2017 (11) TMI 919 - RAJASTHAN HIGH COURT

Commissioner of Income Tax, Jaipur-II, Jaipur Versus M/s Gad Fashion

D. B. Income Tax Appeal No. 575 / 2008

Dated: - 10 November 2017

Monetary limit for filing an appeal - power of CBDT u/s 119 - retrospective effect - Department acted contrary to the Circular issued by CBDT in pursuance of Section 268A - scope of amendment - Held that:- From the policy which has been referred by different High Courts and the intention of the legislation to reduce the pendency of the tax appeal and to have a uniform policy for the department through-out the Country, therefore, the direction issued by the CBDT is binding on all subordinate officers and Section 268A(4) which has been amended with retrospective effect is applicable with all force in pending matters.The intention of the legislation is very clear to prohibit the appeal analogous to the provisions of Code of Civil Procedure where there is a prohibition that appeal upto the value will not be entertained by the Court.

The Circular issued by the CBDT under Section 268A of the Act of 1961 is binding on the Department thus the appeal cannot be preferred contrary to the instructions given therein. This Court, however, cannot lose sight of the only issue raised by the Department in reference to Article 141 of the Constitution of India. If an issue has been decided by the Apex Court then the ratio propounded therein is to be applied as a precedence. If the Tribunal or the CIT (Appeals) takes a view contrary to the settled law then rider imposed by the CBDT on filing of appeal cannot be applied. If we hold that appeal would not be maintainable even if the Tribunal or the CIT (Appeals) has taken view contrary to the judgment of the Supreme Court then Article 141 of the Constitution of India would be violated. No statutory provision can stand or be read contrary to the constitutional provision.

In view of the above, theory of reading down needs to be applied for making Circular of the CBDT in consonance to the provisions of the Constitution of India otherwise it would not only cause judicial indiscipline but give rise to the anarchy, leading to serious consequences.

Accordingly, the Circular issued by the CBDT under Section 268A of the Act of 1961 is held binding on the Department thus appeal cannot be filed, if it is barred. It is, however, with a clarification that if the issue decided by the CIT (Appeals) or Tribunal is contrary to the judgments of the Supreme Court, the Department can prefer an appeal, however, care would be taken to file it only in those cases where the order passed by the CIT (Appeals) or the Tribunal is contrary to the ratio propounded by the Supreme Court on the same issue. In doing so, sanctity of Article 141 of the Constitution of India would be maintained, thereby, serious consequences of taking different view would also be avoided. The Department may incorporate it in the Circular to avoid further controversy. - Decided in favour of assessee.

Judgment / Order

Justice K. S. Jhaveri, Justice M. N. Bhandari And Justice Inderjeet Singh

For the Appellant : Mr. R.B.Mathur with Mr. Prateek Kedawat and Ms. Meenal Ghiya, Mr. Sameer Jain with Ms. Mahi Yadav, Mr. Daksh Pareek and Mr. Arjun Singh & Mr. Anuroop Singhi with Mr. Aditya Vijay and Mr. Narendra Singh Bhati

For the Respondent : Mr. Sanjay Jhanwar with Mr. Atul Saxena, Mr. Ankit Sareen, Mr. Rajat Sharma and Mr. Sanjeev Pandey

ORDER

Per Hon'ble Jhaveri & Inderjeet Singh, JJ.

1. By way of reference, this Court vide order dated 05.07.2017 framed the following reference for consideration by the larger Bench.

> *"Whether the Department can take a contrary view than the circular which has been issued for reduction of arrears in the Supreme Court, High Courts and Tribunals and insist for arguing the matter on merits."*

2. The statutory provision which is required to be considered by us reads as under:

> *"268A. Filing of appeal or application for reference by income-tax authority.- (1) The Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income-tax authority under the provisions of this Chapter.*
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> *(2) Where, in pursuance of the orders, instructions or directions issued under sub- section (1), an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of-*
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> *(a) the same assessee for any other assessment year; or*
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> *(b) any other assessee for the same or any other assessment year.*
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> *(3) Notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders or instructions or directions issued under sub-section (1), it shall not be lawful for an assessee, being a party in any appeal or reference, to contend that the income- tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.*
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> *(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under sub-section (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case.*
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> *(5) Every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly."*

3. Another statutory provision which is required to be considered reads as under:

> *"119. Instructions to subordinate authorities.- (1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :*
>
> *Provided that no such orders, instructions or directions shall be issued-*
>
> *(a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or*
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> *(b) so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions.*
>
> *(2) Without prejudice to the generality of the foregoing power,-*
>
> *(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of sections 115P, 115S, 115WD, 115WE, 115WF, 115WG, 115WH, 115WJ, 115WK, 139, 143, 144, 147, 148, 154, 155 , 158BFA, sub-section (1A) of section 201, sections 210, 211, 234A, 234B, 234C, 271 and 273 or otherwise), general or special orders in respect of any class of incomes or fringe benefits or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income-tax authorities in the work relating to*

assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise any income-tax authority, not being a Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law;

(c) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order for reasons to be specified therein, relax any requirement contained in any of the provisions of Chapter IV or Chapter VI-A, where the assessee has failed to comply with any requirement specified in such provision for claiming deduction thereunder, subject to the following conditions, namely:-

(i) the default in complying with such requirement was due to circumstances beyond the control of the assessee; and

(ii) the assessee has complied with such requirement before the completion of assessment in relation to the previous year in which such deduction is claimed :

Provided that the Central Government shall cause every order issued under this clause to be laid before each House of Parliament."

4. The circulars which are the subject matter of this petition read as under:

"INSTRUCTION NO.3/2011 (F.NO.279/MISC.142/2007-1TJ)

SECTION 268A OF THE INCOME-TAX ACT,1961- APPEALS AND REVISION- FILING OF APPEAL OR APPLICATION FOR REFERENCE BY INCOME-TAX AUTHORITY- REVISION OF MONETARY LIMITS FOR FILING OF APPEALS BY THE DEPARTMENT BEFORE INCOME TAX APPELLATE TRIBUNAL, HIGH COURTS AND SUPREME COURT- MEASURES FOR REDUCING LITIGATION

Reference is Invited to Board's instruction No. 5/2008 dated 15-5-2008 wherein monetary limits and other conditions for filing departmental appeals (In Income-tax matters) before Appellate Tribunal, High Courts and Supreme Court were specified.

2. In supersession of the above instruction, it has been decided by the Board that departmental appeals may be filed on merits before Appellate Tribunal, High Courts and Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth appeals shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:-

S. No.	*Appeals in Income-tax matters*	*Monetary Limit (In Rs.)*
1.	*Appeal before Appellate Tribunal*	*3,00,000*
2.	*Appeal u/s 260A before High Court*	*10,00,000*
3.	*Appeal before Supreme Court*	*25,00,000*

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, "tax effect" means the difference between the tax on the 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 (hereinafter referred to as "disputed Issues"). However the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/judgment involves more than one assessee, each assessee shall be dealt with separately.

6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

7. In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value. As the evidence of not filing appeal due to this instruction may have to be produced in courts, the judicial folders in the office of CSIT must be maintained in a Systemic manner for easy retrieval.

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.

9. The proposal for filing Special Leave Petition under Article 136 of the Constitution before the Supreme Court should, in all cases, be sent to the Directorate of Income- tax (Legal & Research), New Delhi and the decision to file Special Leave Petition shall be in consultation with the Ministry of Law and Justice.

10. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income-tax, filing of appeals in other direct tax matters shall continue to be governed by relevant provisions of

statute and rules. Further, filing of appeal in cases of Income-tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A of the IT Act, 1961, shall not be governed by the limits specified in para 3 above and decision to file appeal in such cases may be taken on merits of a particular case.

11. This instruction will apply to appeals filed on or after 9th February 2011. However, the cases where appeals have been filed before 9th February 2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed.

12. This issues under section 268A(1) of the Income-tax Act, 1961."

"Circular No. 21/2015

F No 279/Misc. 142/2007-ITJ (Pt

Government of India Ministry of Finance

Department of Revenue Central Board Direct Taxes

New Delhi the 10th December, 2015

Subject: Revision of monetary limits for filing of appeals by the Department before Income Tax Appellate Tribunal and High Courts and SLP before Supreme Court - measures for reducing litigation - Reg -

Reference is invited to Board's instruction No 5/2014 dated 10.07.2014 wherein monetary limits and other conditions for filing departmental appeals (in Income-tax matters) before Appellate Tribunal and High Courts and SLP before the Supreme Court were specified.

2. In supersession of the above instruction, it has been decided by the Board that departmental appeals may be filed on merits before Appellate Tribunal and High Courts and SLP before the Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth, appeals/ SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder: -

S.No	*Appeals in Income-tax matters*	*Monetary Limit (in Rs.)*
1.	*Before Appellate Tribunal*	*10,00,000/-*
2.	*Before High Court*	*20,00,000/-*
3.	*Before Supreme Court*	*25,00,000/-*

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, "tax effect" means the difference between the tax on the 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 (hereinafter referred to as "disputed issues"). However the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/ judgement involves more than one assessee, each assessee shall be dealt with separately.

6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

7. In the past, a number of instances have come to the notice of the Board, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other assessee for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counselsmust make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not filed or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value. As the evidence of not filing appeal due to this instruction may have to Page 2 of 4 be produced in courts, the judicial folders in the office of CSIT must be maintained in a systemic manner for easy retrieval.

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 provision 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. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute & rules. Further, filing of appeal in cases of Income Tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under se the IT Act, 1961, shall not be governed by the limits specified in para 3 above and decision to file appeal in such cases may be taken on merits of a particular case.

10. This instruction will apply retrospectively to pending appeals and applications be filed henceforth in High Courts/ Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed.

Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed.

11. This issue under Section 268A (1) of the Income-tax Act 1961."

5. Counsel for the Department Mr. R.B. Mathur has relied upon the following decisions:

(i) K.P. Varghese vs. Income Tax Officer, Ernakulam and Anr.(04.09.1981 – SC), [1981]131ITR597(SC)

11. There is also one other circumstance which strongly reinforces the view we are taking in regard to the construction of Sub-section (2). Soon after the introduction of Sub-section (2), the Central Board of Direct Taxes, in exercise of the power conferred under Section 119 of the Act, issued a circular dated 7th July, 1964 explaining the scope and object of Sub-section (2) in the following words:

Section 13 of the Finance Act has introduced a new Sub-section (2) in Section 52 of the Income-tax Act with a view to countering evasion of tax on capital gains through the device of an under-statement of the full value of the consideration received or receivable on the transfer of a capital asset.

The provision existing in Section 52 of the Income-tax Act before the amendment (which has now been remembered as Sub-section (2) enables the computation of capital gains arising on transfer of a capital asset with reference to its fair market value as on the date of its transfer, ignoring the amount of the consideration shown by the assessee, only if the following two conditions are satisfied:

(a) the transferee is a person who is directly or indirectly connected with assessee, and

(b) the Income-tax Officer has reason to believe that the transfer was effected with object of avoidance or reduction of the liability of assessee to tax on capital gains.

In view of these conditions, this provision has a limited operation and does not apply to other cases where the tax liability on capital gains arising on transfer of capital assets between parties not connected with each other, is sought to be avoided or reduced by an under-statement of the consideration paid for the transfer of the asset.

