

(i) Mr. Mohanty, Learned Counsel appearing for the Revenue very fairly states that the issue arising herein stands concluded against the Revenue and in favour of the respondent-Assessee by the decision of this Court in ***Commissioner of Income-Tax, (Central), Pune V/s. Ghatge Patil Transports Ltd. 368 ITR 749 (Bombay)****.*

(ii) In the above view, Question no.1 does not give rise to any substantial question of law.

4. Regarding Question no.2,

(i) Mr. Mohanty fairly invites our attention to the decisions of this Court in the case of ***Commissioner of Income-Tax-1, Mumbai V/s. M/s. Hindustan Unilever Ltd.*** *(Income Tax Appeal No. 1873 of 2013) rendered on 26th July, 2016 and in the case of* ***The Commissioner of Income Tax, Central-III V/s. M/s. Arch Fine Chemicals Pvt. Ltd*** *(Income Tax Appeal*

No.1037 of 2014) rendered on 6th December, 2016 dismissing the Revenue's appeal on this very question of law. Inspite of the above, in the subsequent case of ***Commissioner of Income-Tax V/s. M/s. Milton's Pvt. Limited*** *(Income Tax Appeal No. 2301 of 2013) and* ***Commissioner of Income-Tax-8 Vs. M/s. Confidence Petroleum India. Ltd****. (Income Tax Appeal No. 582 of 2014) on an identical issue as raised herein were admitted on 20th February, 2017 and 3rd April, 2017 respectively. The order dated 20th February, 2017 of this Court listed the hearing of the Appeal alongwith Income Tax Appeal No. 841 of 2011 and Income Tax Appeal No. 842 of 2011 admitted earlier on the same issue.*

(ii) It appears that in Milton's (Pvt) Ltd. (supra) and Confidence Petroleum (I) Ltd. (supra), the attention of the Court was not drawn to the orders of this Court in Hindustan Unilever (supra) and M/s. Arch Fine Chemicals (supra) although rendered prior to the admission of the appeals of Milton (P) Ltd. (supra) and Confidence Petroleum (I) Ltd. (supra). The decision of this Court in M/s. Hindustan Unilever Ltd. (supra) placed reliance upon the decision of Gujarat High Court in ***General Motors (I) Pvt. Ltd vs. DCIT, 354 ITR 244*** *and the CBDT Circular No.14 of 2001 dated 22nd November, 2001. The order also records that nothing was shown by the Revenue as to why the decision of Gujarat High Court should not be followed. Infact, it appears earlier orders in respect of appeals of 2011 admitting this question was pointed out by the Revenue. It may be pointed out that, the same Advocate appeared for the Revenue in M/s. Hindustan Unilever (supra) and in M/s. Milton (P) Ltd. (supra) and Confidence Petroleum (I) Ltd. (supra). It is noted that, the decision in M/s. Hindustan Unilever (supra) at the time , the Court admitted the appeals by M/s. Milton (P) Ltd. (supra) and Confidence Petroleum (I) Ltd. (supra) was not pointed out to the Court. Besides, at the hearing of the appeal of Hindustan Unilever (supra) the fact that Income Tax Appeals No. 841 and 842 of 2011 were already admitted was not pointed out.*

1. We are pained at this attitude on the part of the State to obtain orders of admission on pure questions of law by not

pointing out that an identical question was considered by this Court earlier and dismissed by speaking order.

(iv) This is not for the first time that this has happened on the part of the Revenue. On an earlier occasion also, in the case of ***The Commissioner of Income Tax-8 V/s. TCL India Holdings Pvt. Ltd. (ITA No. 2287 of 2013)*** *on 6th May, 2016 on similar issue arising, we were assured by the Revenue that proper steps would be taken to ensure that the State takes a consistent view and decisions on any issue which are already taken by this Court would be informed to their Advocates who would also be continuously updated of the decisions taken by this Court on the questions of law. This is to ensure that there is consistency in the view taken by this Court. However, it appears that the Revenue has not carried out the assurance which was made to the Court.*

We would expect the Revenue to look into this issue at the highest level and ensure that the State takes a consistent view and does not agitate matters on which the Court has already taken a view, without pointing out the earlier order of this Court to the subsequent Bench. It is possible that, there can be certain distinguishing features which may require the next Court to admit the question which has been otherwise dismissed by an earlier order. But this would not be an issue which could arise in the case of pure question of law as raised herein. The decision on the question raised is not related to and/or dependent upon finding upon any particular fact.

