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Reserved

Income Tax Appeal No.172 of 2004

Commissioner of Income Tax-II,
Agra and another ..... Appellants

Vs.

Shyam Biri Works, Allahabad ..... Respondent

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Hon'ble Tarun Agarwala, J.
Hon'ble Dr. Satish Chandra, J.

(Per: Tarun Agarwala, J.)

(Delivered on 6th May, 2015)

The present appeal relates to the Assessment Year 1993-94. Since the tax effect was more than Rs.2 lacs, the appeal was presented on 24th December, 2004 on the basis of Instruction No.1979 dated 27th March, 2000. When the appeal was taken up for hearing, a preliminary objection was raised by the learned counsel for the respondent-assessee on the issue of maintainability of the instant appeal. Reliance was placed on Section 268A of the Income Tax Act *(hereinafter referred to as the Act)* as well as the Instructions No.3 of 2011 dated 9th February, 2011 by the Central Board of Direct Taxes *(hereinafter referred to as the CBDT)* laying down the monetary limits for regulating the filing of the appeals. The learned counsel for the assessee contended that under the Instructions No.3 of 2011, the monetary limit

for filing an appeal by the Department was Rs.10 lacs, whereas the tax effect in the instant appeal is less than Rs.10 lacs and, therefore, the appeal should be dismissed as not maintainable. Since the preliminary objection raised had far reaching consequence affecting pending appeals in the High Court, the Court invited other counsels to address the Court on this issue. In this manner, we have heard Sri Bharat Ji Agarwal, the learned Senior Counsel alongwith Sri Shambhu Chopra and Sri Govind Krishna, the learned counsels for the Department and Sri R.P. Agarwal, Sri Piyush Agarwal, Sri Ashish Bansal and Sri Suyash Agarwal, the learned counsels for the assessee.

The learned Senior Counsel for the Income Tax Department *(hereinafter referred to as the Department)* vehemently repudiated the preliminary objection raised by the learned counsel for the assessee. The learned Senior Counsel for the Department contended that the instructions issued by CBDT only lays down the monetary limits for regulating the filing of the appeals and not to regulate the appeals already filed. It was urged that the appeals already filed as per the earlier instructions will have to be decided on merits irrespective of the fact that the tax effect was less than the prescribed limit as per the latest instructions. The learned Senior Counsel urged that the right to file an appeal is a substantive right under Section 260A of the Act which cannot be taken away by Section 268A or by the instructions issued by CBDT under Section 119 of

the Act. It was contended that the instructions are at best guidelines and are not mandatory upon the department. In support of his submission, reliance was placed on the following decisions, namely, ***Messrs. Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and others, AIR 1953 SC 221, Garikapati Veeraya Vs. N. Subbiah Choudhry and others, AIR 1957 SC 540 and Ramesh Singh and another Vs. Cinta Devi and others, 1996 (3) SCC 142***. It was urged that para 11 of the instructions clearly indicate that the instruction is prospective in nature. The learned Senior Counsel contended that para 11 of the instruction makes it clear that the instruction is not applicable to pending appeals and that the language employed in the instructions is clear and unambiguous and, therefore, the literal rule of interpretation would apply and it is not for the Court to interpret the same in a different way.

On the other hand, the counsels in support of the assessee, in addition to the submission on monetary limit, contended that the instructions has been issued pursuant to the National Litigation Policy, which also provided for review of pending cases so as to reduce the government litigation in Courts so that valuable court time was spent in resolving other serious issues. The underlying idea under the policy was to filter out frivolous appeals where the stakes were not so high and was less than the amount fixed by the revisional authorities. It was also contended that the instruction

was a beneficial piece of legislation and would be applicable retrospectively. It was also urged that the right of appeal under Section 260A of the Act, is now regulated by Section 268A of the Act. In support of their submissions, the learned counsels for the parties have placed reliance on various decisions which would be referred hereinafter.

In the light of the submissions made by the learned counsels, reference in the first instance must be made to the National Litigation Policy.

In 2009, the Central Government formulated a National Litigation Policy to reduce the cases pending in various Courts of India in an attempt to reduce the average pendency time from 15 years to 3 years. The National Litigation Policy reads as under:-

> *"**National Litigation Policy***
>
> *In this background, it is necessary to notice the 'National Litigation Policy Document Released'. The Centre has formulated the National Litigation Policy to reduce the cases pending in various courts in India under the National Legal Mission to reduce average pendency time from 15 years to 3 years. It reads as under:*
>
> *'Introduction*
>
> *Whereas at the National consultation for strengthening the judiciay toward reducing pendency and delays held on October 24/25, 2009, the Union Minister of Law and Justice, presented resolutions which were adopted by the entire conference unanimously.*

And wherein the said resolution acknowledged the initiative undertaken by the Government of India to frame the National Litigation Policy with a view to ensure conduct of responsible litigation by the Central Government and urges every State Government to evolve similar policies.

The National Litigation Policy is as follows:

The Vision/Mission

1. The National Litigation Policy is based on the recognition that the Government and its various agencies are the pre-dominant litigants in courts and Tribunals in the country. Its aim is to transform the Government into an efficient and responsible litigant. This policy is also based on the recognition that it is the responsibility of the Government to protect the rights of citizens, to respect fundamental rights and those in charge of the conduct of the Government litigation should never forget this basic principle.

"Efficient litigant" means

Focusing on the core issues involved in the litigation and addressing them squarely.

Managing and conducting litigation in a cohesive, co-ordinated and time-bound manner.

Ensuring that good cases are won and bad cases are not needlessly persevered with.

A litigant who is represented by competent and sensitive legal persons: competent in their skills and sensitive to the facts that the Government is not, an ordinary litigant and that a litigation does not have to be won at any cost.

"Responsible litigant" means

That litigation will not be resorted to for the sake of litigating.

That false pleas and technical points will not be taken and shall be discouraged.

