(2016) 07 CAL CK 0001

In the Calcutta High Court

Case No : I.T.A. No. 149 of 2008

Commissioner of Income Tax APPELLANT

Vs

Mohanlal Agarwal RESPONDENT

Date of Decision : 26-07-2016

Acts Referred:
Income Tax Act, 1961 — Section 132, Section 158BC, Section 263, Section 40A(3)

Citation : (2017) 393 ITR 402

Hon'ble Judges : Girish Chandra Gupta and Arindam Sinha, JJ.

Bench : Division Bench

Advocate : Mr. M.P. Agarwal and Mrs. Anwari Quraishi, Advocates, for the Appellant; Mr. J.P. Khaitan, Sr. Advocate, Mr. Saurabh Bagaria and Mr. Niloy Sengupta, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. The appeal is directed against a judgment and order dated 15th June, 2007 passed by the learned Income Tax Appellate Tribunal, "B" Bench, Kolkata in I.T. (SS). A. No.28/Kol/2007 pertaining to the block assessment period 01-04-1996 to 25-09-2002 by which the learned Tribunal partly allowed the appeal preferred by the assessee modifying the order under section 263 passed by CIT. The revenue has come up in appeal. The following question of law was formulated on 18th April, 2008 when the appeal was admitted.

"Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in holding that the disallowance under section 40A(3) of the Act does not fall within the ambit of undisclosed income within the meaning of Section 158B(b) of the Income tax Act ?"

2. The facts and circumstances of the case, briefly stated, are as follows :-

The assessment under section 158BC(c) of the I.T. Act, 1961, was completed on May 30, 2004 for the block period between April 1, 1996 and March 31, 2002; and April 1, 2002 and September 25, 2002. The Assessing Officer decided to apply a rate of profit to the undisclosed sales which, according to him, was necessary in the following facts and circumstances of the case.

"The assessee in working out his undisclosed income has adopted varieties of interpretations regarding different seized documents. For some seized documents he has taken the entries as undisclosed sales and applied the rate of profit and for some seized documents has taken net of receipt and payments. For some of the undisclosed expenses and payments the assessee claimed that they are irrelevant as the rate of profit has been applied on undisclosed sales. The main activities of the assessee are clear from the seized documents as being related to unaccounted purchase and sales. He has claimed expenses for netting out the receipts which leads to taking stand by assessee as per his own discretion. All receipts are relatable to sales and as such all gross receipts are considered as unaccounted sales and on the same rate of profit are applied to arrive at the undisclosed income. All expenses claimed therefore become irrelevant. Once the rate of profit is applied then the question of further allowing of any expenses is against any provision of the Income-tax Act."

3. The order passed by the Assessing Officer was revised under section 263 by an order dated March 30, 2007. The CIT was of the opinion that disallowance under section 40A(3) should have been made by the Assessing Officer. He issued notice to that effect and after hearing the assessee, held as follows:-

"9. The issue was discussed with the Ld. A.R. of the assessee. It was pointed out that section 40A, as discussed in the apex Court''s order in Attar Singh Gurmukh Singh v. ITO (191 ITR 667 SC), "begins with a non obstante clause. It is an overriding provision which operates in spite of anything to the contrary contained in any other provision of the Act relating to the computation of income under the head profits and gains of business or profession." Thus, it was pointed out to the A.R. that even in cases of block assessment, such as the instant case, where income had been arrived at by estimation of net profits, the non obstante nature of the provision and the ratio of the Supreme Court''s decision in the aforementioned case made it mandatory to apply the provision of section 40A(3). Since no further decision of the Supreme Court had been cited by the A.R. which could be said to overturn the ratio of the cited decision of Attar Singh Gurmukh Singh, it was not possible to hold a different view in the matter.

10. Moreover, the reasoning given by the Ld. A.R. in para 6 (iv) above (that where 2 alternative views could validly be held, the A.O.''s view could not be held to be erroneous simply because it caused loss to revenue) is not relevant to the facts of this case. As discussed in para 7 above, the provisions of section 40A(3) are necessarily attracted in the light of the non obstante nature of the provision and the ratio of the Supreme Court''s decision in the aforementioned case. Thus, this is not a case where two views are possible. Moreover, from the assessment order and the records of the assessment proceedings it emerges that this is not a case where the A.O. took a conscious decision regarding the applicability of section 40A(3) or otherwise. It is simply a case where the A.O. has failed to

apply his mind as to whether the said provision is attracted. As the application of the provisions of section 40A(3) to the unverified expenditure of undisclosed sales of Rs. 25,14,93,071/- would have led to 20% disallowances thereof, since the seized documents in this case of undisclosed income, the transactions have taken place mostly in cash, this oversight by the A.O. in not applying section 40A(3) has been prejudicial to the interest of revenue.

