

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Ramlal Negi (JM)

I.T.A. No. 2966/Mum/2014
(Assessment Year 2007-08)
I.T.A. No. 3412/Mum/2014
(Assessment Year 2008-09)

M/s. Bank of India 8 th Floor, Star House Taxation Department Bandra-Kurla Complex Bandra East Mumbai-400 051. (Appellant)	Vs.	ACIT-2(1) Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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I.T.A. No. 3085/Mum/2014
(Assessment Year 2007-08)
I.T.A. No. 3959/Mum/2014
(Assessment Year 2008-09)

DCIT-2(1) Aayakar Bhavan M.K. Road Mumbai-400 020. (Appellant)	Vs.	M/s. Bank of India 8 th Floor, Star House Taxation Department Bandra-Kurla Complex Bandra East Mumbai-400 051. (Respondent)
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PAN No.AAACB0472C

Assessee by	Shri C. Naresh
Department by	Shri Shishir Dhamija
Date of Hearing	20.6.2016
Date of Pronouncement	13.7.2016

ORDER

Per B.R. Baskaran (AM) :-

These cross appeals relate to the assessment years 2007-08 and 2008-09 and are directed against the orders passed by Ld CIT(A)-4, Mumbai for the respective years. All these appeals were heard together and hence they are being disposed of by this common order, for the sake of convenience.

2. The assessee is a public sector Bank and is engaged in the banking activities.
3. We shall take up the appeals filed by the revenue. The first common issue urged in both the appeals relates to the deduction allowed in respect of bad debts written off. The AO restricted the deduction in excess of the amount available in "Provision for bad and doubtful Debts Account" created u/s 36(1)(viia) of the Act. The Ld CIT(A), however, directed the AO to apply the principles laid down by Hon'ble Supreme Court in the case of Catholic Syrian Bank Ltd (343 ITR 270).
4. At the time of hearing, both the parties agreed that this issue is covered by the decision rendered by co-ordinate benches of Tribunal in the assessee's own case in ITA No.3422 & 3437/Mum/2013 relating to AY 2006-07. A perusal of the order passed by the co-ordinate bench of Tribunal shows that the Tribunal has followed the decision rendered by another co-ordinate bench in assessee's own case relating to AY 2001-02 passed in ITA No.1498/Mum/2011 dated 09-04-2014 and ITA No.3534/Mum/2011 dated 15-06-2012.
5. In ITA No.1498/Mum/2011, the co-ordinate bench has followed the decision rendered by Hyderabad bench of Tribunal in the case of State Bank of Hyderabad (ITA No.578 and 579/Hyd/2010 dated 07-09-2012) and held that the Explanation 2 to sec. 36(1)(vii) introduced by Finance Act 2013 shall be applicable from 1.4.2014, i.e., AY 2014-15. In the case of Catholic Syrian Bank (supra), the Hon'ble Supreme Court had held that the restriction provided in the proviso to sec. 36(1)(vii) shall apply only to the provision created for rural advances. Accordingly, the Tribunal has restored this matter to the file of the AO with the direction to allow the claim in the light of decision rendered by Hon'ble Supreme Court. Consistent with the view taken in the assessee's own

cases in the earlier years by the co-ordinate benches, the order passed by Ld CIT(A), wherein he has directed the AO to examine this issue in the light of decision rendered by Hon'ble Supreme Court in the case of Catholic Syrian Bank (supra) is upheld.

6. The next common issue urged in both the appeals relates to disallowance of diminution in value of investments. In the earlier years, the Tribunal had allowed this claim by following the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Bank of Baroda (262 ITR 334). We notice that the Ld CIT(A) has followed the above said binding decision of Hon'ble jurisdictional High Court as well as the orders passed by the ITAT. Hence we do not find any infirmity in the order passed by him on this issue.