We note that the decision of this Court in Milton Private Limited (supra) renderred on 20th February, 2017 makes a reference to a Supreme Court decision in the case of ***Deputy Commissioner of Income Tax vs. General Motors India P. Ltd.*** *Mr. Mohanty is directed to produce a copy of the same on the next occasion. We would also want, Mr. Mohanty on the next occasion to bring on record by Affidavit, whether appeals have been filed from the orders of this Court in Hindustan Unilever (supra) decided on 26th July, 2016 and Arch Fine Chemicals (supra) decided on 6th December, 2016 to the Apex Court, when filed and the decision, if any, thereon.*

5. We adjourn the hearing of both these appeals by a period of 3 weeks as prayed for by Mr. Mohanty, for the Revenue.

6. *On the next occasion, we would expect a proper response from the Revenue and explanation as to why assurance given to us earlier that consistent view would be taken by the Revenue is not being followed. It is time, responsibility is fixed and the casual approach of the Revenue in prosecuting its appeals is stopped. We would also request the Additional Solicitor General to assist us on the next date.*

7. *Stand over to 3 weeks i.e. 18th July, 2018."*

3. On 25th July, 2018, the following order was passed in Income tax Appeal No.293 of 2016.

"1. This appeal challenging the order dated 29th April, 2015 of the Income Tax Appellate Tribunal relates to Assessment Year 2009-10.
2. The issue raised in this appeal is identical to the one raised in Income Tax Appeal Nos. 130 of 2016 and 151 of 2016 which are on board today. The Revenue is represented by the learned Additional Solicitor General. This appeal is adjourned to be tagged along with Income Tax Appeal Nos. 130 of 2016 and 151 of 2016 which have been adjourned to 1st August, 2018.
3. The order passed on 27th June 2018 in Income Tax Appeal Nos. 130 of 2016 and 151 of 2016 would also equally apply to the present appeal. The learned ASG is requested to assist the Court in this appeal also.
4. Stand over to 1st August, 2018."

4. All the three appeals were on board yesterday. No affidavit is filed by Revenue in any of the three appeals. At that time, it was not disputed by the Revenue that the decision of this Court in Hindustan Unilever Ltd. (supra) rendered on 26th July, 2016 and of Arch Fine

Chemicals Ltd. (supra) rendered on 6th December, 2016 was not pointed out to the bench which subsequently heard the appeal in case of M/s. Milton Pvt. Ltd. (supra) and M/s. Confidence Petroleum India Ltd. (supra) on 20th February, 2017 and 3rd April, 2017. The learned Additional Solicitor General assisted by Mr. Mohanty, learned Counsel for the Revenue has stated yesterday that he cannot justify this conduct. Further, he stated that in view of this Court's order in ***Hindustan Unilever Ltd.*** (Income Tax Appeal No. 1873 of 2013) decided on 26th July, 2016 (supra) and in ***M/s. Arch Fine Chemicals Pvt. Ltd.*** (Income Tax Appeal No. 1037 of 2014) rendered on 16th December 2016 (supra), the Revenue would file a praecipe listing out all the pending matters raising identical issue, to be placed on board on 3rd August, 2018 and disposed of in terms of this Court's order in Hindustan Unilever Ltd. (supra). Thereafter the Revenue would carry our orders in SLP to the Apex Court to be tagged along with the SLP filed in case of Hindustan Unilever Ltd. (supra). It was stated on behalf of the Revenue that a praecipe would be filed indicating the above facts along with the list of pending appeals in this Court raising identical issue, some of which have been admitted and some awaiting admission.

5. Consequent to the above, the advocate for the Revenue Mr. Pinto

filed a handwritten praecipe wherein he listed out the list of the pending appeals, to be listed along with these three appeals for final disposal tomorrow i.e. on 3rd August, 2018. At this, the Associate of this Court informed Mr. Pinto, the learned Counsel appearing for the Revenue (telephonically), who had given the praecipe, that the praecipe should briefly indicate the purpose for which these matters are to be listed on board and particularly be in accord with the statement made on behalf of the Revenue by the Additional Solicitor General.

6. Instead of carrying out the statement made in Court by the Addl. Solicitor General, the Advocate Mr. Pinto, responded by sending an SMS to the Associate of this Court, which reads as under :-

> "*Madam Gawande, I did return your call and you informed me that the precipice requires to modified to state that the decision of one Court is the correct decision thereby implying that the decision of the other Court is wrong.. I fully appreciate that you are acting under instructions, but what you are pressurising me to do is both wrong and unethical.. No Advocate of any worth would stoop so low. Sorry I am not able to comply with this rather unusual demand. Regards, Advocate Arvind PINTO"*

7. Today in Court we again confirmed from Mr. Mohanty, learned Counsel appearing for the Revenue, whether the facts recorded hereinabove by us about what transpired yesterday morning in Court is

correct. Mr. Mohanty states that the facts of what transpired in Court is correctly recorded.

