Appeal against earlier ITAT order could be filed from second order if second order made reference of earlier order

Summary – The High Court of Bombay in a recent case of Forest Development Corporation of Mah. Ltd., (the Assessee) held that Even if appeal has not been filed from an earlier order, which has been relied upon by impugned order, appellant can file an appeal from second order; however, said filing of appeal from second order has to be supported by averments/submissions showing distinction in facts and/or in law

Facts

- The Tribunal passed impugned order whereby it dismissed the revenue's appeal by following its order in respect of the same assessee on identical issues for the assessment year 2003-04. There were no independent reasons recorded in the impugned order except stating the issue stood concluded against the revenue by earlier order of the Tribunal for the assessment year 2003-04. No appeal had been filed by the revenue for the assessment year 2003-04 from the order of the Tribunal.
- The revenue having admitted that there were no distinction in facts and in law in the subject Assessment Year *i.e.* 2002-03 to that existing when the earlier order of the Tribunal relating to assessment year 2003-04 was passed, contented that in matters of tax laws, there was no question of *res judicata*. Thus, the revenue was entitled to file an appeal from the impugned order of the Tribunal even if no appeal was filed from the earlier order of the Tribunal.

Held

- The fact that the question of law has been formulated by the Court as a substantial question of law at the time of admission would not by itself estop the respondents from submitting before the Court that the question as formulated in the given facts does not give rise to substantial question of law. This is particularly so as sub-section (4) of section 260A enables the respondents at the hearing of the appeal to impress upon the Court that the issue on which the question has been admitted does not give rise to any substantial question of law. Therefore, the respondent is not prohibited from urging that a question which has been admitted is not a substantial question of law, at the final hearing of the appeal. Moreover, it is always open to the Court at the final hearing of the appeal to come to the conclusion that the question as formulated does not give rise to any substantial question of law and dismiss the appeal, as the view at the stage of admission is only a *prima facie* view.
- There can be no two opinions on the issue that even if appeal has not been filed from an earlier order, which has been relied upon by the impugned order, the appellant can file an appeal from the

second order. However, said filing of appeal from the second order has to be supported by the averments/submissions showing distinction in the facts and/or in law which would evidence that the impugned order gives rise to substantial question of law in the backdrop of the distinctive features in the subsequent order, even though no appeal has been filed from the earlier order. No such averment is found either in the appeal memo nor any such submission has been made at the bar.

- One of the important elements of rule of law is certainty of law. Therefore, mere change in the Assessment Year, Assessing Officer or assessee will not warrant a filing of appeal. Therefore, where the relied upon order has been accepted by the revenue and they are able to show by either making an averment in the appeal memo or filing an affidavit showing distinctive features either in facts or in law which would warrant different considerations for entertaining the appeal, the Court would entertain the appeal. However, the revenue cannot pick and choose the matters which it would agitate before a Higher Forum without there being any distinctive features in fact and /or law.
- Moreover, even if the principle of *res judicata* does not apply in tax matters, yet consistency and certainty of law would require the State to take uniform position and not change their stand in the absence of change in facts and/or law. In this case, admittedly there is no change in the facts and/or in law.
- In the present case, no distinction in facts or law has been shown in the earlier order of the Tribunal for the assessment year 2003-04 and the impugned order. Nor any submission has been made to show why the reasons found in the earlier order which are incorporated in the impugned order are not sustainable in law. This would have to be shown as the impugned order merely relies upon the earlier order of the Tribunal for the assessment year 2003-04. In fact, the revenue has even not annexed the copy of the earlier order for the assessment year 2003-04 of the Tribunal to the appeal memo.
- In the above view, there is no reason to interfere with the impugned order of the Tribunal. Thus, in the peculiar facts of the case, no substantial question arises for consideration.
- Accordingly, the revenue's appeal is dismissed.