7. The next issue relates to the disallowance of depreciation claimed on leased assets. We notice that the identical disallowance made by the AO in AY 2002-03 and 2003-04 was deleted by Ld CIT(A) and the same was accepted by the revenue by not filing appeal before ITAT. Recognizing this factual position, the co-ordinate bench has deleted the disallowance of depreciation made in AY 2006-07, in the order referred supra passed for AY 2006-07. Since there is no change in facts, consistent with the view taken by the co-ordinate bench in AY 2006-07, we uphold the order passed by Ld CIT(A) on this issue.

8. Now we shall take up the appeals filed by the assessee. The first common issue urged by the assessee in both the years relate to the disallowance made u/s 14A of the Act. In both the years under consideration, the AO worked out the disallowance u/s 14A of the Act in accordance with Rule 8D of the Act. The Ld CIT(A) took note of the binding decision rendered by Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd (328 ITR 81), wherein it was held that the provisions of Rule 8D shall apply from AY 2008-09 onwards and for

earlier years, the disallowance should be worked out on a reasonable basis. Accordingly he upheld the workings for AY 2008-09. However, for AY 2007-08, the Ld CIT(A) took the view that the disallowance worked as per the provisions of Rule 8D would be reasonable disallowance.

9. Before us the Ld A.R contended that the Tribunal has restricted the disallowance to 1% of the exempt income in AY 2006-07. He further submitted that

- (a) the interest free funds available with the assessee is in far excess of the investments. (HDFC Bank (284 CTR 409)(Bom))
- (b) All investments are held as stock in trade and hence the provisions of sec. 14A should not be applied to it. (India Advantage Securities (ITA 1131 of 2013))

The Ld A.R placed his reliance on various case laws.

10. We heard Ld D.R and perused the record. We notice that the Tribunal has restricted the disallowance to 1% of the exempt income in AY 2006-07 and earlier years. Consistent with the view taken therein we direct the AO to restrict the disallowance to 1% of the exempt income in AY 2007-08, since the provisions of Rule 8D are not applicable to this year.

11. In respect of AY 2008-09, the assessee is raising new contentions before us, viz., the investments are held as stock in trade, interest free funds available with it are in far excess of the investments etc. The Ld D.R submitted that the claim of the assessee that it is holding all its investments as stock in trade is farfetched one, since the assessee is required to hold certain funds as pure investments. We notice that this aspect of the submissions require verification at the end of the AO. Accordingly, we set aside the orders passed by Ld CIT(A) on this issue and restore the same to the file of the AO with the direction to

examine this issue afresh in the light of fresh explanations that may be furnished by the assessee by duly considering various case laws relied upon by the assessee.

12. The next common issue urged by the assessee relates to the disallowance of lease premium paid. The Ld A.R fairly admitted that this issue has been decided against the assessee by the Tribunal in AY 2006-07. We notice that the Tribunal has decided this issue against the assessee by following the decision rendered by Special Bench of Tribunal in the case of JCIT Vs. Mukund Ltd (106 ITD 231). Consistent with the view taken in the earlier years, we uphold the order passed by Ld CIT(A) on this issue.

13. The next common issue urged by the assessee relates to the applicability of provisions of sec. 115JB to it. This issue has been decided in favour of the assessee in AY 2006-07, wherein the Tribunal has followed the decision rendered in the assessee's own case in ITA No.1498/Mum/2011 relating to AY 2001-02. Consistent with the view taken in AY 2006-07, we set aside the order passed by Ld CIT(A) on this issue and hold that the provisions of sec. 115JB shall not be applicable for both the years under consideration.

14. We shall now take up individual issue urged in the years under consideration. In AY 2007-08, the assessee is contesting the disallowance of claim made u/s 36(1)(viii) of the Act. We notice that this issue has been decided in favour of the assessee by the co-ordinate bench of Tribunal in AY 2006-07. The tax authorities had rejected the claim by holding that the provisions of sec. 36(1)(viii) shall be applicable only to "financial Corporations". The Tribunal has held that the banks will also be covered by the inclusive definition given for the expression "financial Corporations" in sec. 36(1)(viii) of the Act. Consistent with

the view taken therein, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to allow the claim.