The circular also drew the attention of Income- tax Authorities to the assurance given by the Finance Minister in his speech that Sub-section (2) was not aimed at perfectly honest and bonafide transactions where the consideration in respect of the transfer was correctly disclosed or declared by the assessee, but was intended to deal only with cases where the consideration for the transfer was under-stated by the assessee and was shown at a lesser figure than that actually received by him. It appears that despite this circular, the Income-tax Authorities in several cases levied tax by invoking the provision in Sub-section (2) even in cases where the transaction was perfectly, honest and bonafide and there was no under-statement of the consideration. This was quite contrary to the instructions issued in the circular which was binding on the Tax Department and the Central Board of Direct Taxes was, therefore, constrained to issue another circular on 14th January, 1974 whereby the Central Board, after reiterating the assurance given by the Finance Minister in the course of his speech pointed out:

It has come to the notice of the Board that in some cases the Income-tax Officers have invoked the provisions of Section 52(2) even when the transactions were bonaflde. In this context reference is invited to the decision of the Supreme Court in Navnitlal C. Jhaveri v. K.K. Sen [1965]56ITR198(SC) and Ellerman Lines Ltd. v. Commissioner of Income-tax, West Bengal [1971]82ITR913(SC) wherein it was held that the circular issued by the Board would be binding on all officers and persons employed in the execution of the Income-tax Act. Thus, the Income-tax Officers are bound to follow the instructions issued by the Board.

and instructed the Income-tax Officers that "while completing the assessments they should keep in mind the assurance given by the Minister of Finance and the provisions of Section 52(2) of the Income-tax Act may not be invoked in cases of bonafide trans-actions". These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in Sub-section (2), but quite apart from their binding character, they are clearly in the nature of contemporanea exposition furnishing legitimate aid in the construction of Sub-section (2). The rule of construction by reference to contemporanea exposition is a well established rule for interpreting a statute by reference to the exposition it has

received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction (1940 ed) where it is stated in paragraph 219 that "administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight; it is highly persuasive." The validity of this rule was also recognised in Baleshwar Bagarti v. Bhagirathi Dass ILR 35 Cal. 701 where Mookerjee, J. stated the rule in these terms:

It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it.

and this statement of the rule was quoted with approval by this Court in Deshbandhu Guptu & Co. v. Delhi Stock Exchange Association Ltd. [1979]3SCR373 . It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act, understood Sub-section (2) as limited to cases where the consideration for the transfer has been under-stated by the assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on that sub-section.

12. But the construction which is commending itself to us does not rest merely on the principle of contemporanea exposition. The two circulars of the Central Board of Direct Taxes to which we have just referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of Sub-section (2) and they depart or deviate from such construction. It is now well-settled as a result of two decisions of this Court, one in Navnitlal C. Jhaveri v. K.K. Sen [1965]56ITR198(SC) and the other in Ellerman Lines Ltd. v. Commissioner of Income-tax, West Bengal [1971]82ITR913(SC) that circulars issued by the Central Board of Direct Taxes under Section 119 of the Act are binding on all Officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act. The question which arose in Navnitlal C. Jhaveri's case (supra) was in regard to the constitutional validity of Sections 2(6A)(e) and 12(1B) which were introduced in the Indian Income Tax Act 1922 by the Finance Act 1955 with effect from 1st April, 1955. These two sections provided that any payment made by a closely held company to its shareholder by a way of advance or loan to the extent to which the company possesses accumulated profits shall be treated as dividend taxable under the Act and this would include any loan or advance made in any previous year relevant to any assessment year prior to the assessment year 1955-56, if such loan or advance remained outstanding on the first day of the previous year relevant to the assessment year 1955-56. The constitutional validity of these two sections was assailed on the ground that they imposed unreasonable restrictions on the fundamental right of the assessee under Article 19(1)(f) and (g) of the Constitution by taxing outstanding loans or advances of past years as dividend. The Revenue however relied on a circular issued by the Central Board of Revenue under Section 5(8) of the Indian Income-tax Act 1922 which corresponded to Section 119 of the Present Act and this circular provided 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 to whom such loans or advances were given. This circular was clearly contrary to the plain language of Section 2(6A)(e) and Section 121(B), but even so this Court held that it was binding on the Revenue and since "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)"

Sections 2(6A)(e) and 12(1B) did not suffer from the vice of unconstitutionality. This decision was followed in Ellerman Lives case (supra) where referring to another circular issued by the Central Board of Revenue under Section 5(8) of the Indian Income Tax Act 1922 on which reliance was placed on behalf of the assessee, this Court observed:

Now, coming to the question as to the effect of instructions issued under Section 5(8) of the Act, this Court observed in Navnit Lal C. Jhaveri v. K.K. Shah Appellate Assistant Commissioner, Bombay.

It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under Section 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision.

The directions given in that circular clearly deviated from the provisions of the Act, yet this Court held that circular was binding on the Income-tax Officers.

The two circulars of the Central Board of Direct Taxes referred to above must therefore be held to be binding on the Revenue in the administration or implementation of Sub-section (2) and this sub section must be read as applicable only to cases where there is under- statement of the consideration in respect of the transfer.

(ii) Commissioner of Central Excise, Bolpur vs. Ratan Melting and Wire Industries (14.10.2008 – SC), (2008) 13 SCC 1.

5. Learned counsel for the assessee on the other hand submitted that once the circular has been issued it is binding on the revenue authorities and even if it runs counter to the decision of this Court, the revenue authorities cannot say that they are not bound by it. The circulars issued by the Board are not binding on the assessee but are binding on revenue authorities. It was submitted that once the Board issues a circular, the revenue authorities cannot take advantage of a decision of the Supreme Court. The consequences of issuing a circular are that the authorities cannot act contrary to the circular. Once the circular is brought to the notice of the Court, the challenge by the revenue should be turned out and the revenue cannot lodge an appeal taking the ground which is contrary to the circular.

6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

7. As noted in the order of reference the correct position vis-à-vis the observations in para 11 of Dhiren Chemical's case (supra) has been stated in Kalyani's case (supra). If the submissions of learned Counsel for the assessee are accepted, it would mean that there is no scope for filing an appeal. In that case, there is no question of a decision of this Court on the point being rendered. Obviously, the assessee will not file an appeal questioning the view expressed vis- a-vis the circular. It has to be the revenue authority who has to question that. To lay content with the circular would mean that the valuable right of challenge would be denied to him and there would be no scope for adjudication by the High Court or the Supreme Court. That would be against very concept of majesty of law declared by this Court and the binding effect in terms of Article 141 of the Constitution.

(iii) Kalyani Packaging Industry vs. Union of India (UOI) (06.05.2004 – SC), (2004) 6 SCC 719

4. This Court has, in the case of Collector of Central Excise, Vadodara v. Dhiren Chemical Industries reported in MANU/SC/0787/2001, clarified that when an exemption Notification uses the words "has already been paid", the benefit of that Notification would only be available if duty has, as a matter of fact, been paid and has been paid at the appropriate or correct rate. It is held that where the raw material is not liable to excise duty or to "nil" rate of duty then, as a matter of fact, no duty is paid and to such goods benefit of an exemption Notification will not be available.

5. It was however sought to be submitted that in Para 9 of Dhiren Chemical's case (supra) it has been clarified that in spite of the interpretation given by this Court, if there are any circulars issued by the Central Board of Excise and Customs which place a different interpretation, that interpretation would be binding upon the Revenue. It is

submitted that Dhiren Chemical's case thus lays down that an interpretation given in Circulars would prevail over the interpretation given by a Constitution Bench of this Court. In support of this submission reliance is placed on a decision dated 22nd January, 2004 in 2004(164)ELT394(SC) [Civil Appeal No. 9924 of 1996] entitled Collector of Central Excise, Meerut v. Maruti Foam (P) Ltd. wherein relying upon Para 9 of Dhiren Chemical's case it is held that the Circular would be binding on the Revenue.

6. We have noticed that Para 9 of Dhiren Chemical's case is being misunderstood. It therefore becomes necessary to clarify Para 9 of Dhiren Chemical's case. One of us (Variava, J.) was a party to the Judgment of the Dhiren Chemical's case and knows what was the intention in incorporating Para 9. It must be remembered that law laid down by this Court is law of the land. The law so laid down is binding on all Courts/Tribunals and Bodies. It is clear that circulars of the Board cannot prevail over the law laid down by this Court. However, it was pointed out that during hearing of Dhiren Chemical's case because of circulars of the Board in many cases the Department had granted benefits of exemption Notifications. It was submitted that on the interpretation now given by this Court in Dhiren Chemical's case, the Revenue was likely to reopen cases. Thus Para 9 was incorporated to ensure that cases where benefits of exemption Notification had already been granted, the Revenue would remain bound. The purpose was to see that such cases were not reopened. However, this did not mean that even in cases where Revenue/Department had already contended that the benefit of an exemption Notification was not available, and the matter was sub-judice before a Court or a Tribunal, the Court or Tribunal would also give effect to circulars of the Board in preference to a decision of the Constitution Bench of this Court. Where as a result of dispute the matter is sub-judice a Court/Tribunal is, after Dhiren Chemical's case, bound to interpret as set out in that judgment. To hold otherwise and to interpret in the manner suggested would mean that Courts/Tribunals have to ignore a judgment of this Court and follow circulars of the Board. That was not what was meant by Para 9 of Dhiren Chemical's case.

(iv) Commissioner of Income Tax (CNTL), Ludhiana vs. Hero Cycles Pvt. Ltd., Ludhiana (28.08.1997 – SC) [1997] 228 ITR 463 (SC).

13. We have passed similar orders in a large number of cases but in this case on behalf of the assessee it has been contended that there is a circular issued by Central Board of Direct Taxes, New Delhi which should conclude the matter. A copy of the so-called circular dated 9th April, 1981/13th April, 1981 has been handed over in Court. It does not appear that the document handed over in Court is a copy of Circular at all. It is a letter written to one Shri D'Souza with reference to a letter written by his predecessor.

14. Moreover, it is well-settled that circulars can bind the Income-tax Officer but will not bind the appellate authority or the Tribunal or the Court or even the assessee. There is nothing in the alleged circular which supports the contention of the assessee. It merely says that each case has to be examined and the issue would be basically a find of fact. The assessee had not made his claim before the Income-tax Officer by relying on this Circular.

(v) Bengal Iron Corporation and another vs. Commercial Tax Officer and others (27.04.1993 – SC), AIR 1993 SC 2414.

18. So far as clarifications/circulars issued by the Central Government and/or State Government are concerned, they represent merely their understanding of the statutory provisions. They are not binding upon the Courts. It is true that those clarifications and circulars were communicated to the concerned dealers but even so nothing prevents the State from recovering the tax, if in truth such tax was leviable according to law. There can be no estoppel against the statute, The understanding of the government, whether in favour or against the assessee, is nothing more than its understanding and opinion. It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. while acting in quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Law is what is declared by this Court and the High Court - to wit, it is for this Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament/Legislature never speaks or explains what does a provision enacted by it mean. (See Sanjeev Coke Manufacturing Company v. Bharat Coking Coal Ltd. and Anr. : [1983]1SCR1000).

19. Now coming to G.O. Ms. 383, it is undoubtedly of a statutorily character but, as explained hereinbefore the power under Section 42 cannot be utilised 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 can not 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 utilised 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. Though it is not argued before us, we tried to see the possibility but we find it difficult to relate the order in G.O. Ms. 383 to the power of the Government under Section 9, apart from the fact that the nature and character of the power under Section 42 is different from the one conferred by Section 9. As exemption under Section 9 has to be granted not only by a notification, it is also required to be published in the Andhra Pradesh Gazette. It is not suggested, nor is it brought to our notice, that G.O. Ms. 383 was published in the Andhra Pradesh Gazette. This does not, however, preclude the Government of Andhra Pradesh from exercising the said power of exemption, in accordance with law, if it is so advised. We need express no opinion on that scores.

6. Mr. Sameer Jain appearing for the department has relied on the following decisions:

(i) Commissioner of Central Excise, Bolpur vs. Ratan Melting and Wire Industries, Calcutta (23.02.2005 - SC) 2005 (181) ELT 364 (SC)

3. A disparate view has been taken in CCE v. Maruti Foam Pvt. Ltd. 2004(164)ELT 394 (SC) and Commissioner of Customs, Calcutta and Ors. v. Indian Oil Corporation Ltd. and Anr. [2004]267ITR272(SC) . It appears to us that the law declared by this Court is binding on the Revenue/Department and once the position in law is declared by this Court, the contrary view expressed in the circular should per force lose its validity and becomes non est.

4. Though the view expressed in Kalyani's case (supra), and our view about invalidation might clarify the observations in para 11 of Dhiren Chemical's case (supra), we feel that the earlier judgment in Dhiren Chemical's case (supra),) being by a Bench of five Judges, it would be appropriate for a bench of similar strength to clarify the position. In the circumstances, we refer the matter to a larger bench of five Hon'ble Judges. Let the papers be placed before Hon'ble the Chief Justice of India for constituting an appropriate Bench.

