**IN THE HIGH COURT OF CALCUTTA**

**ITA No.270 of 2003**

**M/s BAGORIA UDYOG**

**Vs**

**COMMISSIONER OF INCOME TAX**
**KOL-XVI**

**Bhaskar Bhattacharya and Sambuddha Chakrabarti, JJ**

**Dated: March 17, 2011**

**Appellant Rep by:** Mr J P Khaitan
**Respondent Rep by:** Md Nizamuddin

**JUDGEMENT**

**Per: Bhaskar Bhattacharya:**

This appeal is at the instance of an assessee and is directed against an order dated May 28, 2003, passed by the Income-tax Appellate Tribunal, "A" Bench, Calcutta, in Income-tax (Appeal) being ITA No.881/Cal/2002 for the assessment year 1997-98 thereby allowing an appeal filed by the Revenue in part with a finding that the assessee had no business connection with the alleged borrower in giving a loan by relying upon the alleged admission of the representatives of the assessee before the Tribunal.

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

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

a) The assessee is a partnership firm deriving income from house property and profit and gain from business. During the course of assessment proceeding, the Assessing Officer observed that the assessee had obtained unsecured loan of Rs.2,39,87,889/- for which interest of Rs.20,92,832/- was paid and out of the said unsecured loan, the assessee advanced a sum of Rs.1,09,94,298/- by way of unsecured loan to M/s. Hamlet for which the assessee neither received any interest nor accrued any interest in the P & L account.

b) According to the Assessing Officer, the assessee submitted before him that M/s. Hamlet was dealing with the real estate development business and due to abnormal bad market condition, neither were they refunding the money nor were in a position to give any commitment about the money due. According to the Assessing Officer, the assessee could not produce any agreement with M/s. Hamlet in that regard. After recording such fact, the Assessing Officer held that the assessee followed mercantile system and accordingly, treated the interest refund reflected as the income accrued or receivable on the aforesaid loan advanced to M/s. Hamlet. The Assessing Officer calculated the interest @ 13% received by the assessee in the last year on the sum

of Rs.1,09,94,298/- which came to Rs.16,49,145/- and treated the said interest of Rs.16,49,145/- as deemed interest accrued to the assessee in the Assessment year.

c) Being dissatisfied, the assessee preferred an appeal before the first Appellate Authority and produced the copy of the agreement dated 8th February, 1997 entered into between the assessee and M/s. Hamlet and submitted that by the said agreement, the assessee agreed to waive the interest for the financial year 1996-97 onwards. According to the assessee, it had been the practice and understanding of the assessee with M/s. The Hamlet that interest would be payable on 31st March each year and accordingly the interest had been charged. The assessee pointed out before the Commissioner of Income-tax (Appeal) that it had entered into the said agreement dated 28th February, 1997 and agreed not to charge any interest to M/s. Hamlet with effect from 1st April, 1996. Since the interest accrued to the assessee only at the last date of accounting year, no interest accrued to the assessee on 31st March, 1997 and consequently, there was no question of any income by way of interest accrued to the assessee on that date or during the financial year 1996-97.

d) The assessee submitted that the variation in charging the interest was made by virtue of the agreement dated 28th February, 1997 purely on commercial consideration as the said borrower had undertaken to repay the principal before the 31st March, 2004 and also to pay to the assessee 2.5% of the net sale realization and/or 12.5% of net profit as stipulated in the agreement.

e) The Commissioner of Income-tax (Appeal) accepted the contention of the assessee that the said agreement was entered into on commercial consideration and there was no mala fide or collusion and the agreement dated 28th February, 1997 not to charge interest with effect from 1st April, 1996 before the interest accrued on 31st March, 1997 was permissible as held by the Supreme Court in the case of *CIT vs. Shiv Prakash Janakraj & Co. Pvt. Ltd., reported in 222 ITR 583*. The CIT (Appeal), thus, deleted the said addition of interest done by the Assessing Officer.

f) The Department then preferred an appeal before the Tribunal. The Tribunal by the order impugned agreed with the Commissioner of Income-tax (Appeal) that the assessee had a reasonable cause for not filing the copy of the agreement before the Assessing Officer. However, after making such comment, the Tribunal held that during the course of hearing, the learned authorized representative of the assessee had submitted that there was no business connection of the assessee with M/s. Hamlet and only an advance of money was given to M/s. Hamlet. By relying upon the aforesaid statement allegedly made by the representative of the assessee, the Tribunal was of the view that as the loan was not for business consideration because of the fact that there was no business connection between the assessee and the borrower, the assessee was not entitled to any deduction on the aforesaid amount although the Tribunal agreed with the representative of the assessee that the assessee entered into an agreement dated 28th February, 1997 before the interest became due. The Tribunal also agreed with the Commissioner of Income-tax (Appeal) that in view of the decision of the Supreme Court in the case of Shiv Prakash Janakraj (Supra), when the waiver takes place before expiry of the accounting year in which the interest becomes payable, such interest could not be burdened with tax liability and that such decision squarely applied to the case in favour of the assessee. Even after making such finding, the Tribunal held that the assessee had given interest bearing loan to one of its sister concerns and since the authorized representative admitted that there was no business connection between

the assessee and the said borrower, the borrowed money to the extent of Rs.1,09,94,298/- was not used by the assessee for business purpose and the assessee was thus not entitled to claim the debit of interest in the P & L account in respect of the aforesaid amount.

g) It may not be out of place to mention here that subsequently the assessee filed a miscellaneous application before the Tribunal being submitted by the said authorized representative asserting that no such submission was made before the Tribunal that the assessee had no business connection with the borrower and as such, the order of the Tribunal should be set aside. The Tribunal, however, rejected such application only on the ground that such application was not maintainable without, however, disputing the statement of the authorized representative of the assessee that no such concession was made before the Tribunal that there was no business connection of the assessee with M/s. Hamlet.

