

IN THE INCOME TAX APPELLATE TRIBUNAL : 'A' BENCH, KOLKATA

**Before : Shri P.M. Jagtap, Accountant Member and
Shri S.S.Viswanethra Ravi, Judicial Member**

ITA No. 1788/Kol/2016
A.Y 2009-10

**Asstt. Commissioner of
Income-tax, Circle-15(1),
Kolkata.**
[Appellant]

Vs.

**M/s. ABCI Infrastructure
Pvt. Ltd.**
PAN:AACCM3317R
[Respondent]

Appellant/Department by : Shri Sallong Yaden, Addl.CIT, Id.Sr.DR
Respondent/Assessee by : Shri Miraj D.Shah, Id.AR

Date of Hearing : 18-06-2018

Date of Pronouncement : 31-08-2018

ORDER

Shri S.S.Viswanethra Ravi, JM:

The above appeal by the Revenue is against the order dt. 20-07-2016 of the CIT-A, 16, Kolkata for the A.Y 2009-10.

2. The Ld. AR submits that the only issue raised in this appeal by revenue challenging the impugned order of the CIT-A in deleting the disallowance made on account of excess depreciation of Rs.21,73,214/- and it is below tax effect, which does not exceed the monetary limit as prescribed by CBDT Instruction 21/2015 dt.10-12-2015 and prayed to dismiss the appeal of revenue being low tax effect as it is not maintainable as per said CBDT Instruction.

3. The Id.DR has objected to the above submissions of the Id. AR and contended that the addition made by the AO was prompted by audit objection in respect of excess claim of depreciation. The dept. of Revenue has not accepted the decision of the CIT-A in deleting the impugned addition as the issue involved therein is a claim of higher rate of depreciation. He also submitted that the AO made this addition in pursuance of order passed under section 263 of the Act

and argued that the issue raised in the appeal though it is below the tax effect, but it is covered by exception (c) to para 8 provided in CBDT Circular No. 21/2015 dt. 10-12-2015. Basing on which, the CIT suggested to file appeal before this Tribunal as the issue involved as arisen due to audit objection. The appellant Revenue preferred this present appeal, even though the revenue effect is lower than the prescribed monetary limit, to maintain continuity with the various stages of appeal filed/pending in the case of the same assessee on the same issue. He referred to the statement of facts filed by revenue annexed with Form No. 36 before this Tribunal and argued that the issue in hand is covered by para 8 (c) of Circular No. 21/2015 and as such the appeal is maintainable in the facts and circumstances of the case.

4. In reply, the Id. AR submits that the CBDT issued clarification vide Instruction No.7/2017 dt. 21-07-2017 and placed on record the same and referred to para 5 of the said circular and submitted that PCIT/CIT shall carefully examine the cases involving the revenue audit objection and appeal should not be filed mechanically if the order is justified either in law or on facts. He further submits that Instruction No. 07/2017 superseded the Circular No. 08/2016 and modified the Instruction No. 9/2006 Dt. 07-11-2006.

5. He argued that the revenue was filing the appeals mechanically without proper examination of the cases on merits and by interpreting para 8 (c) of Circular No. 21/2015 erroneously. The same was clarified by CBDT by way of Circular No. 05/2017 dt. 23-01-2017 and referred to para 3 of said circular. In support of the contention, the Id.AR placed reliance on the order of Co-ordinate Bench, ITAT, Visakhapatnam in the case of Movva Lakshmi and referred to para 3.2 of the said order and argued that the Co-ordinate Bench in the case of Movva Lakshmi *supra* considered the CBDT Circular No. 21/2015 dt. 10-12-2015 and subsequent Circulars 5/2017 dt. 23-01-

2017 and held that the revenue shall not file the appeal(s) as a matter of routine merely because there is revenue audit objection.

6. By referring to present case, Id. AR submits that the CIT-A deleted the impugned addition made on account of excess depreciation by placing reliance on the decision of Hon'ble High Court of Bombay in the case of S.C. Thakur & Bros. reported in 322 ITR 263 and CBDT Circular No. 609 dt. 29-07-1991. The appellant revenue without examining the issue on merits mechanically filed this present appeal, which is contrary to Circular 5/2017 dt. 23-1-2017 & Instruction No. 7/2017 dt. 21-07-2017. He further submits that the CBDT directed the concerned revenue authorities not to file appeals(s) before this Tribunal in violation of said instruction/circular of CBDT. Further, it was submitted that, if any appeals filed violating the said instruction/circular of CBDT, directed the same to be withdrawn being non maintainable and as such the present appeal filed by the revenue being low tax effect involved therein is liable to be dismissed being non maintainable.

7. In the rejoinder, the Id.DR submits that the CIT examined the present issue on merits and suggested to file appeal to maintain continuity with various stages of appeal filed/pending in the case of the same assessee on the same issue and referred to statement of facts filed. Further, it was urged that, if Tribunal dismisses the present appeal for non recording of satisfaction by the PCIT/CIT, then it would become precedent for all other cases, which is not justified in the interest of revenue.

8. Heard the rival submissions and perused the record including various CBDT Circulars/Instructions. We find that the issue in hand is to be decided by us as to whether the appeal effect is below the monetary limit or not and whether it is covered by para 8 (c) of the CBDT Circular No. 21/2015 dt. 10-12-2015. For better understanding para 8 of Circular No. 21/2015 is reproduced herein below:-

- "8. *Adverse judgments relating to the following issues should be contested on 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 Rule 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 Revenue Audit objection in the case has been accepted by the Department, or*
 - (d) *Where the addition relates to undisclosed foreign assets/bank accounts."*

9. A reading of aforementioned para-8 suggests that adverse judgements relating to Constitutional validity of the provision of an Act or Rule, Board's circular, notification, instruction, revenue audit objection and addition relates to undisclosed foreign assets/bank accounts should be contested on merits notwithstanding the tax effect. According to Id. DR that the issue involved in the present appeal is covered para no: 8 (c) of CBDT Circular No. 21/2015, that the addition made on account of revenue audit objection was deleted, the revenue filed appeal in terms of para 8 (c) of said Circular No. 21/2015 and it is maintainable.