(ii) CIT, Jaipur-III vs. M/S Saraf Exports, ITA No. 7/2014, 04.02.2016

17. We may reiterate and also hasten to add that if the initial assessment order is legally unsustainable & perverse, it need not be followed though for diverse reasons may have attained finality. It may be true that consistency in order is required to be maintained but in our view the claim allowed by the Tribunal in the assessment year 2005-06 and 2006-07 is not sustainable and Tribunal has decided contrary to the law laid down by Apex Court in Liberty India (Supra) and as the said judgment was available before the ITAT who decided the appeals for the Assessment Year 2005-06 and 2006-07. this also highlights that it requires extra cautious approach by the authorities (Revenue) and standing counsels which should not sweep the matters under the carpet taking advantage of monetary limits fixed by CBDT. This Court in Commissioner of Income Tax vs, M/s Garment Cradts in DB ITA No.42/2008 decided on 12.01.2016 held that if a substantial question is covered by the judgment of the Apex Court and this Court and is no more res integra then the circular of Central Board of Direct Taxes about tax effect may not be binding to non-suit the Revenue.

(iii) CIT vs. M/s Gad Fashion, DB ITA No. 937/2008 decided on 26.04.2016

7. Insofar as the argument of the learned counsel for the assessee about the appeals involving tax effect being less than 20 lac is concerned, this bCOurt in Garment Crafts (supra) and M/s Saraf Exports (supra), has already taken a view that if an issue/question issqarely covered by judgment of the Apex Court and of this Court directly, then the Circular is inapplicable. Accordingly the argument of the learned counsel for the assessee in this regard is also rejected. Taking into consideration the above judgments, the question of law is answered in favour of the Revenue and against the assessee.

7. Mr. Anuroop Singhi appearing for the Department has relied upon the following decisions:

(i) CIT vs. Udaipur Mineral Development Syndicate (P) Ltd.,DB ITR No. 32/1995, decided on 12.11.2014

"12. We would first deal with the preliminary objection of the ld. counsel for the assessee as to whether the tax effect being minimal the reference at the instance of this Court deserve consideration. Although the judgments cited by counsel for the assessee has observed that it is applicable not only to the appeals but the old pending references as well, but the other view is that the position has to be seen and has to be governed at the time when the reference application was moved/filed and is thus inapplicable for the old pending references/reference applications. This Court, in the case of CIT v. Rajasthan Patrika Ltd: [2002] 258 ITR 300/125 Taxman 819 (Raj.), came to the following:-

"It is true that in the case of the Supreme Court, which has been referred to by Mr. Ranka, learned counsel for the assessee, their Lordships held that a circular, which interprets the statute for the uniformity of the decisions in the Department. But the circular before us is as to whether the appeal is to be filed or not ? These are administrative instructions and in spite of these administrative instructions if the department prefers to file an appeal or make a reference to this Court, in our view, on such administrative instructions the appeal of the Department should not be dismissed or the reference should not be rejected. We do not find any infirmity in disposing of the appeal on the merits."

13. This Court again, in the case of CIT v. Registhan (P.) Ltd [2003] 132 Taxman 894 (Raj.) also came to the said conclusion of disposal on merits.

14. This Court, in the case of CIT v. Registhan (P.) Ltd: [2004] 186 CTR 260 (Raj.), again held that if the department wants to file reference application, this Court should entertain despite tax amount involved being minimal and directed the Tribunal to refer the question at the instance of this Court.

15. Punjab and Haryana High Court (Full Bench) also, in the case of CIT v. Varindera Construction Co.: [2011] 331 ITR 449/, after analysing the judgments and the circular of the CBDT, came to the conclusion that the circular, laying down monetary limit, controls filing of the appeals but not their hearing. The appeals, filed as per the applicable limit, at the time of filing, cannot be governed by the circular applicable at the time of hearing and Punjab and Haryana High Court dissented from the view of the Bombay High Court and observed that the object of section 268A is to govern monetary limit for filing of the appeals and there is no scope of reaching the circular as being applicable to pending appeals. It further expressed that even Bombay High Court held that the circular was not retrospective and it only observed that having regard to the falling money value and chocking court docket, policy of monetary limit was needed to be adopted for pending matters.

16. The Hon'ble Apex Court, in the case of CIT v. Surya Herbal Ltd: [2013] 350 ITR300 has expressed that the circular dt. 09/02/2011 issued by the Board should not be applied ipso facto, though it also observed that when the matter has a cascading effect in which a common principle may be involved in a subsequent group of matters or a large number of matters. In such cases if the attention of the High Court is drawn, the High Court will not apply the circular ipso facto for the purpose.

17. Thus, we are of the view that once reference has been admitted by this Court u/s256(1) or 256(2), then the matter cannot be disposed off merely because the tax effect is minimal. We dissent with the view expressed by the Bombay High Court and M.P. High Court, relied upon by counsel for the assessee as the judgment rendered by this Court in Rajasthan Patrika Ltd. (supra) and Registhan (P.) Ltd. (supra) is binding on us on the self-same issue and we would choose to follow the view rendered by this court. In our view, once a reference application of the Revenue had been allowed by this Court and reference was called at the instance of this Court, the question of law framed has to be answered on merits, thus the preliminary objection of the counsel for the assessee is rejected."

(ii) CIT vs. Surya Herbal Ltd., [2013] 350 ITR 300 (SC)

"2. Liberty is given to the Department to move the High Court pointing out that the Circular, dt. 9th Feb., 2011, should not be applied ipso facto, particularly, when the matter has a cascading effect. There are cases under the IT 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 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."

8. Mr. Sanjay Jhanwar appearing on behalf of the assessee has relied upon the following decisions:

(i) Commissioner of Income Tax-II and Ors. vs. Shyam Biri Works (06.05.2015 - ALLHC)

5. In 2009, the Central Government formulated a National Litigation Policy to reduce the cases pending in various Courts of India in an attempt to reduce the average pendency time from 15 years to 3 years. The National Litigation Policy reads as under:-

"National Litigation Policy

In this background, it is necessary to notice the 'National Litigation Policy Document Released'. The Centre has formulated the National Litigation Policy to reduce the cases pending in various courts in India under the National Legal Mission to reduce average pendency time from 15 years to 3 years. It reads as under:

'Introduction

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

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.

That nothing will be suppressed from the court and there will be no attempt to mislead any court or tribunal.

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 decide" must be eschewed and condemned-

3. The purpose underlying this policy is also to reduce 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 the average pendency time from 15 years to 3 years. Litigators on behalf of the Government have to keep in mind the principles in corporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritization in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority. In respect of filing of appeals in revenue matter it is stated as under:

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

(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 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 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."

6. This policy was formulated with the purpose that the Central Government would be a responsible litigant and would not be involved in frivolous litigation, especially where the stakes were not high. The policy aimed to transform the government into an efficient and responsible litigant and urged every State Government to evolve similar policies. The policy defined the efficient litigant to mean that the litigation should not be resorted to for the sake of litigating and that the government ceases to a compulsive litigant. The underlying purpose of the policy was to reduce the government litigation in Courts so that valuable court time was spent in resolving other pending issues to enable the average pendency of a case in a court reduced from 15 years to 3 years. The policy, therefore, provided that the government would identify bottlenecks and that the appeals would not be filed where the stakes are not so high and was less than by the amount fixed by the revenue authorities. The policy also formulated that all pending cases involving the government would be reviewed to filter frivolous and vexatious matters from the meritorious one. Such cases so identified would be withdrawn, which would also include cases, which are covered by previous decisions of Courts. Such withdrawal of the cases would be done in a time bound fashion.

11. Previously, only instructions were issued by CBDT under Section 119 of the Act and, in order to give it a legislative measure, a new Section 268A was inserted by the Finance Act, 2008 with retrospective effect from 1st April, 1999 in the Income Tax Act, 1961. For ready reference, the said provision is extracted hereunder:--

"Filing of appeal or application for reference by income-tax authority.

268A. (1) The Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income-tax authority under the provisions of this Chapter.

(2) Where, in pursuance of the orders, instructions or directions issued under sub- section (1), an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of-

(a) the same assessee for any other assessment year; or

(b) any other assessee for the same or any other assessment year.

(3) Notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders or instructions or directions issued under sub-section (1), it shall not be lawful for an assessee, being a party in any appeal or reference, to contend that the income- tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under subsection (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case.

(5) Every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and

(4) shall apply accordingly."

12. Sub-clause (4) of Section 268A of the Act clearly indicates that the Tribunal and the Court shall have regard to all instructions issued under sub-section (1) of the Act by CBDT and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case. Sub-clause (5) indicates that instructions issued by CBDT shall be deemed to have been issued under Section 268 of the Act.

13. The object of introduction of Section 268A of the Act was to regulate the filing of the appeals by the government. The said object is extracted hereunder:-

"The proposed section seeks to provide that the Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income tax authority under the provisions of Chapter XX.

It is further proposed to provide that where, in pursuance of the orders, instructions or directions issued under sub-section (1), an income tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of--

(a) the same assessee for any other assessment year, or

(b) any other assessee for the same or any other assessment year.

It is also proposed to provide that notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders, instructions or directions issued under sub-section (1), it shall not be lawful for an assessee, being a party in any appeal or reference, to contend that the income tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

It is also proposed to provide that the Appellate Tribunal or Court, hearing any appeal or reference had filed under this Chapter, shall have regard to the orders, instructions or directions issued by the Board from time to time either before or after the insertion of this section and the circumstances in which such appeal or application for reference was filed or was not filed in any case; and accordingly the Tribunal or Court shall decide the appeal or the reference on the merits of the issue under consideration.

It is also proposed to provide that every order or instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-

section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly.

This amendment will take effect retrospectively from 1st April, 1999."

15. Numerous rules of interpretation have been formulated by courts. If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the legislature. The duty of the Court is to expound and not to legislate. However, at times, there is a marginal area in which the Court could mould or creatively interpret legislation. The Court in such a situation are called refiners or polishers of legislation. At times there are gaps in the legislation and Courts are called upon to fill in the gaps. Lord Due Parco in Cutler Vs. Wandsworth Stadium Ltd. (1949) 1 All ER 544 was of the view that in some cases it becomes necessary for the courts "to fill in such gaps as Parliament may choose to leave in its enactments".

19. In the instant case, the question is not what the words in the relevant provision mean but what the national litigation policy meant requiring the Courts to interfere and fill in the gaps which was excluded by the legislature. In our view, it is permissible for the Courts to look into the legislative intention and go behind the enactment and take other factors into consideration in order to give effect to the legislative intent and to the purpose of the national litigation policy.

20. The process of construction, therefore, combines both literal and purposive approaches, namely, the true meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. Once this is achieved, it would be called "the cardinal principle of construction".

23. The rule is equally applicable to a large extent. In order to properly interpret the provisions of the instructions, it is, therefore necessary to consider how the matter stood immediately before the circular came into existence, what was the intention and object necessitating the legislature to issue the impugned circular and the defect which the circular did not provide. Consequently, we are of the opinion that the courts should adopt a purposive approach in order to give effect to the true purpose of the legislation by looking at the National Litigation Policy which is the relevant material on the basis of which the circular was issued.

25. The Bombay High Court, being conscious of the instructions issued by CBDT dismissed a large number of appeals on the ground that the instructions issued by CBDT from time to time were not being adhered to and that the appeals were being filed in utter disregard to the monetary limits. The Bombay High Court insisted that all the appeals filed by the department where the tax effect was below the Board's prescribed limit should be withdrawn forthwith. In this regard, CBDT issued instruction dated 5th June, 2007 directing the department to examine all appeals pending before the Bombay High Court on a case to case basis with further direction to withdraw cases wherein the criteria of monetary limits as per the prevailing instruction was not satisfied unless the question of law involved or raised in appeal or referred to the High Court for opinion was of a recurring nature requiring it to be settled by the High Court.

35. The legislature in its wisdom clearly desired to give effect to all instructions issued on the subject of monetary limits for regulating filing of appeals retrospectively. Accordingly, all instructions laying down monetary limits for filing appeals issued on or after 1st April, 1999 by a deeming fiction has to be treated as having been issued under Section 268(1) of the Act.

36. The contention of the department that Section 260A of the Act authorises the department to prefer an appeal to the High Court from every order passed in appeal by the appellate authority subject to the condition that the department should satisfy the High Court that the case involves a substantial question of law and, consequently, this substantive right cannot be curtailed by the provision of Section 268A of the Act or by the instructions issued by the CBDT under Section 119 of the Act cannot be accepted. At the outset, the instructions issued by the CBDT are binding on the department. Prior to the introduction of Section 268A in the Act, the object of issuing instructions under Section119 of the Act was apparent and obvious, namely, to alleviate unnecessary hardship to the assessee and also to avoid financial hardship and long drawn appellate proceedings even for the department. The objects recorded in the bill while introducing Section 268A into the Act was aimed at alleviating and remedying the hardship being caused to the assessee as well as to reduce the financial burden upon the income tax department in

pursuing appeals where the tax effect was negligible. A perusal of sub-section (1) of Section 268A of the Act indicates that CBDT was authorized to issue orders, instructions or directions to income tax authorities laying the monetary limits for the purpose of filing appeals. As a consequence of the insertion of Section 268A in the Act, the orders and instructions or directions issued on the subject of monetary limits for filing appeals has attained a statutory status and it has become mandatory for the department to comply with the requirement on the subject of monetary limits for filing appeals. Sub- section (5) of Section 268A of the Act indicates that earlier instructions issued by CBDT fixing monetary limits for filing an appeal shall be deemed to have been issued under Section 268A of the Act. After the introduction of Section 268A into the Act, Section 260A of the Act cannot be read independently. Both Section 260A and 268A of the Act will have to be interpreted by reading the two provisions harmoniously. Section 268A was inserted in the Act with retrospective effect from 1st April, 1999. The legislature desired to give statutory effect to all the instructions issued on the subject of monetary limits in regulating filing of appeals retrospectively.

37. We are of the view that instructions issued by CBDT laying down the monetary limits for filing an appeal is mandatory and binding on the Revenue. The contention of the department that the right to file an appeal under Section 260A of the Act by the department cannot be restricted or carved by any instructions of CBDT or by Section 268A is patently erroneous and cannot be accepted. Similar view was also given by the Punjab and Haryana High Court in Oscar Laboratories case (supra).

47. In the light of the aforesaid, we find that since the CBDT while issuing Instruction No. 3 of 2011 had not kept in mind the object and intention sought to be achieved by the National Litigation Policy and, in order to bring harmony with the National Litigation Policy, we are of the opinion that the Instruction No. 3 of 2011 would also apply to pending appeals in various Courts or Tribunals unless it is pointed out by the department that the appeal would have a cascading effect in other assessment years of the assessee or that it is within the exception provided in the instructions that was issued at the time when the appeal was presented."

(ii) CIT, Tamil Nadu-IV, MADras vs. G.K.Enterprises,(2016) 73 Taxmann.com 56 (Madras)

"6. It is appropriate to notice that the Central Board of Direct Taxes has issued the instructions contained in the said Circular in exercise of its power available to it under Section 268A(i) of the Income-tax Act, 1961 and hence, the Circular has statutorily enforceable character. In that view of the matter, we treat this appeal as not pressed and dismiss it as such. However, it goes without saying that the questions of law raised in this appeal for consideration of this Court in this appeal, are kept open to be decided on merits in an appropriate case. No costs."

(iii) Commissioner of Income Tax vs. Associated Electrical Agencies (16.08.2007 - MADHC) : (2007) 295 ITR 496

10. We are of the considered view that none of the exceptions stated in the circular are applicable to the facts of the present case. The circular was stated to be issued by invoking the statutory power under Section 119 of the IT Act. The appeal is filed under Section 260A of the IT Act. It is well-settled principle of law that each and every provision of a statute has to be given the same importance. One provision cannot be alleviated to a higher pedestal than the other provision, of course, unless or otherwise specifically stated either in the scheme, the Act or in the provision itself that a particular provision is subjected to or qualified by any other provision or the provision can be given effect to notwithstanding anything contained in any other provisions by assigning overriding effect. Hence, the contention that notwithstanding the circular, which was issued under Section 119 of the IT Act, the appeal could be filed by the Revenue under Section 260A has to be rejected for the reason that if the contention is accepted, one of the sections would become virtually otiose and that cannot be the intention of the law makers. Hence, the above judgments cannot be taken in aid for non- suiting the respondent/assessee from taking shelter under the Government order.

11. In this case, not only the tax effect involved is nearly □ 5,000, b also the other qualifications prescribed in the circular were also not available or in existence to carve out the case to bring outside the purview of the circular. Even de hors the circular, if the facts are considered, the assessee is entitled to claim the benefit for the next assessment year if the same was negatived for the assessment year in question. Further, the point in issue is whether the bonus as claimed by the respondent has been paid within 31st Oct., 1991 or subsequent to that date,

can by no stretch of imagination be considered as a question of law rather than substantial question of law as provided under Section 260A of the IT Act.

(iv) CIT vs. Jugal Kishore Mahanta (09.05.2013 - GUHC) [2013] 355 ITR 432

10. We have given our anxious consideration to the rival submissions made before us. There is no dispute that Instruction No. 5 of 2008, dated 15-5-2008, imposes a monetary limit of □ 4,00,000 for preferring an appeal under section 260A of the Act nor is it in dispute before us that the net tax effect in the case at hand, is less than □ 4,00,000. It is also not in question before us in view of a catena of decisions of the Supreme Court on the issue, that the instructions issued by the Central Board of Direct Taxes, are binding on the Revenue except where (a) the constitutional validity of the provisions of an Act or Rule is under challenge; (b) the Boards order, notification, instruction or circular has been held to be illegal or ultra vires; and (c) a Revenue audit objection in the case has been accepted by the Department.

13. Though what has been indicated above is sufficient to dispose of the present appeal as not maintainable inasmuch as the appeal runs counter to the instructions, which have been issued by the Central Board of Direct Taxes, we deem it appropriate to point out that section 268A has been inserted in the Act, with effect from 1-4-1999, by the Finance Bill, 2008. The Memorandum Explaining the Provisions of the Finance Bill, 2008, while highlighting the underlying object of section 268A, clearly reflected the anxiety of Parliament to reduce the litigation in small cases and regulate the fight of the Revenue to file or not to file an appeal under section 260A. Consequently, there is an inherent limitation on the Revenues right to file appeal tinder section 260A inasmuch as the condition precedent for preferring an appeal is existence of a substantial question of law. Section 260A does not, however, contemplate any monetary limit. This monetary limit has been imposed a indicated above by the Central Board of Direct Taxes in exercise of its power under section 268A.

14. It is worth pointing out that section 268A enjoys the same legislative status as section 260A, both having been enacted by Parliament. Undisputedly, section 268A is later in point of time. Having known and being conscious of the right of appeal, which has been provided to the Revenue under section 260A, Parliament has nevertheless deemed it necessary to vest in the Central Board of Direct Taxes, by enacting section 268A, the power to regulate appeal by prescribing the monetary limit.

15. When, thus, the Central Board of Direct Taxes has prescribed a monetary limit, no appeal under section 260A can be filed by the Revenue except in the circumstances, which we have indicated above. The mere fact that the assessee-respondent has taken two distinctly different stands, one, before the income-tax authority, and the other, before the Income-tax Appellate Tribunal, we do not deem it proper that such a conflict can be of such a grave nature, which would allow the Revenue to override the prescription of section 268A.

17. We must, however, point out that in an appropriate case, the High Court may, perhaps, not apply the instructions, as regards the monetary limits, ipso facto and may choose nevertheless to examine the substantial questions of law raised in an appeal. The present one, however, is in our considered view, not such a case, where the High Court shall enter into determination of the substantial question of law, which has been framed. We are in this regard, conscious of the Supreme Courts order, dated 29-8-2011, passed in Special Leave to Appeal (CM) No. 24562 of 2011 (13694 of 2011) CIT v. Surya Herbal Ltd. (2013) 350 ITR 300 (SC), wherein the court has observed:

Delay condoned.

Liberty is given to the Department to move the High Court pointing out that the Circular dated February 9, 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 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."

(v) Commissioner of Income Tax vs. Camco Colour Co. (26.11.2001 – BOMHC) [2002] 254 ITR 565

3. The issue in the present case being one of some potential general significance in relation to the policy decision taken by the Board not to raise questions of law where the effect is less than the amount prescribed in the

instructions issued by the Central Board of Direct Taxes with a view to reduce litigations before the High Courts and the Supreme Court, we propose to dispose of this appeal on this short contention canvassed by learned counsel for the respondent without examining the merits of the question of law sought to be raised in this appeal.

4. Learned counsel for the respondent also relied upon the decision in Navnit Id C. Javeri v. K. K. Sen, AAC of I.T. [1965]56ITR198(SC) ; Ellerman Lines Ltd. v. C1T [1971]82ITR913(SC) and K. P. Varghese v. ITO [1981]131ITR597(SC) to contend that the circular issued by the Central Board of Direct Taxes is binding on all the officers and Commissioners and in terms of which he sought to examine the question of necessity of filing of the present appeal.

5. In appears that despite the above circular, the Revenue has chosen to file the present appeal knowing fully well that the corridors of the courts are flooded with pending litigations. The presentation of this appeal is quite contrary to the instruction issued in the circular which is binding on the Revenue.

6. In the above view of the matter, considering the instructions issued by the Central Board of Direct Taxes, we are satisfied that the Board has taken a policy decision not to file appeal in a type of case in hand and the same is binding on the Revenue (appellant herein). In the result, we dismiss this appeal on this count in limine with no order as to costs."

(vi) Commissioner of Income Tax vs. Abhinash Gupta (11.12.2009 - PHHC) [2012] 327 ITR 619 (P&H)

"7. After hearing the arguments of the learned Counsel for the parties, we find force in the preliminary objection raised by the learned Counsel for the assessee with regard to maintainability of the appeal filed by the Department. During the course of arguments, it is not disputed before us that the tax effect in the instant case is less than 4 lakhs. In the present case, the Assessing Officer disallowed the claim of the assessee of exemption of 4,04,664 under Section 54F of the Act on the ground that the investment made by the assessee on construction in a residential house was not made within the specified time of one year before the date when the long-term capital gains arose. However, the said addition was deleted by the Income Tax Appellate Tribunal while recording a finding of fact that the investment by the assessee on construction in a residential house was made during the period March 1, 1999 to March 26,1999. The said finding was recorded on the basis of the housing loan account. It has also been held that the transfer of the long-term capital asset, i.e., shares and securities took place on February 1, 2000, therefore, the said investment was within one year prior to the date of transfer of the long-term capital asset. In view of the said fact, it was held that the assessee was fully eligible for the benefit of Section 54F of the Act. Though the Income Tax Appellate Tribunal has deleted the addition on the basis of the above-said finding of fact, yet, in our opinion, the dispute arises in this appeal is not of recurring nature. Even if it is taken that the alleged substantial question of law raised in this appeal is of recurring nature, in our opinion, the Revenue cannot maintain the instant appeal in view of Circular No. 5 of 2008 issued by the Central Board of Direct Taxes, as the cumulative tax effect involved, in this appeal is less than 4 lakhs. In CIT v. Oscar Laboratories P. Ltd. [2010] 324 ITR 115 (P & H), it was held that the Instructions/Circulars issued by the Central Board of Direct Taxes laying down monetary limits for filing of appeals are mandatory and binding on the Revenue. The contention of the learned Counsel for the Revenue that Circular No. 5 of 2008 is not applicable on the appeals filed prior to May 15, 2008, cannot be accepted. The similar issue has been considered by the Bombay High Court in CIT v. Madhukar K. Inamdar (HUF) [2009] 318 ITR 149 wherein it was held that Circular No. 5 of 2008 is also applicable on the pending appeals, irrespective of the fact whether the same were filed before or after May 15, 2008. In this regard the Bombay High Court made the following observations (page 150):

It cannot be disputed that the Central Board of Direct Taxes Circular dated May 15, 2008, has no retrospective effect. It operates from the date of its issuance. As a corollary thereof, the appeals which come on board for consideration after the issuance of the Central Board of Direct Taxes Circular dated May 15, 2008, needs to be considered in the light of the said Circular. Application of the said Circular to the cases coming on board after May 15, 2008, by no stretch of imagination can be said to be an application of Circular with retrospective effect.

In order to consider the issue in its right perspective, it is necessary to refer to the Circular of the Central Board of Direct Taxes dated May 15, 2008, paragraph 5 of which reads as under:

5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issue in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal shall be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issue exceeds the monetary limit specified in paragraph 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in paragraph 3. In other words, henceforth, appeals will be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one year, appeal shall be filed in respect of all assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to file appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed.

(emphasis supplied)

The aforesaid paragraph (5) makes it clear that no appeals should be filed in the cases involving tax effect less than 4 lakhs notwithstanding the issue being of recurring nature.

