

CASE NO.:
Appeal (civil) 2342-2362 of 2001

PETITIONER:
Commissioner of Customs, Calcutta etc.

RESPONDENT:
M/s Indian Oil Corporation Ltd. & Anr.

DATE OF JUDGMENT: 17/02/2004

BENCH:
P. VENKATARAMA REDDI.

JUDGMENT:
JUDGMENT

P. VENKATARAMA REDDI, J.

I am in agreement with my learned sister that without entering into the merits of the contentions advanced, the Revenue's appeal is liable to be dismissed in the light of the Circular dated 14-8-1991 issued by Central Board of Excise and Customs which is traceable to the power conferred on the Board by Section 151-A of the Customs Act. The purpose of this separate opinion is only to highlight certain doubts I have entertained as to the correctness of the proposition laid down in the two Dhiren Chemical Industries cases¹ decided by the Constitution Bench and the other by a three Judge Bench. The absence of reasoning in both these decisions has aggravated my doubts and made me ponder over the possible implications of the said judgments. Hence I felt impelled to express the thoughts passing in my mind and my prima facie views, hoping that the legal position will perspicuously be laid down by a Constitution Bench sooner or later. For the time being, I have refrained from persuading my learned Sister to refer the matter to a larger Bench as the decision in the instant case need not rest on the principle enunciated in the said two decisions.

I have no reservations in accepting the principle that the circulars issued by the Board under Section 151 (A) of the Customs Act or Section 37 (B) of the Central Excise Act are generally binding on the Revenue. Normally, the instructions issued by the superior authorities on administrative side cannot fetter the exercise of quasi judicial power and the statutory authority invested with such power has to act independently in arriving at a decision under the Act (vide: *Sirpur Paper Mills Ltd. Vs. Commissioner of Wealth Tax, Hyderabad* [(1970) 1 SCC 795]. However, when there is a statutory mandate to observe and follow the orders and instructions of the Board in regard to specified matters, that mandate has to be complied with. It is not open to the adjudicating authority to deviate from those orders or instructions which the statute enjoins that it should follow. If any order is passed contrary to those instructions the order is liable to be struck down on that very ground. That is what has been held in some of the cases referred to by my learned sister. Extending this principle which flows from the statutory provision contained in Section 151 (A) of the Customs Act or a pari-materia provision in other fiscal enactments, this Court also held that it is not open to the department to file an appeal against the order passed in conformity with the circular. To this extent I have no difficulty in

understanding the rationale of the decisions of this Court leaving apart for the time being the decisions in which a somewhat different note was struck. However, I am unable to reconcile myself to the view that even after the highest Court settles the law on the subject, the view expressed by the Central Board on the same point of law should still hold the field until and unless it is revoked.

As is evident from Section 151-A the Board is empowered to issue orders or instructions in order to ensure uniformity in the classification of goods or with respect to levy of duty. The need to issue such instructions arises when there is a doubt or ambiguity in relation to those matters. The possibility of varying views being taken by the customs officials while administering the Act may bring about uncertainty and confusion. In order to avoid this situation, Section 151A has been enacted on the same lines as Section 37(A) of the Central Excise Act. The apparent need to issue such circulars is felt when there is no authoritative pronouncement of the Court on the subject. Once the relevant issue is decided by the Court at the highest level, the very basis and substratum of the circular disappears. The law laid down by this Court will ensure uniformity in the decisions at all levels. By an express constitutional provision, the law declared by the Supreme Court is made binding on all the Courts within the territory of India (vide Article 141). *Proprio vigore* the law is binding on all the tribunals and authorities. Can it be said that even after the law is declared by the Supreme Court the adjudicating authority should still give effect to the circular issued by the Board ignoring the legal position laid down by this Court? Even after the legal position is settled by the highest Court of the land, should the customs authority continue to give primacy to the circular of the Board? Should Section 151(A) be taken to such extremities? Was it enacted for such purpose? Does it not amount to transgression of constitutional mandate while adhering to a statutory mandate? Even after the reason and rationale underlying the circular disappears, is it obligatory to continue to follow the circular? These are the questions which puzzle me and these are the conclusions which follow if the observations of this Court in the two cases of *DHIREN Chemical Industries* are taken to their logical conclusion.

