ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction (Income Tax)

ORIGINAL SIDE

ITA No. 124 of 2005

TRADE APARTMENT LTD.

Versus

COMM. OF INCOME TAX W.B. - XIII KOL

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 12th February, 2015.

Mr. Moloy Dhar, Adv. and Mr. A.K.Dey, Adv.
for the appellant
Mr.P.K.Bhowmick, Adv. for the Respondent

The Court : The subject matter of challenge in this appeal is a judgment and order dated 22nd November, 2004 by which the learned Tribunal dismissed an appeal preferred by the assessee. Aggrieved by the order the assessee has come up in appeal. The question framed at the time of admission of the appeal reads as follows :

" *Whether on the facts and in the circumstances of the case, when the assessee had during the course of carrying on the*

business of granting of loans and advances earned interest income and although the same was offered and assessed as "income from other sources", it had nonetheless the character of business income admittedly and should be set-off against brought forward business loss and as such the decision of the Tribunal in not allowing the set-off was preverse ?"

The facts and circumstances briefly stated are as follows :

The assessee filed a return for the assessment year 1997-98 showing a total loss of Rs.4,50,76,610/-. The assessment was completed under section 143(3) of the Act determining a total income of Rs.1,94,15,386/-. The assessee applied for rectification contending that the income arising out of interest and the income arising out of dividend which the assessee had offered for taxation should be treated as business income so that the carry forward losses could be set-off against them. The aforesaid prayer of the assessee was allowed by an order dated 27th June, 2001 thereby the income assessed at Rs.1,94,15,390/- was reduced to nil. The Assessing Officer, however, realised that the prayer of

the assessee under section 154 was not rightly allowed and, therefore, he issued a notice dated 23rd July, 2001 under section 154 seeking to reverse the order under section 154 passed on 27th June, 2001. It is not in dispute that the notice was duly received by the assessee, but he did not reply thereto.

In the circumstances, an order under section 154 dated 25th February, 2002 was passed reversing the order dated 27th June, 2001. Aggrieved by the order dated 25th February, 2002, the assessee preferred an appeal. The CIT (Appeal) was of the opinion that under section 129 of the Act a fresh notice should have been given to the assessee and, therefore, the assessee was given an opportunity to make his representation and the matter was remanded to the Assessing Officer. The Assessing Officer after considering the representation of the assessee furnished a remand report to the CIT (Appeal). CIT (Appeal) after considering the whole matter rejected the contention of the assessee by his order dated 9th August, 2002. The assessee aggrieved by the order of the CIT

(Appeal) preferred an appeal before the learned Tribunal which has dismissed the appeal concurring with the views of the CIT. In doing so, the learned Tribunal held as follows :

> " In the facts of the instant case, we find that the Ld. Authorized representative of the assessee could not bring any material on record to show that the assessee was carrying on the business of money lending in a systematic and organised manner. The assessee is engaged in the business of dealing in shares. In these circumstances, in our considered opinion, the contention of the assessee that the interest income was its business income cannot be accepted. The assessee has shown the interest income under the head "income from other sources". Therefore, the contention of the revenue is that it is not the business income of the assessee. The Ld. Authorized representative of the assessee could not produce any evidence in support of his claim. In absence of any evidence brought on record, the interest income in our considered view cannot be treated as business income of the assessee in order to allow set off of brought forward business loss from earlier years against the said interest income".

The learned Tribunal, however, allowed the contention of the assessee that the income arising out of dividend should be permitted to be set off against the carry forward loss arising out of business.

Mr. Dhar, learned Advocate appearing for the appellant submitted that the order passed by the Assessing Officer reversing the initial order under section 154 of the Act should not have been passed because the question sought to be raised was far too complex to be dealt with in exercise of power under section 154 of the Act. He submitted that he is supported by a judgment of the Apex Court in the case of T.S. Balaram ITO vs. Volkart Bros. (1971) 82 ITR 50. The second submission was that the ITO was satisfied with the contention of the assessee and such satisfaction is based on verification of the records as would appear from the order dated 27th June, 2001.

We have not been impressed by the submissions advanced by Mr. Dhar. The judgment in the case of T.S. Balaram ITO (supra) has no

manner of application because the question for determination in that case was whether rectification proceedings were competent in a case where the revenue wanted to charge income tax at the highest rate whereas originally slab rates were applied. It was held that the case was not free from doubt and therefore rectification was not competent. The question for determination in the present case was whether the income offered by the assessee arising out of interest which the assessee himself had disclosed as an income from other sources could be permitted to be set off against the carry forward business losses. If the contention is that this question which arose for consideration was a very complex question, which could not have been considered under section 154 of the Act, then the initial prayer of the assessee could not also have been considered under section 154. The assessee cannot be permitted to have two standards for the selfsame issue. If he chooses to raise the jurisdictional sword, then he shall be perished by the same sword. The submission that

the Assessing Officer was satisfied, after verifying all records, when he passed the order dated 27th June, 2001 is altogether unmeritorious. The records allegedly verified should have been produced before the CIT (Appeal) which the assessee admittedly did not do. The learned Tribunal has recorded that "the assessee could not bring any material on record …." which is a pointer to show that the contention is without any substance.

We are, as such, not convinced by the submission advanced by Mr. Dhar.

The question before us is whether the judgment of the learned Tribunal is perverse. The learned Tribunal has recorded reasons and the correctness of those reasons was not disputed before us. Mr. Dhar submitted that all the records had already been verified by the Assessing Officer while initially exercising jurisdiction under section 154 of the Act, but he does not deny that the alleged records were not once again produced either before the CIT

(Appeal) or before the learned Tribunal. Therefore, the learned Tribunal was correct in taking the view that they did.

The appeal is, therefore, dismissed and the question is answered in the negative.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)

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