

Joint Commissioner of Vs. Peerless Developers Ltd.

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Jul-10-2006

Reported in : (2006)103ITD349Cal

Judge : G Agrawal, Vice, D K Agarwal, N Saini

Appellant : Joint Commissioner of

Respondent : Peerless Developers Ltd.

Judgement :

1. The Hon'ble President, Income-tax Appellate Tribunal vide, order dated 8-1-2004 has constituted this Special Bench for deciding the following question: Whether on the facts and in the circumstances of the case the assessee engaged in the real estate business and following project completion method, is justified in claiming project expenditure on accrual basis in the year of incurring, when income is reflected only in the year of completion of the project.

Subsequently by order dated 21-4-2006 amending the earlier order, the entire appeal was referred to the Special Bench for consideration and disposal by the Special Bench.

2. Brief facts of the case are that the Assessing Officer while making the assessment disallowed deduction of Rs. 69,84,089 claimed by the assessee in respect of overhead expenses of Sodepur and Brahmaputra Projects. While doing so, he observed that the assessee was following mercantile system of accounting

and any expenditure incurred has to be included in the cost of project and debited to the Profit & Loss A/c.

and cost of project has to be shown as closing stock of work-in-progress, which the assessee has shown in its Balance sheet. In computing the income, the assessee has reduced the work-in-progress and thereby lowering the income for the year under consideration. This cannot be accepted in view of the fact that while completing the assessment for the assessment years 1993-94 and 1995-96, similar view was taken. He also noted that the Id. CIT(A)-II vide order dated 28-7-1998 has allowed relief to the assessee and as the Department is in appeal before the ITAT, therefore, following its decision of the earlier years, he disallowed the claim of deduction to the assessee.

3. The Id. CIT(A) in appeal following his order dated 28-7-1998 in Appeal No. 172/A-II/97-98 deleted the disallowance and decided the issue in favour of assessee. Revenue being aggrieved by the said order of the CIT(A) is in appeal before us.

4. At the outset, the Id. Authorised Representative for the assessee Shri S.K. Tulsian submitted that since the assessed loss in the year was Rs. (-) 5,74,69,643, the tax effect of the relief of Rs. 69,89,089 allowed by the Id. CIT(A), against which the Department is in appeal, was nil. In this connection, he invited the attention of the Bench to the Central Board of Direct Taxes Instruction No. 1979, dated 27-3-2000 and submitted that in the said Instruction the CBDT has directed the Departmental Officers to file appeal before the Income-tax Appellate Tribunal in income-tax matter only in cases where the tax effect exceeds the revised monetary limit i.e., Rs. 1,00,000. He submitted that from the copy of intimation issued by the Assistant Registrar, Income-tax Appellate Tribunal, Kolkata Benches to the assessee, it may be seen that the Department filed this appeal before the Tribunal on 6-2-2001 i.e., after the issue of CBDT Instruction on 27-3-2000. Since the tax effect in the appeal was much less than the prescribed monetary limit of Rs. 1 lakh, the Department was not justified in filing the present appeal before the Tribunal in contravention of the CBDT Instruction and, therefore, the appeal was liable to be dismissed on this ground itself.

5. On the other hand, the Id. Departmental Representative for the Revenue argued and submitted that in case of a loss, it cannot be said that the Revenue effect is nil. He placed reliance on the decision of the Hon'ble Calcutta High Court in case of *Eastern Aviation & Industries Ltd. v. CIT* , wherein it was held "that it is well-settled that the words "income" or "profits and gains" should be understood as including losses also, so that in one sense "profits and gains" represent "positive income" whereas "losses" represents "negative income". In other words, "loss" is "negative profit". Both positive and negative profits are of revenue character. Both must enter into computation, wherever it becomes material in the same mode of the taxable income of the assessee". He also relied on the decisions of the Hon'ble Supreme Court in case of *CIT v. Harprasad & Co. (P.) Ltd.* and which decisions were also to the same effect. It was the submission of the Id. Departmental Representative that in the case of loss it cannot be held that the tax effect is ML as the loss determined is allowed to be carried forward and adjusted with the profits of the subsequent year.

