A DIRECTOR OF INCOME TAX, CIRCLE 26(1) NEW DELHI

v.

S.R.M.B. DAIRY FARMING (P) LTD.

(Civil Appeal No. 19650 of 2017)

B NOVEMBER 23, 2017

[R. F. NARIMAN AND SANJAY KISHAN KAUL, JJ.]

Income Tax Act, 1961:

C *Circular/Government order/Notification – Circular No.3 of 2011 dated 9.2.2011 issued by IT department providing that appeals are not to be filed before the High Courts where tax impact was less than Rs.10 lakhs – Applicability of the circular to pending matters – Held: Circular dated 9.2.2011 would apply even to pending matters but subject to the two caveats provided in order passed by* D *a three-Judge Bench of Supreme Court in* **Surya Herbal case** *– The two caveats are: (i) Circular dated 9.2.2011 should not be applied by High Courts ipso facto when the matter has a cascading effect; (ii) where common principles may be involved in subsequent group of matters or large number of matters – Order passed in* **Surya** E **Herbal case** *holds the field – Appeals of Revenue accordingly dismissed.*

National Litigation Policy, 2011 – Purpose of – Discussed.

Dismissing the appeals, the Court

F **HELD: The matter has been squarely put to rest taking further care of the interests of the Revenue by the order passed by the three Judges Bench of this Court in *Surya Herbal Ltd.*, which had put two caveats even to the retrospective application of the Circular. The said view of the three Judges Bench would** G **hold water and Circular would apply even to pending matters but subject to the two caveats provided in *Surya Herbal Ltd.* case. [Para 25] [1133-G; 1134-A-C]**

CIT Central-III v. Surya Herbal Ltd. **(2011) 15 SCC 482 – Followed**

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Suchitra Components Ltd. v. Commissioner of Central Excise, Guntur **2007 (208) ELT 321 (SC);** *Commissioner of Central Excise, Bangalore v. Mysore Electricals Industries Ltd.* **2006 (204) ELT 517 (SC) – relied on.**

Commissioner of Income Tax, Bangalore v. Ranka & Ranka **2012(284) ELT 185 (Kar.);** *Commissioner of Income Tax v. Pithwa Engg. Works* **(2005) 276 ITR 519 (Bom.);** *Commissioner of Income Tax v. Madhukar K. Inamdar* (HUF) **(2009) 318 ITR 149 (Bom);** *Commissioner of Income Tax v. Ashok Kumar Manibhai Patel & Co.* **(2009) 317 ITR 386 (MP);** *Commissioner of Income Tax v. P.S. Jain & Co.* **(2011) 335 ITR 591 (Delhi);** *Commissioner of Income Tax v. Varindera Construction Co.* **(2011) 331 ITR 449 (P&H)(FB);** *Commissioner of Income Tax v. Navbharat Explosives Co. P. Ltd.* **(2011) 337 ITR 515 (Chhattisgarh);** *Commissioner of Income Tax v. Kodanand Tea Estates Co.* **(2005) 275 ITR 244 (Mad.);** *CWT v. John L. Chackola* **(2011) 337 ITR 385 (Ker);** *Commissioner of Income Tax-VII, New Delhi v. Suman Dhamija* **(2015) 16 SCC 176;** *Commissioner of Income Tax & Anr. V. Century Park* **(2015) 14 SCC 704 – referred to.**

Case Law Reference

(2011) 15 SCC 482	**followed**	**Paras 19, 25**
2012(284) ELT 185 (Kar.)	**referred to**	**Para 8**
(2005) 276 ITR 519 (Bom.)	**referred to**	**Para 14**
(2009) 318 ITR 149 (Bom)	**referred to**	**Para 15**
(2009) 317 ITR 386 (MP)	**referred to**	**Para 16**
(2011) 335 ITR 591 (Delhi)	**referred to**	**Para 16**
(2011) 331 ITR 449 (P&H)(FB)	**referred to**	**Para 17**
(2011) 337 ITR 515 (Chhattisgarh)	**referred to**	**Para 18**
(2005) 275 ITR 244 (Mad.)	**referred to**	**Para 18**
(2011) 337 ITR 385 (Ker)	**referred to**	**Para 18**

A	**(2015) 16 SCC 176**	**referred to**	**Para 21**
	(2015) 14 SCC 704	**referred to**	**Para 22**
	2007 (208) ELT 321 (SC)	**relied on**	**Para 24**
	2006 (204) ELT 517 (SC)	**relied on**	**Para 24**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 19650 of 2017.

