A HINDUSTAN AERONAUTICS LTD.

v.

COMMISSIONER OF INCOME TAX
KARNATAKA-I, BANGALORE

MAY 11, 2000

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[S. RAJENDRA BABU AND Y.K. SABHARWAL, JJ.]

Income Tax Act 1961—Section 264—Revision by assessee before CIT—
C *in respect of part of an order made by AAC—Appeal in respect of part of the order under challenge by Revenue before Tribunal—Whether revision before CIT in respect of part of the order maintainable—Held No-what becomes merged in the order of the Tribunal is the order made by AAC in its entirety and not in part.*

D *Practice and Procedure—Income tax Act 1961—Section 119—Circulars issued by CBDT—Held, are not binding when there is a contrary declaration of law by the Supreme Court or High Court.*

For the assessment year 1970-71, the assessee filed its return before the ITO who disallowed certain deductions claimed by the appellant on various
E **grounds. Against the assessment order of the ITO, the assessee filed an appeal before the Appellate Assistant Commissioner which was partly allowed. Both the Revenue and the assessee preferred second appeals before the Income Tax Appellate Tribunal, to the extent each one of them was aggrieved. The assessee withdrew its appeal before the Tribunal with liberty reserved to it to approach the Commissioner of Income Tax in a revision under Section 264 of**
F **the Act. The Tribunal, dismissed the appeal filed by the Revenue on merits.**

The assessee filed revision petition under section 264 of the Act before the Tribunal. The Commissioner dismissed the revision petition on the ground that he has no power to revise any order under Section 264 as the order had
G **been made the subject to appeal to the Appellate Tribunal.**

Assessee filed a Writ Petition challenging the order made by the Commissioner. The Single Judge, who considered the matter, directed the Commissioner to entertain the Revision Petition filed by the assessee in terms of Circular No. XVI/11/69 issued by the Central Board of Direct Taxes and
H **examine its case on merits. An appeal was preferred by the Revenue before**

the Division Bench. A

The Division Bench following a decision in *C.I.T.* v. *Hindustan Aeronautics,* 157 ITR 315, of the Full Bench of the High Court held that the Revision filed by the appellant could not be maintained and the Commissioner was justified in dismissing the same. The Division Bench held that the Commissioner of Income Tax cannot entertain assessee's Revision Petition B under Section 264 preferred from a part of the order of the Appellate Assistant Commissioner against which the assessee is aggrieved, during the pendency or after the disposal, as the case may be, of the Department's Second appeal before the Income Tax Appellate Tribunal preferred against another part of the order where the subject matter of the appellate and revisional proceedings C are not the same but relates to distinct matters.

In appeal to this Court it was contended by the assessee that the circulars issued by the Board under Section 119 of the Act is binding on the Commissioner in terms of which he was bound to examine the revision of the appellant on merits and the order of the Single Judge merely gives effect to D such a course. Revenue contended that the circulars or instructions given by the Board are no doubt binding in law on the authorities under the Act but when the Supreme Court or the High Court had declared the law on the question arising for consideration it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision E of the Supreme Court or the High Court.

HELD : 1. Section 264(4) of the Income Tax Act, 1961 provides that the Commissioner shall not revise any order under this Section in a case where the order has been made the subject of an appeal to the Appellate Tribunal. What becomes final in such a proceeding is the order made by the Appellate F Tribunal which is a superior forum than that of the Commissioner and the order which is the subject matter of an appeal cannot be divided into two parts, one which is the subject matter of the appeal and the other which was not in issue in the appeal before the Tribunal. What becomes merged in the order of the Tribunal is the order made by the Appellate Assistant Commissioner G in its entirety and not in part. Indeed wherever the legislature intended to make a distinction in such circumstances where there will be no merger in such cases is expressly provided. Section 263 of the Act where a revision is permissible in cases of orders which are prejudicial to the interest of the Revenue, in Explanation (c) thereof it has been provided where any order referred to in this sub-section and passed by the Assessing Officer had been H

A **the subject matter of any appeal the powers of the Commissioner under this sub-section shall extend to such matters as had not been considered and decided in such appeal. Where the legislature intended that the scope of revision should extend to a part of the order which had not been considered and decided in an appeal and thereby does not merge is explicitly provided.**
B **When the legislature does not make such a distinction in the scheme of Section 264 of the Act the view taken by the High Court appears to be correct. [234-B-F]**

Vijayalakshmi Lorry Service **v.** *CIT,* **ITRC 37 of 1973 and** *CWT* **v.** *Kasturbai,* **177 ITR, 188, relied on.**

C **2. The contention of the Revenue that the circulars or instructions given by the Board are no doubt binding in law on the authorities under the Act but when the Supreme Court or the High Court had declared the law on the question arising for consideration it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of**
D **the Supreme Court or the High Court is upheld. [234-G-H; 235-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9104 of 1995.

From the Judgment and Order dated 24.7.85 of the Karnataka High Court
E in W.A. No. 721 of the 1981.

Arvind Minocha, for the Appellant.

Dr. V. Gaurishankar, S. Rajappa and Ms. Sushma Suri for the Respondent.