6. The second contention of the Id. Departmental Representative was that once an appeal is filed by the Department, the Tribunal is bound to decide the same even if the tax effect is below monetary limit as per Instruction issued by the CBDT. For this, he placed reliance on the decision of the Hon'ble Punjab & Haryana High Court in case of *Rani Paliwal v. CIT* , wherein it was held that Board Circular is only Instruction issued to the Income-tax Authorities not to file appeals, where the tax effect is less than Rs. 1 lakh. The Tribunal is not bound by any such Instruction and once the Department files an appeal, the Tribunal was bound to decide the same on the merits. He also relied on the decision of the Hon'ble Delhi High Court in case of *CIT v. ITAT [1998] 232 ITR 207 : [1999] 106 Taxman 399*, wherein it was held that "the Central Board of Direct Taxes Instruction are binding on the Department. If the instant case was covered by a policy laid down by the Central Board of Direct Taxes, in that case no fault could be found with the order of the Tribunal refusing to state the case and there was no reason by the Hon'ble High Court to interfere with such discretion of the Tribunal as has been exercised. The Hon'ble High Court could not ordinarily breach of policy decision and Departmental Instructions which have a public purpose behind it.

However, if the case is not covered by the said Instruction or is covered by one of the exceptions carved out in the Instructions themselves, in that case, the denial of reference would be failure to exercise its jurisdiction statutorily vested in the Tribunal. Inasmuch as, the Tribunal has not examined the case from that point of view and adequate material was not available before the Hon'ble High Court and enabling formation of an opinion in that way, the present case should be sent back to the Tribunal for consideration afresh", 7. The third contention of the Id. Departmental Representative for the Revenue was that the Chandigarh Bench of Tribunal in case of ITO v. Dharmvir held that Central Board of Direct Taxes in Circular dated 27-3-2000 had asked all officers of the Income-tax Department under their control not to file appeals before the Appellate Tribunal in cases where the tax effect involved in appeal did not exceed Rs. 1 lakh. He submitted that the Tribunal observed that these Instructions have been issued to avoid unnecessary litigation in small cases. It is difficult for small assesseees from remote and distant place to defend an appeal filed against him in the Appellate Tribunal.

Thus the Tribunal held that these Instructions have been issued by the CBDT for mitigation of the hardship of small assesseees. He submitted that where substantial revenue was involved and the Department preferred an appeal before the Tribunal, then it was incumbent upon the Tribunal to decide the appeal on merit and not to dismiss the same at the threshold by applying the said Circular of tax effect less than Rs. 1 lakh.

8. He also relied on the decision of the Hon'ble Punjab & Haryana High Court in case of CIT v. S.C. Nagpal, where it was held that where the question sought for opinion of the Court is a question of law, it cannot be declined to be referred to the Court without properly appreciating the contents of the instructions issued by the CBDT. 9. He also relied on the decision of the Hon'ble Allahabad High Court in case of Jugal Kishore Arora v. Dy. CIT 10. The 4th and last contention of the Id. Departmental Representative for the Revenue was that in a case which involved substantial question of law as referred to Special Bench, the appeal can be filed before the Tribunal and in those cases, the Instruction No. 1979 read with Instruction No. 1777, dated 4-11-1987 and Instruction No. 2 of 2005 are not applicable and the appeal of the Revenue cannot be dismissed on that count.

11. He also relied on the decision of the Hon'ble Bombay High Court in case of CIT v. Pithwa Engg. Works , where it was held that the CBDT Circular dated 27-3-2000 raising the earlier limit of Rs. 50,000 to Rs. 2 lakhs for not filing appeal before the Hon'ble High Court was applicable even to old references which were still undecided.

Thus it was the submission of the Id. Departmental Representative that the Hon'ble High Court held that the raising of the limit at an higher amount for not filing of appeal in retrospective in nature, on the same analogy, the Instruction No. 2 of 2005 which provides that where it involves substantial question of law, the issue should be decided irrespective of monetary limit, is also retrospective. Thus the Tribunal was bound to decide the appeal filed by the Department ignoring the monetary limit of tax provided in the Instruction.

12. In the rejoinder, the Id. counsel for the assessee submitted that in the present appeal, there was no substantial question of law involved as in the preceding assessment years 1993-94, 1994-95 and 1995-96, the Tribunal upheld the order of the Id. CIT(A) allowing deduction of the administrative expenses claimed by the assessee and also in the subsequent assessment years 1997-98, 1998-99 and 1999-2000, the Tribunal upheld the order of the Id. CIT(A) allowing deduction of the administrative expenses to the assessee and dismissed the appeal of the Revenue. Therefore, it was his submission that it was the consistent method of accounting employed by the assessee that deduction was claimed for the expenses in the year of accrual and was added to the income by the assessee on the completion of the contract. He submitted that it will be seen from the assessment order that the Assessing Officer has disallowed the claim of expenditure of Rs. 69,84,089 but has added the same to the income of the assessee in the assessment year 1997-98, which is evident from the assessment order for the assessment year 1997-98. By adding the sum of Rs. 69,84,089 to the income of the assessee in the assessment year 1997-98, the Assessing Officer has accepted the method of accounting consistently followed by the assessee. Therefore, the Revenue cannot blow hot and cold at the same time taxing the expenditure in the assessment year 1997-98 in disallowing the claim for deduction in the assessment year 1996-97 thereby making double addition of the same

amount to the income of the assessee.

