

आयकर अपीलीय अधिकरण, मुंबई "ए" खंडपीठ
Income-tax Appellate Tribunal -"A" Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं अमित शुक्ल न्यायिक सदस्य

Before S/Sh.Rajendra, Accountant Member and Amit Shukla, Judicial Member

आयकर अपील सं./I.T.A. No.3823-24/Mum/2005 निर्धारण वर्ष /AY.s.1997-98, 1998-99

State Bank of India Accounts & Compliance Deptt. Corporate Centre, Madam Cama Road Mumbai-400 021. PAN:AAACS 8577 K	Vs.	Addl. CIT- Range-2(2) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Rajeshwar Yadav

Assessee by: Shri Girish Dave

सुनवाई की तारीख / **Date of Hearing** : **02.03.2016**

घोषणा की तारीख / **Date of Pronouncement**: **29.04.2016**

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

खंडपीठ के अनुसार PER BENCH:

Challenging the orders dated 24.3.2005 and 28.3.2005 the assessee has filed the appeals for above mentioned two AY.s raising various grounds of appeal. It has also filed additional Grounds of appeal for the AY 1997-98. Assessee, a Public Sector Bank is engaged in the business of banking. The details of filing of returns, returned income etc., for both the years can be summarised as under :

A.Y.	ROI filed on	Returned Income(Rs.)	Assessment dt.	Assessed Income(Rs.)	Dt. of orders of CIT(A)
1997-98	28.11.1997	2086,56,04,580/-	27.03.2000	2433,18,77,427/-	24.3.2005
1998-99	30.11.1998	2816,41,01,920/-	14.02.2001	3558,87,03,620/-	28.3.2005

3823/Mum/05(97-98):

2. First Ground of appeal is about guest house expenses, amounting to Rs.1.19 crores. During the course of hearing before us, the Authorised Representative (AR) fairly conceded that identical issue has been decided by the Tribunal against the assessee in the earlier years. We find that while deciding the appeal for the AY 1996-97 the Tribunal has held as under :

“7. Ground No. 3 is regarding guest house expenses. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. We find that an identical issue has been considered and decided by this Tribunal in assessee’s own case for the assessment year 1991-92 vide order dated 19.5.2008 in para 21 as under:

“21. The next issue is regarding guest house expenses and depreciation thereon. At the time of hearing, the learned Authorised Representative of the assessee has submitted that the issue was decided against the assessee by the judgment of Hon’ble Supreme Court in the

case of Britannia Industries Ltd. Vs CIT, reported in 278 ITR 546 (SC). Accordingly, we are not inclined to interfere with the findings of the CIT(A). The same is upheld.”

Following the earlier order of this Tribunal we decide this issue against the assessee and in favour of the revenue. Accordingly the order of CIT(A) qua this issue is upheld.”

Respectfully, following the above, Ground No.1 is decided against the assessee .

2.Next ground is about interest credited to interest suspense account taxed in earlier years. During the course of hearing before us, representatives of both the sides conceded that issue stands decided in favour of the assessee subject to verification by the AO with respect to the earlier years.

“19. At the time of hearing before us, the learned counsel for the assessee has submitted that the addition made by the A.O. on account of interest credited to interest suspense account in earlier years amounting to Rs.54,50,93,051/- has already been deleted by the Tribunal by allowing the appeals of the assessee on this issue. He has contended that this matter thus had become virtually infructuos and the assessee is not interested in pressing the same. He has contended that this concession, however, is subject to the rider that if the order of the Tribunal for earlier years allowing the deduction is reversed by the Hon'ble High Court, the assessee shall be at liberty to revert his claim. this ground of the assessee's appeal is accordingly dismissed as not pressed after taking note the submissions made by the learned counsel for the assessee.

20. As regards ground No.10 challenging the action of the ld. Commissioner of Income tax(Appeals) in setting aside the issue regarding deduction for provision on account of bad and doubtful debts, the learned counsel for the assessee has submitted that the COD has not given its approval for pursuing this ground. Accordingly, this ground is dismissed for want of COD approval.”

Following the above, we direct the AO to carryout verification and allow the claim if found correct. Ground No.2 is allowed in favour of the assessee, in part.

