A COMMISSIONER OF INCOME TAX CENTRAL KANPUR

v.

J.K. CHARITABLE TRUST KAMAL TOWER, KANPUR

(Civil Appeal No. 2092 of 2006)

NOVEMBER 7, 2008

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[DR. ARIJIT PASAYAT, C.K. THAKKER AND LOKESHWAR SINGH PANTA, JJ.]

Income Tax Act, 1961 – Revenue not preferring appeal C *in respect of some assessment years involving identical dispute – Filing of appeal for other assessment years – Permissibility of – Held: Role of Revenue in such cases explained—However, in the fact situation filing of appeal by Revenue not permissible.*

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The question which arose for consideration in these appeals was whether the revenue can be precluded from filing an appeal even though in respect of some other years involving identical dispute no appeal is filed.

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Dismissing the appeals, the Court

HELD: If the assessee takes the stand that the Revenue acted *mala fide* in not preferring appeal in one case and filing the appeal in other case, it has to establish F ***malafides*. As a matter of fact, there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of the decision** G **is revenue neutral there may not be any need for preferring the appeal. All these certainly provide the foundation for making a departure. In the instant case, it is accepted by the appellant-revenue that the fact situation in all the assessment years is same. According**

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to revenue, if the fact situation changes then the revenue can certainly prefer an appeal notwithstanding the fact that for some years no appeal was preferred. This question is of academic interest in the instant appeals as undisputedly the fact situation is the same. [Paras 16 and 17] [956-G-H; 957-A]

Commissioner of Income Tax v. J.K. Charitable Trust **1992 (196) ITR 31;** *CIT, Bombay City VII v. Trustees of the Jadi Trust* **1982 (133) ITR 494;** *CIT v. Hindusthan Charity Trust* **1983 (139) ITR 913;** *CIT v. Sarladevi Sarabhai Trust No.2* **1988 (172) ITR 698;** *CIT v. Nirmala Bakubhai Foundation* **1996 (226) ITR 394;** *C.K. Gagadharan & Anr. v. Commissioner of Income Tax* **2008 (304) ITR 61 (SC);** *Bharat Sanchar Nigam Ltd. v. Union of India* **2006 (3) SCC 1;** *State of Maharashtra v. Digambar* **1995(4) SCC 683;** *Government of West Bengal v. Tarun K. Roy* **2004(1)SCC 347;** *State of Bihar v. Ramdeo Yadav* **1996(3) SCC 493;** *Commissioner of Central Excise v. Hira Cement* **2006(2)SCC 439;** *Chief Secretary to Government of Andhra Pradesh v. V.J. Cornelius* **1981 (2) SCC 347;** *Karamchari Union v. Union of India* **2000 (243) ITR 143 (SC);** *Union of India v. Kaumudini Narayan Dalal* **2001 (249) ITR 219 and** *CIT v. Shivsagar Estate* **2004 (9) SCC 420, referred to.**

Case Law Reference :

1992 (196) ITR 31	**Referred to.**	**Para 1**
1982 (133) ITR 494	**Referred to.**	**Para 3**
1983 (139) ITR 913	**Referred to.**	**Para 3**
1988 (172) ITR 698	**Referred to.**	**Para 3**
1996 (226) ITR 394	**Referred to.**	**Para 3**
2008 (304) ITR 61 (SC)	**Referred to.**	**Para 4, 15 and 17**
2006 (3) SCC 1	**Referred to.**	**Para 8**

995(4) SCC 683	**Referred to.**	**Para 9**
2004(1) SCC 347	**Referred to.**	**Para 10**
1996(3) SCC 493	**Referred to.**	**Para 10**
2006(2) SCC 439	**Referred to.**	**Para 12**
1981 (2) SCC 347	**Referred to.**	**Para 13**
2000 (243) ITR 143 (SC)	**Referred to.**	**Para 14**
2001 (249) ITR 219	**Referred to.**	**Para 14**
2004 (9) SCC 420	**Referred to.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2092 of 2006.

From the final Judgment and Order dated 6.7.2005 of the High Court of Judicature at Allahabad in ITR No. 189 of 1989.

WITH

C.A. Nos. 682 of 2007, 1698, 1699 and 2423 of 2006.

P. Vishwanath Shetty, H. Raghavendra Rao, Arijit Prasad and B.V. Balaram Das for the Appellant.

M.L. Verma, Bhargava V. Desai, Rahul Gupta and Reema Sharma for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in these appeals in each case is to the order passed by a Division Bench of the Allahabad High Court answering the reference made by the Income Tax Appellate Tribunal, Allahabad Bench (in short the 'ITAT') under Section 256(1) of the Income Tax Act, 1961 (in short the 'Act') in favour of the assessee and against the revenue. For answering the references in favour of the assessee the High Court relied upon its judgment for two

previous assessment years i.e. 1972-73 and 1973-74 in the assessee's case which is reported in *Commissioner of Income Tax v. J.K. Charitable Trust* (1992 (196) IIR 31). The present dispute relates to several assessment years, i.e. 1972-73 (in respect of an assessment re done under Section 147(1) of the Act) and assessment years 1975-76 to 1982-83.

2. Learned counsel for the revenue appellant submitted that each assessment year is a separate assessment unit and the factual scenario has to be seen. Dispute relates to the question whether the respondent, assessee's trust was hit by the provisions of Section 13(1)(c) and 13(2)(a)(f) & (h) of the Act and therefore cannot be given the benefit of exemption provided under Section 11 of the Act.

3. Learned counsel for the assessee submitted that for several years no appeal has been filed even though the factual position is the same i.e. for the assessment years 1983-84 upto assessment year 2007-08. Even no appeal was filed against the decision reported in [1992(196) ITR 31] (supra). It is also pointed out that several other High Courts have taken a similar view and no appeal was preferred by the revenue against any of the judgments of the different High Courts. Reference is made to the decisions reported in *CIT, Bombay City VII v. Trustees of the Jadi Trust* [(1982) 133 ITR 494], *CIT v. Hindusthan Charity Trust* [(1983) 139 ITR 913], *CIT v. Sarladevi Sarabhai Trust No.2* [1988 (172) ITR 698] and *CIT v. Nirmala Bakubhai Foundation* [1996 (226) ITR 394]. The first two judgments have been rendered by the Bombay and Calcutta High Court respectively while the other two decisions are of the Gujarat High Court.

4. Learned counsel for the revenue submitted that even though appeal has not been preferred in respect of some assessment years, that does not create a bar for the revenue filing an appeal for other assessment years. Reliance is placed on a decision of this Court in *C.K. Gagadharan & Anr. v. Commissioner of Income Tax* [(2008)304 ITR 61 (SC)].

A 5. The factual scenario is undisputed that for a large number of assessment years no appeal has been filed.

6. The basic question therefore is whether the revenue can be precluded from filing an appeal even though in respect of some other years involving identical dispute no appeal is filed.

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7. For deciding the issue a few decisions of this Court need to be noted.

8. In *Bharat Sanchar Nigam Ltd. v. Union of India* (2006 C (3) SCC 1) it was noted as follows:

> "The decisions cited have uniformly held that *res judicata* does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same D cause of action whereas the cause of action for each assessment year is distinct. The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held E parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a F subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these G are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.

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A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in *Hurra v. Hurra* (2002 (4) SCC 388). As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per incuriam. The decision in *State of U.P. v. Union of India* (2003(3) SCC 239) related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Here a coordinate Bench has referred the matter to a larger Bench. This Bench being of superior strength, we can, if we so find, declare that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected."

9. In *STATE OF MAHARASHTRA V. DIGAMBAR* (1995(4) SCC 683) the position was highlighted by this court as follows:

"We are unable to appreciate the objection raised against the prosecution of this appeal by the appellant or other SLPs filed in similar matters. Sometimes, as it was stated on behalf of the State, the State Government may not choose to file appeals against certain judgments of the High Court rendered in writ petitions when they are

A considered as stray cases and not worthwhile invoking the discretionary jurisdiction of this Court under Article 136 of the Constitution, for seeking redressal therefor. At other times, it is also possible for the State, not to file appeals before this Court in some matters on account of improper B advice or negligence or improper conduct of officers concerned. It is further possible, that even where SLPs are filed by the State against judgments of the High Court, such SLPs may not be entertained by this Court in exercise of its discretionary jurisdiction under Article 136 of the C Constitution either because they are considered as individual cases or because they are considered as cases not involving stakes which may adversely affect the interest of the State. Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the D rejection of some SLPs in limine by this Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an SLP or SLPs in other similar matters where it is considered on behalf of the State that non-filing of such SLP or SLPs and pursuing them is likely to seriously jeopardise the interest of the E State or public interest."