8. The aforesaid SMS communication by Mr. Pinto to the Associate of this Court is contrary to the statement made on behalf of the Revenue yesterday by the learned Additional Solicitor General, assisted by Mr. Mohanty, learned advocate for the Revenue. Requesting an Advocate to put in a praecipe the facts which correctly records the reason for having the matters taken out of turn and being put on board, does not in any manner detract from dignity of an advocate. We are not sure, whether this indignation on the the part of the Advocate Mr. Pinto stems from not understanding our view or it is a made up indignation so as to accuse of us of pressurizing him to do an activity not expected of an Advocate. It appears to be in the second category as the SMS appears to give a completely different twist to the facts as stated to him by Associate. Our endeavor is only to ensure that the law is settled for the tax payers within the State of Maharashtra till the time the Apex Court takes a final view on the issue arising before us. Failing this, the Officers of the Revenue may arbitrarily decide which view of this Court it should follow and the justification would be (even in the absence of any distinguishing facts) the contradictory views of this

Court. We have time and again reiterated that equality of treatment at the hands of law is an essential attribute of the Rule of Law, about which we as a State are justifiably proud. We let the matter rest here.

9. In the above view, for the aforesaid reasons we list the following appeals on board tomorrow i.e. on 3rd August, 2018 along with the these three appeals for final disposal at 3.00 p.m.

(i) ITXA No. 841 of 2011 (Times Guarantee Vs. CIT)
(ii) ITXA No.842 of 2011 (Time Guarantee Vs. CIT)
(iii) ITXA No. 2301 of 2013 (CIT Vs. Milton's Pvt. Ltd.)
(iv) ITXA No. 582 of 2014 (CIT Vs. Confidence Petroleum India Ltd.)
(v) ITXA No. 795 of 2014 (CIT Vs. Associated Cable Pvt. Ltd.)

10. We trust the above list exhausts the appeals on this issue pending in this Court.

(SANDEEP K. SHINDE J.) **(M.S. SANKLECHA, J.)**

11. After having passed the above order in Court, we did not load this order yesterday. This as we believed, we must hear Mr. Pinto before we take any view on the matter, though he did not appear

yesterday. Today when we asked him why he did not appear yesterday, he informed us that he was busy elsewhere.

12. Therefore, we asked Mr. Pinto the reason for the content of the SMS to the Associate of this Court. Mr. Pinto responds by stating that he was shocked at receiving the phone call from the Associate of this Court. Thus, justified his SMS only on the above fact. This even after we pointed out to him that the reason for the call was only to request him to make the application / praecipe in accordance with the statement of the Addl. Solicitor General of India. We also pointed out to him that the orders passed at the stage of admission cannot be compared with an order finally disposing of the appeal, particularly on a question of law. However, the justification continued to remain the same that a phone call was received by him from the Associate of this Court.

13. Today, Mr. Pinto, contrary to the statement made on 1st August, 2018 by the Addl. Solicitor General states that he had pointed out the earlier decision of this Court to the subsequent bench which admitted the Revenue's appeal in the case of Miltons Pvt. Ltd. (supra) and Confidence Petroleum India Ltd. (supra). However, we pointed out to

him that there is nothing on record to indicate the same and also the fact that no affidavit to the above effect has been filed. This particularly even when our orders dated 27th June, 2018 (in ITA Nos. 130 and 151 of 2016) and 25th July, 2018 (in ITA Nos. 293 of 2016) proceeded on the above basis. At this, he responded by pointing out to Ms. Sathe, advocate and Mr. Jasani, advocate, who were present in Court in the matters which were admitted by this Court after the decision in M/s. Hindustan Unilever Ltd. (supra), stating that they would corroborate his statement. However, when specifically asked both of them stated that they do not remember his citing the decision. In any case, we have now kept the matters for final disposal. Therefore, we do not dwell upon this now.

14. In the above circumstances, there is no need to vary our order passed in Court on 2nd August, 2018.

15. The Registry is directed to forward a copy of this order to the Chairman, Central Board of Direct Taxes.

(SANDEEP K. SHINDE J.) **(M.S. SANKLECHA, J.)**