The Judgment of the Court was delivered by

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RAJENDRA BABU, J. The appellant before us is M/s Hindustan Aeronautics Ltd., which is a wholly centrally owned Government Company engaged in the manufacture of aeroplanes and its parts. For the assessment year 1970-71, the appellant filed its return before the concerned ITO who by
G an order made on March 15, 1973 completed the assessment by disallowing certain deductions claimed by the appellant on various grounds. Against the assessment order of the ITO, the assessee filed an appeal before the Appellate Assistant Commissioner who by an order made on October 27, 1976 partly allowed the same. By the order of the Appellate Assistant Commissioner, both the Revenue and the assessee preferred second appeals before the Income
H Tax Appellate Tribunal, Bangalore to the extent each one of them was

aggrieved. However, on May 9, 1977, the assessee withdrew its appeal before the Tribunal with liberty reserved to it to approach the Commissioner of Income Tax (Commissioner) in a revision under Section 264 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act']. On May 20, 1978, the Tribunal, however, dismissed the appeal filed by the Revenue on merits.

The assessee filed revision petition on May 19, 1977 under Section 264 of the Act to the extent of the grievance projected before the Tribunal earlier. On 22.12.78 the Commissioner dismissed the revision petition on the ground that he has no power to revise any order under Section 264 as the order had been made the subject to an appeal to the Appellate Tribunal.

A writ petition [No. 4803/79] was filed challenging this order made by the Commissioner. The learned Single Judge, who considered the matter, directed the Commissioner to entertain the revision petition filed by the assessee in terms of Circular No. XVI/11/69 issued by the Central Board of Direct Taxes [hereinafter referred to as 'the Board'] and examine its case on merits. Aggrieved by that order, an appeal was preferred by the Commissioner before the Division Bench.

The Division Bench following a decision in *CIT* v. *Hindustan Aeronautics,* 157 ITR 315, of the Full Bench of the High Court held that the revision petition filed by the appellant could not be maintained and the Commissioner was justified in dismissing the same. The question considered by the Full Bench was as follows :

> "Can the Commissioner of Income Tax entertain assessee's revision petition under Section 264 of the Income Tax Act, 1961, preferred from a part of order of the Appellate Commissioner against which the assessee is aggrieved during the pendency or after the disposal, as the case may be, of the Department's Second appeal before the Income - Tax Appellate Tribunal preferred against another part of the same order where the subject matter of the appellate and revisional proceedings are not the same but relates to distinct matters."

The said question was answered in the negative.

This view is a reiteration of earlier view stated in *Vijayalakshmi Lorry Service* case, ITRC 37 of 1973. The Commissioner had in fact followed the decision of the High Court in *Vijayalakshmi Lorry Service* case. It is not necessary for us to dilate on this aspect of the matter any further because

A this Court in *CWT* v. *Kasturbai,* 177 ITR 188, has held that the Commissioner has no power to revise any order under Section 264 if the order "has been made subject to an appeal to the Appellate Tribunal, even if the relief claimed in the revision is different from the relief claimed in the appeal and irrespective of the fact whether the appeal is by the assessee or by the Department". That is because Section 264(4) provides that the Commissioner shall not revise any B order under this section in a case where the order has been made the subject of an appeal to the Appellate Tribunal. What becomes final in such a proceeding is the order made by the Appellate Tribunal which is a superior forum than that of the Commissioner and the order which is the subject matter of an appeal cannot be divided into two parts - one which is the subject C matter of the appeal and the other which was not in issue in the appeal before the Tribunal. What becomes merged in the order of the Tribunal is the order made by the Appellate Assistant Commissioner in its entirety and not in part. Indeed where the legislature intended to make a distinction in such circumstances where there will be no merger in such cases is expressly provided. We may notice that Section 263 of the Act where a revision is D permissible in cases of orders which are prejudicial to the interest of the Revenue, in the Explanation (c) thereof it has been provided where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal the powers of the Commissioner under this sub-section shall extend to such matters as had not been considered and E decided in such appeal. Where the legislature intended that the scope of revision should extend to a part of the order which had not been considered and decided in an appeal and thereby does not merge is explicitly provided. When the legislature does not make such a distinction in the scheme of Section 264 of the Act the view taken by the High Court appears to us to be correct.

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However, the learned counsel for the appellant relied on the decisions in *Navnitlal C. Javeri* v. *K.K. Sen,* AAC of Income Tax, 56 ITR 198, *Ellerman Lines Ltd.* v. *C.I.T,* 82 ITR 913 and *K.P. Varghese* v. *ITO,* 131 ITR 597, to contend that the circular issued by the Board under Section 119 of the Act G is binding on the Commissioner in terms of which he was bound to examine the revision of the appellant on merits and the order of the learned Single Judge merely gives effect to such a course. Dr. Gauri Shankar, learned senior advocate for the Revenue, however, pointed out by referring to several decisions of this Court to the effect that the circulars or instructions given by the Board are no doubt binding in law on the authorities under the Act H but when the Supreme Court or the High Court has declared the law on the

question arising for consideration it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court. We find great force in this submission made by the learned senior advocate for the Revenue and find absolutely no merit in this appeal and the same stands dismissed, but in the circumstances of the case, there shall be no orders as to costs.

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V.M. Appeal dismissed.