10. In *Government of West Bengal v. Tarun K. Roy* [2004(1)SCC 347] reference was made to the judgments in *Digambar's* case (supra) and *State of Bihar v. Ramdeo Yadav* F (1996(3) SCC 493). It was noted as follows:

"28. In the aforementioned situation, the Division Bench of the Calcutta High Court manifestly erred in refusing to consider the contentions of the appellants on their own merit, particularly, when the question as regards G difference in the grant of scale of pay on the ground of different educational qualification stands concluded by a judgment of this Court in *State of West Bengal v. Debdas Kumar* {(1991) Supp(1) SCC 138]. If the judgment of *Debdas Kumar's* case (supra) is to be followed, a finding H

of fact was required to be arrived at that they are similarly situated to the case of *Debdas Kumar* (supra) which in turn would mean that they are also holders of diploma in Engineering. They admittedly being not, the contention of the appellants could not be rejected. Non-filing of an appeal, in any event, would not be a ground for refusing to consider a matter on its own merits. (See *State of Maharashtra v. Digambar* (1995) 4 SCC 683)

29. In *State of Bihar v. Ramdeo Yadav* (1996) 3 SCC 493) wherein this Court noticed *Debdas Kumar's* case (supra) by holding: (SCC p. 494, para 4)

"4. Shri B.B. Singh, the learned counsel for the appellants, contended that though an appeal against the earlier order of the High Court has not been filed, since larger public interest is involved in the interpretation given by the High Court following its earlier judgment, the matter requires consideration by this Court. We find force in this contention. In the similar circumstances, this Court in *Digambar's* case (supra) and in *Debdas Kumar's* case (supra) had held that though an appeal was not filed against an earlier order, when public interest is involved in interpretation of law, the Court is entitled to go into the question."

11. In *Ramdeo's case* (supra) reference was made to Debdas Kumar's case (supra) wherein it was observed at paragraph 5 as follows:

"It is then contended that Section 3(2) and (3) make distinction between the employees covered by those provisions and the employees of the aided schools taken over under Section 3(2). Until the taking over by operation of Section 3(4) recommendation is complete, they do not become the employees of the Government under Section 4 of the Act. The Government in exercise of the power under Section 8 constituted a committee and directed to

A enquire and recommend the feasibility to take over the schools. On the recommendation made by them, the Government have taken decision on 13-1-1981 by which date the respondents were not duly appointed as the employees of the taken over institution. Therefore, the High
B Court cannot issue a mandamus directing the Government to act in violation of law."

12. In *Commissioner of Central Excise v. Hira Cement* (2006(2)SCC 439) at paragraph 24 the position was reiterated.

C 13. In *Chief Secretary to Government of Andhra Pradesh v. V.J. Cornelius* [(1981) 2 SCC 347] it was observed that equity is not a relevant factor for the purpose of interpretation.

14. It will be relevant to note that in *Karamchari Union v.*
D *Union of India* [(2000)243 ITR 143 (SC)] and *Union of India v. Kaumudini Narayan Dalal* [(2001) 249 ITR 219] this Court observed that without a just cause the Revenue cannot file the appeal in one case while deciding not to file an appeal in another case. This position was also noted in *CIT v. Shivsagar*
E *Estate* [(2004)9 SCC 420].

15. In *C.K. Gangadharan's* case (supra) this Court held that where different High Courts have taken different views and some of the High Courts have decided in favour of the revenue, same is a just cause for the revenue to prefer an appeal.

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16. If the assessee takes the stand that the Revenue acted mala fide in not preferring appeal in one case and filing the appeal in other case, it has to establish malafides. As a matter of fact, as rightly contended by the learned counsel for the
G revenue, there may be certain cases where because of the small amount of revenue involved, no appeal is filed. Policy decisions have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of the decision is revenue neutral there may not be
H any need for preferring the appeal. All these certainly provide

the foundation for making a departure. A

17. In *C.K. Gangadharan's* case (supra) it was held that merely because in some cases revenue has not preferred an appeal that does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher court when divergent views are expressed by the different High Courts. In this case, it is accepted by the learned counsel for the appellant-revenue that the fact situation in all the assessment years is same. According to him, if the fact situation changes then the revenue can certainly prefer an appeal notwithstanding the fact that for some years no appeal was preferred. This question is of academic interest in the present appeals as undisputedly the fact situation is the same. B C

18. The appeals are without merit and are accordingly dismissed. No costs. D

N.J. Appeals dismissed