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

INCOME TAX REFERENCE NO.213 OF 1997

The Commissioner of Income Tax]
Bombay City-I] .. Appellant.
V/s.
M/s. Sunny Sounds P. Ltd.]
Mumbai] .. Respondent.

Mr. Suresh Kumar, for the Appellant.
Mr. Mihir Naniwadekar, Amicus Curie.

CORAM: M.S.SANKLECHA, &
B.P.COLABAWALLA, JJ.
DATED: 8th JANUARY, 2016.

ORAL ORDER (Per M. S. Sanklecha,J.):-

This Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) is Income Tax Appellate Tribunal at the instance of the Revenue, seeks our opinion on the following question of law:-

> *" Whether on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the order of the CIT(A) that assessee's business of Dubbing and sound recording is a manufacturing/ processing activity and assessee is entitled or investment allowance on plant and machinery?".*

2 Mr. Suresh Kumar, learned Counsel appearing for the Revenue states that in the present Reference Application the tax effect involved is admittedly less than Rs.20 lacs. In the above view, we

enquired of Mr. Suresh Kumar- whether the Circular No.21/2015 dated 10th December, 2015 issued by the Central Board of Direct Taxes(CBDT) would also apply to the pending Reference made under Section 256 (1) of the Act. At this, Mr. Suresh Kumar pointed out that a bare reading of the Circular dated 10th December 2015 would indicate that it applies only to pending appeals as it does not make any mention of References under Section 256(1) of the Act. However, we pointed out to Mr. Suresh Kumar that on an identically worded Instruction No. 5 of 2015 issued by the CBDT(where also References under Section 256 of the Act are not mentioned), we have held that it applies even to pending References under Section 256(1) of the Act in CIT v/s. M/s. Computer Point (I) Ltd. (Income Tax Reference No. 430/1997) decided on 24 July 2015. In the above context Mr. Suresh Kumar requested that the hearing of this Reference be kept back to 3.00 p.m. so as to enable him to obtain instructions with regard to the stand of the Department in relation to application of the Circular No. 21/2015 dated 10 December 2015 issued by the CBDT to pending References under Section 256 of the Act. Thus at the request of Mr. Suresh Kumar we kept the hearing of this Reference at 3.00 P.M. to enable him to obtain necessary instructions from the Commissioner of Income Tax. At that stage, we also enquired of Mr. Mihir Naniwadekar, Advocate who was present in Court – whether he would assist us on the issue of the applicability of the Circular dated 10th December, 2015 issued by the CBDT to the pending References under Section 256 of the Act at 3.00 p.m.. This was agreed to by Mr. Naniwadekar.

3 When this Reference was again called out for hearing at 3.00 p.m., Mr. Suresh Kumar learned Counsel appearing for the Revenue

pointed out that the Commissioner of Income tax does not have any instructions/view with regard to the application of the Circular dated 10 December 2015 to the pending References under Section 256(1) of the Act. This in spite of our having kept back the Reference only to enable Mr. Suresh Kumar to obtain instructions on the department's view on the appropriate interpretation of the Circular. It may be pointed out that in December 2015, while dealing with appeals filed by the Revenue, having tax effect of less than Rs.20 lacs were being considered, we had specifically asked the learned Counsel for the Revenue including Mr. Suresh Kumar on the department's view of the applicability of the Circular to pending References and we were informed (one of us was a member of that bench) that due instructions on that account would be obtained and communicated to the Court at the hearing of the References. It is pertinent to note that this Reference was listed for today almost a week in advance. However no assistance is forthcoming. No attempt is also being made to obtain necessary clarification from the CBDT nor is a statement being made that according to them the Circular has no application and they want to pursue this Reference. Therefore though it is for the Revenue to take a decision on wanting to pursue this Reference or not, in this case it seems that the the Commiserate is not wanting to take any decision or even seek clarification from the CBDT on the application of the Circular. Therefore in the aforesaid facts we are required to examine whether the Circular No. 21/2015 dated 10 December 2015 applies to pending References having a tax effect of less than Rs. 20 lacs.

4 The Circular dated 10th December, 2015 bearing No. 21/ 2015 issued by the CBDT under Section 268A of the Act reads as under:-

Circular No.21/2015
F No. 279/Misc. 142/2007-ITJ(Pt)
Government of India
Ministry of Finance
Department of Revenue
Central Board Direct Taxes

New Delhi the 10th December, 2015.

Subject:- Revision of monetary limits for filing of appeals by the Department before Income Tax, Appellate Tribunal and High Courts and SLP before Supreme Court – measures for reducing litigation – Reg.

Reference is invited to Board's instruction No.5/2014 dated 10.07.2014 wherein monetary limits and other conditions for filing departmental appeals (in Income Tax matters) before Appellate Tribunal and High Courts and SLP before the Supreme Court were specified.

2 In supersession of the above instruction, it has been decided by the Board that departmental appeals may be filed on merits before Appellate Tribunal and High Courts and SLP before the Supreme Court keeping in view the monetary limits and conditions specified below.

3 Henceforth, appeals/ SLPs shall not be filed in cases where the tax effect does not exceeds the monetary limits given hereunder:

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S No.	*Appeals in Income Tax matters*	*Monetary Limit (in Rs.)*
1	*Before Appellate Tribunal*	*10,00,000/*
2	*Before High Court*	*20,00,000/*
3	*Before Supreme Court*	*25,00,000/*

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.*

4 For the purpose, "tax effect" means 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 (hereinafter referred to as "disputed issues"). However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5 The Assessing Officer shall circulate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in

which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only wit reference to the tax effect in the relevant assessment year. 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. In case where a composite order / judgment involves more than one assessee, each assessee shall be dealt with separately.

6 In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income Tax shall specifically record that "even though the decision is not acceptable, appeals is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income Tax Department has acquiesced in the decision on the disputed issues. The Income Tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

7 In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to

bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit, and therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value. As the evidence of not filing appeal due to this instruction may have to be produced in Courts, the judicial folders in the office of CsIT must be maintained in a systemic manner for easy retrieval.

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

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

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

(c) Where Revenue Audit objection in the case has been accepted by the Department, or

(d) Where the addition relates to undisclosed foreign assets/ bank accounts.

9 The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income tax, Filing of appeals in other Direct Tax matters shall continue to be governed by relevant provisions of statute and rules. Further, filing of appeal in cases of Income Tax, where the tax effect is not quantifiable or not involved or not involved, such as the case of registration of trusts or institutions under section 12A of the IT Act, 1961 shall not be governed by the limits specified in para 3 above and decision to file appeal in such cases may be taken on merits of a particular case.

10 The instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/

Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed.

11 This issue under Section 268A(1) of the Income Tax Act, 1961."

5 From a reading of the aforesaid Circular it is clear that it does not advert to pending References. It only makes mention about non-filing of appeals to the High Court where tax effect is less than Rs.20 lacs and that it would apply retrospectively even in respect of pending appeals which would not be pressed. The above Circular of 10 December 2015 is focused only on appeals under the Act and does not make any mention of References under Section 256 of the Act as after the introduction of statutory appeals in 1998 under Section 260A of the Act there are no References under Section 256 of the Act being made to this Court from the orders of the Tribunal passed after 1998. Therefore now there are no References being filed in the Court under Section 256 of the Act and thus the Circular does not deal with the same. Moreover as pointed out earlier in this order, this Court in M/s. Computer Point (I) Ltd. (supra) interpreting the earlier circular/instructions No.5 dated 10th July, 2014 (no mention as in this Circular about References) issued by the CBDT, has held that it would apply also to pending references. The aforesaid view has been followed by us in Income Tax Reference No. 419 of 1995 (CIT v/s. M/s. Dempo Mining Corporation Ltd.) and Income Tax Reference No. 214 of 1996 (CIT v/s. M/s. Sanrit Hotel, Margao, Goa), both rendered on 24th July, 2015. In all the above cases, pending references were returned unanswered in view of low tax effect. It would be appropriate to extract

the relevant observations made by us in paragraph Nos. 4 and 5 of our decision in M/s. Computer Point (I) Ltd.(supra) to indicate the basis of holding that 2014 instructions would apply to pending References which reads as under:-

> *"4:- Therefore, in view of the Instruction No.5 dated 10 July, 2014 read with decision of this Court in Commissioner of Income Tax v/s. Madhukar Inamdar (HUF) – 318 ITR 149; Commissioner of Income Tax v/s. Pithwa Engineering Works – 276 ITR 598 and Commissioner of Income Tax v/s. Vijaya Kawekar – 380 ITR 237 (dealing with earlier Circulars/ Instructions) the instructions of 2014 issued by CBDT would also be applicable to pending appeals and reference.*
>
> *5 In fact this Court in Madhukar Inamdar (HUF) has while dealing with Circular dated 15 May 2008 observed as under:-*
>
> > *"8:- This Court can very well take judicial notice of the fact that by passage of time money value has gone down, the cost of litigation expenses has gone up, filing of cases at the instance of the Revenue has increased; consequently, the burden on the department has also increased to a tremendous extent. The corridors of superior courts are choked with huge pendency of cases. ..... In this view the Board has rightly taken a decision not to file appeals, if the tax effect is less than Rs.4 lakhs so as to reduce the burden of the Department as well of the Tribunals and courts. The same policy for old matters needs to be adopted by the department, so as to achieve the object of the policy laid down by the Central Board of Direct Taxes."*

6 We find that the Circular dated 10 December, 2015 is identically worded to the instructions No.5 dated 10th July, 2014 save and except enhancement of the threshold limit for the purpose of Revenue pursuing its appellate remedies inter alia before the High Court,

specifically providing for the retrospective operation of the 2015 Circular so as to apply to pending appeals and directing that the pending appeals be withdrawn and/or not pressed. In the above view, we follow our decision in M/s. Computer Points (I) Ltd., (supra), M/s. Dempo Mining Corporation (supra) and M/s. Sanrit Hotel, Madgao, Goa (supra) and hold that even though the 2015 Circular does not specifically refer to References just as the instruction No.5 of 2014, it should apply even to pending References under Section 256 of the Act. This is so as the entire objective of the Circular in having been made retrospective is that the Court should concern itself with grievances of the Revenue having substantial financial stake in terms of the tax involved and normally the decision of the Tribunal up to the value of Rs.20 lacs even if it is adverse to the Revenue should be accepted. The Circular in paragraph 6 thereof protects the interest of the Revenue by providing that where it does not pursue appellate remedies in view of the low tax effect as provided therein, it would not be held against the Revenue for any other Assessment year in respect of the same Assessee or even in respect of any other Assessee , if the tax effect involved in those cases is higher than the threshold limits specified in the Circular.

7 One feature in support of the submission that the Circular be not applied to References could be that the References are opinions sought by the Tribunal on questions of law from this Court unlike statutory appeals filed by the parties, seeking the view of the Courts. However though these References are undoubtedly made by the Tribunal, they emanate from an application by one of the parties before it leading to the order giving rise to the question of law requiring the opinion of the Court. This in practice is similar to the statutory appeal under Section

260A of the Act being filed by a party to the High Court for the reason that, this appeal is not considered as a matter of right of the party but only if the court to which the appeal is preferred is satisfied that a substantial question of law arises and admits the appeal for further consideration. Therefore a pending appeal under Section 260A of the Act is no different from a pending Reference in as much as in the case of a Reference the Tribunal is of the view that a substantial question of law arises either on its own (Section 256(1) of the Act) or as directed by Court (Section 256(2) of the Act) which requires the opinion of the Court, while in a pending appeal under Section 260A of the Act which has been admitted, the Court is of the view that a substantial question of law arises which requires due consideration by the Court. Therefore we construe the Circular dated 10th December 2015 as applicable even to pending References in the same manner they apply to pending appeals.

8 The need for the CBDT to issue the 15th December 2015 Circular and to clarify that it would apply retrospectively to govern even pending appeals arose on account of the enormous increase in the number of appeals being filed by the Revenue over the years. To give figures of this Court in the year 1995, the total number of References filed in this Court were in the aggregate 504 i.e both at the instance of the Revenue and the Assessee. In 2001, the total number of appeals filed under Section 260A of the Act in this Court in the aggregate were 648 and 546 of there were filed by the Revenue. In 2009, the total number of appeals filed under Section 260A of the Act in the aggregate was 4266, out of which, that filed by the Revenue were 3790. However, it may be pointed out that in 2015, the total number of appeals filed under Section 260A of the Act in the aggregate was 2384, out of which, that filed by the Revenue were

1834. Thus, the Revenue has now become circumspect in filing appeals as they seem to filter orders of the Tribunal which requires challenge. However, many of the indiscriminate appeals filed by the Revenue, are awaiting disposal. It thus appears that appeals are being filed by the Revenue from almost every order of the Tribunal adverse to it, without taking into account the tax effect involved with the fear that in other cases where tax effect is more, the non-filing of an appeal may be used against the department as having accepted the position in law. It is in that view that the Circular of 2015 clarifies that non filing of appeal in view of low tax effect will not be used against the Revenue in other appeals. Therefore the CBDT to ensure that there is uniformity in respect of filing of appeals has fixed threshold limits which would do away with the discretion of the officer to file and pursue the appeal remedy where the tax effect is less than the minimum amounts specified. It is noteworthy that the Circular specifically provides that where the tax effect is higher than that specified in the Circular then the filing of appeal in such cases is to be decided on the merits of the case. Therefore, to enable the Revenue to focus on matters where the tax implication is above Rs.20 lacs only such matters should be agitated in appeal before the High Court according to the Circular. This policy of non filing and of not pressing and/or withdrawing admitted appeals having tax effect of less than Rs.20 lacs has been specifically declared to be retrospective by the Circular dated 10th December, 2015. There is no reason why the circular should not apply to pending References where the tax effect is less than Rs.20 lacs as the objective of the Circular would stand fulfilled on its application even to pending References more particularly bearing in mind that there are 1149 number of References still awaiting disposal by this Court and a large

number of them would have tax effect of less than Rs. 20Lakhs.

9 In the above view, we hold that as admittedly, the tax effect is less than Rs. 20 lacs in the present Reference Application at the instance of the Revenue, the same is being returned unanswered. However, we make it clear that the question of law as raised for our opinion is left open be considered in an appropriate case.

10 We place on record our appreciation for the assistance rendered to the Court by Mr. Mihir Naniwadekar.

11 **Reference** is **disposed of** in the above terms. No order as to costs. Liberty to apply.

(B.P.COLABAWALLA,J.) **(M.S.SANKLECHA,J.)**

S.R.JOSHI