Ensuring that the correct facts and all relevant documents will be placed before the court.

That nothing will be suppressed from the court and there will be no attempt to mislead any court or tribunal.

That nothing will be suppressed from the court and there will be no attempt to mislead any court or tribunal.

2. The Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded. The easy approach, "Let the court decide" must be eschewed and condemned –

3. The purpose underlying this policy is also to reduce Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the National Legal Mission to reduce the average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles in corporated in the National mission for judicial reforms which includes identifying bottlemecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritisation in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring

assistance must be given utmost priority. In respect of filing of appeals in revenue matter it is stated as under:

"(G) Appeals in revenue matters will not be filed:

(a) if the stakes are not high and are less than that amount to be fixed by the Revenue authorities:

(b) if the matter is covered by a series of judgments of the Tribunal or of the High Court which have held the field and which have not been challenged in the Supreme Court:

(c) where the assessee has acted in accordance with long standing industry practice:

(d) merely because of change of opinion on the part of the jurisdictional officers.

Review of pending cases

(A) All pending cases involving the Government will be reviewed. This due diligence process shall involve drawing upon statistics of all pending matters which shall be provided for by all Government departments (including public sector undertakings). The Office of the Attorney General and the Solicitor General shall also be responsible for reviewing all pending cases and filtering frivolous and vexatious matters from the meritorious ones.

(B) Cases will be grouped and categorized. The practice of grouping should be introduced whereby cases should be assigned a particular number of identity according to the subject and statute involved. In fact, further sub-grouping will also be attempted. To facilitate this process, standard forms must be devised which lawyers have to fill up at the time of

filing of cases. Panels will will be set up to implement categorization, review such cases to identify cases which can be withdrawn. These include cases which are covered by decisions of courts and cases which are found without merit withdrawn. This must be done in a time bound fashion."

This policy was formulated with the purpose that the Central Government would be a responsible litigant and would not be involved in frivolous litigation, especially where the stakes were not high. The policy aimed to transform the government into an efficient and responsible litigant and urged every State Government to evolve similar policies. The policy defined the efficient litigant to mean that the litigation should not be resorted to for the sake of litigating and that the government ceases to a compulsive litigant. The underlying purpose of the policy was to reduce the government litigation in Courts so that valuable court time was spent in resolving other pending issues to enable the average pendency of a case in a court reduced from 15 years to 3 years. The policy, therefore, provided that the government would identify bottlenecks and that the appeals would not be filed where the stakes are not so high and was less than by the amount fixed by the revenue authorities. The policy also formulated that all pending cases involving the government would be reviewed to filter frivolous and vexatious matters from the meritorious one. Such cases so identified would be withdrawn, which would also include cases, which are covered by previous decisions of Courts. Such withdrawal of the cases would be done

in a time bound fashion.

In this background, Instructions No.3 of 2011 was issued by the Central Board of Direct Taxes (CBDT) dated 9th February, 2011 reported in 332 ITR (Statutes) 1. For facility, the said Instructions No.3 of 2011 is extracted hereunder:-

C.B.D.T. Instructions

"Instruction No.3 of 2011

dated 9th February 2011

To

All Chief Commissioners of Income-tax and

All Directors General of Income-tax.

Subject: Revision of monetary limits for filing of appeals by the Department before the Income-tax Appellate Tribunal, High Courts and Supreme Court – Measures for reducing litigation – Regarding.

Reference is invited to Board's instruction No.5 of 2008, dated May 15, 2008, wherein monetary limits and other conditions for filing Departmental appeals (in Income-tax matters) before Appellate Tribunal, High Courts and Supreme Court were specified.

2. In supersession of the above instruction, it has been decided by the Board that departmental appeals may be filed on the merits before the Appellate Tribunal, High Courts and Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth appeals shall not be filed in cases where the tax effect does not exceed monetary limits given hereunder:

Sl. No.	*Appeals in income-tax matters*	*Monetary limit (in Rs.)*
1	Appeal before Appellate Tribunal	3,00,000
2	Appeal under section 260A before High Court	10,00,000
3	Appeal before Supreme Court	25,00,000

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on the merits of the case.

4. For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issue against which appeal is intended to be filed (hereinafter referred to as 'disputed issues'). However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect, in respect of the

disputed issues exceeds the monetary limited specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of year (s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/judgment involves more than one assessee, each assessee shall be dealt with separately.

6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any

other assessment year, if the tax effect exceeds the specified monetary limits.

7. In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and therefore, no inference should be drawn that the decision rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value. As the evidence of not filing appeal due to this instruction may have to be produced in courts, the judicial folders in the office of Commissioners of Income-Tax must be maintained in a systemic manner for easy retrieval.

8. Adverse judgments relating to the following issues should be contested on the merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect,

(a) Where the Constitutional validity of the provisions of an Act or Rules are under challenge, or

(b) Where Board's order, notification, instruction

or circular has been held to be illegal or ultra vires, or

(c) Where the Revenue audit objection in the case has been accepted by the Department.

9. The proposal for filing special leave petition under Article 136 of the Constitution before the Supreme Court should, in all cases, be sent to the Directorate of Income-tax (Legal and Research) New Delhi and the decision to file special leave petition shall be in consultation with the Ministry of Law and Justice.

10. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income-tax. Filing of appeals in other direct tax matters shall continue to be governed by relevant provisions of statute and rules. Further, filing of appeal in cases of income-tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under Section 12A of the Income-tax Act, 1961, shall not be governed by the limits specified in para 3 above and decision to file appeal in such cases may be taken on the merits of a particular case.

11. This instruction will apply to appeals filed on or after February 9, 2011. However, the cases where appeals have been filed before February 9, 2011, will be governed by the instructions on this subject, operative at the time when such appeal was filed.

12 This issues under section 268A(1) of the Income-tax Act, 1961.

Yours faithfully,

(Sd.).....

