**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 2277 OF 2013

Commissioner of Income Tax-11,
Mumbai .. Appellant

v/s.

M/s.Kanga & Co., ..Respondent

Mr. P.C.Chhotaray, for the appellant.
Mr.Atul Jasani, for the respondent

**CORAM : M.S. SANKLECHA &**
**B.P. COLABAWALLA, J.J.**

**DATED : 01st FEBRUARY, 2016.**

**P.C.**

1. This Appeal by the Revenue under Section 260-A of the Income Tax Act, 1961 (the Act) assails the order dated 14th June, 2013 passed by the Income Tax Appellate Tribunal (Tribunal). The appeal relates to Assessment Year 2008-2009.

2. The appellant - Revenue urges following question of law for our consideration.

> *"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the sum of Rs.1,20,89,002/- paid to ex partners amounted to diversion of income by over-ridding title and so was allowable as deduction? "*

3. The only issue in this appeal is the exclusion from the income of the firm, the amounts relatable to the retired/deceased partner/s share by diversion on account of overriding title in favour of the ex-partner/s or their heirs/ executors by virtue of the partnership deed.

4. We find that the impugned order of the Tribunal has dismissed the Revenue's appeal by inter alia recording the fact that in the order of the Commissioner of Income Tax (Appeals) (CIT(A)) had only followed the consistent view of the Tribunal in the assessee's own case for the earlier Assessment Years. In fact, the impugned order of the Tribunal has further placed reliance upon the decision of this Court in Income Tax Appeal No. 860 of 2009 dated 19/06/2009 rendered in the respondents – assessee's own case as well as decision of this Court in the case of ***CIT Vs. Mulla and Mulla and Craigie, Blunt and Caroe, (1991) 190 ITR 198*** while dismissing the Revenue's appeal.

5. In view of impugned order of the Tribunal merely following the orders of this Court, we are of the view that the appeal does not raise any substantial question of law.

6. In view of our above finding, the learned Counsel for the Revenue wanted to urge an additional question of law which reads as under :

> "Whether on the facts and in the circumstances of the case and in law, the assessee has adopted colourable device to evade tax?"

We are unable to understand how the additional question of law can arise from the impugned order of the Tribunal. At no point of time before the authorities or before the Tribunal, the Revenue has urged that respondent- assessee had adopted any colourable device to evade tax. The appeal memo before us also does not refer to the above issue even remotely. This question does not arise from the order of the Tribunal and therefore as held by this Court in CIT Vs. Tata Chemicals Ltd. 256 ITR 395 and CIT Vs.Smt. Lata Shantilal Shah (2010) 323 ITR 297, such a question cannot be urged in an appeal under Section 260A of the Act. Moreover, these are the questions of fact which ought to have been raised before the authorities. In fact, it is not even the Assessing Officer's case that the assessee has adopted any colourable device to evade tax either in his order or before the Tribunal. The Assessing Officer confirmed the demand only on the ground that though the issue is decided by this Court, it is still pending in the Apex Court on a question of law. It is not pending on issue of fact viz. adoption of colourable device. In the above view, the additional question of law sought to be raised by the Revenue cannot be raised in the present appeal and hence, is not considered.

7. Inspite of our pointing out to the learned Counsel for the Revenue that in the present facts, no substantial question of law arises for our consideration, he insisted upon pointing out that this Court had admitted an appeal filed by M/s. S.B.Billimoria & Co., being Income Tax Appeal No. 940 of 2009 on 28/07/2009. The appeal filed by M/s. S.B.Billimoria & Co., according to Mr.Chhotaray raises issues which are identical to the issues arising in the present appeal. We are unable to understand Mr.Chhotaray's submission. M/s.S.B.Billimoria & Co. had filed appeal because the Tribunal in its order had negatived the claim of the appellant that the amount paid to its retiring partner was diverted by overriding title and thus, never formed a part of the M/s.S.B.Billimoria & Co.'s income. Therefore, the view of the Tribunal was at variance with a view taken by this Court in Mulla & Mulla & Craigie Blunt & Caroe (supra) as well as in the respondent- assessee's own case in Income Tax Appeal No.860 of 2009 (the Commissioner of Income Tax – 11 Vs. M/s.Kanga & Co.) decided on 19/06/2009. Therefore the appeal of M/s. S.B.Billimoria & Co. has been admitted because it takes a view different from the view taken by this Court. The reliance upon the admission of M/s.S.B.Billimoria & Co.'s appeal (Income Tax Appeal No. 940 of 2009) does not support cause of the Revenue.

8. Before closing, we would observe that judicial time is very precious in view of the large numbers of Income Tax Appeals pending disposal before this Court. In these circumstances, we would expect the Revenue's Counsel to act with responsibility and not raise issues of fact not raised before the authorities and also not raised even remotely in the appeal memo. In this case, the Tribunal placed reliance upon its earlier orders in respondent- assessee's own case rendered by this Court as well as the decision of this Court in Mulla & Mulla & Craigie Blunt & Caroe (supra). Before the Tribunal, the Revenue accepted that it is so and no distinguishing features were brought to the notice of the Tribunal for it to take a different view. However, it is only at the time of the hearing of this appeal, the Counsel for the Revenue claims to have studied papers which none of the authorities have referred to and seeks to reopen the issue on facts. It is not fair on the part of the Counsel for the Revenue to proceed on the basis that all officers of the Revenue who handled this case did not do so properly and it is only he who does so. The Revenue's Counsel should appreciate that the Tribunal is the final fact finding authority and in case the order of the Tribunal is vitiated on account of mischief on the part of the Respondent then appropriate proceeding should have adopted before the Tribunal to correct the same. In the absence of the same, the

Tribunal order has to be accepted as it is a final fact finding authority and factual findings are not to be disturbed unless the same is perverse or arbitrary on the basis of the facts on record. It is not open to the Revenue to urge and canvass that the finding of fact of the Tribunal requires a re-look by looking the documents which are not a part of the record before us and even not remotely referred to in the memo of appeal.

9. Hence, appeal is dismissed. No order as to costs.

**(B.P. COLABAWALLA, J.)** **(M.S. SANKLECHA, J.)**