From the Judgment and Order dated 19.04.2011 of the High Court
C of Delhi at New Delhi in ITA No. 44/2005

WITH

Civil Appeal No.19651 of 2017.

Arijit Prasad, T. M. Singh, Ms. N. Annapoorni, Mrs. Anil Katiyar, Advs for the Appellant.
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S. B. Upadhyay, Sr. Adv, Pawan Upadhyay, Sarvjit Pratap Singh, Nishant Kr., Ms. Sharmila Upadhyay, Salil Kapoor, Sumit Lalchandani, Kamal Mohan Gupta, Advs for the Respondent.

The Judgment of the Court was delivered by

E **SANJAY KISHAN KAUL, J.** 1. Leave granted.

2. The propensity of Government Departments and public authorities to keep litigating through different tiers of judicial scrutiny is one of the reasons for docket explosion. The Income Tax Department of the Government of India is one of the major litigants. There are two
F departmental scrutinies at the level of the Assessing Officer and the Commissioner of Income Tax (Appeals) and thereafter an independent judicial scrutiny at the Income Tax Appellate Tribunal (hereinafter referred to as the 'ITAT') level followed by the legal issue which can be inquired into by the High Courts. The last tier is, of course, the jurisdiction
G under Article 136 of the Constitution of India before the Supreme Court.

3. Mindful of the phenomenon of the docket explosion and the rising litigation in the country, the Union of India in order to ensure the conduct of responsible litigation framed what is today known as the National Litigation Policy, to bring down the pendency of cases and get meaningful issues decided from the judicial forums rather than multiple
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tiers of scrutiny just for the sake of it. The Government, being a litigant in well over 50 per cent of the cases, has to take a lead in not being a compulsive litigant.

4. It is towards the aforesaid avowed object that the Income Tax Department, from time to time, has come out with administrative circulars/ notifications for the Department not to litigate where the revenue impact is low.

5. In the present proceedings, we are concerned with the implementation of Instruction No.3 of 2011 dated 9.2.2011, providing for appeals not to be filed before the High Court(s) where the tax impact was less than Rs.10 lakh. It also contains certain other conditions which will be reverted to later, but suffice to say that this Instruction was in supersession of the earlier Instruction No.1979 of 2000 dated 27.3.2000 where the limit of the tax effect was Rs.4 lakh. The Instruction/Circular in question is stated to have a prospective effect as per the Revenue and, thus, cases which were pending in the High Court(s) and had been filed prior to the Instruction in question (Instruction No.3) but had tax effect of less than Rs.10 lakh were, thus, required to be determined on their merits and not be dismissed by applying the circular/instruction.

6. There has been a divergence of legal opinion on this aspect amongst the High Courts.

7. There have also been certain orders passed by this Court which appear to have a divergence of view and we consider it necessary to examine this issue in detail so that conflicting orders do not arise and the High Courts are also guided appropriately. This is also necessary, as in the mean time, a large number of cases have been disposed of on the application of the Instruction/Circular in question though the appeals were preferred by the Revenue prior to the Instruction/Circular being issued as a large number of High Courts took that view.

High Courts of the View that the Circular in question would apply to pending appeals as well:

A. ***Karnataka High Court:***

8. ***Commissioner of Income Tax, Bangalore v. Ranka & Ranka***[1]. The issue was squarely addressed by the Division Bench of the Karnataka High Court recognizing that the concept of providing the

[1]2012(284) ELT 185 (Kar.)

A monetary limit was not new and has been invoked from 1992. The limit was raised from time to time. The clause in the circular has explained the meaning of 'Tax Effect' as the "difference between the tax on 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 issues against which appeal is intended to be filed without impact of interest." The different clauses protected the interest of the Revenue so as not to have any precedentiary impact. There were, however, certain exclusions from this, i.e., challenge to constitutional validity of an Act or Rule, declaration of any Board Order, Notification, Instruction or Circular being held to be illegal or *ultra vires*, audit objections of the Revenue Department being accepted by the Department. These Circulars have been given statutory recognition having been issued under Section 268A of the Income Tax Act, 1961 (hereinafter referred to as the 'IT Act').

9. The judgment took note of the fact that the Madras High Court, Kerala High Court, Chhattisgarh High Court and the Punjab and Haryana High Court had taken a contra view, opining that the existing Circular/ Instruction prevailing at the relevant time when the appeal/reference was made would apply and there would be no retrospective application of the circular. On the other hand, the Bombay High Court, Madhya Pradesh High Court, Delhi High Court had taken the view, which was sought to be taken by the Karnataka High Court.