13. We have given our careful consideration to the rival submissions made before us and have perused the orders of tax authorities and the material available on record. The short question to be decided by us is whether the appeal filed by the revenue is maintainable in view of the CBDT Instruction No. 1979, dated 27-3-2000 which states that where the tax effect in an appeal is less than Rs. 1 lakh, then the department should not file any appeal before the Tribunal. The facts leading to this case are that in the year under appeal, the assessee has claimed expenditure of Rs. 69,84,089 on account of administrative overhead in respect of Sodepur and Brahmaputra Projects, which are under construction. The assessee has included this expenditure in the computation of income in the assessment year 1997-98 when the said projects were completed and the revenue from projects was recognized as income. The Assessing Officer in the assessment made for the assessment year 1997-98 has added the sum of Rs. 69,84,089 while determining the income of the assessee for the assessment year 1997-98, but in the assessment year 1996-97 has not allowed deduction for the sum of Rs. 69,84,089 claimed by the assessee. Thus if we uphold the addition in the present year under appeal and consequently the Revenue has to delete the addition made in the assessment year 1997-98 or vice versa, the tax effect of the same would be zero. This is so, in view of the fact that the income determined in the assessment year 1996-97 is loss of Rs. 5,74,69,643 and the income determined in the assessment year 1997-98 is also a loss of Rs. 2,76,81,893. Further it is observed that similar issue in the hands of the assessee itself was decided in favour of the assessee vide order dated 30-12-2002 in I.T.A. Nos. 1341 and 1342/Cal./1998 for the assessment years 1993-94 and 1995-96, order dated 6-9-2004 in I.T.A. No. 1744/Kol./2003 for the assessment year 1999-2000, order dated 10-9-2004 in I.T.A. Nos. 972 & 973/Kol./2002 for the assessment years 1997-98 and 1998-99. It is also observed that the Department has accepted the above decisions of the Tribunal as the Id.

DR could not bring any material before us to show that any appeal was preferred to the Hon'ble High Court against those orders. In the circumstances as the issue is already a decided issue and coupled with the fact that the tax effect on the same

is NIL as demonstrated above, in our considered view the issue even if involves a question of law, the same cannot be treated as a substantial question of law.

14. The Id D.R. relied on the decision of the Hon'ble Calcutta High Court in the case of Eastern Aviation Industries Ltd. (supra), the decision of the Hon'ble Supreme Court in cases of Harprasad & Co. (P.) Ltd. (supra), J.H. Gotla (supra) and P. Doraiswamy Chetty (supra) for submitting that income includes negative income, i.e., loss also. But the issue before us is a tax effect involved in the case is above Rs. 1 lakh or not and not the quantum of the income or loss. As demonstrated above, the tax effect in the instant case is NIL and hence the above decisions quoted by the Id. DR. do not support the case of the Revenue.

15. Further, the Id. D.R. also cited the decision of the Hon'ble Punjab & Haryana High Court in the case of Rani Paliwal (supra) and the decision of the Hon'ble Delhi High Court in the case of ITAT (supra) and the decision of the Hon'ble Allahabad High Court in the case of Jugal Kishore Arora (supra) to submit that once the appeal is filed before the Tribunal by the Revenue, even ignoring the Circular issued by the CBDT then the Tribunal is bound to decide the issue and cannot dismiss the appeal. As against this, we find that the Hon'ble Delhi High Court in the above cited case has held as under: The Central Board of Direct Taxes Instructions are binding on the Department. If the instant case was covered by a policy laid down by the Central Board of Direct Taxes, in that case no fault could be found with the order of the Tribunal refusing to state the case and there was no reason by the Hon'ble High Court to interfere with such discretion of the Tribunal as has been exercised. The Hon'ble High Court could not ordinarily breach of policy decision and Departmental Instructions which have a public purpose behind it.

However, if the case is not covered by the said Instruction or is covered by one of the exceptions carved out in the Instructions themselves, in that case, the denial of reference would be failure to exercise its jurisdiction statutorily vested in the Tribunal.

Inasmuch as, the Tribunal has not examined the case from that point of view and adequate, material was not available before the Hon'ble High Court and enabling

formation of an opinion in that way, the present case should be sent back to the Tribunal for consideration afresh.

