



IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA.153 of 2005

Date of Decision : 8th of November, 2005

The Commissioner of
Income Tax

.....Petitioner,

Through : Mr.R.D.Jolly, Advocate, with
Ms.Sonia Mathur, Advocate

versus

M/s.Milk Food Ltd.

.....Respondent,

Through : Mr.M.S.Syali, Sr.Advocate, with
Mr.S.Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE T.S.THAKUR

HON'BLE MR. JUSTICE B.N. CHATURVEDI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Yes.

T.S.Thakur, J.(Oral)

1. The respondents-assessee is engaged in the business of manufacturing and marketing of various milk products like milk



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powder, ghee etc. During assessment year 1996-97, the respondent appears to have finalised agreements with M/s. Brooke Bond Lipton India Limited effective from 1st of April, 1995 for assignment of its trade mark 'Milk Food 100% Ice Cream' in favour of the said company. A non-competition agreement in ice cream/frozen dessert was also separately entered into between these two companies. In consideration of the two agreements, the assessee company received a sum of Rs.5 crores for assignment of its trademark and Rs.8 crores for non-competition in manufacturing, selling and distribution of ice cream. The trade mark was assigned for a period of eight years while non-competition in ice cream was to last for ten years.

2. In the course of assessment, the assessee claimed that the amounts received by it from M/s. Brooke Bond Lipton India Limited were not exigible to tax. The assessing officer declined to accept that contention and declared the receipt exigible to tax in the hands of the assessee. Aggrieved, the



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assessee filed an appeal before the Commissioner of Income Tax and, inter alia, relied upon instructions issued by the Central Board of Direct Taxes, according to which, receipts of the kind referred to above could be brought to tax only from the assessment years 1998-99 onwards in view of the amendment made in Section 55 of the Income Tax Act, 1961. The Commissioner upheld the claim and the contention urged by the assessee. Relying upon the decision of the Supreme Court as also the instructions issued by the Central Board of Direct Taxes, the Commissioner held that the receipts in question were not, exigible to tax for the periods they were actually received.

3. A further appeal taken to the Tribunal by the revenue failed and was dismissed by the order impugned in the present appeal. The Tribunal also placed reliance upon the instructions issued by the Central Board of Direct Taxes and held that the amendment to Section 55 notwithstanding, receipts of the kind we are concerned with were not exigible to tax as the same



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were to be treated as capital receipts. The present appeal assails ⁷ the correctness of the said order.

4. We have heard Mr.Jolly, learned counsel for the Revenue and Mr.Syali, appearing for the respondent-assessee.
5. It is not in dispute that the instructions issued by the Central Board of Direct Taxes specifically take care of cases like the ones at hand and provide that receipts on account of transfer of trademark and restrictive covenant were not exigible to Capital Gains Tax. Mr.Jolly, learned counsel for the Revenue, however, argued that the instructions issued by CBDT did not fall in line with the true and correct interpretation of the provisions of Section 55 of the Act, and could not, therefore, be relied upon.
6. The question whether the instructions issued by the Central Board of Direct Taxes are binding upon the Revenue and whether an appeal can be maintained even in the teeth of those instructions is no longer res integra. The Supreme Court has in "Commissioner of Customs Vs. Indian Oil Corporation



Limited & Another", 267 ITR 273 (SC), considered the question and held that the Revenue is not entitled to raise a contention contrary to the circular or instructions issued by the Central Board of Direct Taxes. The Court has held that so long as a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid or that it is contrary to the terms of the statute. The Court has, after noticing a series of decisions rendered by it earlier, summarised the governing principles in the following words:-

" (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." 9

7. In a separate but concurring opinion recorded by P.Venkatarama Reddi, J., the above principles were affirmed in the following words:

"I have no reservations in accepting the principle that the circulars issued by the Board under Section 151A of the Customs Act or Section 37B of the Central Excise Act are generally binding on the Revenue. Normally, the instructions issued by the superior authorities on the administrative side cannot fetter the exercise of quasi judicial power and the statutory authority invested with such power has to act independently in arriving at a decision under the Act (vide Sirpur Paper Mills Ltd. v. CWT [1970] 1 SCC 795; [1970] 77 ITR 6 (SC). However, when there is a statutory mandate to observe and follow the orders and instructions of the Board in regard to specified matters, that mandate has to be complied with. It is not open to the adjudicating authority to deviate from those orders or instructions which the statute enjoins that it should follow. If any order is passed contrary to those instructions the order is liable to be struck down on that very ground. That is what has been held in some of the cases referred to by my learned sister. Extending this principle which flows from the statutory provision



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contained in Section 151A of the Customs Act or a *pri materia* provision in other fiscal enactments, this court also held that it is not open to the Department to file an appeal against the order passed in conformity with the circular. To this extent I have no difficulty in understanding the rationale of the decisions of this court, leaving apart for the time being the decisions in which a somewhat different note was struck." (emphasis supplied)

8. Having said so, the Court referred to certain incongruities appearing in some of the decisions rendered by the Apex Court that required to be reconciled or explained by referring the matter to a Constitution Bench for an authoritative pronouncement on the subject. Of these areas, the primary area referred to by his Lordship called for some explanation in situations where a circular issued by the Board came in indirect conflict with the law declared by the Supreme Court. The Court expressed reservations about the view taken in *Dhiren Chemical Industries'* case [2002] 254 ITR 554 (SC) : [2002] 2 SCC 127 to the extent the said decision held that a circular would continue to hold good regardless of the fact that the interpretation placed upon a provision is contrary to the



interpretation placed upon the same provision by the Supreme Court. Suffice it to say that to the extent of the binding nature of the circulars and instructions issued by the Central Board of Direct Taxes under Section 119 of the Act in cases where there is no contrary pronouncements from the Apex Court, there was unanimity in the decisions rendered by the Two Judges comprising the Bench. 11

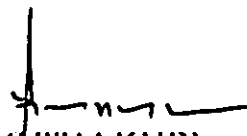
9. It was on the authority of the above pronouncement argued by Mr.Syali that the Revenue was not entitled to maintain the present appeal, especially when the Commissioner of Income Tax and the Tribunal had, apart from examining the issue in the light of the pronouncement of the Supreme Court, also placed reliance upon instructions issued by the Board, which instructions unequivocally applied to the fact situation in hand and made the capital receipt in the hands of the assessee exempt from Capital Gains Tax.

10. In the light of what is stated above and the authoritative pronouncements of the Supreme Court regarding the binding



nature of the instructions issued under Section 119 of the Act,
as also the fact that the appellate authority, has while allowing
the appeal filed by the assessee, placed reliance upon the
instructions, we see no substantial question of law arising for
our consideration in this appeal. The appeal, accordingly, fails
and is hereby dismissed.

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(T.S. THAKUR)
JUDGE


(B.N. CHATURVEDI)
JUDGE

November 8, 2005
RS/