* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **[ITA No.60 of 2008]**
&
[ITA No.61 of 2008]

RESERVED ON: 21.03.2011
% PRONOUNCED: 30.03.2011

ITA No.60 OF 2008

COMMISSIONER OF INCOME TAX . . . APPELLANT
Through : Ms.Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Jr. Standing Counsel

VERSUS

CONTINENTAL CONSTRUCTION LTD. …RESPONDENT
Through: Mr. Kanan Kapur, Advocate

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CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J.

1. Central Board of Direct Taxes (CBDT) has been issuing circular from time to time fixing the mandatory monetary limits for filing appeals. The circular with which, we are concerned is the one dated 24.10.2005, as per which appeals could be filed by the Department against the order of the Income Tax Appellate Tribunal to the High Court under Section 260A of the Income Tax Act only if the tax effect exceeds ₹4 lacs. This Circular was prevalent when instant appeals were filed. Naturally, in the cases where returns were filed and or assessed at loss, there was no tax effect. That is the position in these appeals also. However, clarification dated 15.05.2008 was issued by the Board clarifying the meaning which is to be assigned to "tax effect". As per this Circular, even in loss cases, "notional tax effect" is to be taken into account. Para 11 of the Circular stated that it would apply to the appeals filed after the date of circular.

2. These appeals pertain to the period before this clarification dated 15.05.2008 was issued. Taking refuge under Para 11, the learned counsel for the assessee has questioned the maintainability of these appeals preferred by the Revenue against the judgment of the Tribunal. The submission of learned counsel

for the assessee, in this behalf, is that these appeals pertain to assessment years 1992-93 and 1993-94 and in both these years, the assessee had filed the return with no actual tax effect. There were losses in the earlier years, which were brought forward. The Assessing Officer while completing the assessment had disallowed the amount paid to M/s Negolice Ltd. as fee for service, which addition is deleted by the ITAT. The submission is that even after the disallowance of the aforesaid expenditure by the AO, the assessment is completed at loss and, therefore, there was no 'tax effect'. The learned counsel for the assessee pointed out that having regard to the CBDT Circular which was prevalent at the relevant time, appeals could not be filed when tax effect was neutral. No doubt, he conceded that thereafter clarification was issued by the CBDT vide O.M. dated 15th May, 2008 which is instruction no. 5 of 2008 and as per these instructions, in loss cases notional tax effect is to be taken into account. However, his submission was that this O.M. was made operative only prospectively and was to be applicable in respect of appeals filed on or after 15th May, 2008. Hence, as the appeals were filed in December, 2007, the aforesaid CBDT Circular had no application and as per the prevailing instructions as on the date of filing of these appeals, actual tax effect and not the notional tax effect was taken into consideration. It was, thus, argued that in the instant

appeals, where the assessment resulted in losses even after disallowance of certain expenditure, and there was no actual tax effect in the year in question, the appeals were not maintainable as appeals could be filed in this Court only in those cases where the actual tax effect was ₹4 lacs. The learned counsel relied upon the judgment of this Court in ***CIT*** Vs. ***Nanak Ram*** 317 ITR 302 where the view taken in ***CIT*** Vs. ***Pradeep Kumar Gupta*** , 303 ITR 95 was followed and appeals were dismissed in exactly the same circumstances.

3. The learned counsel for the Revenue could not dispute that in the aforesaid two judgments, this Court had decided that the Circular dated 15th May, 2008 clarifying that notional tax effect is also to be taken into account while calculating the tax effect and examining the maintainability of the appeals. Her submission was that the aforesaid view taken was based on para 11 of the instructions stipulating "this instruction will apply to appeals filed on or after May 15, 2008". However, on the other hand this Court in **CIT** Vs. ***Ms/ P.S. Jain & Co. (ITR 179/1991 decided on August 2,2010)*** had that the instructions would apply even to the pending appeals.

4. In ***CIT*** Vs. ***Nanak Ram Jaisinghania***, 317 ITR 302, a Division Bench of this Court held that the appeal to be not maintainable observing as under:-

> "Learned Counsel for the appellant submits that the Central Board of Direct Taxes has issued OM dated May 15, 2008, which is Instruction No. 5 of 2008 and as per these instructions, in loss cases, notional tax effect is to be taken into account. The learned Counsel, however, conceded that these instructions are applicable in respect of those appeals preferred after the issuance of these instructions. In fact, it is specifically provided in paragraph 11 of the said instruction as under "this instruction will apply to appeals filed on or after May 15, 2008". However, the cases where appeals have been before May 15, 2008, will be governed by the earlier instructions on this subject, operative at the time when such appeal was filed. In the present case, appeal was filed in the year 2005 before the Income-tax Appellate Tribunal and it was dismissed on November 30, 2007, as not maintainable. These instructions came much thereafter, and in view of paragraph 11 thereof, has no applicability to the case. The Income-tax Appellate Tribunal, therefore, rightly dismissed the appeal as non-maintainable."