(A.K. Bharadwaj)

Under Secretary to the Government of India

(ITJ-II), CBDT"

Prior to the aforesaid instructions, the CBDT had issued Instructions No.1777 dated 4th November, 1987 fixing a monetary limit by which an appeal would not be filed before the High Court where the tax effect was less than Rs.50,000/- This was enhanced to Rs.2 lacs by Instructions No.1979 dated 27th March, 2000. By Instructions No.2 of 2005 dated 24th October, 2005 the limit was enhanced to Rs.4 lacs. Similar instructions were again issued by Instruction No.5 of 2008 dated 15th May, 2008. By Instruction No.3 of 2011, the limit was enhanced to Rs.10 lacs and reiterated by Instruction No.5 of 2014 dated 10th July, 2014 wherein the limit for filing an appeal before the High Court remained the same. Para 3 of Instruction No.3 of 2011 indicates that the appeal would only be filed where the tax effect exceeds the monetary limits, namely, Rs.10 lacs before the High Court. Para 11 of the instructions indicate that Instructions No.3 of 2011 would apply to appeals filed on or after 9th February, 2011 and where appeals having been filed before 9th February, 2011, the said appeals would be governed by the instructions, which were operative at the time when such appeal was filed.

The present appeal was filed in 2004. At that time Instruction No.1979 dated 27th March, 2000 was applicable. The said instruction is extracted hereunder:

"Board's Instruction No.1979- "F.No.279/126/98-IT3 dated the 27th March, 2000

Subject: *Revising monetary limits for filing Departmental appeals/ references before Income-tax Appellate Tribunal, High Courts and Supreme Court – Measures for reducing litigation- Regarding.*

Reference is invited to the Board's Instruction No.1903, dated 28th October, 1992, and Instruction No.1777, dated 4th November, 1987, wherein monetary limits of Rs.25,000 for Departmental appeals (in income-tax matters) before the Appellate Tribunal, Rs.50,000 for filing reference to the High Court and Rs.1,50,000 for filing appeal to the Supreme Court were laid down.

2. In supersession of the above instruction, it has now been decided by the Board that appeals will be filed only in cases where the tax effect exceeds the revised monetary limits given hereunder:

		(Tax Effect) Rs.
(i)	Appeal before the Appellate Tribunal (in income-tax matters)	1,00,000
(ii)	Appeal under Section 260A/reference under Section 256(2) before the High Court	2,00,000
(iii)	Appeal in the Supreme Court	5,00,000

The new monetary limits would apply with reference to each case taken singly. In other words, in group cases, each case should individually satisfy the new monetary limits. The working out of monetary limits will therefore not taken into consideration the cumulative revenue effect as envisaged in the Board's earlier instruction referred to above.

3. Adverse judgments relating to the following should be contested irrespective of revenue effect:

(i) Where Revenue audit objection in the case has

been accepted by the Department.

(ii) Where the Board's order, notification, instruction or circular is the subject matter of an adverse order.

(iii)Where prosecution proceedings are contemplated against the assessee.

(iv) Where the constitutional validity of the provisions of the Act are under challenge.

4. Special leave petitions under Article 136 of the Constitution are filed before the Supreme Court Court only in consultation with the Ministry of Law. Therefore, where the Chief Commissioner decides to contest an adverse judgment by filing special leave petition before the Supreme Court, they should send the proposal to the Board for further processing.

5. These instructions will apply to litigation under other direct taxes also, e.g., wealth-tax, gift-tax, estate duty, etc.

6. These monetary limits will apply to writ matters.

7. This instruction will come into effect from April 1, 2000."

A perusal of the aforesaid instructions and the earlier instructions of the CBDT indicate that it was issued to reduce the litigation in the Court.

Previously, only instructions were issued by CBDT under Section 119 of the Act and, in order to give it a legislative measure, a new Section 268A was inserted by the Finance Act, 2008 with retrospective effect from 1st April, 1999 in the Income Tax Act, 1961. For ready reference, the said provision is extracted hereunder:---

"Filing of appeal or application for reference

by income-tax authority.

268A. *(1) The Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income-tax authority under the provisions of this Chapter.*

(2) Where, in pursuance of the orders, instructions or directions issued under sub-section (1), an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of –

(a) the same assessee for any other assessment year; or

(b) any other assessee for the same or any other assessment year.

(3) Notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders or instructions or directions issued under sub-section (1), it shall not be lawful for an assessee, being a party in any appeal or reference, to contend that the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under sub-section (1) and the circumstances under which such

appeal or application for reference was filed or not filed in respect of any case.

(5) Every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly."

Sub-clause (4) of Section 268A of the Act clearly indicates that the Tribunal and the Court shall have regard to all instructions issued under sub-section (1) of the Act by CBDT and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case. Sub-clause (5) indicates that instructions issued by CBDT shall be deemed to have been issued under Section 268 of the Act.

The object of introduction of Section 268A of the Act was to regulate the filing of the appeals by the government. The said object is extracted hereunder:-

"The proposed section seeks to provide that the Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income tax authority under the provisions of Chapter XX.

It is further proposed to provide that where, in pursuance of the orders, instructions or directions issued under sub-section (1), an income tax authority has not filed any appeal or application for reference on any issue in the case of an assessee

for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of--

(a) the same assessee for any other assessment year, or

(b) any other assessee for the same or any other assessment year.

It is also proposed to provide that notwithstanding that no appeal or application for reference has been filed by an income- tax authority pursuant to the orders, instructions or directions issued under sub-section (1), it shall not be lawful for an assessee,being a party in any appeal or reference, to contend that the income tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

It is also proposed to provide that the Appellate Tribunal or Court, hearing any appeal or reference had filed under this Chapter, shall have regard to the orders, instructions or directions issued by the Board from time to time either before or after the insertion of this section and the circumstances in which such appeal or application for reference was filed or was not filed in any case; and accordingly the Tribunal or Court shall decide the appeal or the reference on the merits of the issue under consideration.

It is also proposed to provide that every order or instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have

been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly.

This amendment will take effect retrospectively from 1st April, 1999."

At this stage it would be relevant to make a reference to Section 260A of the Act, which is extracted hereunder:--

"***Appeal to High Court.***

260A. *(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.*

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be—

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner;

*(b) *******

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section

(2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

***Provided** that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.*

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which –

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

Numerous rules of interpretation have been formulated by courts. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the legislature. The duty of the Court is to expound and not to legislate. However, at times**,** there is a marginal area in which the Court could mould or creatively interpret legislation. The Court in such a situation are called refiners or polishers of legislation. At times there are gaps in the legislation and Courts are called upon to fill in the gaps. Lord Due Parco in ***Cutler Vs. Wandsworth Stadium Ltd. (1949) 1 All ER 544*** was of the view that in some cases it becomes necessary for the courts “to fill in such gaps as Parliament may choose to leave in its enactments”.

In ***Guiseppi Vs. Walling, 114F (2d) 608 pp 620, 622 (CCA 2d 1944)*** which is quoted in 60 Harvard Review at 372, Judge Frank held:-

> *“The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the Courts, as best as they can, to fill in the gaps, an activity which no matter how one may label it, is in part legislative. Thus the Courts in their way, as administrators in their way perform the task of supplementing statutes. In the case of Courts, we call it 'interpretation' or 'filling in the gaps', in the case of administrators we call it 'delegation' or authority to supply the details.”*

The aforesaid opinion was approved by the Supreme Court in ***Directorate of Enforcement Vs.***

Deepak Mahajan and another, AIR 1994 SC 1775

Normally, the Courts should be slow to pronounce the legislature and take its plain grammatical meaning of the words of enactment as the best guide, but to winch up the legislative intent, it is permissible for the courts to take into account the purpose and object and the real legislative intent, otherwise a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane.

In the instant case, the question is not what the words in the relevant provision mean but what the national litigation policy meant requiring the Courts to interfere and fill in the gaps which was excluded by the legislature. In our view, it is permissible for the Courts to look into the legislative intention and go behind the enactment and take other factors into consideration in order to give effect to the legislative intent and to the purpose of the national litigation policy.

The process of construction, therefore, combines both literal and purposive approaches, namely, the true meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. Once this is achieved, it would be called “the cardinal principle of construction”.

The difference between purposive and literal constructions is in truth one of degree only as held in

Oliver Ashworth (Holdings) Ltd. Vs. Bellard (Kent) Ltd., (1999) 2 All ER 791at 805 and reiterated in ***Tanna & Modi Vs. Commissioner of Income Act, Mumbai, (2007) 7 SCC 434***. The real distinction lies in the balance to be struck in the particular case between literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. In Francis Bennion's Statutory Interpretation, purposive construction has been described in the following manner:

> *"A purposive construction of an enactment is one which gives effect to the legislative purpose by –*
>
> *(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this code called purposive and literal construction)."*

Heydon's case now known as "purposive construction" or "mischief rule" was explained by the Supreme Court in ***Bengal Immunity Co. Vs. State of Bihar, AIR 1955 SC 661*** holding:

> *"(22) It is a sound rule of construction of a statute firmly established in England as far back as 1584 when – 'Heydon's case, (1584) 3 Co. Rep 7a (V) was decided that –*
>
> *"..... for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:*
>
> *1st. What was the common law before the*

making of the Act,

2nd. What was the mischief and defect for which the common law did not provide,

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and 'pro privato commodo', and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, 'pro bono publico'."

The rule is equally applicable to a large extent. In order to properly interpret the provisions of the instructions, it is, therefore necessary to consider how the matter stood immediately before the circular came into existence, what was the intention and object necessitating the legislature to issue the impugned circular and the defect which the circular did not provide. Consequently, we are of the opinion that the courts should adopt a purposive approach in order to give effect to the true purpose of the legislation by looking at the National Litigation Policy which is the relevant material on the basis of which the circular was issued.

In ***New India Assurance Co. Ltd. Vs. Nusli Neville Wadia and another, AIR 2008 SC 876***, the Supreme Court held:

"..... For proper interpretation not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein. With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfill its constitutional obligations."

The Bombay High Court, being conscious of the instructions issued by CBDT dismissed a large number of appeals on the ground that the instructions issued by CBDT from time to time were not being adhered to and that the appeals were being filed in utter disregard to the monetary limits. The Bombay High Court insisted that all the appeals filed by the department where the tax effect was below the Board's prescribed limit should be withdrawn forthwith. In this regard, CBDT issued instruction dated 5th June, 2007 directing the department to examine all appeals pending before the Bombay High Court on a case to case basis with further direction to withdraw cases wherein the criteria of monetary limits as per the prevailing instruction was not satisfied unless the

question of law involved or raised in appeal or referred to the High Court for opinion was of a recurring nature requiring it to be settled by the High Court.

When the hearing of the present appeal started, the instructions of CBDT dated 5th June, 2007 was brought to the notice of the Court. The Court accordingly, directed the Ministry of Finance and/or CBDT to take a conscious decision as to whether they would like to pursue the pending appeals where the tax effect was less than Rs.10 lacs and that this conscious decision should be taken keeping in mind the National Litigation Policy which was framed by the Central Government with the object of reducing the burden of pending appeals before the Court. For facility, the order of the Court dated 22nd July, 2014 is extracted hereunder:-

> *"We have heard Sri Shambhoo Chopra, Sri Govind Krishna & Sri Dhananjay Awasthi for the Income Tax Department and Sri R.P.Agarwal, the learned counsel for the assessee.*
>
> *Upon insertion of Section 268A in the Income Tax Act, instruction no.3 of 2011 dated 09.02.2011 was issued by the Central Board of Direct Taxes increasing the monetary limit of filing an appeal by the Department before the Tribunal, High Court and Supreme Court. By this instruction it was indicated that where the tax effect is less than Rs. 10.00 lacs, no appeal shall be filed by the Department before the High Court.*
>
> *When the present appeal came up for*

hearing, an objection was taken that since the tax effect is less than Rs. 10.00 lacs, the appeal should be dismissed as not maintainable. The question whether the instruction no.3 of 2011 dated 09.02.2011 will have retrospective effect on pending appeals filed before 09.02.2011 has engaged the attention of various High Courts giving divergent opinions.