I am of the view that in a situation like this, the Customs authority should obey the constitutional mandate emanating from Article 141 read with Article 144 rather than adhering to the letter of a statutory provision like Section 151-A of the Customs Act. The Customs authority should act subservient to the decision of the highest constitutional Court and not to the circular of the Board which is denuded of its rationale and substratum under the impact of the authoritative pronouncement of the highest Court. Alternatively, Section 151 A has to be suitably read down so that the circulars issued would not come into conflict with the decision of this Court which the Customs authorities are under a Constitutional obligation to follow. I can perceive of no principle or authority to countenance the view expressed in *Dhiren Chemicals* case that regardless of the interpretation placed by this Court, the Circulars which give a different interpretation would still survive and they have to be necessarily followed by the statutory functionaries. The opinion expressed in the case of *Hindustan Aeronautics Vs. Commissioner of Income Tax, Karnataka* [(2000) 5 SCC 365] seems to project a correct view, though that decision cannot prevail over the Constitution Bench decision in *Dhiren Chemical*

Industries. The unintended results that may follow from the verdict of this Court in Dhiren Chemical Industries is another aspect that has worried me. Let us take a case where in accordance with the instructions in the Circular of the Board, the adjudicating authority has to decide the case against the assessee, but as per the decision of this Court, the Assessee's contention has to be accepted by the adjudicating authority. If the proposition laid down in Dhiren Chemical Industries has to be followed, the adjudicating authority should pass an order in terms of the Circular holding the issue in favour of Revenue, knowing fully well that on a challenge by the assessee, it is liable to be set aside in appeal. The assessee will then be driven to file an appeal to get rid of an obviously illegal order. Is it all contemplated by Section 151-A?

As far as the present case is concerned, there is no direct decision of the Supreme Court which has taken a view different from what was expressed in the Circular of 1991. As clarified by my learned sister, the decision of this Court in Garden Silks case has no direct bearing on the issue involved in this case. It did not construe the 1988 rules. Hence, the doubts expressed by me in regard to the correctness of the principle laid down in Dhiren Chemical Industries case need not necessarily be resolved in the instant case. Still, the observation in Dhiren Chemical Industries was sought to be pressed into service to counter the contention of the appellant that a cloud has been cast on the Circular in the wake of the Tribunal's order in Panchmahal Steel case and therefore the Circular had been eclipsed. Whether the Tribunal's order stands on the same footing as the decision of this Court, insofar as its impact on the Circular is concerned is one aspect which will have to be considered in an appropriate case. Here, that issue need not be probed further. I agree with my learned sister that the order of the Tribunal being an *exparte* one, it does not take precedence over the binding circular under Section 151-A and I may add that the Tribunal's decision is not so categorical and clear as to strike at the root of the Circular in its application to the facts of the present case. Hence, there is no need for further discussion on this point. Before parting, I would like to point out that the basis on which the circulars of the Central Board are placed on a high pedestal seems to have its origin in Navnit Lal's case [AIR 1965 SC 1375]. In that case, a Constitution Bench of this Court was examining the constitutional validity of Sections 2, 6A(e) and 12(1B) inserted in the Income Tax Act of 1922 by the Finance Act of 1955. These Sections provided that any payment made by a closely held Company to its shareholder by way of advance or loan to the extent to which the Company possessed accumulated profits shall be treated as dividend taxable under the Act and this would include any loan or advance made in the relevant year prior to the assessment year, 1955-56, if such loan or advance remained outstanding on the 1st day of the previous year relevant to the assessment year 1955-56. In order to mitigate the rigour of the provision to some extent, the Central Board of Revenue issued a circular under Section 5(8) of the Act to the effect that if any such outstanding loans or advances of past years were repaid on or before 30th June, 1955, they would not be taken into account in determining the tax liability of the shareholders who received such loans or advances. The Court after pointing out that the circular would be binding on all officers and persons employed in the execution of the Act, observed thus:

"In other words, past transactions which would normally have attracted the stringent provisions of Section 12(1B) as it was introduced in 1955, were substantially granted exemption from the operation of the said provisions by making it clear to all the companies and their shareholders that if the past loans were genuinely refunded to the companies, they would not be taken into account under Section 12(1B)."