11. For the reasons discussed in detail in the foregoing paras, and after hearing the assessee through his Ld. A.R., I find that in the impugned assessment order dated 30.09.2004, not only has net profit been taken without basis of Rs. 16,80,287/-, i.e. at lower than the figure of "net receipts" of Rs. 59,55,494/-, offered by the assessee himself (vide para 7(ii) of this order), but also the disallowance under section 40A(3) has not been made, though it was due. Such non-application of mind by the Asseessing Officer, as held in numerous case laws, including the decision of the Hon''ble Supreme Court in Malabar Industrial Co. Ltd. v. CIT (243) ITR 83, (SC), amounts to rendering the assessment order erroneous. Since the nature of defaults as noted above has also led to escapement of income and tax, it is apparent that the erroneous assessment order is prejudicial to the interest of revenue. These conditions are necessary for invoking the provision of section 263 vide the wording of the statute and the ratio of a host of decisions, including from CIT v. Gabriel India Ltd. (1993) 203 ITR 102, Bom.; CIT v. Executors of the Estate of late H.H. Rajkuherba Dowager Maharani Sahab of Gondal, (1978) 115 ITR 301 etc. Since both these preconditions are fulfilled in the instant case, and looking to the nature of mistakes in the Assessment Order, in exercise of my revisionary powers under section 263 of the Income Tax Act, I set aside the Assessment order under section 158BC, dated 30.09.2004 and direct the A.O. to make assessment de novo in the light of the discussion above, after giving full opportunity to the assessee."

4. Challenging the aforesaid order, the assessee preferred an appeal before the learned Tribunal which was allowed by holding as follows:-

"5. We have carefully considered the arguments of both the sides and perused the material placed before us. So far as applicability of Section 40A(3) is concerned, we find that the issue is squarely covered in favour of the assessee by the decision of ITAT in the case of Sushil Kumar Mohta(supra) wherein the ITAT held as under:-

"We have carefully considered the arguments of both the sides and perused the material placed before us. We find that in this case block assessment was framed under section 158BC(c) on the basis of seized documents. After scrutinising the seized documents, the A.O. has determined undisclosed income of the block period. The CIT has held the assessment order to be erroneous and prejudicial to the interest of Revenue on the ground that the A.O. failed to make disallowance under section 40A(3) in respect of expenditure incurred by the assessee other than account payee cheques or bank drafts. We find that the ITAT, Kolkata Bench has considered the disallowance under section 40A(3) in block assessment in the case of Smt. Gita Rani Mondal vide IT(SS)A No.7(Kol) of 1997. The ITAT came to the conclusion that by very nature of unrecorded expenditure, the payment cannot be made by account payee cheque/bank draft. They also held that the disallowance under section 40A(3) does not fall within the ambit of undisclosed income within the meaning of Section 158B(b). The above order of the ITAT is followed in the cases of G.P. Mondal & Sons vide IT(SS)A No. 3(Kol)/1997 and Tapan Kumar Dutta vide IT(SS)A No. 174(Kol)/2003. Similar view is also taken by the ITAT, Pune Bench, in the case of Janta Tiles v. ACIT 66 TTJ (Pune) 695 and ITAT Jaipur Bench in the case of ACIT v. Dr. Mohallal Swarnakar 95 TTJ(Jp) 969.

The CIT can assume jurisdiction under section 263 only when the assessment order is erroneous as well as prejudicial to the interest of the revenue. The Hon''ble Apex Court has considered the same in the case of Malabar Industrial Co. Ltd. v. CIT 243 ITR (SC) and laid down the guidelines when the assessment order can be said to be erroneous and prejudicial to the interest of Revenue. Their Lordships held as under:-

"The phrase ''prejudicial to the interests of the Revenue'' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law."

Thus, when two views are possible and the A.O. has adopted one of the possible views, the assessment order cannot be termed as ''erroneous'' even though the CIT does not agree with the view taken by the A.O.