Without going into the said controversy, we find that there was a circular issued on 05.06.2007 directing the Income Tax Department to examine all appeals pending before the Bombay High Court on a case to case basis with further direction to withdraw cases wherein the criteria for monetary limit as per the prevailing instructions was not satisfied.

We are of the opinion that the Ministry of Finance and/or Central Board of Direct Taxes should take a conscious decision as to whether they would like to pursue the pending appeals where the tax effect is less than Rs. 10.00 lacs. This conscious decision must be taken keeping in mind the national litigation policy framed by the Central Government with the object of reducing the burden of pending appeals before various Courts across the country.

We, accordingly, adjourn the matter for a period of two weeks and direct the Income Tax Department to take necessary instructions and intimate the Court on an affidavit.

List on 06.08.2014."

Based on the aforesaid direction, the Income Tax

Officer, Allahabad filed an affidavit dated 14th August, 2014 indicating that the Instruction No.3 of 2011 was issued in the light of the National Litigation Policy. Since the affidavit was not in consonance with the direction of the Court dated 22nd July, 2014, further directions was issued directing that an affidavit should be filed by the Joint Secretary of the Ministry of Finance or Central Board of Direct Taxes. Based on the aforesaid order, an affidavit of CBDT dated 1st September, 2014 was filed. The CBDT contended that the earlier instruction dated 5th June, 2007 was only confined to the appeals pending before the Bombay High Court and that it was not applicable to other High Courts. The CBDT in the affidavit further contended that the instructions issued from time to time were prospective in nature as is clear from para 11 of Instruction No.3 of 2011 and contended that pending appeals filed prior to the issuance of the Instruction No.3 of 2011 have to be decided on merits. The CBDT further contended that the National Litigation Policy has been considered and, in order to reduce the litigation with the tax payers, the monetary limits have been revised.

The CBDT however, has said nothing in the affidavit as to why the pending appeals as per the National Litigation Policy should not be reviewed and frivolous and vexatious cases should not be withdrawn as has been done before the Bombay High Court. It is strange that since the Bombay High Court insisted, the CBDT issued instructions dated 5th June, 2007 directing

the income tax department to examine all appeals pending before the Bombay High Court on a case to case basis and withdraw cases where the criteria for monetary limit as per the prevailing instructions was not satisfied, but the same criteria was not adopted by CBDT for this High Court or for other High Courts across the country. The National Litigation Policy has clearly indicated that pending cases should be reviewed filtering frivolous and vexatious matters from the meritorious ones.

Various Courts have dealt with the instructions issued by CBDT from time to time. The Bombay High Court in ***CIT Vs. Pithwa Engineering Works, 276 ITR 519*** held:

> *"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 Rs.2 lakhs. But the same approach is not adopted with respect to the old referred cases even if the tax effect is less than Rs.2 lakhs. In our view, there is no logic behind this approach.*
>
> *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 assessees on the file of the Department have 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 is less than Rs.2 lakhs. The same policy for old matters needs to be adopted by the Department. In our view, the Board's circular dated March 27m 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."

The Bombay High Court held that the instructions would apply to pending appeals and, therefore, will have a retrospective effect. Similar view was again reiterated by the Bombay High Court in ***Commissioner of Income Tax Vs. Camco Colour Co.***, ***254 ITR 565, Commissioner of Income Tax Vs. Smt. Vijaya V. Kavekar L/H of Late Vijaykumar B. Kavekar, 350 ITR 237, Commissioner of Income Tax Vs. Madhukar K. Inamdar (HUF), 318 ITR 149 and Commissioner of Income Tax Vs. Vitessee Trading Ltd., 331 ITR 433***. The Delhi High Court also took the same view in ***CIT Vs. P.S. Jain and Co.***, ***335 ITR 591***. The Madhya Pradesh High Court in ***Commissioner of Income Tax Vs. Ashok Kumar Manibhai Patel and Co.***, ***317 ITR 386*** followed the Bombay High Court and extended the benefit to the assessee.

The Karnataka High Court in ***Commissioner of Income Tax and another Vs. Ranka and Ranka, 352***

ITR 121 considered Instruction No.3 of 2011 and held that the said instruction would be applicable to pending appeals. The Karnataka High Court held:

> *"**33.** In the instant case, Instruction No.3 of 2011 is more beneficial than Instruction No.2 of 2005. If Instruction No.3 of 2011 is also made applicable to the pending appeals before this court, it would grant relief to the assessee. Apart from granting relief to the assessee, if a number of appeals pending before this court are disposed of on the basis of the said circular, the precious time which would be saved by this court could be better utilized for deciding disputes where the tax effect is enormous. That apart, the duration, an appeal takes in this court would be reduced as desired by the National Litigation Policy."*
>
> ***35.** It is also not out of place to mention herein that Parliament wanted to grant statutory recognition to these orders/instructions/circulars, issued by the Department from time to time retrospectively to take care to protect the interests of the Revenue by introducing sub-sections (2) and (3) in section 268A of the Act. This benefit conferred on these assessees would be only in the nature of one-time settlement because if the same issue arises for consideration in the subsequent years and the tax effect is more than Rs.10 lakhs, it is not open to them to plead that either the Department is estopped from claiming such amount or that the order passed by this court dismissing the appeals on the ground that the tax effect being within the monetary limit would come in the way of the Department proceeding against*

the assessee. The circular also makes it clear that in the pending appeals, where the constitutional validity of the provisions of the Act or Rule or under challenge, or where the Board's order, notification, instruction or circular has been held to be illegal or ultra vires or whether the Revenue audit objection in the case has been accepted by the Department notwithstanding the fact that the tax effect is less than the monetary limit fixed under the aforesaid circular, still it is open to the Department to request the court to permit them to prosecute such appeals. Thus, the Department has to apply its mind in all the pending appeals and point out to the court, which are those appeals in which they intend to prosecute. Therefore, sufficient safeguards have been made to protect the interests of the public revenue. By this approach we would be saving the time of the court, the time of the Department and public time in general and giving effect to the National Litigation Policy, 2011, so that it can be used for better and productive purpose.

