IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-tax)
(Original Side)

Present:
The Hon'ble Mr. Justice Bhaskar Bhattacharya
And
The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.3 of 2003
Surajmall Lalchand & Sons

Versus

Assistant Commissioner of Income-tax Central Circle-XI

For the Appellant: Mr. R. N. Dutta,
Smt. Sutapa Roy Choudhury.

For the Respondent: None appears.

Heard on. 26.07.2011

Judgment on: August 12, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax Act, 1961 is at the instance of an assessee and is directed against order dated 22nd August, 2002, passed by the Income-tax Appellate Tribunal, "B" Bench, Kolkata, in Income-tax Appeal No.1036 (Cal) of 1997 for the Assessment Year 1993-94 and thereby partly allowing the appeal filed by the Revenue.

Being dissatisfied, the assessee has come up with the present appeal.

The facts giving rise to filing of this appeal may be summed up thus:

a) The appellant is a registered Partnership Firm carrying on business of giving loans and advances and the present appeal arises out of assessment for the Assessment Year 1993-94, of which the Previous Year ended on 31st March, 1993.

b) For the Assessment Year under consideration, the appellant filed a return of income on 3rd February, 1994 disclosing the total income of Rs.1,41,540/-. The return was processed under Section 143(1) (a) of the Act and notice was issued under Section 143(2) of the Act. In making the assessment, the Assessing Officer disallowed the interest receivable on account of loan debtors against the interest debited by the assessee payable to the loan creditors for Rs.25,71,523/-.

c) Being dissatisfied, the appellant preferred an appeal before the Commissioner of Income-tax (Appeals). On consideration of the submission made by the appellant, the Commissioner of Income-tax (Appeals) allowed the claim of the appellant amounting to Rs.13, 03,140/- relating to interest liability.

d) The CIT (Appeals) held that since the assessee was mainly engaged in money lending business, it would not be feasible to require it to establish as one-to-one co-relation between the money going out as the loans advanced and the money coming in as the loans borrowed. It was further held that it was clear that Rs.73,24,200/- appeared as

minimum of the amount for six years by which the aggregate amount of loan given exceeded the total amount of loan taken and thus, it was logical that the amount to the extent of Rs.73,24,200/- was available as rolling from the own fund of the assessee. According to the CIT (Appeals), the interest computed at the rate of 15% per annum on Rs.73,24,200/- worked out at Rs.10,98,630/- and the same amount could be treated as outside the scope of disallowance on the ground that the interest from advances to the extent of Rs.73,24,200/- could be treated as coming out of the assessee's own generated funds in respect of which it was not required to incur any liability on account of interest payable on the borrowed money. It was further held that in working out the disallowance out of the amount of interest debited to the profit and loss account, the assessee should be allowed the benefit accruing from liberty to advance loans aggregating to Rs.73,24,200/- free from interest without in any way adversely affecting its claim for deduction of interest liability. Thus, the CIT (Appeals) deleted the addition of Rs.24,01,770/- and restricted the disallowance to Rs.1,39,753/-.

e) Being dissatisfied, the Revenue preferred an appeal before the Tribunal below and the Tribunal by the order impugned set aside the order passed by the Commissioner of Income-tax (Appeals) and remanded the matter to the Assessing Officer to decide the aforesaid issue afresh in accordance with law and in the light of the

observations made in the body of the order after giving reasonable opportunity of hearing to the parties. According to the Tribunal, the notional interest income cannot be taxed but it the borrowed funds had been diverted to interest free advances, then certainly the interest payable on borrowed funds is not allowable. The Tribunal held that as all the material details whether the interest free advances were related to the business or not, and the interest paid on the total amount of borrowed fund and the rate of interest paid on borrowed funds were not available from records, the issue should be decided afresh after giving opportunity of hearing to the assessee. The Tribunal, however, made it clear that the disallowances of interest would be restricted to the extent of interest paid/payable on borrowed sum only and the disallowances of interest proportionately or otherwise would be calculated by the rate of interest on which the interest was paid or payable on borrowed funds. The Tribunal further repeated that no tax would be leviable on notional interest but the interest paid on borrowed funds should be disallowed if the same was not utilized for business purpose

f) Being dissatisfied, the assessee has come up with the present appeal.

At the time of admission of this appeal, a Division Bench of this Court formulated the following substantial questions of law for decision:

"(i) Whether on proper interpretation of Section 36(1)(iii) of Income Tax Act, 1961 the direction of the Tribunal that if borrowed funds have been diverted to interest free advance then interest payable on borrowed funds is disallowable is sustainable in law.