No proposition was laid down in that case that even if the circular was clearly contrary to the provisions of the Act it should prevail. On the other hand, the learned Judges were inclined to view the circular as granting the benefit of exemption from the operation of the impugned provisions subject to fulfillment of certain conditions. Navnit Lal's case was referred to and construed in two cases decided by Benches of two learned Judges. The first one was the case of Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal [AIR 1972 SC 524] and the other is K.P. Varghese Vs. I.T. Officer, Ernakulam [AIR 1981 SC 1922]. In both these cases it was assumed that Navnit Lal's case was an authority for the proposition that even if the directions given in the circular clearly deviate from the provisions of the Act, yet, the Revenue is bound by it. These three decisions were repeatedly referred to and relied on in the subsequent decisions in which the issue arose as regards the binding nature of the circulars either under the Income Tax Act or under the Central Excise Act. In between, there was the three Judge Bench decision in Sirpur Paper Mills Ltd. Vs. Commissioner of Wealth Tax [(1970) 1 SCC 795] in which Section 13 of the Wealth Tax Act corresponding to Section 5(8) of the Income Tax Act, 1922 fell for consideration. This Court took the view that the instructions issued by the Board may control the exercise of the power of the departmental officials in matters administrative but not quasi-judicial. There is yet another decision of a three Judge Bench which seems to make a dent on the weight of the proposition that the circulars of the Board, even if they are plainly contrary to the provisions of the Act, should be given effect to and binding on the authorities concerned in the administration of the Act. That is the case of Keshavji Ravji & Co. Vs. I.T. Commissioner [(1990) 2 SCC 231]. Venkatachaliah, J (as he then was) speaking for the Court observed thus: "Sri Ramachandran contended that circular of 1965 of the Central Board of Direct Taxes was binding on the authorities under the Act and should have been relied upon by the High Court in support of the Court's construction of Section 40(b) to accord with the understanding of the provision made manifest in the circular.

This contention and the proposition on which it rests, namely, that all circulars issued by the Board have a binding legal quality incurs, quite obviously, the criticism of being too broadly stated. The Board cannot preempt a judicial interpretation of the scope and ambit of a provision of the 'Act' by issuing circulars on the subject. This is too obvious a proposition to require any argument for it. \005\005\005.

\005The Tribunal, much less the High Court, is an authority under the Act. The circulars do not bind them. But the benefits of such circulars to the assesses have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. But that is not the same thing as saying that such circulars would either have a binding effect in the interpretation of the provision itself or that the Tribunal and the High Court are supposed to interpret the law in the light of the circular. There is, however, support of certain judicial observations for the view that such circulars constitute external aids to construction. \005"

In Bengal Iron Corporation Vs. C.T.O. [(1994) Supp. 1 SCC 310] a two Judge Bench considered the effect of a G.O. issued by the State Government clarifying that cast iron castings fall within sub-item (i) of item No.2 of the iii schedule to A.P.General Sales Tax Act. The assessee's contention that the benefit should be given in terms of the said G.O. was not accepted by this Court. This is what the Court said at para 19.

"Now coming to G.O.Ms. 383, it is undoubtedly of a statutory character but, as explained hereinbefore the power under Section 42 cannot be utilized for altering the provisions of the Act but only for giving effect to the provisions of the Act. Since the goods manufactured by the appellant are different and distinct goods from cast iron, their sale attracts the levy created by the Act. In such a case, the government cannot say, in exercise of its power under Section 42(2) that the levy created by the Act shall not be effective or operative. In other words, the said power cannot be utilized for dispensing with the levy created by the Act, over a class of goods or a class of persons, as the case may be. For doing that, the power of exemption conferred by Section 9 of the A.P. Act has to be exercised."

In C.S.T. Vs. Indra Industries [(2000) 9 SCC 66] a three Judge Bench referred to the above case and purported to distinguish it as follows:

"The observations in para 18 of the judgment in Bengal Iron Corpn. at best, apply only when a case of estoppel against a statute is made out."

In Wilh, Wilhelmsen Vs. C.I.T. [(1996) 9 SCC 161] a two Judge Bench having referred to Section 5(8) of I.T. Act, 1922 observed thus:

"The provision is clear. It requires no elaboration. It is, however, evident that the power so conferred on Central Board of Revenue has to be exercised for the purpose of and within the four corners of the Act."

I have referred to these cases to demonstrate that a common thread does not run through the decisions of this Court. The dicta/observations in some of the decisions need to be reconciled or explained. The need to redefine succinctly the extent and parameters of the binding character of the circulars of Central Board of Direct Taxes or Central Excise looms large. It is desirable that a Constitution Bench hands down an authoritative pronouncement on the

subject.

JUDIS