37. *Yet another anomaly which requires to be noticed is, if a Tribunal where the number of cases which are pending are more, decides the appeal, subsequent to these latest circulars and the amount involved is less than Rs.10 lakhs, the assessee in such cases get the benefit of the latest circular. However, if the Tribunal has decided a case expeditiously or in Tribunals where the pendency is less and if the subject-matter of the appeal preferred by the Revenue in such cases is more than Rs.4 lakhs and less than Rs.10 lakhs, the assessees in those appeals are denied the*

benefit of the latest circular. In other words, where there is huge pendency of cases in the Tribunal or court, an appeal filed earlier is disposed of after the circular, the benefit accrues to the assessee. However, in Tribunals and the courts where the pendency of cases is less, an appeal filed recently is decided before the circular or where the assessee co-operates with the court in speed disposal of the appeal and the appeal is disposed of before the date of circular, he is denied the benefit of the circular. Therefore, the benefit to which the assessee is entitled to should not be dependant on the date of the decision, over which neither the assessee nor the Revenue has no control. In this context, the circular would be discriminatory, it it is held to be prospective only. It could be saved from such vice of discrimination by holding it as retrospective.

38. *Though Circular/Instruction 3 of 2011 is issued by the Department in pursuance of the power conferred under the statutory provisions while issuing such circular/instruction, the Department has not kept in mind the object with which such circulars/instructions are issued from time to time. The object sought to be achieved by such circulars/instructions and also the law declared by the apex court, the National Litigation Policy, 2011, as well as the various schemes introduced by the Department granting relief to persons who have not even filed returns and paid taxes, are kept in mind, to bring the circular/instruction in harmony with the National Litigation Policy, it would be appropriate to hold*

that the benefit of such circular/instruction also applies to the pending cases appeal in various courts and Tribunals on the date of the circular/instruction."

On the other hand, a Full Bench of the Gujrat High Court in ***Commissioner of Income Tax Vs. Shambhubhai Mahadev Ahir, 363 ITR 572*** held that the circulars/instructions issued by CBDT are not applicable to pending appeals. The Gujarat High Court held that the language employed was clear and unambiguous and, therefore, it is not for the Court to interpret the same in a different way. The Full Bench further held that where the language was clear and unambiguous, the literal rule of interpretation would apply and it is not required to take the aid of the other rules of construction of statutes and that purposive construction should only be used in a rare case. Similarly, a Full Bench of the Punjab and Haryana High Court in ***Commissioner of Income-Tax Vs. Varindera Construction Co.***, ***331 ITR 449*** also held that pending appeals could not be governed by a subsequent circular unless it was specifically provided in the circular. The Punjab and Haryana High Court held that the object of the circular was to regulate the filing of the appeal and not to regulate the appeals already filed. Similar view was reiterated by the Madras High Court in ***CIT Vs. Kodanand Tea Estates Co., 275 ITR 244*****.** The Kerala High Court in the case of ***CWT Vs. John L. Chackola, 337 ITR 385*** and the Chattisgarh High Court in the case of ***CIT Vs. Navbharat Explosives Co. P. Ltd., 337 ITR***

515, have held that:

> *"... the maintainability of appeals/references at the instance of the Revenue is to be considered on the basis of circulars/ instructions prevailing at the relevant time when the appeal/reference was made and instruction issued, vide circular dated May 15, 2008, is prospective and it has no application whatsoever to any proceedings initiated before May 15, 2008, and the same remain undecided and pending after May 15, 2008."*

In the light of the contentions raised by the parties and various provisions indicated above, we find that the instructions issued by CBDT is not merely an administrative instruction but is an extension of the statute being issued under Section 268A of the Act.

A Division Bench of the ***Punjab and Haryana High Court in CIT Vs. Oscar Laboratories Ltd., 324 ITR 115*** held that as a consequence of the insertion of Section 268A in the Act, orders, instructions, or directions issued on the subject of monetary limits for filing appeals must be deemed to have attained statutory status.

The legislature in its wisdom clearly desired to give effect to all instructions issued on the subject of monetary limits for regulating filing of appeals retrospectively. Accordingly, all instructions laying down monetary limits for filing appeals issued on or after 1st April, 1999 by a deeming fiction has to be treated as having been issued under Section 268(1) of the Act.

The contention of the department that Section 260A of the Act authorises the department to prefer an appeal to the High Court from every order passed in appeal by the appellate authority subject to the condition that the department should satisfy the High Court that the case involves a substantial question of law and, consequently, this substantive right cannot be curtailed by the provision of Section 268A of the Act or by the instructions issued by the CBDT under Section 119 of the Act cannot be accepted. At the outset, the instructions issued by the CBDT are binding on the department. Prior to the introduction of Section 268A in the Act, the object of issuing instructions under Section 119 of the Act was apparent and obvious, namely, to alleviate unnecessary hardship to the assessee and also to avoid financial hardship and long drawn appellate proceedings even for the department. The objects recorded in the bill while introducing Section 268A into the Act was aimed at alleviating and remedying the hardship being caused to the assessee as well as to reduce the financial burden upon the income tax department in pursuing appeals where the tax effect was negligible. A perusal of sub-section (1) of Section 268A of the Act indicates that CBDT was authorized to issue orders, instructions or directions to income tax authorities laying the monetary limits for the purpose of filing appeals. As a consequence of the insertion of Section 268A in the Act, the orders and instructions or directions issued on the subject of monetary limits for

