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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 30th October, 2012

\+ **ITA 323/2010**

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms. Rashmi Chopra, Sr. Standing Counsel.

versus

RBG INVESTMENT & FINANCE LTD. ..... Respondent
Through: Mr. S. Krishnan, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R. V. EASWAR, J: (OPEN COURT)

The Revenue which is in appeal is aggrieved by the order of the Tribunal restoring the issue of allocation of interest expenditure back to the assessing officer following the decision of a Special Bench of the Tribunal with certain directions. The contention of the Revenue is that the Tribunal ought not to have issued those directions and should have kept the remand open.

2. After hearing both the sides we frame the following question of law: -

"*Whether the Tribunal was right in law in restoring the issue of allocation of interest expenditure and financial charges with the direction to the assessing officer to follow the decision of the Special Bench of the Tribunal in the case of Venkateshwara Investment & Finance Pvt. Ltd.?*"

3. The assessee is a company engaged in finance and investment business. While completing the assessment, the assessing officer noted that the assessee derived income from the activity share dealing and from loans and advances. He, therefore, took the view that the interest and financial charges incurred by the assessee should be bifurcated

between the two activities. Incidentally, he also considered the share dealing activity as speculation on the basis of the Explanation to section 73. He arrived at the ratio between the share dealing (speculative) and the loan and advances at 85:15. This resulted in a higher amount of ₹3,27,55,572/- being apportioned against the speculation income and lesser amount of ₹57,85,395/- apportioned against the interest from loans and advances. The computation resulted in a loss in the speculation activity and a taxable income in the other activity.

4. The assessee carried the matter in appeal to the CIT (Appeals) and contended that the bifurcation between speculation and loans and advances was not justified and that both the activities should be considered as business activities giving rise to an assessment under the head 'business'. Obviously the assessee wanted this because in that case the entire interest and financial charges incurred by it would be allowed as a deduction without being bifurcated. The CIT (Appeals) found merit in the assessee's contention and held as under: -

> "*I have considered the facts of the case. In the case reported in 232 ITR 7, the Hon'ble High Court has held that once capital has been borrowed for the purpose of business, it is immaterial as to how the borrowed money was applied. The interest payment would be deductible u/s 361(1)(iii) of the Act. Considering that the borrowings made by the assessee were for the purpose of business, whether of dealing in shares or dealing in investments, the interest payable on such borrowings has to be allowed as deduction u/s 36(1)(iii). Such interest cannot be allocated among different kinds of business activities. Accordingly, the claim of the appellant is accepted and the apportionment on interest and financial charges made in the assessment order is deleted.*"

5. The Revenue carried the matter in appeal to the Tribunal and one of the grounds taken was that the CIT (Appeals) "*erred in deleting the disallowance of proportionate interest of ₹3,27,55,572/- and holding the speculative business as business income*". The

Tribunal referred to an order of a Special Bench of the Tribunal in the case of Venkateshwara Investment and Finance Pvt. Ltd. (93 ITD 177) and held as under: -

> "*4.2 The Ld. A.R. also drawn our attention to the audited balance sheet of the company wherein deployment of funds for various activities like investment in shares as well as loans and advances, were indicated, which clearly reveals that loans and advances were much more than the investment in shares. Keeping in view the proposition laid down in the Special Bench as discussed herein above, we restore this matter back to the file of the A.O. for deciding afresh the allocation of interest expenditure, keeping in view the ratio laid down by the special bench and after giving due opportunity to the assessee.*"

6. The grievance of the Revenue is not so much against the remand as it is against the rider placed by the Tribunal that the assessing officer, while deciding afresh the allocation of interest expenditure, should "keep in view" the ratio laid down by the Special Bench (supra). The contention of the assessee on the other hand is that the assessing officer invoked the Explanation to section 73 merely to thwart the assessee's claim for deduction of interest and financial charges and that the distinction made by the assessing officer between the two types of activities – share dealing and advancing of loans – was artificial. It is also contended that the order of the Special Bench of the Tribunal (supra) relied upon in the impugned order merely lays down certain guidelines of a general nature in order to ascertain what the principal business of a company is and there is nothing seriously wrong in the Tribunal's direction that the assessing officer may keep in view those guidelines.

7. We do not think that the assessee can really object to the point taken by the Revenue that it should be an open remand without any strings attached. At the same time, there is no need for alarm since the Tribunal has not decided any issue of fact or law but has only directed the assessing officer to "keep in view" the ratio laid down in the order of the Special Bench of the Tribunal (supra). Even so, the apprehension of the Revenue that the direction of the Tribunal may tie the hands of the assessing officer

cannot be said to be entirely unfounded. We accept the general proposition that while remanding issues for fresh consideration by the assessing officer, the Tribunal should be very cautious in issuing directions, even if it is only for the guidance of the assessing officer. The direction should not give rise to a situation where the assessing authority is likely to feel incommoded by it. The question here is as to how the principal business of a company is to be ascertained. A question such as what is the principal business of a company – whether it is the granting of loans and advances, may involve an inquiry into several other facts not contemplated by the Special Bench (supra) and necessitate deeper considerations than what was visualized by the Special Bench and to that extent the fears expressed by the Revenue cannot be said to be wholly unjustified. A perusal of the extract from the order of the Special Bench quoted in the impugned order of the Tribunal shows that they are, as rightly pointed out on behalf of the assessee, in the form of broad and general guidelines and can be kept in view while deciding the question. At the same time the assessing officer need not be confined to those guidelines only and can travel much beyond them, if the inquiry justifies it and can take into account all the attendant and relevant facts and circumstances of the case, without being confined to those guidelines. We think this clarification should suffice.

8. The substantial question of law is, therefore, answered in the negative, in favour of the department and against the assessee and in the terms stated above. No costs.

R.V.EASWAR, J

S. RAVINDRA BHAT, J

OCTOBER 30, 2012
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