In the case under consideration before us, it cannot be said that the view taken by the A.O. is not one of the possible views when there are several decisions of ITAT that disallowances under section 40A(3) is not called for in block assessment. The CIT may be of the view that the A.O. should have made disallowance under section 40A(3). However, that by itself will not make the block assessment to be erroneous and prejudicial to the interests of the Revenue. The course adopted by the A.O. is certainly permissible in law. In view of above, we respectfully following the decision of the Hon''ble Apex Court in the case of Malabar Industrial Co. Ltd. (supra) and orders of different Benches of the Tribunal relied on by the assessee''s ld. Counsel held that the CIT was not justified in setting aside the assessment order dated 28-11-2003. We, therefore, quash the order passed by the CIT under section 263 and restore the assessment order dated 28-11-2003."

6. As the facts are admitted to be identical, respectfully following the above

decision we hold that the CIT was not justified in setting aside the assessment order on the ground that the A.O. has not considered the disallowance under section 40A(3) while determining the undisclosed income of the block period."

5. The revenue has once again come up in appeal.

6. Mr. Khaitan, learned Senior Advocate appearing for the assessee respondent, submitted that the view taken by the Assessing Officer could not be criticised as erroneous because the view of the Assessing Officer had the support of the judgment in the case of CIT v. Banwari Lal Bansidhar, reported in (1998) 229 ITR 229 (Allahabad), wherein the following views were taken (page 232):-

"The question for consideration is when no deduction was sought and allowed under section 40A(3), was there any need to go into section 40A(3) and rule 6DD(j). We see force in the view taken by the Appellate Tribunal that when the income of the assessee was computed applying the gross profit rate and when no deduction was allowed in regard to the purchases of the assessee, there was no need to look into the provisions of section 40A(3) and rule 6DD(j). No disallowance could have been made in view of the provisions of section 40A(3) read with rule 6DD(j) as no deduction was allowed to and claimed by the assessee in respect of the purchases. When the gross profit rate is applied, that would take care of everything and there was no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases by the assessee.

No law contrary to the view taken by the Tribunal has been shown by the standing counsel.

In the alternative, the Tribunal recorded a finding on the ingredients of section 40A(3) and rule 6DD(j). Since we have agreed with the primary finding recorded by the Tribunal, we think it is not necessary for us to go into the alternative finding recorded by the Tribunal."

7. The other judgment which supported the views taken by the Assessing Officer, according to Mr. Khaitan, is the judgment in the case of CIT v. Purushottamlal Tamrokar, reported in (2004) 270 ITR 314 (M.P.), wherein the following views were taken(page 318):-

"It is submitted by Mr. Purohit that the Assessing Officer has determined the income by applying the principle of net profit rate thereby taking into consideration the whole amount which was transacted below the permissible limit under section 40A(3). It is contended by him that once the whole amount is computed on the formula of net rate income, there is no question of grant of deduction as envisaged under section 40A(3). We are of the considered opinion that the submission of Mr. Puruhit has substantial force and the Tribunal has rightly treated that section 40A(3) is not applicable when a net profit rate is applied by the Assessing Officer."

8. Mr. Khaitan submitted that the views taken by the Allahabad High Court and subsequently followed by the Madhya Pradesh High Court were also subsequently

followed by the other High Courts. These judgments are as follows:-

9. In the case of CIT v. Smt. Santosh Jain, reported in (2008) 296 ITR 324 (P&H), the following views were taken (page 325):-

"We are of the view that when income of the assessee was computed by applying a gross profit rate, there was no need to look into the provisions of section 40A(3) of the Act, as applying the gross profit rate takes care of the expenditure otherwise than by way of crossed cheque also. We are in agreement with the view taken by the Allahabad High Court in Banwari Lal''s case, [1998) 229 ITR 229, to the following effect (page 232):

"........ The question for consideration is when no deduction was sought and allowed under section 40A(3), was there any need to go into section 40A(3) and rule 6DD(j). We see force in the view taken by the Appellate Tribunal that when the income of the assessee was computed applying the gross profit rate and when no deduction was allowed in regard to the purchases of the assessee, there was no need to look into the provisions of section 40A(3) and rule 6DD(j). No disallowance could have been made in view of the provisions of section 40A(3), read with rule 6DD(j) as no deduction was allowed to and claimed by the assessee in respect of the purchases. When gross profit rate is applied, that would take care of everything and there was no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases by the assessee."

No substantial question of law arises.

The appeal is dismissed."