filing appeals has attained a statutory status and it has become mandatory for the department to comply with the requirement on the subject of monetary limits for filing appeals. Sub-section (5) of Section 268A of the Act indicates that earlier instructions issued by CBDT fixing monetary limits for filing an appeal shall be deemed to have been issued under Section 268A of the Act. After the introduction of Section 268A into the Act, Section 260A of the Act cannot be read independently. Both Section 260A and 268A of the Act will have to be interpreted by reading the two provisions harmoniously. Section 268A was inserted in the Act with retrospective effect from 1st April, 1999. The legislature desired to give statutory effect to all the instructions issued on the subject of monetary limits in regulating filing of appeals retrospectively.

We are of the view that instructions issued by CBDT laying down the monetary limits for filing an appeal is mandatory and binding on the Revenue. The contention of the department that the right to file an appeal under Section 260A of the Act by the department cannot be restricted or carved by any instructions of CBDT or by Section 268A is patently erroneous and cannot be accepted. Similar view was also given by the Punjab and Haryana High Court in ***Oscar Laboratories case (supra)***.

In the light of the aforesaid, there is no doubt that the instructions issued by CBDT only regulates the monetary limits for filing an appeal. Instruction No.3 of

2011 clearly indicates that no appeal could be filed where the tax effect was less than Rs.10 lacs. A mandatory provision has been made that no appeal would be filed where the tax effect is less than the prescribed limit. Para 3 of the instructions also indicates that an appeal above the prescribed limit cannot be filed merely on the ground that the tax effect is more than the monetary limit. An embargo has been created that even where the tax effect is more than the monetary limit, the appeal could only be filed on merits and not otherwise. Para 4 of the instructions further indicates that if a composite order has been passed for several assessment years then the appeal could be filed notwithstanding that the tax effect in one of the assessment years was less than the prescribed limit. The CBDT has carved out certain exceptions under Para 8 by which an appeal could be filed where the tax effect was less than the monetary limits, namely, where the constitutional validity of the provisions of Act or rule was under challenge or where the Board's order, notification, instruction or circulation has been held to be illegal or ultra vires or where Revenue's audit objection in the case has been accepted by the department.

We find that the CBDT, while issuing the aforesaid instruction, has partly complied with the National Litigation Policy. The CBDT has not fully applied its mind in this regard. The policy clearly indicated that all pending cases would be reviewed from time to time so that frivolous and vexatious cases are filtered and that

cases, which are covered by previous decisions of the Court are also withdrawn. The only measure taken by the CBDT in reducing the litigation was to raise the monetary limit. No effort was made to review the pending cases. Consequently, we are of the opinion that Instructions No.3 of 2011 does not fulfil the requirement prescribed by the National Litigation Policy and that Instructions No.3 of 2011 only fulfils the requirement partially. If only Instructions No.3 of 2011 had been made applicable to pending cases also as laid down by the National Litigation Policy, the object of the policy would have been fulfilled.

No doubt, the instructions issued by CBDT only regulates the filing of an appeal. Para 11 only indicates that the instruction would apply to appeals filed on or after 9th February, 2011 and where appeals have been filed before 9th February, 2011, the said appeals would be governed by the instructions operative at the time when such appeal was filed, which in the instant case was Instruction No.1979 dated 27th March, 2000. Whereas instructions issued by CBDT only regulates the filing of the appeal, sub-clause (4) of Section 268A will come into play when the appeal is being heard and the Court will then have regard to the orders, instructions or directions issued under sub-Clause(1) of Section 268A and the circumstances under which such appeal was filed or not filed in respect of any case. Meaning thereby, that at the stage of hearing of an appeal, the Court can see where the circumstances contemplated under para

3 of the instructions was existing or not. At this stage para 3 of the instructions dated 27th March, 2000 is again being reproduced:-

> *"3. Adverse judgments relating to the following should be contested irrespective of revenue effect:*
>
> *(i) Where Revenue audit objection in the case has been accepted by the Department.*
>
> *(ii) Where the Board's order, notification, instruction or circular is the subject matter of an adverse order.*
>
> *(iii)Where prosecution proceedings are contemplated against the assessee.*
>
> *(iv) Where the constitutional validity of the provisions of the Act are under challenge."*

These exceptions as indicated in para 3 of instructions dated 27th March, 2000 is more or less the same as given in Instruction No.3 of 2011. If the aforesaid exceptions are not existing at the time of hearing of the appeal, the Court can decline to hear the matter on merits and can dismiss the appeal on the ground that the monetary limit is less than the prescribed limit applicable to appeals being filed as on date i.e. as per the latest instructions. Consequently, para 11 of the Instruction No.3 of 2011 will only be considered at the stage of filing an appeal but when the said appeal is being heard, the exceptions as depicted in para 3 of the instructions of 27th March, 2000 would be considered as to whether those exceptions still exists

or not. If the exceptions exists, the Court will hear and decide the matter on merits, failing which it will decline and dismiss the appeal on the ground of monetary limits. The object of issuing such instruction is apparent and obvious, namely, to alleviate unnecessary hardship to assessee and also to avoid financial hardship even for the department where the tax effect at the time of hearing of an appeal becomes negligible. In this regard, the Bombay High Court in ***Pithwa Engineering Works (supra)*** has held that judicial notice of the fact should be taken that by passage of time, the value of money has gone down and that the cost of litigation expenses have gone up. The value of the tax effect at the time when the appeal was filed may have been substantial but by passage of time, the money value has gone down at the stage when the appeal was being heard. In our view, the monetary limit as per the latest instructions should apply equally to pending appeals unless the exception indicating in the instructions at the time of filing the appeal is carved out, which, according to the department, still exists.