5. On the other hand, perusal of the order passed in ***M/s P.S. Jain and Company*** (supra) would show that the Division Bench of this Court followed the judgment of Madhya Pradesh High Court in ***CIT*** Vs. ***Ashok Kumar Manibhai Patel and Company***, 317 ITR 386 which had in turn followed the judgment of the Bombay High Court in ***CIT*** Vs. ***Pithwa Engineering Works*** 276 ITR 519

wherein following rationale was given in fixing the minimum limit of tax effect for filing the appeals:-

> "One fails to understand how the Revenue can contend that so far as new cases are concerned, the circular issued by the Board is binding on them and in compliance with the said instructions, they do not file references if the tax effect is less than ₹ 2 lakhs. But the same approach is not adopted with respect to the old referred cases even if the tax effect is less than ₹ 2 lakhs. In our view, there is no logic behind this approach.
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> 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, the assesses on the file of the Departments have been increased consequently, the burden on the Department has also increased to a tremendous extent. The corridors of the superior courts are choked with huge pendency of cases. In this view of the matter, the Board has rightly taken a decision not to file references if the tax effect less than ₹2 lakhs. The same policy for old matters need to be adopted by the Department. In our view, the Board's circular dated March 27, 2000 is very much applicable even to the old references which are still undecided. The Department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no justification to proceed with decades old references having negligible tax effect."

6. The question that arises is as to whether there is a conflict between the two sets of judgments. Though, in the first blush it appears to be so. But when we examine the matter at deeper

level having proper prospective in mind, we do not find any conflict.

7. It is a matter of record that the CBDT has been issuing circulars from time to time whereby instructions are given to the officers of the Income-Tax Department not to file references/appeals when tax effect is less than the one prescribed/stipulated in those circulars. By successive circulars, the limits mentioned are revised upward. At the relevant time, i.e. in the year 2007, Circular dated 24th October, 2005 fixing the monetary limits for filing appeals was in vogue. As per this Circular it was decided by the Board that the appeals would henceforth be filed only in cases where the tax effect exceeds the following monitory limits.

> "Sr. No.Income tax effect
>
> (i) Appeal before Appellate Tribunal ₹ 2,00,000/-
> (ii) Appeal u/s 260A ₹ 4,00,000/-
> (iii) Appeal before the Supreme Court ₹ 10,00,000/-"

8. Thereafter, vide instructions dated 16th July, 2007 a clarification was issued in the following manner:-

> "2.With reference to para 2 of the above instruction, it is clarified that the 'tax effect' specified in para 2 means the tax only i.e. tax excluding interest.

> 3. Para 3 of the Instruction No. 02/2005 is substituted as under:-
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> "the Board has also decided that cases where the question of law involved or raised in appeal is/are of a recurring nature to be decided by the Court, should be separated, considered on merits without being hindered by the monetary limits"

9. It was thus clarified that while calculating the tax effect, interest component would not be included. We may record at this stage that way back in the year 2003 the Board had issued instruction dated 17th July, 2003 clarifying the meaning of "tax effect" in the following words:-

> "In order to avoid ambiguity and to adopt uniformity in approach while filing appeals by the field formation, it a hereby clarified by the Board that the words "monetary limit" and "tax effect" in the aforesaid instruction be read as "revenue effect" which denotes the amount of tax, interest, penalty, fine or any other sum involved. This instruction is clarificatory in nature and will apply to litigation under other Direct Taxes also e.g. Wealth-tax, Gift-tax, Estate duty etc."

10. In the year 2008, vide instruction no.5/2008 dated 15th May, 2008 (with which we are concerned), the Board further clarified the meaning which was to be assigned to 'tax effect'. As per this Circular it was stipulated that in all loss cases, notional tax effect is to be taken into account. It thus meant that even in those cases where there are losses, depending upon the quantum of relief

given by the Tribunal which the Department wanted to challenge, the Department could consider the 'tax effect' thereupon even if the net effect was that there was no positive income in the concerned year exigible to tax and it was a case of loss. It is this instruction of calculating the tax effect by taking into consideration even notional tax effect are held to be applicable in respect of those appeals file on or before 15th May, 2008. However, the position is all together different when the pending appeals with lesser tax effect than stipulated in the O.Ms are to be considered which was the focus of consideration in ***M/s P.S.Jain and Co.*** (supra). What was held in ***M/s P.S. Jain*** is that when certain reference/appeals are filed earlier and are pending for consideration, the Court can refuse to consider those appeals/references if in the meantime, by new circular CBDT has fixed higher tax effect limit than the tax effect involved in those pending appeals. The court held that the new Circular prescribing higher limit was very much applicable even to the old cases which are still undecided and the Department is not justified in proceeding with those old references/appeals where the tax impact is minimal.

11. On the other hand, in the instant case we are concerned with the issue as to how tax effect is to be calculated and not with the minimum limit of tax effect prescribed in the circular simpliciter.

When it comes to the meaning that is to be assigned to the 'tax effect' and the modified manner/formula is prescribed in O.M. dated 15th May, 2008, such a circular on this aspect has to be treated having prospective application moreso when para 11 thereof specifically so provides. It would be moreso when the same is to the prejudice of the assessee. Thus, we find no dichotomy when the question raised in two sets of decisions was based on all together different rationale.

12. We, therefore, held that these appeals are not maintainable and are dismissed on this ground alone.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

March 30, 2011
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