10. In the case of CIT v. S. M. Dohrabuddin, reported in (2008) 4 DTR 218, the following views were expressed by the Madras High Court:-

"When the GP rate is applied, that will take care of everything and there is no need for the AO to make scrutiny of the amount incurred on the purchases by the assessee."

11. Mr. Khaitan added that the learned Tribunal relied upon the judgment in the case of Sushil Kumar Mohta. The revenue had unsuccessfully attempted to challenge that order. This court, by its order dated August 31, 2007, in the case of CIT v. Sushil Kumar Mohta, (ITA 540 of 2007), refused to admit the appeal by holding as follows:-

"We have perused the order passed by the learned Tribunal. We are absolutely ad-idem with the opinion expressed by the learned Tribunal and we do not find that there is any substantial question of law involved in view of the judgment of the Supreme Court in the case of Malabar Industries Company Ltd., reported in 243 ITR 83. Hence we dismiss this appeal being ITA No.540 of 2007."

12. He also submitted that this court, by its order dated July 30, 2008, refused to admit the appeal in the case of CIT v. M/s. Jaibalaji Jyoti Steel Ltd. (ITA NO. 318 of 2008) by passing the following order:-

"We are, therefore, of the opinion that the learned Tribunal correctly upheld the order of the Commissioner of Income Tax(Appeals) in affirming the said order of the Commissioner and do not find that there is any irregularity or illegality so passed by the Tribunal. Hence we do not find any substantial question of law involved to admit this appeal. The appeal is, therefore, dismissed."

13. Finally, Mr. Khaitan drew our attention to the judgment in the case of Malabar Industrial Co. Ltd. v. CIT, reported in (2000) 243 ITR 83, wherein the following views were taken:- (page 88)

"The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. Rampyari Devi Saraogi v. CIT (1968) 67 ITR 84 (SC) and in Smt. Tara Devi Aggarwal v. CIT, (1973) 88 ITR 323 (SC)."

14. Mr. Khaitan submitted that the CIT could have revised the order passed by the Assessing Officer if the order sought to be revised was unsustainable in law. Far from being unsustainable, the order passed by the Assessing Officer was in conformity with the views expressed by the Allahabad High Court and the Madhya Pradesh High Court. He added that the mere fact that the CIT did not agree with the views of the Assessing Officer would not make the order passed by the Assessing Officer erroneous nor shall the same become prejudicial for that reason.

15. Mr. Agarwal, learned advocate appearing for the revenue, submitted that the judgement in the case of C.I.T. v. Banwari Lal Banshidhar [supra] has no manner of application. At the time when the aforesaid judgement was rendered, disallowance under Section 40A(3) was 100 % of the expenditure claimed. In the case before the Allahabad High Court the Assessing Officer had applied profit rate @ 15%. If 100% disallowance was made under Section 40A(3), that would mean that for a transaction of Rs. 100/- taxable profit had to be assessed at Rs. 115/- which would be an absurdity. This was or could be the reason why the Allahabad High Court held that when the gross profit rate was applied, that would take care of everything and there was no need for the Assessing Officer to make scrutiny of the amount incurred on the purchases by the assessee. Mr. Agarwal submitted that law has subsequently been changed. At the relevant point of time, disallowance under Section 40A(3) was restricted to 20% of the expenditure

claimed to have been incurred. Therefore, the logic attributable to the judgement in the case of Banwari Lal Banshidhar [supra] decided by the Allahabad Bank is no longer available nor can the same logic be applied to the facts of this case. If Section 40A(3) is applied to an offending expenditure of the case before us that would increase the rate of profit by 20%. He, therefore, submitted that the judgement in the case of Banwari Lal Banshidhar [supra] has no manner of application.

16. He submitted that in the case of C.I.T. v. Purshottamlal Tamrakar, [supra], Their Lordships of the Madhya Pradesh High Court did not disclose any reasons. Therefore, that judgement is not of any assistance to the assessee.

17. He submitted that the judgement in the case of C.I.T. v. Smt. Santosh Jain [supra] rendered by the Division Bench of Punjab and Haryana High Court is based on the views expressed by the Allahabad High Court which he has already distinguished. The judgement in the case of CIT v. Md. Dhurabudeen [supra] has also followed the judgement passed in the case of Banwari Lal Banshidhar [supra] by the Allahabad High Court. He submitted that the fact that the appeal preferred by revenue against the judgement of the learned Tribunal in the case of C.I.T. v. Sushil Kumar Mohta [supra] was not admitted by this Court does not go to show that the views expressed therein were affirmed by this court. He added that the same is also true as regards the order dated 30th July, 2008 passed by this Court in the case of C.I.T. v. M/s. Jai Balaji Jyoti Steels Limited [supra]. This Court had refused to admit the appeal.