15. In AY 2008-09, the assessee is contesting the disallowance of expenditure relating to issue of capital. During the relevant year, the paid share capital of the assessee has been increased from Rs.488 crores to Rs.525 crores by issuing new shares. The AO ascertained that the assessee has incurred a sum of Rs.8,25,57,501/- towards increasing the share capital by way of fee for merchant bankers, legal fees, Stamp Duty, Registration charges etc. The AO took the view that this expenditure cannot be allowed under sec. 32 to 37 of the Act and further they are not in the nature of revenue expenditure. He also took the view that this expenditure cannot be amortised. Accordingly the AO disallowed the above said expenditure. The Learned.CIT(A) confirmed the disallowance by holding that the expenditure incurred for expansion of capital base is Capital Expenditure. In this regard, the Ld CIT(A) took support of the decision rendered by Hon'ble Supreme Court in the following cases:-

- (a) Brooke Bond India Ltd Vs. CIT (1997)(225 ITR 798)
- (b) Punjab State Indl. Corporation Ltd Vs. CIT (225 ITR 792)
- (c) CIT Vs. Kodak India Ltd (2002)(253 ITR 445)

16. The Ld A.R submitted that the assessee was constrained to increase the share capital by issuing shares in order to meet Capital adequacy Norms fixed by Reserve Bank of India. He submitted that the assessee could not have continued to carry on the business unless it fulfilled the norms of RBI. He submitted that issue of share capital was on account of satisfying a legal and statutory requirement and hence the same cannot be treated as Capital Expenditure. In support of these contentions, the Ld A.R placed reliance on the decisions rendered by Hon'ble jurisdictional Bombay High Court in the case of Glaxo Pharmaceuticals Ltd (181 ITR 59). The Ld A.R further submitted that the funds received from share capital issued by the assessee shall be used for

working capital purposes only, since the money is 'stock in trade' for the assessee. He submitted that Hon'ble Supreme Court has decided, in the case of Brooke Bond India Ltd (supra), the issue relating to expenses incurred on capital raised to meet capital expenditure requirements. With regard to the contention of the assessee that capital was raised to meet working capital needs, the Hon'ble Supreme Court refrained from considering the said fact, since the same was not available on record. He submitted that the observations made by Hon'ble Supreme Court indicate that the expenditure incurred for raising capital for working capital purposes should be allowed as revenue expenditure.

17. On the contrary, the Ld D.R submitted that the assessee has issued fresh capital and hence the expenses incurred on expansion of capital base is capital expenditure, as held by Hon'ble Supreme Court in the case of Brooke Bond India Ltd (supra). He submitted that the user of funds so raised shall not be taken as determinative factor for deciding the nature of expenditure.

18. We have heard rival contentions on this issue and perused the record. We notice that the facts prevailing in the case of Glaxo Laboratories (India) Ltd (supra) are different, i.e., in the case before Hon'ble Bombay High Court, the assessee was not in requirement of any funds, since it had a cash balance of Rs.50.00 lakhs and borrowing capacity of Rs.10 crores. The assessee was compelled to raise additional capital, since the Government of India put a condition for diluting its share holding in order to give its approval for continuation of a technical collaboration arrangement with its parent company. In these set of facts, the Hon'ble Bombay High Court held that the expenditure incurred on raising the capital is revenue in nature. However, in the instant case, the assessee has been carrying on the business for the past several years. The Reserve Bank of India, the apex body which monitors the functioning of banks, had prescribed certain norms that should be complied by the banks. In

the course of compliance of those norms, the assessee has raised capital by issuing shares. It was not the case of the assessee that it was not in need of funds. It was also possible to reach the required Capital adequacy ratio by generating profit also. In any case, the above said decision was rendered by Hon'ble Bombay High Court prior to the decision of Hon'ble Supreme Court rendered in the case of Brooke Bond India Ltd (supra).

19. In the case of Brooke Bond India Ltd (supra), the following question was placed before Hon'ble Supreme Court for its decision:-

"Whether on the facts and in the circumstances of the case, the Tribunal was right in sustaining the disallowance of Rs. 13,99,305/- being expenses incurred in connection with the issue of fresh lot of shares in 1967?"

