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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 8287/2005

M/S. MANSAROVAR INVESTMENTS LT Petitioner
Through: Mr.B.B.Ahuja, Sr. Adv. with Mr.Manish
Kumar, Adv.

versus

THE COMMISSIONER OF INCOME TAX Respondent
Through: Mr.R.D. Jolly, Mr.Vishnu Sharma &
Mr.Ajay Jha, Adv.

CORAM:

HON'BLE MR. JUSTICE T.S.THAKUR

HON'BLE MR. JUSTICE SHIV NARAYAN DHINGRA

1. Whether 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?

ORDER

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27.04.2006

PER THAKUR, J (ORAL) :

Issue rule.

Despite opportunities granted to Mr.Jolly to file a counter affidavit to this



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writ petition, the needful has not been done. Mr.Jolly, on the contrary, submits that since the question arising for consideration is purely legal in character, the filing of a counter was unnecessary. He has accordingly argued the writ petition for final disposal.

This case has a chequered history starting with the assessment of the assessee company in May, 1995 under the Gift Tax Act. We are for the present not concerned with the various stages through which the litigation has progressed and the orders that the authorities have passed in those proceedings from time to time. All that we need mention is that pursuant to an order made by the Commissioner of Income Tax (Appeals) passed on 31st March, 2004, the Gift Tax Officer computed the amount of gift tax payable by the petitioner and charged interest under Section 220(2) read with Section 32(2) of the Gift Tax Act with effect from 17.5.1995. A demand for an amount of Rs.18,69,857/- towards interest was raised against the petitioner on that basis. Aggrieved the petitioner preferred an appeal against the said order before the Commissioner Gift Tax (Appeals). The said appeal was, however, dismissed by the Commissioner in terms of an order dated 21st June, 2004 holding that the appellant had no right to maintain an appeal against the levy of interest under under Section 32(2) of the Gift Tax Act. The petitioner, thereafter preferred a revision petition before the Commissioner of Income Tax/Gift Tax, Delhi under Section 24(1) of the Gift Tax



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Act. Interestingly enough, the Commissioner dismissed even the revision petition on the ground that the same was not maintainable. The Commissioner was of the view that since the petitioner had preferred an appeal against the order impugned in the revision petition before the Commissioner of Income Tax (Appeals) who has passed a speaking order on the merits of the case, the revision petition was not maintainable. The Commissioner observed:

"Against this appeal effect given by the A.O., the assessee filed a regular appeal before the CIT (A)-IX. This appeal has been given a regular appeal number 115/2004-05 and has since been decided by the Ld. CIT(A) vide order dated 21.6.2004. The Ld. CIT(A) has passed a speaking order on merits of the case and had dismissed the appeal of the assessee accordingly.

In the present case the order under revision is just an order giving effect to the order of the CIT(A) in the regular assessment. The AO has charged statutory interest thereon after giving appeal effect. The assessee filed a regular appeal against this order giving appeal effect and this has been decided by the Ld. CIT(A) through a speaking order on merits. Therefore the so called order under revision is an order subject to an appeal. The reliance placed on the Board's circular No.367 by the appellant is misplaced. The legal position in this regard has been outlined in the preceding para. As the revision petition is against an order which was the subject matter of an appeal, this petition is not maintainable."

The petitioner has in the present writ petition assailed the correctness of the above order.

Appearing for the petitioner, Mr. Ahuja, learned Senior counsel argued that the Commissioner of Income Tax/Gift Tax had erred in holding that the revision



petition filed by the petitioner was not maintainable. He submitted that the Commissioner was palpably wrong in taking the view that the Commissioner of Income Tax (Appeals) had passed an order on the merits of the case in the appeal filed by the petitioner. He submitted that the Commissioner of Income Tax (Appeals) had not touched the merits of the case as the appeal had been dismissed as not maintainable. Any such order of dismissal was not tantamount to an order passed on the merits of the case. There was in that view, no legal impediment maintaining a revision petition against the order passed by the Assessing Officer. In support, he placed reliance upon a circular issued by the Board of Direct Taxes which is to the following effect:

“1. Section 264(4)(c) of the Income Tax Act, 1961 provides that the Commissioner shall not revise any order under that section where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal. A doubt has been raised whether in the following situations the order can be said to have been made “subject of an appeal”:

- (i) where the appeal was withdrawn by the assessee and it was dismissed as such;
- (ii) where the appeal was dismissed on the ground that the appeal was incompetent;
- (iii) where the appeal was dismissed on ground of limitation.