The aforesaid paragraph (5) was a subject- matter of the judicial interpretation in the case of CIT v. Polycott Corporation in Income Tax Appeal No. 1241 of 2008 decided on January 23, 2009, (since reported in [2009] 318 ITR 144 (Bom) wherein this Court ruled as under (page 146):

It would be clear from the above that if in the case of an assessee if the disputed issues arise in more than one assessment year, appeals are to be filed only in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in paragraph 3. In other words, even if in respect of the same issue in respect of the same assessee for other assessment years the monetary limit is not more than 4 lakhs, appeals need not be filed. Paragraph 6 makes it clear that in such a case if an appeal is not filed, there will be no presumption that the Income Tax Department has acquiesced in the decision on the disputed issues. The aforesaid judicial verdict makes it clear that the Circular dated May 15, 2008, in general and paragraph (5) thereof in particular lay down that even if the same issue, in respect of the same assessee, for other assessment years is involved, even then the Department should not file appeal, if the tax effect is less than 4 lakhs. In other words, even if the question of law is of recurring nature even then, the Revenue is not expected to file appeals in such cases, if the tax impact is less than the monetary limit fixed by the Central Board of Direct Taxes.

One fails to understand how the Revenue, on the face of the above clear instructions of the Central Board of Direct Taxes, can contend that the Circular dated May 15, 2008, issued by the Central Board of Direct Taxes is applicable to the cases filed after May 15, 2008, and in compliance thereof, they do not file appeals, if the tax effect is less than 4 lakhs; but the said circular is not applicable to the cases filed prior to May 15, 2008, i.e., to the old pending appeals; even if the tax effect is less than 4 lakhs. In our view, there is no logic behind this belief entertained by the Revenue.

This court can very well take judicial notice of the fact that by passage of time money value has gone down, the cost of litigation expenses has gone up, filing of cases at the instance of the Revenue has increased; consequently, the burden on the Department has also increased to a tremendous extent. The corridors of the superior courts are choked with huge pendency of cases. The litigation expenses have also increased manifold. In this view of the matter, the Board has rightly taken decision not to file appeals if the tax effect is less than 4 lakhs so as to reduce burden of the Department as well as that of the tribunals and courts. The same policy for old matters needs to be adopted by the Department so as to achieve the object of the policy laid down by the Central Board of Direct Taxes.

It would be in the 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 4 lakhs considering the cost of litigation and other administrative cost which may be much more than the tax recovery.

At this juncture, it will be relevant to note that the Central Board of Direct Taxes has also issued a Circular on June 5, 2007, directing the Department to examine all appeals pending before this Court on case to case basis with further direction to withdraw cases wherein the criteria of monetary limits as per the prevailing instruction is not

satisfied, unless the question of law involved or raised in appeal or referred to the High Court for opinion is of a recurring nature required to be settled by the higher court.

The aforesaid Circular makes it clear that on the date of issuance of Circular, prevailing instructions fixing monetary limit will hold good even for pending cases. Adopting the same approach, we are of the considered view that the Central Board of Direct Taxes Circular dated May 15, 2008, would be very much applicable to the pending cases requiring the Department to withdraw cases wherein the tax effect is less than the prescribed monetary limits.

At this juncture, it will also be relevant to mention that it was necessary for the Central Board of Direct Taxes to put a caveat, while issuing instructions, vide its Circular dated June 5, 2007, that the appeals involving substantial question of law of recurring nature should not be withdrawn since provision like Section 268A of the Income Tax Act was absent. Now, in view of the insertion of the provision of Section 268A by the Finance Act, 2008, with effect from April 1, 1999, in the Income Tax Act, 1961, no prejudice could be caused to the Revenue even if the cases involving legal issues of recurring nature are withdrawn, since the newly inserted provision takes care of the adverse eventuality which could have been put against the Revenue.

While agreeing with the view taken by the Bombay High Court, we are of the view that Circular No. 5 of 2008 would be applicable to the cases pending before this Court either for admission or for final disposal and that the said Circular is binding on the Revenue. Since admittedly the tax effect in this appeal is less than □ 4 lakhs, therefore, in our opinion, the appeal filed by the Revenue is not maintainable and the same is hereby dismissed with no order as to costs."

(vii) CIT vs. Sherno Ltd. (28.03.2013 - GUJHC) [2013] 33 taxmann.com 45 (Gujarat)

4. Revenues case as can be discerned from question No. 2 noted above is that since Constitutional validity of the provisions of the Act ore the Rule are under challenge the appeal may be entertained. Learned counsel Shri Parikh for the Revenue was at a loss to explain in what manner the validity of statutory provision is involved in the present appeal. Admittedly vires of statutory provision is nowhere in question. He however, strenuously urged that decision of the Tribunal is palpably erroneous.

5. This in our view would not enable the Revenue to ignore the conditions of the circular dated 9-2-2011 and file appeal which is other-wise not envisaged in the said circular. This Court in case of CIT v. Concord Pharmaceuticals (2009) 25 (I) ITCL 548 (Guj-HC): (2009) 317 ITR 395 (Guj) held that the instructions issued in the said circular dated 9.2.2011 are binding on the department. In other words, an appeal which is filed ignoring said directives would not be maintainable. Such is the view taken by various High Courts. Reference to all judgments is therefore, not necessary.

(viii) Commissioner of Income Tax vs. Zoeb Y. Topiwala (22.08.2005 - BOMHC) [2006] 284 ITR 379 (Bombay)

4. This Court in the case of CIT v. Cameo Colour Co. [2002]254ITR565(Bom) ruled that the above instructions are binding on the Department. This judgment is followed by this Court in CIT v. Pithwa Engg. Works [2005]276ITR519(Bom) and held that it is not open for the Department to contend that this circular is binding only with respect to the new cases and not with respect to the old cases even if the tax is less than □ 2 lakhs. The same policy for old matters needs to be adopted by the Department.

5. The above instructions dt. 27th March, 2000, reflects the policy decision taken by the Board not to raise questions of law where the tax effect is less than the amount prescribed in the instructions with a view to reduce litigations before High Courts and Supreme Court. The circular is binding on the Revenue. There is no justification to proceed with the appeal having tax effect less than □ 7,000.

6. We, thus, do not think it necessary to entertain this appeal and answer the question raised by the appellant-Revenue. Accordingly, appeal stands dismissed with no order as to costs."

(ix) CIT vs. Paramount Guest House & Resort Ltd., [2013] 38 taxmann.com 262 (Allahabad)

"5. We find that under Section 268A of the Act which has been inserted with retrospective effect from 1.04.1999 the Board has power to issue circular regarding fixing monetary limit and no appeal can be filed by the Revenue. The

circular dated 27.03.2000 issued by the Board has thus been issued in exercise of powers conferred under section 268A of the Act and has binding effect on all the authorities. As the tax in dispute is less than rupees two lakh the Revenue was not entitled to file appeal before the Tribunal. The appeal neither involves any question which had a far reaching effect nor was of recurring in nature.

8. None of the above conditions applies in the present case. In this view of the matter we are of the considered opinion that the circular dated 27th March, 2000 issued by the Central Board of the Direct Taxes was binding upon the Department and, therefore, the appeal preferred by it against the order of the Commissioner of Income Tax (Appeals) dated 4th November, 2008 wherein tax effect was less than rupees two lac ought not to have been filed. The order of the Tribunal does not call for any interference."

(x) Commissioner of Income Tax vs. Ramkishore Nandkishore (12.02.2013 - MPHC)

5. A Division Bench of this Court in Suresh Chand Goyal (supra) has considered this aspect and held thus:-

The another question raised by learned counsel for the respondent is about the filing of appeal contrary to the circular issued by the Central Board of Direct Taxes, according to which, the appeal under section 260A of the Income-Tax Act on the tax effect of less than 2 lakhs should not be filed by the Revenue and placed reliance on the decision of the Bombay High Court in the case of CIT vs. Cameo Colour Co. [2002] 254 ITR 565]. Learned counsel for the respondent also relied upon the decisions of the Supreme Court in the cases of Navnit Lal C. Javeri v. K.K. Sen, AAC [1965] 56 ITR 198, Ellerman Lines Ltd. vs.CIT [1971] 82 ITR 913 and K.P. Varghese vs. ITO [1981] 131 ITR 597, to contend that the circular issued by the Central Board of Direct Taxes is binding on all the officers and Commissioners and appeal or reference contrary to the instructions issued in the circular will not be considered by the courts and the Division Bench of the Bombay High Court was satisfied that the Board has taken a policy decision not to file appeal in a type of case in hand and the same is binding on the Revenue and in the result the appeal was dismissed following the circular. The similar view was taken by the Division Bench of the High Court of Madhya Pradesh in the case of Asst. CIT v. Aradhana Oil Mills [2002] 30 ITC 446 and following the circular of the Central Board of Direct Taxes, the appeal was dismissed.

6. In Ashok Manibhai Patel (supra) another Division Bench has also taken similar view. Justice Dipak Misra, as his Lordship then was, speaking for the Bench held thus:-

11. The factual scenario can be perceived from another aspect. Submission of Mr. A.K. Shrivastava, learned counsel for the respondent is that the tax impact is 52,565 and, therefore, as per the circular of the Central Board of Direct Taxes the reference need not be adverted to. A Division Bench of the High Court of Bombay in the case of CIT v. Pithwa Engg. Works[2005] 276 ITR 519 (Bom) in paragraph 6 expressed the view as under (page 520):

'This court can very well take judicial notice of the fact that by passage of time money value has gone down, the cost of litigation expenses has gone up, the assessees on the file of Department has also increased to a tremendous extent. The corridors of the superior courts are choked with huge pendency of cases. In this view of the matter, the Board has rightly taken a decision not to file references if the tax effect less than 2 lakhs. The same policy for old mattes needs to be adopted by the Department. In our view, the Board's circular dated March 27, 2000, is very much applicable even to the old references which are still undecided. The department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no justification to proceed with decades old references having negligible tax effect Judged from both angles we would answer the reference in the negative in favour of the assessee and against the Revenue.

7. A Division Bench of Bombay High Court in Commissioner of Income Tax vs. Pithwa Engg. Works [276 ITR 519] held thus:-

3. This Court in the case of Commissioner of Income Tax V/s. Cameo Colour Co.(2002) 254 ITR 565 ruled that the instructions issued by the Central Board of Direct Taxes, New Delhi, dated 27th March, 2000; wherein monetary limit for the department for filing reference to the High Court earlier fixed for 50,000/- came to be revised and fresh instructions are issued to file references only in cases where tax effect exceeds 2,00,000/-, are binding on the Department.

4. The above instructions dated 27th March, 2000 reflect the policy decision taken by the Board not to raise questions of law where the tax effect is less than the amount prescribed in the above circular with a view to reduce litigations before High Courts and Supreme Court. The said circular is binding on the Revenue though learned Counsel tried to contend that the said circular is not applicable to the old referred cases. However, he could not take his submission to a logical end.

5. One fails to understand how Revenue can contend that so far as new cases are concerned, circular issued by the Board is binding on them and in compliance with the said instructions, they do not file references if the tax effect is less than 2 lakhs. But the same approach is not adopted with respect to the old referred cases even if the tax effect is less than 2 lakhs. In our view, there is no logic behind this approach.

6. This Court can very well take judicial notice of the fact that by passage of time money value has gone down, cost of litigation expenses has gone up, the assessees on the file of the departments have increased; consequently, burden on the department has also increased to a tremendous extent. The corridors of the superior courts are chocked with huge pendency of cases. In this view of the matter, the Board has rightly taken decision not to file references if the tax effect less than 2 lakhs. The same policy for old matters needs to be adopted by the department. In our view, the Board's circular dated 27th March, 2000 is very much applicable even to the old references which are still undecided. The department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no justification to proceed with the decades old references having negligible tax effect.

8. The aforesaid judgments specifically lays down that any appeal, if tax effect less then 2 lakhs, could not have been filed by the Department.

9. From the perusal of the instructions issued by the Board, we find that the Board had issued directions that the appeals will be filed only in cases where the tax effect exceeds 2 lakhs in the matter of High Court in appeals U/s. 260A or Reference U/s. 256(2). The aforesaid circular is binding on all the authorities under the Board including the appellant Commissioner of Income Tax, Jabalpur. The Board had taken this decision in continuation to earlier directions issued by the Board on 28.10.1992 where the monitory limit was 50,000/-. Now in view of the changed circumstances, as directed by the Board by instruction dated 27.3.2000, it is apparent that the appeal or reference below 2 lakhs, could not have been filed. The instructions of the Board are binding to all the authorities working under the Board including the appellant. This appeal which was filed on 10.1.2005 is fully covered by the instructions issued by the Board on 27.3.2000, and this appeal could not have been filed. The aforesaid position has been clarified by two Division Bench of this Court in Suresh Chand and Ashok Manibhai (supra). In the result, this appeal is found incompetent and is dismissed with no order as to costs."