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

A Division Bench of this Court at the time of admission of the appeal formulated the following question of law:

*"i) Whether the Tribunal exceeded its jurisdiction in entering upon the question of allowability of interest paid by the appellant on the moneys borrowed by it when the question before its was as to whether any deemed interest accrued to the appellant in respect of the loan advanced to the firm M/s. The Hamlet and its purported findings directing disallowance of interest paid are beyond the scope of the appeal filed by the Revenue?"*

*"ii) In the event the answer to question No.1 is in the negative, whether the purported findings of the Tribunal that there was no business connection between the appellant and the said firm or that any such admission was made by the appellant's authorized representative or that the loan given to the said firm was not on business consideration or that borrowed money to the extent of Rs.1,09,94,298/- was not used by the appellant for the purpose of its business and directing disallowances of interest referable to the said sum of Rs.1,09,94,298/- are arbitrary, unreasonable and perverse?"*

Mr. Khaitan, the learned Senior Advocate appearing on behalf of the appellant, has laboriously contended before us that the learned Tribunal below erred in law in allowing the appeal of the Revenue simply on the basis of the alleged admission of the representative of the assessee that there was no business connection between the assessee and M/s. Hamlet when no such admission was made and the said representative filed an application for review by asserting that no such concession was made by him before the Tribunal. Mr. Khaitan points out that the Tribunal did not reject such application for review on merit holding that in fact such concession was made but dismissed the application on the ground that the same was not maintainable under law by avoiding the question of wrong recording of the alleged concession. Mr. Khaitan submits that the learned Tribunal was called upon to decide whether on the basis of materials on record, the Commissioner of Income Tax (Appeals) was justified in allowing the appeal of the assessee but there was no scope of deciding the appeal on the basis of the alleged concession of the representative of the assessee which itself was denied by the said representative by filing substantive

application. Mr. Khaitan, thus, prays for setting aside the order passed by the Tribunal.

Mr. Nizamuddin, the learned counsel appearing on behalf of the Revenue, has on the other hand, supported the reasons assigned by the Tribunal below and has contended that a concession made by a representative is binding on the assessee and thus, the Tribunal did not commit any illegality.

After hearing the learned counsel for the parties and after going through the materials on record, we are quite conscious of the position of law that although a concession by a counsel on behalf of his client on a question of law is not binding but a concession made on a question of fact is binding on his client. The law is equally settled that if a Tribunal records a wrong finding that there was a concession on an issue of fact, a litigant is not remediless. In such a situation, the litigant should immediately file an application for review supported by the assertion of that very counsel that no such admission was made and the recording of the Tribunal was wrong. If such an application is filed, it is the duty of the Tribunal to answer the allegation made against it by the litigant and if the Tribunal maintains that such a concession was made, the litigant should approach the higher forum challenging also the finding of the Tribunal that there was really any such concession.

In the case before us, immediately after the order passed by the Tribunal, the assessee moved such application through the selfsame representative asserting that he did not make any such concession. The Tribunal, however, did not enter into such question and dismissed the application for review on the sole ground that the same was not maintainable. Thus, it is apparent that in this case, the Tribunal did not dispute the assertion of the representative of the assessee that he did not make any such concession. In such a situation, we are unable to accept the contention of Mr. Nizamuddin, the learned Advocate appearing on behalf of the Revenue, that there was a concession of the assessee on an issue of fact before the Tribunal. In the case before us, we hold that as the Tribunal has not disputed the said allegation made against it, we should presume that no such concession was made on behalf of the assessee.

Apart from the aforesaid fact, we are of the view that within the scope of appeal before the Tribunal preferred by the Revenue, the question was whether the CIT (Appeals) was justified in passing the order impugned on the basis of materials on record and there was no question of deciding the appeal on the basis of any admission when at no point of time in the past there was any admission of the assessee that there was no business connection between the assessee and M/s. Hamlet and such alleged admission was also not put forward as one of the grounds by the Revenue in appeal before the Tribunal; on the other hand, the CIT(Appeals) accepted the written agreement between the assessee and M/s. Hamlet showing exemption of interest by the assessee on pure business consideration holding that the interest having been waived before it became due, the assessee was entitled to rely upon such waiver and there was no justification of adding the amount as deemed interest accrued in favour of the assessee. In our opinion, it was the duty of the Tribunal to answer the said question in accordance with law of the land. In this case, the Tribunal accepted the position of law that such waiver was permissible according to the decision of the Supreme Court and further accepted the finding of the CIT (Appeals) that sufficient cause was shown by the assessee for non-production of the agreement before the Assessing Officer.

We, therefore, find that having regard to the position of law laid down by the Supreme Court in the case of *CIT vs. Shiv Prakash Janakraj & Company, reported in 222 ITR 583 (SC)*, relied upon by the CIT (Appeals), the Tribunal erred in law in setting aside the order of CIT (Appeals) on the alleged ground of concession which itself was incorrect.

We, therefore, set aside the order of the Tribunal below and affirm the order of the CIT (Appeals) by answering the first question in the negative and the second question in the affirmative.

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