Thus the Hon'ble Delhi High Court opined that only in cases which fall in the exception carved out in the CBDT Instructions are to be decided and those not falling within the exception are to be decided, as per the CBDT's instructions. Thus the above cited case of the Hon'ble Delhi High Court does not favour the case of the Revenue, inasmuch as, the Revenue could not point out that the present case falls within the exception clauses mentioned in the CBDT Instructions. Further we find that the Hon'ble Bombay High Court in the case of CIT v. Cameo Colour Co. in the case of Pithwa Engg. Works (supra) has held that the Instructions issued by the CBDT are policy decision taken by the highest tax administrative body keeping in view public interest in mind and hence the same are public policy and should be followed.

Thus we find that the Hon'ble Delhi and Bombay High Courts have held that the appeals filed by the Revenue in contravention of the CBDT Instructions are not to be admitted. The Amritsar (Special) Bench of the Tribunal in ITO v. Sir Engg. Works [2005] 94 ITD 164 held that instructions of Board prescribing monetary limit for filing appeal before various forums are binding on Income-tax Authorities. We find that recently the Apex Court has considered the effect of Circular issued by the CBDT in the case of Commissioner of Customs v. Indian Oil Corporation Ltd. . Their Lordships examined the earlier decisions of the Apex Court with regard to binding nature of the Circular and laid down the following principles at page 277 of the Reports: (1) Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show-cause notice and demand contrary to existing circulars of the Board are ab initio bad.

(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars.

16. The other contention of the Id. D.R. following the decision of the Chandigarh Bench of the Tribunal in Dharamvir's case (supra) is that the present appeal is maintainable. However, as we found above that the Revenue involved in the present case is ML and hence the decision in the case of Dharamvir (supra), wherein the Tribunal has held that the appeal is maintainable when substantial revenue is involved, is found not applicable to the instant case.

17. The last contention of the Id. D.R. was that as the issue has been referred to a Special Bench, it implies that the issue involves a substantial question of law. We find that Section 255(3) of the Act empowers the President of the Tribunal to constitute a Special Bench.

The said section reads as under - 255. (3) The President or any other member of the Appellate Tribunal authorized in this behalf by the Central Government may, sitting singly, dispose of any case which has been allotted to the Bench of which he is a member and which pertains to an assessee whose total income as computed by the [Assessing] Officer in the case does not exceed five hundred thousand rupees, and the President may, for the disposal of any particular case, constitute a Special Bench consisting of three or more members, one of whom shall necessarily be a judicial member and one an accountant member.

18. Thus it is observed that it is not necessary that whenever any issue is referred to a Special Bench, it implies that the said issue involves a substantial question of law. Thus we find no merit in this contention of the Id. D.R. We have already observed in this order that the issue involved in this case does not involve a substantial question of law.

19. We find that the CBDT vide Instruction No. 2/2005, dated 24-10-2005 issues guidelines to the Revenue authorities with regard to filing of appeal before the Tribunal, High Court and Supreme Court. From the above instruction, it is evident that since 1987, the CBDT is instructing its officers not file the appeal where the tax effect is below certain monetary limits. Vide Instruction No. 1903, dated 28-10-

1992, the monetary limit was revised upward and the officers were directed not file the appeal before the Income-tax Appellate Tribunal where the tax effect was below Rs. 25,000. The above monetary limit was further revised upward by Instruction No. 1979, dated 27-3-2000 and the officers were directed not file the appeal to ITAT where the tax effect is below Rs. 1 lakh. Thereafter in partial modification of the above instruction, the Board vide Instruction No. 2/2005, dated 24-10-2005 has further raised the above monetary limit to Rs. 2 lakhs with the same directions. Thus, the CBDT since 1987 has not only taken a consistent approach of instructing its officers for not filing the appeal where the tax effect is below the monetary limit, but such monetary limit is also revised upward from time to time. The Circular under Instruction No. 1979, dated 27-3-2000 was considered by the Bombay High Court in the case of Cameo Colour Co. (supra) and Their Lordships held at page 568 as under: It appears that despite the above circular, the Revenue has chosen to file the present appeal knowing fully well that the corridors of the courts are flooded with pending litigations. The presumption of this appeal is quite contrary to the instruction issued in the circular which is binding on the Revenue.

In the above view of the matter, considering the instructions issued by the Central Board of Direct Taxes, we are satisfied that the Board has taken a policy decision not to file appeal in a type of case in hand and the same is finding on the Revenue (appellant herein). In the result, we dismiss this appeal on this count in limine with no order as to costs.

20. In these facts and circumstances of the case, we are of the considered opinion that the tax effect in the present year under appeal is less than Rs. 1 lakh following the Instruction No. 1979, dated 27-3-2000, the present appeal filed by the Revenue is not maintainable and is required to be dismissed. We do so.

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