



## Rajasthan High Court's Larger Bench's decision on filing of appeal by the tax department contrary to the CBDT circular on monetary limits

### Background

Recently, the Larger Bench<sup>1</sup> of the Rajasthan High Court in the case of Gad Fashion<sup>2</sup> (the taxpayer) held that the tax department cannot file appeals or insist for arguing matters on merits, contrary to the requirements of the Central Board of Direct Taxes (CBDT) circulars setting out monetary limits for filing of departmental appeals. The intention of the legislation is to prohibit the appeal analogous to the provisions of Code of Civil Procedure where there is a prohibition that appeals upto the value will not be entertained by the court.

However, the third judge of the Larger Bench delivered a partially dissenting decision and observed that in view of Article 141 of the Constitution, if the issue decided by the Appellate authorities is contrary to the decision of the Supreme Court, the tax department can prefer an appeal. However, care would be taken to file it only in those cases where the order passed by the appellate authorities is contrary to the ratio laid down by the Supreme Court on the same issue.

### Facts of the case

- Under the Income-tax Act, 1961 (the Act), Section 268A authorises the CBDT to issue orders, instructions or directions to other income-tax authorities by way of fixing appropriate monetary limits, for the purpose of filing of appeal or application for reference by any income-tax authority. It has been further provided that the Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions so issued.

- Section 119 of the Act provides that the CBDT may issue appropriate orders, instructions, and directions to other income-tax authorities for the proper administration of the Act, and such authorities and all other persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the Board.
- In 2011, the CBDT issued an Instruction<sup>3</sup> under Section 268A of the Act. By the said Instruction, the CBDT, in order to reduce the litigation, revised the monetary limits for the filing of appeals by the department before the Income-tax Appellate Tribunal, High Courts and Supreme Court for reducing tax litigation. The Instruction specifies that it will apply to appeals filed on or after 9 February 2011. However, the cases where appeals have been filed before 9 February 2011, it will be governed by the instructions on this subject, operative at the time when such appeal was filed.
- In supersession of the above instruction, on 10 December 2015, the CBDT<sup>4</sup>, further revised monetary limits. This instruction will apply retrospectively to pending appeals and applications be filed henceforth in High Courts/Tribunals. Pending appeals below the specified tax limits may be withdrawn/not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed.

<sup>1</sup> Larger Bench comprising of 3 judges

<sup>2</sup> CIT v. Gad Fashion (ITA No. 575/2008) – Taxsutra.com

<sup>3</sup> CBDT Instruction No. 3/2011, dated 9 February 2011

<sup>4</sup> CBDT Instruction No.21/2015, 10 October 2015

- The High Court vide its order dated 5 July 2017 referred the matter to the larger bench on the issue of whether the tax department can take a contrary view than the CBDT circular which has been issued for reduction of arrears in the Supreme Court, High Courts, and Tribunals and insists for arguing the matter on merits.

## High Court's decision

### *Decision by majority judges*

- The High Court observed that the intention of the legislation to reduce the pendency of the tax appeal and to have a uniform policy for the tax department throughout the country, therefore, the direction issued by the CBDT is binding on all subordinate officers and Section 268A(4)<sup>5</sup> of the Act which has been amended with retrospective effect is applicable with all force in pending matters. The intention of the legislation is very clear to prohibit the appeal analogous to the provisions of Code of Civil Procedure where there is a prohibition that appeals upto the value will not be entertained by the Court.
- In view of the majority of High Court decisions where the view is in favour of the taxpayer and in view of all the decisions referred by the taxpayer if two views are possible, then one view which is in favour of the taxpayer is required to be upheld, and the same is upheld.
- There are ample powers under Section 263 and 154, which will meet the ends of justice and it will not be out of place to mention that the writ can also be filed by the tax department if it is a gross case decided by any officer or authority but to that extent the appeal is not maintainable and would amount to give over riding effect to the statutory provisions.
- It is well known that the Courts are flooded with litigation where the State Government and Central Government or the tax department or Corporation are the largest litigants, therefore, frivolous litigation is curb for the larger interest of avoiding more Tribunals or Courts to decide the matters on merits. In that view of the matter, when the legislation had thought it fit to put some prohibition on the tax department, in our considered opinion the issue is required to be answered in favour of the taxpayer and against the department in as much as the circular of the CBDT is binding on the subordinate officers.

<sup>5</sup> The appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under Section 268A(1) and the circumstances under which such appeal or application for reference was filed in respect of any case

### *Decision by the third judge*

- Various High Courts have considered the said issue. The Circular issued by the CBDT under Section 268A of the Act is binding on the tax department. Thus, the appeal cannot be preferred contrary to the instructions given therein. However, the High Court cannot lose sight of the only issue raised by the tax department in reference to Article 141 of the Constitution of India.
- If an issue has been decided by the Supreme Court, then the ratio propounded therein is to be applied as a precedence. If the Tribunal or the Commissioner of Income-tax (Appeals) [CIT(A)] takes a view contrary to the settled law, then rider imposed by the CBDT on the filing of appeal cannot be applied. If it has been held that appeal would not be maintainable even if the Tribunal or the CIT(A) has taken a view contrary to the decision of the Supreme Court, then Article 141<sup>6</sup> of the Constitution of India would be violated. No statutory provision can stand or be read contrary to the constitutional provision.
- In view of the above, the theory of reading down needs to be applied for making Circular of the CBDT in consonance to the provisions of the Constitution of India otherwise it would not only cause judicial indiscipline but give rise to the anarchy, leading to serious consequences.
- Accordingly, the Circular issued by the CBDT under Section 268A of the Act of 1961 is held binding on the tax department thus appeal cannot be filed, if it is barred. However, it is with a clarification that if the issue decided by the CIT(A) or Tribunal is contrary to the decisions of the Supreme Court, the tax department can prefer an appeal, but, care would be taken to file it only in those cases where the order passed by the CIT(A) or the Tribunal is contrary to the ratio propounded by the Supreme Court on the same issue. In doing so, the sanctity of Article 141 of the Constitution of India would be maintained, thereby, serious consequences of taking different view would also be avoided.

<sup>6</sup> The law declared by the Supreme Court is binding on all the Courts within the territory of India

## Our comments

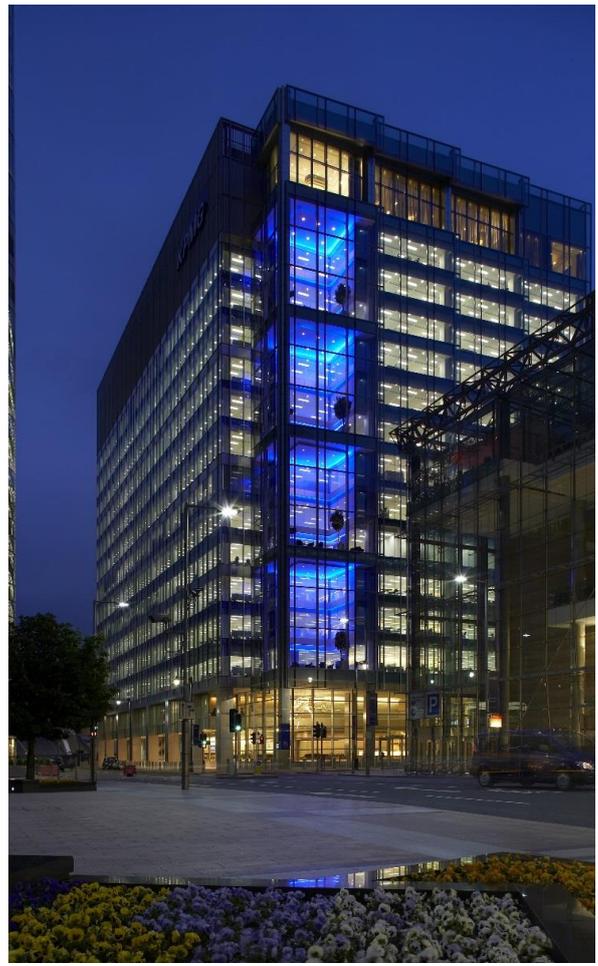
The issue with respect to whether the tax department can file an appeal by taking a contrary view from the CBDT circular setting out monetary limits for the filing of departmental appeals has been a matter of debate before courts.

In the instant case, the majority bench held that the tax department cannot file appeals or insist on arguing matters on merits, contrary to the requirements of CBDT circulars setting out monetary limits for the filing of departmental appeals.

However, the third judge observed that in view of Article 141 of the Constitution, if the issue decided by the CIT(A) or Tribunal is contrary to the decision of the Supreme Court, the tax department can prefer an appeal.

The Delhi Tribunal in some of the cases<sup>7</sup> held that instructions issued by the CBDT prescribing monetary limit for filing appeals before Tribunal, High Court or Supreme Court are binding on income-tax authorities. On a plain reading of Section 119, it is clear that subsection (1) refers to, orders, instructions, and directions to the income-tax authorities by CBDT. The section itself provides that all such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions, and directions of CBDT.

It would be interesting to see how the tax department would apply this decision. Whether based on the decision of the third judge, the tax department will file an appeal against the decisions of CIT(A) or Tribunal where it is contrary to the decision of the Supreme Court. The issue may get resolved at the Supreme Court level.



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<sup>7</sup> ACIT v. Salil Kapur [2008] 23 SOT 204 (Del), DCIT v. Net 4 India Ltd [2008] 23 SOT 72 (Del), ACIT v. Satish Chand Jain [2006] 10 SOT 383 (Del)

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