10. The line of reasoning adopted is that as the value of money went down and the cases of the Revenue increased, the choking docket required such an endeavour and there is no reason why the same policy should not be applied to old matters to achieve the objective of the policy laid down by the Central Board of Direct Taxes ('CBDT'). An earlier Circular dated 5.6.2007 issued by the CBDT was also taken note of, which required all appeals pending before the Court to be examined, with direction to withdraw the cases wherein criteria for monetary limit as per prevailing instructions was not satisfied unless the question of law involved or raised in the appeal referred to High Court was of recurring nature, and therefore, required to be settled by a higher court.

11. The Bench considered the issuance of the Circular in the conspectus of the National Litigation Policy Document Released. The said Policy Document which has been extracted in the judgment for its reliance has been reproduced hereinunder:

"*Introduction*

Whereas at the National consultation for strengthening the judiciary toward reducing pendency and delays held on October 24/25, 2009, the Union Minister for 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.

A - 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.

B - 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 C decide" must be eschewed and condemned—

3. The purpose underlying this policy is also to reduce the 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 principles incorporated in the National mission for judicial D reforms which includes identifying bottlenecks 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 E categories requiring assistance must be given utmost priority.

In respect of filing of appeals in revenue matters it is stated as under:

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

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(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 G 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 H 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 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."

12. We consider it appropriate to refer to some of the observations in the judgment of the Karnataka High Court, which have our imprimatur, as under:

"22. The Government has formulated 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. Its aim is to transform Government into an efficient and responsible litigant. "Efficient litigant" means ensuring that good cases are won and bad cases are not needlessly persevered with. The litigation should not be resorted to for the sake of litigating. 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. The purpose underlying this policy is also to reduce the 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 average pendency time from 15 years to

A 3 years. All pending cases involving the Government has to be reviewed with the intention of filtering frivolous and vexatious matters from the meritorious one. Panels have to 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 the cases which are found without merit. Such cases have to be withdrawn. This must be done in a time bound fashion.

23. Instruction No. 3 of 2011 is issued subsequent to the aforesaid National Litigation Policy. A perusal of the aforesaid policy makes it clear that though the said instruction was issued as a measure for reducing litigation, it was issued in supersession of the earlier instruction enhancing the monetary limits and prescribing certain conditions. The very fact that clause 11 provides that this instruction will apply to appeals filed on or after February 9, 2011, and where appeals have been filed before that date, the same will be governed by the instructions on this subject, operative at the time when the said appeal was filed, makes it clear that the said instruction is not applicable to the pending proceedings. The National Litigation Policy provides that appeals in revenue matters should not be filed if the stakes are not high and are less than that amount to be fixed by the Revenue authorities, it equally provided that cases which are found without merit should be withdrawn. Similarly, cases which are covered by the decision of the courts also have to be withdrawn. For that purpose, a nodal officer has to be appointed and all pending cases have to be reviewed and frivolous and vexatious matters have to be filtered from the meritorious cases and the same are withdrawn. In other words, the National Litigation Policy dealt with the pending cases and wanted the pending cases to be reduced by way of withdrawal, so that valuable time of the courts would be spent in resolving other pending cases so as to achieve the goal in the National Legal Mission to reduce the average pendency from time from 15 years to 3 years.

24. The National Litigation Policy expressly stated that the Government must cease to be a compulsive litigant. The philosophy, that the matters should be left to the courts for ultimate decision is to be discarded and the easy approach that "let the court decide",

must be eschewed and condemned. The Revenue has not applied its mind in this direction. No attempt is made to reduce the pendency of the litigation by filtering frivolous and vexatious matters from meritorious ones and the said cases are withdrawn. The only measure taken for reducing the litigation is, by raising the monetary limit. However, as the same is made prospective, it had no application to the pending cases. Therefore, the said Instruction No. 3 of 2011 do not fulfil the requirement prescribed by the National Litigation Policy. It only partially satisfies the requirement in respect of future litigation. Under the aforesaid instruction, the crucial date is the date of filing of the appeal. It is that date when the tax effect is less than the monetary limit prescribed, the Revenue is precluded from filing such appeals. Though the date of filing of the appeal may be the criteria, that by itself would not provide a rationale sufficient to distinguish between pending cases and cases to be filed in future. The earlier monetary limit was fixed in the year 2005. So it is after six years, the monetary limit is enhanced. If only Instruction No. 3 of 2011 had been made applicable to the pending cases also, as laid down in the National Litigation Policy, the object of the policy would have been fulfilled. One of the ways of giving effect to the said policy is to make that instruction applicable retrospectively to all pending appeals as on the date of the circular. It would substantially serve the object of the policy.