18. He contended that there is no quarrel with the proposition laid down in the case of Malabar Industrial Co. Ltd. v. C. I. T. [supra], but care should be taken to remember that Their Lordships in the case of Malabar Industrial Co. Ltd., [supra] upheld the order passed under Section 263 because the order sought to be revised was passed without application of mind which is also the case here, according to him. He added that the Supreme Court in the case of Attar Singh Gurkukh Singh v. Income Tax Officer, reported in (1991) 191 ITR 667, held as follows:-

"Originally section 40A(3) required payments in respect of expenditure, which exceeded to Rs. 2,500 to be made by a crossed cheque or a crossed bank draft. On failure to do so, the payments made were disallowed in the computation of income. In order to remove hardship to smaller assessees, the Amending Act, 1987, has raised this ceiling to Rs. 10,000. Section 40A(3) begins with a non-obstante clause. It is an overriding provision which operates in spite of anything to the contrary contained in any other provision of the Act relating to the computation of income under the head "Profits and gains of business or profession". The Legislature has thus made it clear that the provisions of section 40A will apply in suppression of other contrary provisions of the Act relating to the computation of income. Sub-s (3) empowers the Assessing Officer to disallow, as a deduction, any expenditure in respect of which payment is made of any sum exceeding Rs. 10,000 otherwise than by a crossed cheque or crossed bank draft.

Sec. 40A(3) only empowers the Assessing Officer to disallow the deduction claimed as expenditure in respect of which payment is not made by crossed cheque or crossed bank draft. The payment by crossed cheque or crossed bank draft is insisted on to enable the assessing authority to ascertain whether the payment was genuine or whether it was out of the income from undisclosed sources. The terms of section 40A(3) are not absolute. Considerations of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Rule 6DD provides that an assessee can be exempted from the requirement of payment by a crossed cheque or crossed bank draft in the circumstances specified under the rule. It will be clear from the provisions of section 40A(3) and r. 6DD that they are intended to regulate business transactions and to prevent the use of unaccounted money or reduce the chances to use black money for business transactions. [See Mudiam Oil Co. v. ITO (1973) 92 ITR 519 (AP) : TC 18R.450]. If the payment is made by a crossed cheque drawn on a bank or a crossed bank draft, then it will be easier to ascertain, when deduction is claimed, whether the payment was genuine and whether it was out of the income from disclosed sources. In interpreting a taxing statute, the Court cannot be oblivious of the proliferation of black money which is under circulation in our country. Any restraint intended to curb the chances and opportunities to use or create black money should not be regarded as curtailing the freedom of trade or business."

19. He submitted that the learned Tribunal in setting aside the order under Section 263 ignored the aforesaid judgement though it was cited on behalf of the revenue. The Tribunal contented itself by relying upon an earlier judgement of the Tribunal in the case of Sushil Kumar Mohta [supra], but failed to realise that Section 40A(3) starts with a non-obstante clause and is intended to override all other provisions. The learned Tribunal also failed to notice that the judgement in the case of Attar Singh Gurkukh Singh [supra] was not considered by the Bench which heard the matter in the case of Sushil Kumar Mohta [supra]. He therefore, submitted that the judgement of the learned Tribunal is wrong and should be set aside.

20. We have considered the rival submissions advanced by the learned advocates and are of the opinion that reliance placed by Mr. Khaitan upon the judgement in the case of CIT v. Banwari Lal Bansidhar (supra) is misplaced. The Division Bench in that case was considering a case where "no deduction was sought and allowed".

21. The Division Bench, as such opined that there was no necessity of invoking

Section 40A(3). If no deduction has, in fact, been claimed there may be no case for applying Section 40A(3). But in the case before us assessee had in fact "claimed expenses for netting out the receipts" as would appear from the order of the assessing officer which we have quoted above.

22. The assessing officer chose to apply the rate of profit. The assessing officer was not alive of the provision of Section 40A(3) of the Act. The CIT has rightly observed in his order that:-

"this is not a case where the A.O. took a conscious decision regarding the applicability of section 40A(3) or otherwise. It is simply a case where the A.O. has failed to apply his mind as to whether the said provision is attracted."