"(ii) Whether the Tribunal acted legally is directing to disallow interest proportionately or otherwise by calculation of the rate of interest on which the rate of interest was paid or payable on borrowed funds.

"(iii) Whether on the facts and in the circumstances of the case the order of remand by the Tribunal is in accordance with law."

At the time of hearing, Mr. Dutta, the learned Advocate appearing on behalf of the appellant, restricted his submission only to question no. (iii) formulated above and submitted that the Tribunal below, while remanding the matter, could not pass any direction to the Assessing Officer. In other words, according to Mr. Dutta, the remand should have been for *de novo* determination without any restriction. In support of his contention, Mr. Dutta relied upon the following two decisions:

1. State of Madhya Pradesh Vs. Nerbudda Valley Refrigerated Products Company Private Limited & Ors., reported in (2010) 7 SCC 751;

2. Commissioner of Income-tax Vs. H.P. State Forest Corporation Ltd., reported in [2010] 320 ITR 54 (HP).

After hearing the learned counsel for the appellant and after going through the materials on record, we find that the view taken by the Tribunal is correct and the order of remand was also justified in the absence of sufficient materials on record.

We are unable to accept the contention of Mr. Dutt that the Tribunal below could not pass any direction while remanding the matter and it should have passed an order of open remand. An appellate authority, in our opinion, has every right to remand a matter on a specific point if the mistake of the authority below is limited to that very point and in such a situation, there is no necessity of passing an order of fresh assessment on all points.

In the case of State of M. P. vs. Nerbudda Valley Refrigerated Products Company Pvt. Ltd. and Ors (supra), relied upon by Mr. Dutt, the Supreme Court was dealing with a case where the High Court in exercise of writ-jurisdiction interfered with an order of an original authority having jurisdiction notwithstanding the provisions of appeal before the Collector against such order. In such a situation the Supreme Court held that even if the order of the first authority, in that case, Nazul Officer, required interference, it was for the appellate authority to look into it and take a decision one way or the other and it was not an extraordinary case which warranted direct interference by the High Court under Article 226 of the Constitution. The Supreme Court pointed out that the Nazul Officer had adverted to a relevant fact that the Government, while

renewing the lease of 3.13 acres of land from March 14, 1999 to March 13, 2029 in favour of the respondent-Company, permitted it to change the use of leased land from industrial purpose to commercial or residential purpose on payment of the lease rent, as payable on the land used or changed for commercial or residential purpose. The Supreme Court further held that if the parties were aggrieved by the order of the Nazul Officer, they were free to challenge the same before the Collector as pointed above and is such circumstances, interference by the High Court against the order of the original authority, which is based on factual details, was not warranted under writ jurisdiction. In that context, it was further held that when a matter was remitted to the original authority to decide the issue, the said authority must be allowed to take a decision one way or the other in accordance with the statutory provisions, rules and regulations applicable to the same and there could not be any restriction to pass an order in such a way dehors the statutory provisions or regulations/instructions applicable to the case in particular. In the case before us, the Tribunal found that there was error in the assessment on a particular question and thus, there was no wrong in setting aside the order and remanding the matter specifying the field of investigation. The above decision does not apply to the facts of the present case.

In the case of CIT vs. H. P. State Forest Corporation Ltd (supra), a Division Bench of Himachal Pradesh High Court was considering a case where the accounts of the assessee, a State Government Corporation, not having been audited by the office of the Comptroller and Auditor General, the Assessing

Officer treated the assessee's return as a *non est* and passed order of assessment under Section 144 of the Act. The CIT (A) affirmed such order but on a further appeal, the Tribunal set aside the assessment and directed assessment with audited accounts submitted by the assessee with further direction the income to be assessed was to be at a figure less than that declared by the assessee in its return. On a rectification application by the assessee, the Tribunal allowed the application but directed that the income should not be assessed at a figure assessed by the Assessing Officer under Section 144 of the Act. In an appeal under Section 260A of the Act, the High Court held that when the Tribunal directed the assessment *de novo*, there was no justification of putting embargo as to the upper or lower limit of income to be assessed. In the case before us, the Tribunal while remanding the matter has rectified the mistake of the authorities below and has indicated the right approach which as an appellate authority the Tribunal is free to point out to an errant subordinate authority. We, thus, find that the said decision does not help the appellant in any way.

We, consequently, dismiss the appeal by answering all the three points in the affirmative and against the assessee.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarit, J.)