(xi) Commissioner of Income Tax vs. Ramkishore Nandkishore (12.02.2013 – MPHC), [2013] 32 taxmann.com 89

5. A Division Bench of this Court in Suresh Chand Goyal (supra) has considered this aspect and held thus:-

The another question raised by learned counsel for the respondent is about the filing of appeal contrary to the circular issued by the Central Board of Direct Taxes, according to which, the appeal under section 260A of the Income-Tax Act on the tax effect of less than 2 lakhs should not be filed by the Revenue and placed reliance on the decision of the Bombay High Court in the case of CIT vs. Cameo Colour Co. [2002] 254 ITR 565]. Learned counsel for the respondent also relied upon the decisions of the Supreme Court in the cases of Navnit Lal C. Javeri v. K.K. Sen, AAC [1965] 56 ITR 198, Ellerman Lines Ltd. vs. CIT [1971] 82 ITR 913 and K.P. Varghese vs. ITO [1981] 131 ITR 597, to contend that the circular issued by the Central Board of Direct Taxes is binding on all the officers and Commissioners and appeal or reference contrary to the instructions issued in the circular will not be considered by the courts and the Division Bench of the Bombay High Court was satisfied that the Board has taken a policy decision not to file appeal in a type of case in hand and the same is binding on the Revenue and in the result the appeal was dismissed following the circular. The similar view was taken by the Division Bench of the High Court of Madhya Pradesh in the case of Asst. CIT v. Aradhana Oil Mills [2002] 30 ITC 446 and following the circular of the Central Board of Direct Taxes, the appeal was dismissed.

6. In Ashok Manibhai Patel (supra) another Division Bench has also taken similar view. Justice Dipak Misra, as his Lordship then was, speaking for the Bench held thus:-

11. The factual scenario can be perceived from another aspect. Submission of Mr. A.K. Shrivastava, learned counsel for the respondent is that the tax impact is □ 52,565 and, therefore, as per the circular of the Central Board of Direct Taxes the reference need not be adverted to. A Division Bench of the High Court of Bombay in the case of CIT v. Pithwa Engg. Works [2005] 276 ITR 519 (Bom) in paragraph 6 expressed the view as under (page 520):

'This court can very well take judicial notice of the fact that by passage of time money value has gone down, the cost of litigation expenses has gone up, the assessees on the file of Department has also increased to a tremendous extent. The corridors of the superior courts are choked with huge pendency of cases. In this view of the matter, the Board has rightly taken a decision not to file references if the tax effect less than □ 2 lakhs. The same policy for old mattes needs to be adopted by the Department. In our view, the Board's circular dated March 27, 2000, is very much applicable even to the old references which are still undecided. The department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no justification to proceed with decades old references having negligible tax effect Judged from both angles we would answer the reference in the negative in favour of the assessee and against the Revenue.

7. A Division Bench of Bombay High Court in Commissioner of Income Tax vs. Pithwa Engg. Works [276 ITR 519] held thus:-

3. This Court in the case of Commissioner of Income Tax V/s. Cameo Colour Co. (2002) 254 ITR 565 ruled that the instructions issued by the Central Board of Direct Taxes, New Delhi, dated 27th March, 2000; wherein monetary limit for the department for filing reference to the High Court earlier fixed for □ 50,000/- came to be revised and fresh instructions are issued to file references only in cases where tax effect exceeds □ 2,00,000/-, are binding on the Department.

4. The above instructions dated 27th March, 2000 reflect the policy decision taken by the Board not to raise questions of law where the tax effect is less than the amount prescribed in the above circular with a view to reduce litigations before High Courts and Supreme Court. The said circular is binding on the Revenue though learned Counsel tried to contend that the said circular is not applicable to the old referred cases. However, he could not take his submission to a logical end.

5. One fails to understand how Revenue can contend that so far as new cases are concerned, circular issued by the Board is binding on them and in compliance with the said instructions, they do not file references if the tax effect is less than □ 2 lakhs. But the same approach is not adopted with respect to the old referred cases even if the tax effect is less than □ 2 lakhs. In our view, there is no logic behind this approach.

6. This Court can very well take judicial notice of the fact that by passage of time money value has gone down, cost of litigation expenses has gone up, the assessees on the file of the departments have increased; consequently, burden on the department has also increased to a tremendous extent. The corridors of the superior courts are chocked with huge pendency of cases. In this view of the matter, the Board has rightly taken decision not to file references if the tax effect less than □ 2 lakhs. The same policy for old matters needs to be adopted by the department. In our view, the Board's circular dated 27th March, 2000 is very much applicable even to the old references which are still undecided. The department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no justification to proceed with the decades old references having negligible tax effect.

8. The aforesaid judgments specifically lays down that any appeal, if tax effect less then □ 2 lakhs, could not have been filed by the Department.

9. From the perusal of the instructions issued by the Board, we find that the Board had issued directions that the appeals will be filed only in cases where the tax effect exceeds □ 2 lakhs in the matter of High Court in appeals U/s. 260A or Reference U/s. 256(2). The aforesaid circular is binding on all the authorities under the Board including the appellant Commissioner of Income Tax, Jabalpur. The Board had taken this decision in continuation to

earlier directions issued by the Board on 28.10.1992 where the monitory limit was 50,000/-. Now in view of the changed circumstances, as directed by the Board by instruction dated 27.3.2000, it is apparent that the appeal or reference below 2 lakhs, could not have been filed. The instructions of the Board are binding to all the authorities working under the Board including the appellant. This appeal which was filed on 10.1.2005 is fully covered by the instructions issued by the Board on 27.3.2000, and this appeal could not have been filed. The aforesaid position has been clarified by two Division Bench of this Court in Suresh Chand and Ashok Manibhai (supra).

(XII) Commissioner of Income Tax vs. Smt. Madhu Bai Lodha (13.09.2007 - MPHC) (2008)_ 169 Taxmann 147 (Madhya Pradesh)

4. We have considered the contention raised by the learned senior counsel. Before considering the cases: cited by the learned senior counsel, we may point out that a Division Bench of [this Court has held in CIT v. Suresh Chand Goyal (2007) 209 CTR (MP) 410 that in cases where tax effect is below 2,00,000, Revenue cannot file appeal contrary to the terms of circular which is binding on the Department. The relevant discussion contained in para 16 of the said Report reads as extracted below:

16. The another question raised by learned Counsel for the respondent is about the filing of appeal contrary: to the circular issued by the CBDT, according to which, the appeal under Section 260A of the IT Act on the tax effect of less than 2 lacs should not be filed by the Revenue and placed reliance on the decision of the Bombay High Court in the case of CIT v. Camco Colour Co. [2002]254ITR565(Bom) . Learned Counsel for the respondent also relied upon the decision of the Supreme Court in the cases of Navnit Lal C. Javeri v. K.K. Sen, AAC [1965]56ITR198(SC) ; Ellerman Lines Ltd. v. CIT [1971]82ITR913(SC) and K.P. Varghese v. ITO [1981]131ITR597(SC) , to contend that the circular issued by the CBDT is binding on all the officers and CITs and appeal or reference contrary to the instructions issued in the circular will not be considered by the Courts and the Division Bench of the Bombay High Court was satisfied that the Board has taken a policy decision not to file appeal in a type of case in hand and the same is binding on the Revenue and in the result the appeal was dismissed following the circular. The similar view was taken by the Division Bench of the High Court of Madhya Pradesh in; the case of Asstt. CIT v. Aradhana Oil Mills (2002) 30 ITC 446 (MP) and following the circular of CBDT, the appeal was dismissed.

5. We may point out that the circular issued by the CBDT as referred to above carves out only one exception with regard to the permissibility of filing of appeals, etc., notwithstanding the embargo contained in the circular of the monetary limit. It is only in cases involving substantial question of law of importance as well as cases where the same question of law will repeatedly arise either in the case concerned or in similar cases that the Department will not be hindered by the monetary limits. The question, therefore, arises as to whether the Department can be left at liberty to defeat the circular of CBDT restraining its power to file appeal in case of the tax effect being below the monetary limit by capriciously taking subterfuge under the specious plea that the case is one of the excepted categories of cases. It has not been brought to our notice that the IT Department has devised any procedure to consider whether a particular case falls within the excepted category thus, permitting the Revenue to agitate the matter before the higher forums. In cases where no such procedure has been devised, it is expected that while filing appeal in non-adherence of the circular, the Department would place material before the appellate forum that the case falls within the excepted category and, therefore, is not covered by the restraint contained in the circular. The learned senior counsel for the appellants has also invited attention to the decision of the Punjab & Haryana High Court in Rani Paliwal v. CIT MANU/PH/0780/2003, of Delhi High Court in CIT v. Blaze Advertising (Delhi) (P) Ltd. (2002) 173 CTR 482 : (2002) 255 ITR 460 and of Madras High Court in CIT v. Kodananad Tea Estates Co. [2005]275ITR244(Mad) . We are, however, of the view that, as held by this Court in CIT v. Suresh Chand Goyal (supra), where tax liability of the assessee is below the monetary limit prescribed, Revenue cannot file an appeal in transgression of the circular by which it is bound. However, we may add that in a case which falls within the excepted category, it would always be open to the Department to bring it to the notice of the forum approached and to insist that the question being covered by the exceptions contained in Clause 3 of the Circular dt. 24th Oct., 2005 as modified by the Instruction No. 5 of 2007, dt. 16th July, 2007, the same deserves to be considered by the superior forum, the circular of the CBDT notwithstanding.

6. In view of the above, we answer the question raised in these appeals against the Department subject to the liberty that if a case falls within the excepted category, it would be open to the Department to bring the said fact to the notice of the Court or the Tribunal so that the appropriate authority/Court applies its mind to the necessity of formulating the question for rendering decision thereon.

(xiii) Commssioner of Customs vs. Indian Oil Corporation Ltd., [2004] 267 ITR 272 (SC)

10. The principles laid down by all these decisions are:

(1) Although a circular is not binding on a Court or an assessee, it is not open to the Revenue to raise the contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show-cause notice and demand contrary to existing circulars of the Board are ab initio bad.

(4) It is open to the Revenue to advance an argument or file an appeal contrary to the circulars.

(xiv) The Commissioner of Income Tax vs. Ranka and Ranka (02.11.2011 – KARHC), [2013] 352 ITR 121 (Karnataka)

18. The circular No. 1/2009 dated 27.03.2009 states that there is a prescribed dispute resolution mechanism in the Income Tax Act. In this regard the Central Board of Tax cases has issued instructions from time to time directing the departmental officers not to file appeals if the tax effect is less than the monetary limit prescribed by it. The Hon'ble Supreme Court of India in Berger Paints Limited vs. CIT reported in (2004) 266 ITR 99, held that if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge the correctness in the case of other assessee without just cause. The department's appeals are being dismissed by judicial authorities on the consideration that the disputed issue was not agitated in the case of the same assessee or in the case of any other assessee. The underlining object of the Board's resolution is to reduce litigation in similar cases with a view to bring the Revenue's right to file or not to file appeal.

The new Section 268A of the Income Tax Act was inserted by Finance Act, 2008 with retrospective effect from 01.04.1999. The said provision reads as under:

268A. Filing of appeal or application for reference by income-tax authority. (1) The Board may from time to time, issue orders, instructions or directions to other income- tax authorities, fixing such monetary limits as it may deem fit for the purpose of regulating filing of appeal or application for reference by any income-tax authority under the provisions of this Chapter. (2) Where, in pursuance of the orders, instructions or directions issued under sub-section (1), an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of.

(a) the same assessee for any other assessment year; or

(b) any other assessee for the same or any other assessment year.

(3) Notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders or instructions or directions issued under sub-section (1), it shall not be lawful for an assessee, being a party in any appeal or reference, to contend tat the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

(4) The Appellate Tribunal or Court, hearing such appeal or reference, shall have regard to the orders, instructions or directions issued under sub-section (1) and the circumstances under which such appeal or application for reference was filed or not filed in respect of any case.

(5) Every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly.

