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

Reserved on: 12.05.2014
Pronounced on : 23.05.2014

\+ **ITA 26/2014, C.M. NO. 1596/2014 (for exemption)**
\+ **ITA 27/2014**
\+ **ITA 28/2014, C.M. NO. 1597/2014 (for exemption)**

COMMISSIONER OF INCOME TAX-X …..Appellant
Through: Sh. Kamal Sawhney, Sr. Standing Counsel.

Versus

M/S. KULTAR EXPORTS ……..Respondent
Through: Sh. Vineet Bhatia and Sh. Puneet Rai, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT

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C.M. NO. 1596/2014 (for exemption) in ITA 26/2014
C.M. NO. 1597/2014 (for exemption) in ITA 28/2014

Allowed, subject to all just exceptions.

ITA 26/2014, ITA 27/2014 & ITA 28/2014

1. The revenue, in this appeal under Section 260A of the Income Tax Act (hereafter "the Act"), challenges the order of the Income Tax Appellate Tribunal (hereafter the "ITAT") on the ground that it erred in allowing the assessee to belatedly appeal against the orders of the Assessing Officer (hereafter "the AO"), on the basis of a judgment of

the Gujarat High Court pronounced subsequent to the AO's orders, in which the provision underlying the assessment was held unconstitutional.

2. The assessee/respondent in this case filed returns claiming deduction under Section 80HHC of the Act. In view of the Taxation (Amendment) Act, 2005, Act No. 55 of 2005 dated 28.12.2005 (hereafter "the amendment"), a modification was introduced in the working of deductions under the third proviso to Section 80HHC (3) introduced with retrospective effect from 1.4.1998 as well as the fifth proviso introduced with retrospective effect from 1.4.1992.

3. Section 80HHC allows deductions to assessees who are exporters, to the extent of the profits derived from export of goods or merchandise. Section 80HHC (3) provides for the manner of computing the profits deductible. The third proviso, which was introduced by retrospective amendment, essentially required the profit computed for an assessee with export turnover greater than `10 crores, to be further increased by an amount which bears to 90% of the sum in Section 28(iiid), the same proportion as the Export Turnover bears to the Total Turnover of the business, provided the assessee could prove certain requirements with necessary evidence. In accordance with this amendment, the AO completed reassessment proceedings for the three assessment years (i.e. AYs 2001-02 and 2002-03 by orders dated 19.9.2007 and AY 2003-04 by order dated 1.3.2006) under Section 148 of the Act.

4. The amendment was challenged subsequent to the AO's orders and by the decision of the Gujarat High Court in *Avani Exports v. CIT, Rajkot:* [2012] 348 ITR 319 (Gujarat) delivered on 02.07.2012, it was held that the retrospective nature of the amendment was unconstitutional and that the amendment would be valid only so far as it was applied prospectively.

5. The assessee appealed the orders of the AO before the CIT, but the appeals were dismissed *in limine* on ground of delay of 5-6 years. On second appeal, the ITAT, after condoning the delay in filing the appeal on the ground that there was sufficient and reasonable cause, held in favour of the assessee by relying on the decision in *Avani Exports* (supra). The Revenue approached this Court challenging the order of the ITAT.

6. The appellant contends that the ITAT erred in holding that the amendment was only prospective in nature, since the legislature is empowered to impose tax through laws applicable retrospectively as well as prospectively, and in any case, a deduction cannot be available as a matter of right to assessees and thus, can be curtailed by fetters imposed by the legislature. It was more specifically urged that having accepted the reassessment orders made as far back as in 2006 and 2007, the assessee could not have disturbed the finality which attached itself to the assessment order, merely on the basis that some judgment was delivered much later.

7. The respondent submits that no question of law even arises for determination, since the ITAT without doubt, could not have erred in

following the judgment of the Gujarat High Court. Particularly, the respondent points out that the Supreme Court had required the Gujarat High Court to decide the matter of Constitutional validity of the amendment to preclude conflicting judgments being rendered by various High Courts. Thus, the assessee argues that no appeal under Section 260A is maintainable. The respondents also submit that the appellants did not challenge the order of the ITAT for having condoned the delay, in the grounds of appeal and thus, it is not open to the Revenue to argue the same as a grievance.

8. This Court has considered the submissions of both parties. The law on the question of whether a litigant can take advantage of a decision in another litigation belatedly, was made clear in *Tilokchand Motichand & Ors. vs H.B. Munshi & Anr*, [1969] 2 SCR 824, by the majority comprising Hidayatullah, Mitter, and Bachawat, JJ., on similar facts. In that case, the sales tax authorities had directed a refund of the tax amount paid by the petitioners to the State, since the petitioners had also paid to the State, the sales tax amount realised from the customers. The condition for the refund was that the refunded amount ought to be passed on to the customers. Since the petitioners failed to comply with this condition, the sales tax authorities forfeited the amount under Section 21(4) of the Bombay Sales Tax Act, 1953. The petitioners moved a writ petition in the High Court challenging this provision on certain grounds; the writ petition was dismissed by the Single Judge and at all levels of appeal pursued. However, the Supreme Court in a subsequent decision struck down Section 12A(4)

of the Bombay Sales Tax Act, 1946 (corresponding to Section 21(4) of the 1953 Act) on grounds different from those urged by the petitioner in its earlier writ proceedings. The petitioner then filed a writ petition under Article 32 of the Constitution of India seeking refund of the amount, using the ground of unconstitutionality laid down in this subsequent decision. The majority held against the petitioner, in these terms:

> *"The petitioner moved the High Court for relief on the ground that the recovery from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was struck down by this Court. That ground was that the provisions of the Act were unconstitutional. The question is: can the petitioner in this case take advantage, after a lapse of a number of years, of the decision of this Court? He moved the High Court but did not come up in appeal to this Court. His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact ground of unconstitutionality. Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision. If I were to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced it may be questioned in a fresh*

litigation revived only with the argument, that the correct position was not known to the petitioner at the time when he abandoned his own litigation."

[emphasis supplied]

9. This position was subsequently crystallised in *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536, in which the Court was faced with the same question i.e. whether it is open to the assessee to belatedly claim refund of tax paid by him under orders that have become final, on the basis of having discovered a mistake in the law, as found in the decision of a court in another assessee's litigation. The Court held at paragraph 70:

> *"One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long at that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. But what is happening now is that the duty which has been paid under a proceeding which has become final long ago - may be an year back, ten years back or even twenty or more years back - is sought to be recovered on the ground of alleged discovery of mistake of law on the basis of a decision of a High Court or the Supreme Court. …An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another*

assessee's case a similar point is decided in favour of the manufacturer/assesses."

[emphasis supplied]

10. In this case, the reassessment orders of the AO were made on 1.3.2006 and 19.9.2007 on the basis of the retrospective amendment. Thus, in the assessee's own proceedings, the orders of the AO had attained finality, given that the assessee neither promptly filed an appeal against the orders (i.e. within the 30 day requirement under Section 249(2) of the Act) nor moved writ proceedings against the retrospective amendment. Moreover, the assessee was also paying tax under the orders. The assessee only appealed against the AO's orders after a period of 5-6 years i.e. on 23.7.2012. It is clear that this appeal was moved on this date only in order to take advantage of the Gujarat High Court decision in *Avani Exports* (supra) pronounced on 2.7.2012. Thus, based on the law laid down in *Tilokchand* (supra) and *Mafatlal* (supra), this Court is of the opinion that the assessee cannot succeed in its appeal.

11. This Court is also of the opinion that this view does not put the assessee at an unequal position in comparison with the litigants in *Avani Exports* (supra). Materially, the point at which their positions must be compared, to determine whether they were similarly placed vis-à-vis each other was the point in time when the first reassessment order was passed against each of the assessees under the retrospective amendment. At that point, the assessee which chose to challenge the constitutionality of the reassessment in terms of the retrospective amendment is entitled to benefit from the outcome of the litigation

pursued. The assessees who chose not to lay any challenge, cannot seek to stake an equal claim to benefiting from the subsequent outcome of litigation pursued by another assessee, since its own proceedings before the income tax authorities attain finality, when it refrains from pursuing any challenge. For this reason, even the possibility of an appeal against *Avani Exports* (supra) pending before the Supreme Court does not affect the opinion of this Court. This is because the possibility of the assessee being disadvantaged by the outcome of the appeal in *Avani Exports* (supra), and thus being treated unequally from the set of litigants in *Avani Exports* (who may benefit from the outcome of the appeal) is one that rightfully weighs against the assessee for the reason underlined above.

12. It would be useful at this stage to advert to a decision of the Supreme Court in *Devilal Modi v Sales Tax Officer* AIR 1965 SC 1150, where it was observed that:

> *"One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final..and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice…*
>
> *It may be conceded in favour of Mr.Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the*

same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred…."

13. In the present case the retrospective amendment was introduced after the original assessment. The introduction of the amendment occasioned the re-assessment. The reassessment order gave effect to the amendment. The assessee was content; it accepted this order which became final. In these circumstances, the reassessment order cannot be sought to be indicted in as much as the finality which attaches itself to the reassessment order cannot be affected, merely because a later judgment of the Gujarat High Court held the amendment to be arbitrary, to the extent of its retrospectivity.

14. For the above reasons, the question of law framed is answered in favour of the revenue and against the assessee. The appeals are accordingly allowed.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

MAY 23, 2014