2. The Board are of the view that the order cannot be said to have been made “subject of an appeal” if the appeal has been disposed of by the Commissioner (Appeals) or the Appellate Tribunal without passing an order under Section 251(1) or 254 (1) on merits.”

Mr. Ahuja submitted on the authority of the decisions of the Supreme Court



in *UCO Bank Vs. Commissioner of Income Tax*, 237 ITR 889, *Commissioner of Customs Vs. Indian Oil Corporation Ltd. & Anr.*, 267 ITR 272 and the judgment of Division Bench of this Court in *Commissioner of Income Tax Vs. Milk Food Ltd.*, 280 ITR 331, that the circulars issued by the Board of Direct Taxes were binding upon the respondents and that they could not take a stand contrary to what has been stated by the Board in the said circulars.

On behalf of the respondents, Mr. Jolly, on the other hand argued that the order passed by the Assessing Officer recomputing the amount of gift tax payable by the petitioner and charging interest was in essence an order that gave effect to the order passed by the Commissioner of Income Tax/Gift Tax. He submitted that such an order was appealable before the Commissioner and that even if the Commissioner had erroneously taken the view that the appeal was not maintainable, the same did not mean that the order was the subject of an appeal within the meaning of Section 24(1) of the Gift Tax Act. In support, he placed reliance on a decision of Bombay High Court in *Caltex Oil Refining (India) Ltd. Vs. Commissioner of Income Tax*, 202 ITR 375.

The crucial issue that falls for our consideration in the present writ petition is whether a revision under Section 24(1) of the Gift Tax Act would be maintainable in a case where an appeal preferred against the order under challenge



was filed before the Commissioner of Income Tax (Appeals) and was dismissed on the ground that the same was incompetent. An answer to that proposition is, in our opinion, provided by the circular issued by the Board of Direct Taxes. The Board has by reference to Section 264(4)(c) of the Income Tax Act clarified that in cases where an appeal is withdrawn by an assessee and is dismissed as such or in cases where the appeal was dismissed on the ground that the same was incompetent or where the appeal was dismissed on the ground of limitation, the order under appeal cannot be said to have been made the subject matter of an appeal within the meaning of Section 264(4)(c) of the Income Tax Act. That clarification sets at rest the controversy whether an appeal dismissed as not maintainable can prevent the filing of a revision petition against the order that was challenged in such appeal. The clarifications issued by the Central Board of Direct Taxes in regard to the provisions of the Income Tax Act are applicable even to proceedings under the Gift Tax Act *mutatis mutandis*. In that view, therefore, the Commissioner of Income Tax (Appeals) was in error in holding that the revision petition filed by the petitioner before him was not maintainable as the order under challenge in the same had been the subject of an appeal.

That apart the Supreme Court has in *Dwarka Nath Vs. Income Tax Officer*, 57 ITR 349 clearly held that an order of computation of tax while giving effect to the order passed by the appellate authority is not appealable. The Court has in that



case observed:

"In the present case, pursuant to the directions of the Tribunal, Delhi Bench, the Income-tax Officer determined the assessee's capital gains under section 12B of the Act; but the Income-tax Officer did not make any order under Section 23(3) of the Act, nor did he issue a regular notice of demand as prescribed under Section 29 of the Act. The result was, no appeal lay against the computation made by the Income-tax Officer to the Appellate Assistant Commissioner. Indeed, on March 8, 1957, the Appellate Assistant Commissioner rejected the appeal filed by the appellant as being not maintainable. As no appeal lay to the Appellate Assistant Commissioner against the calculations made by the Income-tax Officer, the Commissioner had certainly power to revise the said order."

In the light of the above pronouncement, the Commissioner of Income Tax (Appeals) was, in our opinion, justified in holding that the appeal preferred by the petitioner was not indeed maintainable. In any event, the said order of the Commissioner of Income Tax (Appeal) has attained finality. That being so, it was not open to the parties to assail the correctness thereof in collateral proceedings. The revision petition filed by the petitioner could not be thrown out on the ground that the order under challenge was the subject matter of an appeal.

In the result, this writ petition succeeds and is hereby allowed, and order dated 21st September, 2004 passed by the Commissioner of Income Tax/Gift Tax, Delhi dismissing the revision petition filed by the Commissioner as not maintainable is hereby quashed. The matter shall stand remitted back to the



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Commissioner for a fresh disposal of the revision petition on merits in accordance with law. We hope and trust that the revisional authority shall dispose of the revision petition expeditiously but not later than six months from the date a copy of this order is served upon it. No costs.



T.S. THAKUR, J



SHIV NARAYAN DHANGRA, J

APRIL 27, 2006

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