25. It is in this context, the question arises, when the instruction expressly states that the benefit of the said policy is prospective, still can the courts place a construction on such instruction so as to make it retrospective. In this context, the apex court in the case of *CCE v. Mysore Electricals Industries Ltd. reported in [2006] 204 ELT 517 (SC) : [2007] 8 RC 1*, dealing with the question how a beneficial circular is to be construed, has approached this question in the following manner. At paragraph 13 of the judgment, it is stated that the learned counsel further submitted that the circular being oppressive and against the respondent, has to apply only prospectively and cannot be applied retrospectively. In other words, a beneficial circular has to be applied prospectively. Thus, when the circular is against the assessee they have a right to claim the enforcement of the same

A prospectively. It is further submitted that for the period in question, trade notices had been issued classifying the circuit breakers under heading No. 85.35 or 85.36. When the approved classification was proposed to be revised to reclassify the single panel circuit breakers under heading No.85.37 of the tariff, such re-classification can take effect only prospectively from the date of communication B of the show-cause notice proposing reclassification.

26. Following this judgment, the apex court in the case of Suchitra Components Ltd. v. CCE reported in [2007] 208 ELT 321 (SC) held as under:

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"The point raised by the learned counsel for the appellant is covered by the recent judgment of this court in Civil Appeal No. 4488 of 2005. *CCE v. Mysore Electricals Industries Ltd. reported in [2006] (204) ELT 517 (SC).* In the said judgment, this court held that a beneficial circular has to be applied retrospectively D while oppressive circular has to he applied prospectively. Thus, when the circular is against the assessee, they have the right to claim the enforcement of the same prospectively."

27. 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 E 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 F 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.

28. It is also not out of context to mention that periodically, the Revenue introduces what is called as the Kar Vivadh Samadhan G Scheme and the Voluntary Disclosure of Income Scheme to annul black money and to give benefit to persons who are not prompt in filing returns and paying tax. But unfortunately, persons who are paying tax regularly but have succeeded before the Tribunal in showing that there is no tax liability, are made to face these

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litigations, instead of concentrating their time and energy in productive work. Under these circumstances, we are of the view that it is settled law that any notification issued under this fiscal legislation granting exemption from payment of tax has to be construed strictly. Any circulars/instructions issued conferring the benefit on the assessees who are still to come to the court and who already inside the court, at any rate, if such a benefit is given to the pending matters, it would be only in the nature of one-time settlement, which most of the financial institutions throughout the country extend to defaulters who have borrowed money and who refuse to pay the same.

29. 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 are 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

A of the court, the time of the Department and public time in general and giving effect to the Nation Litigation Policy, 2011, so that it can be used for better and productive purpose."

13. The Division Bench also pointed out the anomaly in the working of the Circular, were it to apply only prospectively, in the following words:

B "31. 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 C 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 D 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, E 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, if it is held to be prospective only. It could be saved from such vice of discrimination by holding it as retrospective.

F 32. 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 G 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

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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 in appeal in various courts and Tribunals on the date of the circular/instruction."

B. *Bombay High Court:*

14. ***Commissioner of Income Tax v. Pithwa Engg. Works***[2]: This judgment of the Division Bench pertains to the Circular dated 27.3.2000 enhancing the previous limit but the ratio is the same.

15. In ***Commissioner of Income Tax v. Madhukar K. Inamdar (HUF)***[3] the Circular dated 15.5.2008 was examined, opining that it was in public interest if the Revenue concentrates on the cases wherein tax effect is substantially high rather than running after the assessees wherein the tax impact is less than Rs.4 lakhs, considering the cost of litigation and other administrative cost which may be much more than the tax recovery, especially in the context of the Circular dated 5.6.2007 requiring the current matters also to be examined.

C & D. *Madhya Pradesh High Court & Delhi High Court:*

16. In ***Commissioner of Income Tax v. Ashok Kumar Manibhai Patel & Co.***[4] and ***Commissioner of Income Tax v. P.S. Jain & Co.***[5]: In both the above cases, the Circular in question was dated 27.3.2000, but the ratio is the same.

High Courts of the View that the Circular in question would apply only prospectively:

A. *Punjab & Haryana High Court:*

17. In ***Commissioner of Income Tax v. Varindera Construction Co.***[6] Instruction No.5/2008 dated 15.5.2008 was held to apply only prospectively. The Court disagreed with the view taken by other High Courts to the contra.