19. In the case of CIT Vs. OSCAR LABORATIES P. LTD (STR VOL 324 Pg. 115 at 144) the Punjab and Haryana High Court has referred to the objects for enacting Section 268A of the Act, which reads as under:

36. Aimed at alleviating and remedying the aforesaid predicament of the Revenue, the Finance Act, 2008, inserted section 268A into the 1961 Act This conclusion of ours is clearly derivable from the objects recorded in the Bill introduced in Parliament for the promulgation of the Finance Act, 2008. An extract of the objects recorded in the Bill pertaining to the insertion of section 268A into the 1961 Act, is reproduced hereunder: (2008) 298 ITR(st) 170

The proposed section seeks to provide that the Board may, from time to time, issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit, for the purpose of regulating filing of appeal or application for reference by any income-tax authority under the provisions of this Chapter XX.

It is further proposed to provide that where, in pursuance of the orders, instructions or directions issued under sub-section (1), an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, it shall not preclude such authority from filing an appeal or application for reference on the same issue in the case of - (a) the same assessee for any other assessment year; or (b) any other assessee for the same or any other assessment year.

It is also proposed to provide that notwithstanding that no appeal or application for reference has been filed by an income-tax authority pursuant to the orders or instructions or directions issued under sub-section (1), it shall not be lawful for an assessee, being a party in any appeal or reference, to contend that the income- tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

It is also proposed to provide that the Appellate Tribunal or Court, hearing any appeal or reference had filed under this Chapter, shall have regard to the orders, instructions or directions issued by the Board from time to time either before or after the insertion of this section and the circumstances in which such appeal or application for reference was filed or was not filed in any case; and accordingly the Tribunal or Court shall decide the appeal or the reference on the merits of the issue consideration. It is also proposed to provide that every order, instruction or direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) and the provisions of sub-sections (2), (3) and (4) shall apply accordingly.

This amendment will take effect retrospectively from 1st April 1999.

20. Interpreting this provision, the Division Bench of the Punjab and Haryana High Court in the above case of CIT VS. OSCAR Laboratories P. Ltd. (2010) 324 ITR 115 (P&H) held as under:

"Under Section 268A(1) of the Income Tax Act, 1961, the Central Board of Direct Taxes has been authorised to issue orders, instructions or directions to the income-tax authorities, laying down monetary limits for purposes of filing appeals. As a consequence of the insertion of section 268A in the Act orders, instructions or direction issued on the subject of monetary limits for filing appeals must be deemed to have attained statutory status. There can be no dispute that every requirement under the mandate of law, leads to a consequential statutory obligation to comply with the requirement. Subsection (5) of Section 268A mandates that instructions, orders or directions, even issued earlier, i.e., prior to the insertion of section 268A in the 1961 Act, by the Finance Act, 2008, fixing monetary limits for filing of appeals, shall be deemed to have been issued under sub-section (1) of section 268A of the 1961 Act. This conclusion emerges from the fact that section 268A of the 1961 Act was introduced with retrospective effect from April 1, 1999. Accordingly, instructions, orders or directions issued even prior to the insertion of section 268A of the 1961 Act must be deemed to have statutory status, if they were issued after April 1, 1999. All issues prejudicial to the Revenue, in cases where an appeal was not filed by the Revenue must, therefore, be deemed to have been done away with, after the inclusion of section 268A into the 1961 Act.

After the introduction of section 268A into the 1961 Act, section 260A of the 1961 Act cannot be read independently. Sections 260A and 268A of the 1961 Act will now have to be interpreted reading the two harmoniously, so as to give effect to the two provisions keeping in mind the objects and the reasons on the basis whereof section 268A was inserted into the 1961 Act. The Department of Revenue having chosen on its own volition, the monetary limits for filing appeals to challenge orders passed in favour of assessee cannot be heard to deviate there from when the Revenue itself lays down the monetary limits. A harmonious construction of sub- section (1) of section 260A of the 1961 Act, and sub-section (1) of section 268A of the 1961 Act would inevitably lead to the conclusion that the Revenue can prefer an appeal if a case raises a substantial question of law, subject to the monetary limits stipulated by the Central Board of Direct Taxes. It is open to the Revenue to prefer an appeal only on the four grounds specified in paragraph 3 of the instruction dated March 27, 2000, and on no other ground, in cases where the tax effect was less than that prescribed therein.

29. It is also not out of place to mention herein that the 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 interest of the Revenue by introducing sub- section (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 □ 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 constitutional validity of the provisions of the Act or Rule are under challenge, or where Board's order, notification, instruction or circular has been held to be illegal or ultra vires or whether Revenue Audit Objection in the case has been accepted by the Department, notwithstanding the fact that the tax effect is less then 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 interest of the public revenue. By this approach we would be saving the time 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.

(xv) Commissioner of Income Tax vs. Ideal Garden Complex P. Ltd. (19.08.2008 – MADHC), [2008] 307 ITR 176 (Madras)

11. It may be noted that this court considered a similar issue in the decision rendered on August 16, 2007, in T. C. No. 222 of 2004 (CIT v. Associated Electrical Agencies [2007] 295 ITR 496). Based on Instruction 1979 in Circular F. No. 279/126/98 ITJ, dated March 27, 2000, referring to the statutory power under Section 119 of the Income Tax Act, 1961 under which the circular was issued, this court held that (page 500)

10. We are of the considered view that none of the exceptions stated in the circular are applicable to the facts of the present case. The circular was stated to be issued by invoking the statutory power under Section 119 of the Income Tax Act. The appeal is filed under Section 260A of the Income Tax Act. It is well-settled principle of law that each and every provision of a statute has to be given the same importance. One provision cannot be elevated to a higher pedestal than the other provision, of course, unless or otherwise specifically stated either in the scheme, the Act or in the provision itself that a particular provision is subjected to or qualified by any other provision or the provision can be given effect to notwithstanding anything contained in any other provisions by assigning overriding effect. Hence, the contention that notwithstanding the circular, which was issued under Section 119 of the Income Tax Act, the appeal could be filed by the Revenue under Section 260A has to be rejected for the reason that if the contention is accepted, one of the sections would become virtually otiose and that cannot be the intention of the law makers.

12. Thus, following the long line of case law reported in CIT v. Rajasthan Patrika Limited MANU/RH/0420/2002 and CIT v. P.S.T.S. Thiruvirathnam [2003]261ITR406(Mad) to which one of us is a party (K. Raviraja Pandian J.), CIT v. Digvijay [2007]292ITR314(MP) and CIT v. Camco Colour Co. [2002]254ITR565(Bom) , this court held that the

uniform line of judicial opinion is that if the tax effect is less than what is stated in the circular, the Revenue need not agitate the issue on appeal and that the circular is binding on the Revenue.

13. In the light of the said view expressed by this court and on the admitted fact that the tax effect is also negligible and less than 1,00,000 and the case not falling under any of the stipulations of the circular, we do not find any justification to admit these appeals. Consequently, the same are dismissed.

(xvi) CIT, Kolkata-I vs. Indo Tossa (P.) LTd., [2016] 66 taxmann.com 182 (Calcutta)

4. Since the tax effect in this appeal is 15,32,504/- and since the monetary limit of 20 lakhs is fixed for filing appeals before the High Court by the Department as per Circular which has been issued with retrospective effect and as Mr. Dudhoria submits that he has no written instruction from the Department for withdrawing this appeal, as the said Circular, in view of Section 119(1) is binding on the departmental authority, the appeal is treated to be dismissed as withdrawn.

(xvii) Commissioner of Income Tax vs. Manbhar Devi Meena (04.05.2016 - RAJHC) [2016] 70 taxmann.com 275 (Rajasthan)

A Circular No. 21/2015 has been issued by the Central Board of Direct Taxes dated 10.12.2015 in exercise of its power u/sec. 268A (1) of the Income-tax Act 1961 in supersession of the Boards Instruction No. 5/2014, Dt. 10.7.2014 regularising the monetary limits for filing the appeals by the Revenue before the Tribunal, High Courts and Apex Court with an object for reducing litigation. Relevant para Nos. 3, 8, 9 and 10 reads ad infra:--

"3. Henceforth, appeals/SLPs shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:--

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

*4 to 7** ** **

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. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by relevant provisions of statute & rules. Further, filing of appeal in cases of Income Tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12A of the IT Act, 1961, shall not be governed by the limits specified in para 3 above and decision to file appeal in such cases may be taken on merits of a particular case.

10. This instruction will apply retrospectively to pending appeals and appeals to be filed henceforth in High Courts/Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/not pressed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed."

The extract of the paragraphs referred to supra, clearly indicates that the limits specified in para 3 may not apply to certain exceptions specified in para 8, at the same time para Nos. 9 and 10 of the Circular if read conjointly, clearly envisages that the present instructions will apply retrospectively to all the pending appeals and appeals to be filed henceforth in High Courts/Tribunals, subject to exceptions where the tax effect even if is less than 20 lac, can be preferred in High Courts.

2. Taking note of the CBDT Circular Dt. 10/12/2015 and the tax effect which indisputably in the instant case is less than 20 lac, much less than what has been prescribed for filing appeal before the High Courts, deserves to be dismissed as not pressed. However, it is made clear that the substantial questions of law raised in the instant appeals, if any, are left open to be examined in an appropriate proceeding, if arises in future. At the same time we consider it appropriate to observe that if the appeal falls in any of the exceptions as referred to in the Circular Dt. 10/12/2015, the Revenue will be at liberty to move an application for recalling of the order if so advised."

(xviii) Commissioner of Income Tax vs. Garment Crafts and Ors. (12.01.2016 - RAJHC) ITA No. 42/2008 & Ors.

"9. Counsels in some of the cases also contended that in few of the appeals preferred by the Revenue, the tax effect is less than 20 lac and therefore, in the light of the latest circular of the Central Board of Direct Taxes bearing No. 21/2005 dt. 10/12/2015, the board has instructed that the Circular be applied to appeals to be filed and also to pending in High Court and such appeals either are required to be withdrawn/not pressed by the Revenue and therefore, such of the appeals where the tax effect being below 20 lac, deserve to be dismissed in view of the Circular which is binding on the revenue.

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17. We may also deal with the issue raised by learned counsel for the assessees that in some of the appeals the tax effect being below 20 lac such appeals deserve to be dismissed in view of the Circular of the Central Board of Direct Taxes No. 21/2015 dated 10.12.2015. We have gone through the Circular which states (para 3) that where the monetary limit is below 20 lac insofar as the High Courts are concerned, and that it applies to all pending appeals (para 10) below the specified tax limits, which may be withdrawn/not pressed. However, in view of Article 141 of the Constitution, we are bound by the judgment of the Hon'ble Apex Court and bound to follow such an issue/question which is squarely and directly covered on the issue being law of the land, and the Circular may not be applicable at-least in such matters and even otherwise the Circular of CBDT is not binding on this Court. Thus, we hold that when an issue/question is directly covered by a binding judgment of the Hon'ble Apex Court or of this Court, the Circular supra insofar as such an issue/question is concerned, is not binding on this count and in our opinion if an issue/question is directly or squarely covered as aforesaid by a judgment and is no more res integra, the Circular (supra) would be inapplicable."

9. Mr. Pandey has relied on the following decisions:

(i) 2008(3) SCC 582 State of Kerala and Ors. vs. Kurian Abraham Pvt. Ltd. and Anr. (08.02.2008 - SC)

23. Tax administration is a complex subject. It consists of several aspects. The Government needs to strike a balance in the imposition of tax between collection of revenue on one hand and business-friendly approach on the other hand. Today, Governments have realized that in matters of tax collection, difficulties faced by the business have got to be taken into account. Exemption, undoubtedly, is a matter of policy. Interpretation of an Entry is undoubtedly a quasi-judicial function under the tax laws. Imposition of taxes consists of liability, quantification of liability and collection of taxes. Policy decisions have to be taken by the Government. However, the Government has to work through its senior officers in the matter of difficulties which the business may face, particularly in matters of tax administration. That is where the role of the Board of Revenue comes into play. The said Board takes administrative decisions, which includes the authority to grant Administrative Reliefs. This is the underlying reason for empowering the Board to issue orders, instructions and directions to the officers under it.