The Hon'ble Supreme Court noticed that an identical issue came up for its consideration in the case of Punjab State Industrial Development Corporation Ltd and accordingly held as under:-

"We find that this matter has come up for consideration before this Court in *m/s Punjab State Industrial Development Corporation Ltd., Chandigarh v. Commissioner of Income Tax, Patiala*. (Tax Reference No. 1 of 1990 decided on December 4, 1996). In that case, the question under consideration was whether an amount of Rs. 1,50,000/- paid to the Registrar of Companies as filing fee for enhancement of capital was not revenue expenditure. The Court has taken note of the decisions of the Madras, Andhra Pradesh, Karnataka and Kerala High Courts to which reference has been made by Dr. Pal as well as the judgment under challenge in this appeal and the judgment under challenge in this appeal and the judgment of the High Courts taking the same view as that taken in the impugned judgment. This Court has also taken note of the decisions in *Empire Jute Company Ltd. (supra)* as well as *India Cements Ltd. (supra)*. While holding that the amount of Rs. 1,50,000/- paid to the Registrar of Companies as filing fee for enhancement of the capital was not revenue expenditure, this Court has said:-

"We do not consider it necessary to examine all the decisions in extenso because we are of the opinion that **fee paid to the Registrar for expansion of the capital base of the company was directly related to the capital incidentally that would certainly help in the business of the company and may also help in profit making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company.** We are, therefore, of the opinion that the view taken by the different High Courts in favour of the Revenue in this behalf is the preferable view as compared to the view based on the decision of the Madras High Court in Kisenchand Chellaram's case."

This decision thus covers the question that falls for consideration in this appeal."

The Counsel appearing before Hon'ble Supreme Court raised alternative contention as under:-

"Dr. Pal has, however, submitted that this decision does not cover a case, like the present case, where the object of enhancement of the capital was to have more working funds for the assessee to carry on its business and to earn more profit and that in such a case the expenditure that is incurred in connection with issuing of shares to increase the capital has to be treated as revenue expenditure. In this connection, Dr. Pal has invited our attention to the submissions that were urged by learned counsel for the assessee before the Appellate Assistant Commissioner as well as before the Tribunal."

However, the Hon'ble Supreme Court refused to acknowledge those facts, i.e., the object of raising capital was to have more working funds, since the statement of case sent by the Tribunal does not indicate that a finding was recorded to the effect that the expansion of capital was undertaken by the assessee in order to meet the need for more working funds for the assessee. After having observed so, the Hon'ble Supreme Court further held as under:-

"In any event, the above quoted observations of this Court in *M/s Punjab State Industrial Development Corporation Ltd. Chandigarh* (supra) clearly indicate that though the increase in the capital results in expansion of the capital base of

the company and incidentally that would help in the business of the company and incidentally that would help in the business of the company and may also help in the profit making, the expenses incurred in that connection still retain the character of a capital expenditure since the expenditure is directly related to the expansion of the capital base of the company.”

The Hon'ble Supreme Court finally held that the expenses incurred in connection with the expansion of capital base of the company are capital in nature, since it would incidentally help in the business of the company and may also help in the profit making. Though the Hon'ble Supreme Court did not consider the submissions that the working funds are sought to be enhanced, yet it has reiterated its decision that the expenses incurred in connection with the expansion of capital base is capital in nature. There is difference between funds inflow and funds outgo. The funds raised by issuing capital shall increase the capital base. The funds so raised, if used for the purpose of business, would ultimately increase the volume of business as well as profitability. The ultimate aim of raising more funds is to increase the volume of business and profitability. Viewed from this angle, the volume and profitability is bound to increase, when funds are used either for creating the assets or as working capital. Hence, we are of the view that the expenses incurred in increasing the capital base is capital expenditure as held by Hon'ble Supreme Court in the case of Brooke Bond India Ltd (supra), since it would incidentally help in the business of the company and may also help in the profit making. Accordingly, we affirm the order passed by Ld CIT(A) on this issue.

20. In the result, both the appeals filed by the revenue are dismissed and both the appeals of the assessee are partly allowed.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 13/7/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS