

Binding nature of CBDT instruction- in the context of instruction in consequence of SC decision on reopening under section 148- Judicial view

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INTRODUCTION

As a fallout of the CBDT Instruction no. 1/2022 dt. 11.05.2022, giving SOP to the Assessing Officers in consequence of Supreme Court order in the case of **UOI Vs. Ashish Aggarwal, dt. 04.05.2022**, the question very specifically going round in the Income Tax circles is with respect to the nature of said instructions issued by the CBDT under section 119 of the Act.

The Income Tax Act is a fiscal statute, which has always been held to be read literally to give its interpretation. India is a democratic country run by the Constitution of India. Three arms to run the nation, viz. legislature, executive and judiciary are provided to be independent of each other and no overlapping is allowed unless specifically provided.

Further, Article 265 of the constitution specifically provides that '*no tax shall be levied or collected except by the authority of law, levy of taxes must be within the legislative power.*' In this manner power to impose tax has specifically been provided to the legislature only. However, the constitution also provides the Orders of Supreme Court to be the law of land.

In the midst of controversy arising before numerous High Courts with respect to the validity of notices under section 148 issued by the department between 01.04.2021 to 30.06.2021, Hon'ble Supreme Court in its power under Article 142 of the constitution, gave certain directions to complete the assessment in such cases in its order in the case of **UOI Vs. Ashish Aggarwal**. The hon'ble Supreme Court had in very clear terms provided certain benefits to the assessee also, more specifically the time limits provided under amended section 149 of the Act.

In the circle, various views as to which Assessment Year would now be reopened and which not were doing the rounds till the arrival of CBDT Instruction no. 1/2022 dt. 11.05.2022. The view expressed in the said instruction did not match at all with any of the views making round. Now the moot question turned out was 'What is the validity of an instruction issued by CBDT'?

In This write up, an attempt has been made to analyse the answer to the above question, without going into the legality of instruction no 1/2022.

SECTION 119

The CBDT has issued these instructions in its powers given under section 119 of the Act. The powers of the CBDT are wide enough to enable it to grant relaxation from the provisions of several sections enumerated in clause (a) to Section 119 (1). The only bar on the exercise of the power is that it is not prejudicial to the assessee as held in **Union of India vs. Azadi Bachao Andolan. (2003) 177 Taxation 775 (SC).**

In this context it becomes pertinent to read the provisions:

“Instructions to subordinate authorities.

119. (1) *The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board”*

From the reading of the above, it becomes very clear that the orders, instructions are meant to be used only for administrative convenience. However these should not be used to give judicial interpretation of any law, whether statutory or a judge made law. Thus, in general an instruction cannot override judicial decision rendered for interpretation of statute.

Hon'ble Delhi High Court in the case of **Geep Industrial Syndicate Vs. CBDT (1987) 166 ITR 88 (Del)**, in this regard, observed as under:

“It is clear that while a circular of the Board will be binding upon an Income-tax Officer in matters relating to the general interpretation of any provisions of the statute, the circular cannot override judicial decisions rendered on the statute. In fields which are covered by judicial decisions, the circular will not be conclusive even so far as the Income-tax Officer is concerned. In the circumstances, we are of opinion that the circular issued by the Central Board of Direct Taxes dated April 3, 1982, cannot constitute a ground for this court assuming jurisdiction in respect of a matter which clearly falls within the territorial jurisdiction of the Allahabad High Court. As recently pointed out by the Supreme Court in Union of India v. Oswal Woollen Mills Ltd. [1985] 154 ITR 135 (SC), a High Court should be reluctant to interfere in matters where the territorial jurisdiction as well as the convenience of the parties render it appropriate that the assessee should move some other High Court in regard to the relief sought.”

The Parliament/Legislature never speaks or explains what does a provision enacted by it mean. Law is what is written in the statute and declared by the Supreme Court and the High Courts. Further, it is for the Supreme Court and the High Courts to declare what does a particular provision of statute say, and not for the executive. The circulars/ instructions issued by the CBDT, in this manner may be binding on the officers of the department, being issued by the higher authority, however just being issued by CBDT, a document, be it a circular or instruction does not get legislative affirmation.

BINDING NATURE OF CIRCULAR/INSTRUCTION

The most relevant judgement of the hon'ble Apex Court was rendered in the context of Central Excise Act in the case of **CCE Vs. Ratan Melting & Melting Wire Industries 231 ELT 22**. The hon'ble court was considering the binding value of the circular issued under the Act, which was contrary to the Supreme Court decision. The hon'ble court held:

“Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not

the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the Court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

The aforesaid observations of the Constitutional Bench of the Apex Court in a Central Excise case was reiterated by the Apex Court in an Income Tax case in **Hindustan Aeronautics Ltd. v/s. C.I.T. (2000) 243 ITR 808 (SC)**.

“Dr. Gauri Shankar, learned senior advocate for the Revenue, however, pointed out by referring to several decisions of this Court to the effect that the circulars or instructions given by the Board are no doubt binding in law on the authorities under the Act but when the Supreme Court or the High Court has declared the law on the question arising for consideration it will not be open to a Court to direct that a Circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court. We find great force in this submission made by the learned senior advocate for the Revenue and find absolutely no merit in this appeal and the same stands dismissed, but in the circumstances of the case, there shall be no orders as to costs.”

Earlier, way back in 1988, The Rajasthan High Court in **CWT v. Sanwormal Shivkumar (1988) 171 ITR 377 (Raj)** had held that the Income-tax and Wealth Tax Departmental Officer are bound to follow the circulars issued by the Central Board of Direct Taxes.

The Delhi High Court in **Addl. CIT v. Mrs. Avtar Mohan Singh (1982) 136 ITR 645 (Del)** had observed that though the circulars of the Central Board are not binding on the court. Through them the Board cannot impose a burden on the taxpayer greater than what the statute provides but it can relax the rigour of the law.

The Kerala High Court in **K.V. Produce. v. CIT (1992) 196 ITR 293 (Ker)**, observed as under:

“Though circulars issued under section 119 of the Income-tax Act, may have the force of law, they may not override the law itself. Concepts like "ultra vires" would come into play if a notification or a rule runs derogatory to the parent law.”

There are numerous other decisions of the Supreme Court as well as of the various High Courts, where it has been categorically held that the instructions are binding on the officers of the department but cannot be said to rightly interpret the legislative intent.

BINDING ON THE REVENUE AUTHORITIES- EXTENT OF

The answer to the question whether an instruction being opposed to the law is still binding on the officer was provided by the Hon'ble Allahabad High Court in the case of **Shivangee Crafts Limited vs. State Of UP, WT no. 1536/2006, dt. 06.12.2013**, relating to writ petition in reference to UP Trade Tax Act, 1948. The court held that till such time as a clarification or amendment by the Legislature or by Ordinance is not incorporated in the statute, no notification or circular of the Department can override the statutory provisions of the Act. It would not be permissible to read words into the statute, which prima facie is very plain and straight.

The Kerala High Court in **CIT v. Malayala Manorama & Co Ltd. (1983) 143 ITR 29 (Ker)** has observed that circulars of general directions issued by the CBDT are binding under section 119 of the Act on all officers and persons employed in the execution of the Act.

“No doubt, we have to look into the context where the provision appears and to the other parts of the statute. While circulars or general directions issued by the CBDT would be binding under s. 119 on all officers and persons employed in the execution of the Act, the court will have to put its own construction upon the provisions of the Act regardless of the practice of the Department and the directions for the guidance of the officials. While it is certainly true that when an interpretation of a fiscal enactment is open to doubt, and even where a literal construction would defeat the obvious intention of the legislation and produce a wholly unreasonable result, the court must try its best to achieve the obvious intention and produce a rational construction.”

Nature of a CBDT circular can be summarised in the words of hon'ble Supreme Court in the case of **Catholic Syrian Bank Vs. CIT (2012) 343 ITR 270 (SC)**:

“18. Now, we shall proceed to examine the effect of the circulars which are in force and are issued by the Central Board of Direct Taxes (for short, `the Board') in exercise of the power vested in it under Section 119 of the Act. Circulars can be issued by the Board to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income tax authorities, though they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act.”

Looking at the above, from the department's perspective, there is very less likelihood of any officer to surpass the instructions issued by the CBDT.

WHETHER BINDING ON QUASI JUDICIAL AUTHORITIES

Under the hierarchy of Income Tax Act, Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal are quasi judicial authorities. Being a quasi-judicial body, these are non-judicial bodies which can interpret law. These are authorities which are given powers and procedures resembling those of a court of law or judge and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action. Now the question arises whether the instructions issued by the CBDT are binding on them.

It can never be said that such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Moreover, it is well-settled that circulars can bind the Income-tax Officer but will not bind the appellate authority or the Tribunal or the court or even the assessee.

The Income Tax Act is a fiscal law and is a complete code in itself. Any order, whether the basic order or the appellate order, is supposed to give full effect to the law as

provided under the Act. Even the CBDT is restricted under first Proviso to section 119, which provides not to issue any order, instruction or direction so as to interfere with the discretion of the Commissioner of Income Tax (Appeals) in the exercise of his appellate functions.

There should be no doubt as to the fact that these quasi judicial authorities are not bound by the instructions issued by the CBDT.

CONCLUSION/ WAY FORWARD

Assumption of power by the CBDT under section 119 is for the proper administration of the work done by officers. It cannot be anybody's case that the CBDT can issue instruction in contravention of the law.

The Supreme Court in **Bengal Iron Corporation v. CTO (1993) UPTC 1312 (SC)** has observed that so far as clarifications/ circulars issued by the Central Government and/or State Government are concerned, they represent merely their understanding of the statutory provision. They are not binding upon the courts. There can be no estoppel against the statute. The understanding of the government, whether in favour or against the assessee, is nothing more than its understanding and opinion.

Now taking this study to a logical conclusion in the context of the present controversy, practically what is likely to happen and what should be the stand of the assesses, can be summarised as follows:

1. Since the Assessing Officers are bound by the instructions issued by the CBDT, in most likelihood the assessments will be reopened as per the instructions.
2. Since the hon'ble Supreme Court has given some specific benefits to the assessee, one should raise all the issues coming out of the information provided by the department, which seem contrary to the Supreme Court order, even at the stage of reply filed after getting information.
3. The Assessing Officer may or may not give assessee any benefit out of the objection so raised.
4. The assessee should carry on with these issues in all the further appellate proceedings, including Commissioner of Income Tax (Appeals).

With this level of perseverance, there is all likelihood to get justice at one stage or another.