(ii) 2004(10) SCC 1, Union of India & Anr. vs. Azadi Bachao Andolan & Anr. (07.10.2003 - SC)

"47. It was contended successfully before the High Court that the circular is ultra vires the provisions of section 119. Sub-section (1) of section 119 is deliberately worded in general manner so that the Central Board of Direct Taxes is enabled to issue appropriate orders, instruction or direction to the subordinate authorities "as it may deem fit for the proper administration of the Act". As long as the circular emanates from the Central Board of Direct Taxes and contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to the source of power under section 119 irrespective of its nomenclature. Apart from sub-section (1), sub-section (2) of section 119 also enables the Central Board of Direct Taxes "for the purpose of proper and efficient management of the

work of assessment and collection of revenue, to issue appropriate orders, general or special in respect of any class of income or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties". In our view, the High Court was not justified in reading the circular as not complying with the provisions of section 119. The circular falls well within the parameters of the powers exercisable by the Central Board of Direct Taxes under Section 119 of the Act."

(iii) Union of India & others Vs. Arviva Industries India Limited and others- 2014 (3) SCC 159

"4. This Court in Commr. Of Customs Vs. Indian Oil Corpn. Ltd.- (2004)3 SCC 488, after examining the entire case law, culled out the following principles: (SCC p.497, para 12)

"(1) Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that it is not valid nor that it is contrary to the terms of the statute.

(2) Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

(3) A show-cause notice and demand contrary to the existing circulars of the Board are ab inititio bad.

(4) It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

5. In this particular case, the Board's Circular No.39/99- Cus. Dated 25.6.1999 extends the benefit of the brand rate of drawback to compensate exporters for the re-rolled steel products and processed fabrics. The High Court has rightly come to the conclusion that the circulars issued by the Board are binding on the Department. An effort was made by the learned Solicitor General to get this case referred to a larger Bench. We do not accept this contention in view of a number of decisions and especially the Constitution Bench decision in Dhiren Chemical Industries- (2002)2 SCC 127."

10. The provisions which are important are as under:

10.1 Article 141 of the Constitution of India

141. Law declared by Supreme Court to be binding on all courts The law declared by the Supreme Court shall be binding on all courts within the territory of India

10.2 Section 263 of the Income Tax Act

263. Revision of orders prejudicial to revenue

(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the 2 Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he, may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. 3Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-of the Commissioner under this sub- section shall extend 1 and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]

(2) No order shall be made under sub- section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]

(3) Notwithstanding anything contained in sub- section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court. Explanation.- In computing the period of limitation for the purposes of sub- section (2), the time taken in giving an opportunity to the

assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

10.3 Section 154 of the Income Tax Act

"154. Rectification of mistake.- (1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may,-

(a) amend any order passed by it under the provisions of this Act ;

(b) amend any intimation or deemed intimation under sub-section (1) of section 143.

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.

(2) Subject to the other provisions of this section, the authority concerned-

(a) may make an amendment under sub- section (1) of its own motion, and

(b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee, and where the authority concerned is the Commissioner (Appeals), by the Assessing Officer also.

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee, shall not be made under this section unless the authority concerned has given notice to the assessee of its intention so to do and has allowed the assessee a reasonable opportunity of being heard.

(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

(5) Subject to the provisions of section 241, where any such amendment has the effect of reducing the assessment, the Assessing Officer shall make any refund which may be due to such assessee.

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund already made, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186 no amendment under this section shall be made after the expiry of four years [from the end of the financial year in which the order sought to be amended was passed.

(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made by the assessee on or after the 1st day of June, 2001 to an income-tax authority referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it,-

(a) making the amendment; or

(b) refusing to allow the claim."

10.4 Section 151-A of the Customs Act

"151A. Instructions to officers of customs.- The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of goods or with respect to the levy of duty thereon, issue such orders, instructions and directions to officers of customs as it may deem fit and such officers of customs and all the other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board: Provided that no such orders, instructions or directions shall be issued-

(a) so as to require any such officer of customs to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Collector of Customs (Appeals) in the exercise of his appellate functions.]"

10.5 Section 37-B of the Excise Act

[37B. Instructions to Central Excise Officers. -The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the said Board: Provided that no such orders, instructions or directions shall be issued-

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the [Commissioner of Central Excise (Appeals)] in the exercise of his appellate functions."

11. While inaugurating a five day National Legal Workshop on 23.12.2001, Mr. Justice S.P. Bharucha (the then Chief Justice of India), made the following statement:

"The principle cause of arrears in the courts does not lay with the Judges or the Bar but with the State Governments. Fast Track Courts or amendments to the Civil and Criminal Procedure Code were of no real cure to the problem unless the Governments acted responsibly."

12. In view of the contentions which have been raised by learned counsel for the parties, an apprehension which has been put forward by the Department that in spite of Supreme Court decision the authority may take contrary view. In that view of the matter, the appeal may be allowed to be filed irrespective of monetary limit.

12.1. In our considered opinion, the intention is not to allow to file appeal up to the monetary limit fixed by the Board which has statutory force and apprehension is misconceived in view of observation made in para 21.

13. We have also heard learned counsel for the parties on the issue.

14. To give a comparison of Clause 11 of the Instruction No.3/2011 issued in reference to Board's Instruction No.5/2008 dated 15.5.2008 and Clause 10 of Circular No.21/2015 dated 10.12.2015, they are required to be reproduced again independently in a tabular form, which read as under:

Clause 11	*Clause 10*
This instruction will apply to appeals filed on or after 9th February 2011. However, the cases where appeals have been filed before 9th February, 2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed.	*This instruction will apply retrospectively to pending appeals and appeal be filed henceforth in High Courts/ Tribunals. Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not passed. Appeals before the Supreme Court will be governed by the instructions on this subject, operative at the time when such appeal was filed.*

15. Even on a plain comparison of two clauses, referred to above, it is very clear that the notification which was issued on 9th February, 2011 could not achieve the results which were envisaged by the Government. Therefore, after almost four years, they have come out with more liberal clause to make it retrospective so that the pendency could be reduced and genuine litigation can be decided on merits.

16. The reasons and objects for which Section 268-A of the Income Tax Act was introduced, reads as under:

> *"The underlying objective of the Board's instruction is to reduce litigation in small cases. With a view to protecting the Revenue's right to file or not to file an appeal, a new Section 268A of the Income- tax Act has been inserted so as to provide that-*
>
> *The Board may issue orders, instructions or directions to other income-tax authorities, fixing such monetary limits as it may deem fit. Such fixing of monetary limit is to be for the purpose of regulating filing of appeal or application for reference by any income tax authority under the provisions of this Chapter.*
>
> *Where an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, due to abovementioned order/instruction/direction of the Board, such authority shall not be precluded from filing an appeal or application for reference on the same issue in the case of –*
>
> *(a) the same assessee for any other assessment year; or*
>
> *(b) any other assessee for the same or any other assessment year.*
>
> *Where no appeal or application for reference has been filed by an income tax authority pursuant to the above mentioned orders/ instructions/ directions of the Board, it shall not be lawful for an assessee to contend that the income tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.*
>
> *The Appellate Tribunal or Court shall have regard to the above mentioned orders/ instructions/directions of the Board and the circumstances under which such appeal or application for reference was filed or no filed in respect of any case.*
>
> *Every order/instruction/direction which has been issued by the Board fixing monetary limits for filing an appeal or application for reference shall be deemed to have been issued under sub-section (1) of this new section and all the provisions of this section shall apply to such order/instruction/direction.*
>
> *Applicability: This amendment has been made applicable with retrospective effect from 1st April, 1999."*

17. From the policy which has been referred by different High Courts and the intention of the legislation to reduce the pendency of the tax appeal and to have a uniform policy for the department through-out the Country, therefore, the direction issued by the CBDT is binding on all subordinate officers and Section 268A(4) which has been amended with retrospective effect is applicable with all force in pending matters.

18. The intention of the legislation is very clear to prohibit the appeal analogous to the provisions of Code of Civil Procedure where there is a prohibition that appeal upto the value will not be entertained by the Court.

19. Under Section 260A of the Act only question of law is required to be decided, therefore, on analogous principle of Section 96(4) of the CPC, if the legislation has thought it fit to prohibit the department to file appeal, the instruction of CBDT to delegate the power, in our considered opinion, the appeal is prohibited. In view of sub-section (4) of Section 96 of the CPC where it has been prohibited that no appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed □ 10,000/-.

20. In view of majority of High Court decisions where the view is in favour of the assessee and in view of all the judgments referred by counsel for the assessee-respondent, if two views are possible, then one view which is in favour of the assessee is required to be upheld and the same is upheld.

21. The contention which has been envisaged is of the decision of the Supreme Court. There are ample powers under Section 263 and 154, which will meet the ends of justice and it will not be out of place to mention that the writ can also be

filed by the department if it is a gross case decided by any officer or authority but to that extent the appeal is not maintainable and would amount to give over riding effect to the statutory provisions.

22. It is well known that the Courts are flooded with litigation where the State Government and Central Government or the Department or Corporation are the largest litigants, therefore, frivolous litigation is curb for larger interest of avoiding more Tribunals or Courts to decide the matters on merits.

23. In that view of the matter, when the legislation had thought it fit to put some prohibition on the department, in our considered opinion the issue is required to be answered in favour of the assessee and against the department inasmuch as the circular of the CBDT is binding on the subordinate officers.

Per Hon'ble M.N. Bhandari, J.

24. The issue for our consideration is as to whether the Department can act contrary to the Circular issued by the Central Board of Direct Taxes (for short "the CBDT") in pursuance of Section 268A of the Income Tax Act, 1961 (for short "the Act of 1961").

25. It is admitted by learned counsel for the parties that the Department cannot act contrary to the Circular issued by the CBDT for reduction of arrears of the cases in different courts. It is more specifically after amendment in Section 268A of the Act of 1961. It is, however, urged by learned counsel appearing for the Department that if the Tribunal takes a view contrary to the judgments of the Apex Court then the appeal should be held maintainable irrespective of value of the tax effect.

26. Learned counsel appearing for the Department submits that Article 141 of the Constitution of India provides law declared by the Supreme Court to be binding on all the Courts within the territory of India. In a case where ratio propounded by the Supreme Court is not followed then irrespective of value of tax effect, appeal should be held maintainable. It is even otherwise required for the judicial discipline. The binding effect of the judgments of the Supreme Court has to be maintained. The Appellate Tribunals are not at liberty to take their own view contrary to the judgments of the Supreme Court on the same issue for the reason that no appeal can be preferred considering tax effect involved therein. The clarification is thus necessary to that extent.

27. Learned counsel for the non-appellant/s has contested the issue. It is submitted that when the Circular has been issued under Section 268A of the Act of 1961 then it takes statutory character, hence, no direction or liberty can be sought contrary to it. Accordingly, the arguments raised by learned counsel for the Department may not be accepted even in reference to Article 141 of the Constitution of India.

28. We have considered the submissions made by learned counsel for the parties and perused the record as well as the judgments cited at Bar.

29. Various High Courts have considered the issue raised before us. The Circular issued by the CBDT under Section 268A of the Act of 1961 is binding on the Department thus the appeal cannot be preferred contrary to the instructions given therein. This Court, however, cannot lose sight of the only issue raised by the Department in reference to Article 141 of the Constitution of India. If an issue has been decided by the Apex Court then the ratio propounded therein is to be applied as a precedence. If the Tribunal or the CIT (Appeals) takes a view contrary to the settled law then rider imposed by the CBDT on filing of appeal cannot be applied. If we hold that appeal would not be maintainable even if the Tribunal or the CIT (Appeals) has taken view contrary to the judgment of the Supreme Court then Article 141 of the Constitution of India would be violated. No statutory provision can stand or be read contrary to the constitutional provision.

30. In view of the above, theory of reading down needs to be applied for making Circular of the CBDT in consonance to the provisions of the Constitution of India otherwise it would not only cause judicial indiscipline but give rise to the anarchy, leading to serious consequences.

31. Accordingly, the Circular issued by the CBDT under Section 268A of the Act of 1961 is held binding on the Department thus appeal cannot be filed, if it is barred. It is, however, with a clarification that if the issue decided by the CIT (Appeals) or Tribunal is contrary to the judgments of the Supreme Court, the Department can prefer an appeal, however, care would be taken to file it only in those cases where the order passed by the CIT (Appeals) or the Tribunal is

contrary to the ratio propounded by the Supreme Court on the same issue. In doing so, sanctity of Article 141 of the Constitution of India would be maintained, thereby, serious consequences of taking different view would also be avoided.

32. The Department may incorporate it in the Circular to avoid further controversy.

33. The question framed before the Larger Bench is answered accordingly.

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