[2] (2005) 276 ITR 519 (Bom.)
[3] (2009) 318 ITR 149 (Bom)
[4] (2009) 317 ITR 386 (MP)
[5] (2011) 335 ITR 591 (Delhi)
[6] (2011) 331 ITR 449 (P&H)(FB)

A **B, C & D.** ***Chhattisgarh High Court; Madras High Court & Kerala High Court:***

18. In ***Commissioner of Income Tax v. Navbharat Explosives Co. P. Ltd.***[7]***; Commissioner of Income Tax v. Kodanand Tea Estates Co***[8]. and ***CWT v. John L. Chackola***[9]**,** the opinion is to the same effect
B as aforesaid applying the circular prospectively as they state so.

The view of the Supreme Court:

19. The view adopted by the Delhi High Court making the Circular applicable to pending matters came up before a three Judge Bench of
C this Court in SLP(C) No.CC 13694/2011 titled ***CIT Central-III v. Surya Herbal Ltd.*** when the following order was passed on 29.8.2011:

"Delay condoned.

D Liberty is given to the Department to move the High Court pointing out that the Circular dated 9th February, 2011, should not be applied *ipso facto*, particularly, when the matter has a cascading effect. There are cases under the Income Tax Act, 1961, in which a common principle may be involved in subsequent group of matters or large number of matters. In our view, in such cases if attention
E of the High Court is drawn, the High Court will not apply the circular *ipso facto*. For that purpose, liberty is granted to the Department to move the High Court in two weeks.

The Special Leave Petition is, accordingly, disposed of."

F 20. The aforesaid order, in our view, actually should have laid the controversy to rest. The retrospective applicability of the Circular dated 9.2.2011 was not interfered with, but with two caveats – (i) Circular should not be applied by the High Courts *ipso facto* when the matter had a cascading effect; (ii) where common principles may be involved
G in subsequent group of matters or a large number of matters. It was opined that in such cases, the attention of the High Court would be drawn and the Department was even given liberty to move the High

[7] (2011) 337 ITR 515 (Chhattisgarh)

[9] (2005) 275 ITR 244 (Mad.)

H [9] (2011) 337 ITR 385 (Ker)

Court in two weeks. In our view this order holds the field and should continue to hold the field.

21. Unfortunately, this order was not brought to the notice of the subsequent two Judges Bench of this Court in ***Commissioner of Income Tax-VII, New Delhi v. Suman Dhamija***[10] again arising from a Delhi High Court order, wherein it was simply stated that since the appeals were preferred before 2011 and the Instructions were dated 9.2.2011, the earlier cases would not be covered by the Instruction. This order in turn had been followed by another two Judges Bench in Civil Appeal No.16815/2017 titled ***The Commissioner of Income Tax Bangalore I & Anr. v. M/s. Gemini Distilleries*** dated 12.10.2017.

22. Once again, in another matter ***Commissioner of Income Tax &Anr. V. Century Park***[11], the line adopted by the three Judges Bench in ***Surya Herbal Ltd.*** case (supra) has been followed.

23. We have already given our imprimatur to the observations made by the Karnataka High Court in a detailed analysis in ***Ranka & Ranka*** case (supra), which has dealt with the litigation policy philosophy behind applying the Circular and the benefit being extended in view thereof to all Assessees where appeals have been pending, but below the financial limit, as otherwise an anomalous situation would arise.

24. We may also take note of the judgment of this Court in ***Suchitra Components Ltd. v. Commissioner of Central Excise, Guntur***[12] on the general principle of application of Circulars. Reliance was placed on the view expressed in ***Commissioner of Central Excise, Bangalore v. Mysore Electricals Industries Ltd.***[13] opining that a beneficial circular has to be applied retrospectively while an oppressive circular has to be applied prospectively.

25. We are of the view that the matter needs to be put to rest and a clarity be obtained in view of the impact of this issue on pending cases before the High Courts as well as the cases which have been disposed of by various High Courts by applying the Circular of 2011 to pending

[10] (2015) 16 SCC 176
[11] (2015) 14 SCC 704
[12] 2007 (208) ELT 321 (SC)
[13] 2006 (204) ELT 517 (SC)

A litigations. In our view the matter has been squarely put to rest taking further care of the interest of the Revenue by the order passed by the three Judges Bench of this Court in ***Surya Herbal Ltd.*** case (supra), which had put two caveats even to the retrospective application of the Circular. The subsequent orders have been passed by the two Judges Bench without those orders being brought to the notice of the Court, a B duty which was cast on the Department to have done so to avoid the ambiguity which has arisen. Thus, the said view of the three Judges Bench would hold water and the Circular would apply even to pending matters but subject to the two caveats provided in ***Surya Herbal Ltd.*** case (supra).

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26. The appeals of the Revenue are, thus, dismissed in the aforesaid terms.

Devika Gujral Appeals dismissed.