10. To consider the submissions, we may have to examine the Circular No. 5/2017 dt. 23-01-2017 and the relevant portion is reproduced herein below:-

"3. However, it has been noticed that para 8 (c) of Circular No. 21/2015, regarding cases where addition made on account of Revenue Audit Objection is deleted, is being erroneously interpreted and appeals are being mechanically filed by the Department without proper examination of the case on merits. This is contrary to the instructions contained in Circular No. 21/2015 and Circular No. 8/2016. It is therefore, clarified that the import and intent of para 8 of the Circular No. 21/2015 is that even on issues mentioned in the said para, appeals against the adverse judgment should only be filed on merits. "

11. The Circular 5/2017 was issued by the CBDT in order to measures for reducing litigation, wherein it clarified the direction in para 8 of Circular 21/2015 specifically to contest on merits negates the mechanical filing of appeals in these cases. It is clear from para 3 of Circular no. 5/2017 that the appeal(s) can be filed by the revenue only on merits, even on issues contemplated (a) to (d) mentioned in para-8 of Circular 21/2015. Therefore, it is clear, an appeal should

not be filed merely on the presumption that the additions involving the exceptions in para-8 of Circular 21/2015, but, only on merits.

12. Further, to examine Instruction No. 7/2017 dt. 21-7-2017, as relied on by the Id.AR, para 5 reads as under:-

"Second appeal in cases involving Revenue Audit Objection: The adverse order of first appellate authority in cases involving Revenue Audit Objections should be carefully scrutinized by the PCIT/CIT, and appeal should not be preferred, if the order is justified either in law or on facts. Reasons for not filing appeal may be recorded by the PCIT/CIT."

13. The aforementioned paragraph, clearly explains that the Pr. CIT/CIT should examine the revenue audit objection carefully before filing of second appeal in the Tribunal involving the revenue audit objection. Further, the appeal shall not be filed if the order of first appellate authority is justified either in law or facts. It also clarifies that the reasons may have to be recorded for not filing the appeal by the Pr. CIT/CIT. We find that in the present case the Id. DR by statement of facts annexed with Form No. 36 pointed out that the CIT concerned examined the appeal carefully and suggested to file appeal even though the revenue effect is lower than the prescribed monetary limit. According to him, it was prompted by audit objection on the issue of excess claim of depreciation and the CIT- A erroneously deleted the same. This decision of the CIT-A has not been accepted by the revenue and as such preferred an appeal before this Tribunal by accepting the said revenue audit objection. The Id. AR brought to our notice during the course of arguments that the CIT-A deleted the addition made on account of excess depreciation by placing reliance on the decision of Hon'ble High Court of Bombay in the case of S.C. Thakur & Bros. *supra* . Therefore, in our opinion the present appeal should be only on merits, if the appellant revenue is not justified either in law or in facts. Thus, the arguments as advanced by the Id. DR fails and are rejected with reference to the submission that the issue arose on audit objection.

14. Further, the order of the Co-ordinate Bench in the case of Movva Lakshmi *supra* vide order dt. 06-12-2017 dismissed the appeal of revenue as unadmitted. On perusal of said order, the AO has been directed to file an appeal against the order of CIT-A on similar set of facts, which are identical to present appeal. Relevant portion of which is reproduced herein below:-

"3.1 On careful perusal of the same it indicates that the CITs have to record their decision issue-wise and also notice tax effect and forward relevant authorisation letter and grounds of appeal to the concerned.

3.2. Since the grounds have to be specified by the Commissioner, if the tax effect is low, reasons as to why an appeal is to be preferred even on matters concerning appreciation of facts, such as the present matter, needs to be recorded. The AO relied upon CBDT Instruction 21/2015 dated 10.12.2015, whereas in the subsequent circulars i.e. Circular No.5 /2017 dated 23.01.2017, the Board clarified that filing of appeals in cases where there is revenue audit objection should not be a matter of routine.

4. No evidence whatsoever is placed even before us to prove that the facts determined by Ld.CIT(A) are perverse. Having regard to circumstances of the case, we are of the view that the AO is bound by the Circular issued by CBDT and he could not have preferred appeal in a case whether the tax effect is less than the specified limit and that too in the routine manner. It is also doubtful as to whether the Commissioner concerned has directed the AD to raise this ground. It does not emanate from the authorisation issued by the Commissioner.

5. Even on merits we do not find any infirmity in the finding of CIT(A) that the disallowance is not permissible in this year."

15. In view of above, we find the issue raised by the revenue is below tax effect, which does not exceed the prescribed monetary limit as per above mentioned CBDT Circulars. Thus, ground no. 1 raised by the revenue is dismissed.

16. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 31 -08-2018

Sd/-
P. M. Jagtap
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated : 31-08-2018

**PP(Sr.P.S.)

Copy of the order forwarded to:

1. Applicant/Department : The ACIT, Circle-15(1), Kolkata
Aaykar Bhawan Poorva, 110 Shantipally, Kolkata-107.
2. Respondent/Assessee: M/s. ABCI Infrastructure Pvt. Ltd.
2/7 Sarat Bose Road, Bhawanipore, Kolkata-20.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order

Senior Private Secretary
Head of office, ITAT, Kolkata