The Punjab and Haryana High Court in ***Oscar Laboratories (supra)*** held:

> "*There can be no doubt, that the process of litigation is a financial hardship. An individual assessee may have to suffer the hardship far beyond the effect thereof on the Revenue. The Revenue also incurs financial expense, which when taken to its logical effect, falls on the shoulders of the general public as the same is*

incurred out of money collected from innocent taxpayers. Filing of an appeal should be a fruitful exercise. An appeal should not be filed only to press a proposition of law, unless it results in an adverse inference against the Revenue. The veracity of filing an appeal must be gauged with reference to the tax, which is likely to be recovered by the Revenue, on the success thereof. If the proportion of the aforesaid recovery of tax as against the expenses incurred in pursuing the appellate remedy is negligible, and there is no other adverse effect, the inference should be, that the remedy of appeal would be an exercise in futility. In such an eventuality, an appeal should not be filed."

There is another aspect of the matter. As per the latest instructions, no appeal could be filed and, consequently, cannot be heard where the tax effect is less than Rs.10 lacs. Would it be justified if a pending appeal, which has a tax effect of less than Rs.10 lacs is now heard on merits? In our opinion, there is no logic behind this approach. If the instruction is only held to be prospective and is not applicable to pending appeals, it would be hit by the vice of discrimination. Consequently, in our view, we have no hesitation in holding that if the exceptions indicated in the instructions exists at the time of hearing of the appeal, the same would be decided on merits othwerwise the appeal would be dismissed on the ground of monetary limit. By doing this, the instructions would be saved from the vice of discrimination.

At this stage, we may take notice that the

underlying purpose of the National Litigation Policy was to reduce government litigation in Courts so that valuable Court time is spent in resolving other pending issues. The Bombay High Court in ***Pithwa Engineering Works (supra)*** has held that the corridors of the superior Courts are choked with huge pendency of cases. The National Litigation Policy was formulated to reduce the cases pending in various Courts and to make the government an efficient litigant. Consequently, if CBDT has issued a policy not to file appeals, which is less than Rs.2 lacs and now Rs.10 lacs, the same policy should also be adopted for pending appeals. The department is not justified in proceeding with pending matters where the tax impact has now become minimal.

In the light of the aforesaid, the object and intention and the surrounding circumstances of the National Litigation Policy introduced by the Central Government has to be kept in mind. As stated earlier, the underlying purpose was to reduce pending government litigation in Courts from 15 years to 3 years so that the valuable court time could be saved for several contentious issues. Pending cases were required to be reviewed and frivolous and vexatious matters was required to be filtered out from the meritorious ones. Unfortunately, the instructions issued by CBDT only partially satisfied the requirement in respect of future litigation but did not take into consideration reviewing the pending cases. The Full Bench of the Gujarat High Court and Punjab and Haryana High Court held that the instructions issued by

CBDT was only prospective in nature. The Full Bench further held that where the language of the instructions were clear and unambiguous only a literal interpretation should be given and that it is not for the Court to interpret the language in a different way. There is no quarrel with the aforesaid proposition laid down by the Full Bench of the Gujarat High Court and Punjab and Haryana High Court but in deference to the said decisions, we find that the National Litigation Policy was not taken into consideration and, consequently, the Full Bench only applied the literal interpretation of the instructions. Considering the object and intention and the surrounding circumstances of the National Litigation Policy, it is necessary for the Court to iron out the creases bearing in mind the principles of interpretation as discussed above and the legal proposition that flows from such interpretation. We find that there is a defect in the instructions issued by the CBDT. The only measure taken in reducing the litigation was to raise the monetary limit. No effort was made to review the pending cases. Accordingly, we are of the opinion that the literal rule of interpretation cannot be applied in the instant case. Since the instructions is a beneficial piece of legislation, the pendulum is tilted more in favour of the assessee and impels the Court to interpret the provisions harmoniously by adopting the purposive method of construction. We must not shut our eyes to the object for which the instructions were issued and if the instructions had been made applicable to pending cases as laid

down by the National Litigation Policy, the object of the policy would have been fulfilled. We are not here to legislate but to expound and in such a situation, we at best could be called reformers or polishers of legislation as to fill up the gaps left in the legislation.

Para 11 of Instruction No.3 of 2011 makes it apparently clear that it applies to appeals that would be filed on or after 9th February, 2011. However, Section 268(4) of the Act allows the Court to consider the circumstances under which such appeal was filed while hearing the appeal. By reading para 11 harmoniously with sub-clause (4) of Section 268 one can remove the mischief or the defect in Instruction No.3 of 2011. By our orders, we had directed the CBDT and the income tax department to take a concious decision and review pending cases, which they failed to do so. On the other hand, the department insisted in hearing the appeal on merits. We find that the exception carved out under of the instructions are not existing and that the appeal was only filed because the tax effect was above the monetary limit. We also find that there is nothing to indicate that the issue involved in the instant appeal has a cascading effect which would affect the same issue in subsequent assessment years.

In the light of the aforesaid, we find that since the CBDT while issuing Instruction No.3 of 2011 had not kept in mind the object and intention sought to be achieved by the National Litigation Policy and, in order to bring harmony with the National Litigation Policy, we

are of the opinion that the Instruction No.3 of 2011 would also apply to pending appeals in various Courts or Tribunals unless it is pointed out by the department that the appeal would have a cascading effect in other assessment years of the assessee or that it is within the exception provided in the instructions that was issued at the time when the appeal was presented.

In view of the aforesaid, the appeal is dismissed on the ground of monetary limit without expressing any opinion on the merits of the claim making it clear that it would be open to the department to proceed against the assessee in any other assessment year on the same issue if it is above the monetary limit prescribed.

In the circumstances of the case, parties shall bear their own cost.

Date:6.5.2015
Bhaskar

(Dr. Satish Chandra, J.) **(Tarun Agarwala, J.)**