23. The consequence of the aforesaid mistake on the part of the assessing officer was rightly indicated by the CIT as follows:-

"As the application of the provisions of section 40A(3) to the unverified expenditure of undisclosed sales of Rs. 25,14,93,071/- would have led to 20% disallowances thereof, since the seized documents in this case of undisclosed income, the transactions have taken place mostly in cash, this oversight by the A.O. in not applying section 40A(3) has been prejudicial to the interest of revenue."

24. The judgement in the case of Malabar Industrial Co. Ltd. does not really help the assessee. It is not a case where the assessing officer has adopted one of the courses permissible in law which has resulted in loss of revenue. It was not open to the assessing officer to ignore the provision of Section 40A(3) nor does he appear to have done so consciously.

25. We are inclined to agree with the CIT that the provision contained in Section 40A(3) did not occur to him. It is not also a case where two views were possible and the assessing officer had taken one of them. As regards the applicability of Section 40A(3), whenever any expenditure was claimed, there were never two views. The judgement of the Apex Court in the case of Attar Singh (supra) may in that regard be referred to.

26. The judgement in the case of Banwari Lal Bansidhar (supra) strongly relied upon by Mr. Khaitan does not really answer the question. The assessee admittedly "had claimed expenses for netting out the receipts" as indicated by the assessing officer himself whereas in the case of Banwari Lal Bansidhar (supra) the Division Bench proceeded on the basis that "when no deduction was sought and allowed under Section 40A(3) was, there any need to go into Section 40A(3) and Rule 6DD(j)(?).

27. We also find some force in the submission of Mr. Agarwal as to why is the judgment in the case of Banwari Lal Bansidhar not applicable. When the said judgement was rendered, disallowance under Section 40A(3) was 100% whereas the disallowance under Section 40A(3) when it was applied by the CIT would have been only 20%.

28. For the aforesaid reasons, we are of the opinion that the judgement in the case of Banwari Lal Bansidhar has no manner of application.

29. The other judgements cited by Mr. Khaitan have really followed the aforesaid judgement of the Allahabad High Court. The orders dated 31st August, 2007 in the case of CIT v. Sushil Kumar Mohta, (ITA 540 OF 2007) and the order dated 30th July, 2008 in the case of CIT v. M/s. Jaibalaji Jyoti Steel Ltd. (ITA NO.318 OF 2008) passed by this Court refusing to admit an appeal do not lend any assistance to the assessee, for the simple reason that these orders do not amount to a judgement replacing that of the Tribunal.

30. Reference in this regard may be made to the judgement in the case of U.J.S. Chopra v. State of Bombay reported in AIR 1955 SC 633. In paragraph 28 of the report the following views were expressed:-

"In all these cases there will be no judgment of the High Court replacing the judgment of the lower Court and the action of the High Court would only amount to a refusal by the High Court to admit the petition of appeal or the criminal revision and issue notice to the opposite party with a view to the final determination of the questions arising in the appeal or the revision.

The order dismissing the appeal or criminal revision summarily or ''in limine'' would no doubt be a final order of the High Court not subject to review or revision even by the High Court itself but would not tantamount to a judgment replacing that of the lower Court."

31. In paragraph 29 their Lordships held as follows:-

"In cases where the petition of appeal or the application for criminal revision is admitted by the High Court and a notice is issued to the opposite party and the High Court maintains the conviction with or without reducing the sentence passed upon the accused the judgment of the High Court in the exercise of its appellate or revisional jurisdiction would replace the judgment of the lower Court and there would be no occasion at all for the exercise by the High Court of its revisional powers under Section 439 (1) which can only be exercised qua the judgments of the lower Courts and certainly not qua its own judgments."

32. Under Section 260A(1) of the Income Tax Act an appeal lies to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. Naturally the appellant has to satisfy the Court as regards the existence of a substantial question of law in the absence whereof an appeal is liable to be dismissed in limine. In case an appeal is admitted by the High Court then only the question of delivery of a judgement would arise as would appear from Sub-section 5 of Section 260A which provides as follows:-

"(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit."

33. In that view of the matter, the order under challenge is set aside to the extent the order is varied. The question, formulated above, is answered in the negative and in favour of the revenue.

34. The appeal is, thus, allowed.

35. Parties shall, however, bear their own costs.