3.Third Ground is about disallowance of Rs.26,44,876/- in respect of payment for scientific research. During the assessment proceedings, the AO found that payment of Rs.26,44,876/- had been made out of a fund established by the assessee for scientific research assistance, that the fund was set up out of surplus fund in earlier years, that the payment was not out of the income of the year under consideration. Following the earlier years order the AO disallowed the claim.

3.1. Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority (FAA). After considering the submission of the assessee and the assessment order he held that his predecessor disallowed the claim made by the assessee while deciding the appeal for AY 1996-97. Following the order of his predecessor for the earlier year he upheld the order of the AO.

3.2. During the course of hearing before us, the AR agreed that assessee had not challenged the order for the year 1996-97 before the Tribunal. As the assessee had accepted the order of the FAA for the earlier year, we are of the opinion that there is no need to disturb the order of the CIT(A) for the current year as facts for both the years are identical- except that the amounts involved are different. Confirming the order of the FAA Ground No.3 is decided against the assessee.

4. Fourth Ground deals with exemption u/s. 10(15)(iv)(h) of the Act. During the assessment proceedings the AO found that the assessee had claimed entire interest received on tax free securities amounting to Rs.70.95 crores, exempt u/s. 10(15)(iv)(h). He held that expression "income" meant "net income" i.e. receipt minus expenditure. He referred to Circular No.780, dt.4.11.1997 of the CBDT dealing with section 10(23)(G) of the Act and observed that the word interest mentioned in section 10(15) was used because it talked about amount payable by the payer in whose hands it was an expenditure, that if the assessee was allowed an exemption with regard to gross interest received by it, it would amount to allowing expenditure twice. He disallowed the expenditure of Rs.45.51 crores.

4.1. Aggrieved by the order of the AO the assessee preferred an appeal before the FAA and made elaborate submissions relying upon various case laws. After considering the submission of the assessee and the assessment order the FAA referred to the provisions of section 14A of the Act and held that the assessee borrowed funds by paying interest and gave advances and invested funds for earning interest/dividends by claiming gross receipts exempt from tax and claiming the entire cost of borrowing from business income it was claiming double deduction, that the expenses incurred for earning the tax free income which had been claimed against taxable income should be excluded from the computation of taxable income, that it would be allocated against tax free income, that would result in deduction of claim u/s. 10 of the Act, that the assessee had earned interest of Rs.7.85 crores that was not added in total income as per provisions of section 10(15) of the Act, that any expenditure incurred in relation to the said income could not be allowed as deduction. The FAA had directed the assessee to prove that borrowed funds were not used for making investment yielding tax free

income. However, vide order sheet entry dt.21.3.2004 the assessee stated that it did not maintain separate accounts for tax free and taxable income and that it was not possible to correlate the investment with the own funds. The FAA after considering the submission of the assessee held that onus was on the assessee to show that the borrowed funds had not been utilised or that expenses had not been incurred in relation to exempt income, that the accounts of the business were maintained by it, it was the duty of the assessee to provide necessary details, that it would be reasonable to assume that investment in tax free securities/bonds etc. had been made out of assessee's own funds as well as from borrowed funds, that the method adopted by the AO to work out the allocable expenditure was quite reasonable. Finally, he held that the AO was justified in allowing exemption for interest income of Rs.70.95 crores on net basis.

4.2. During the course of hearing before us, the AR stated that while deciding the appeals for AY 1996-97 the Tribunal had held that gross amount of interest was exempt u/s. 10(15)(iv), that the Tribunal had while dealing with the deduction u/s. 80M, held that 1% of the dividend had to be treated as income for earning dividend income in the orders passed for the AY.s.1982-83 and 1983-84, that the method of allocation of interest expenditure was illogical, that the provisions of section 14A were applicable only when expenditure was actually incurred, that the assessee would invest in tax free securities to comply SLR requirement laid down by the RBI, that the assessee had own funds of more than Rs.30,000 crores, that non-interest bearing funds far exceeded the investment. He relied upon the cases of American Express Bank Ltd.(55SOT136), Central Bank of India (264ITR522), Godrej Agrovt(ITA 1629/Mum/09), State Bank of Travancore (318 ITR(AT)-171); HDFC Bank (ITA /330of 2012 of Hon'ble Bombay HC), Tinbox Company(260ITR637) and UTI Bank Ltd. (32 taxmann. Com 370). He referred to Annexure to the return of income and the submissions made before the AO and the FAA. The DR supported the order of the FAA.

4.3. We have heard the rival submissions and perused the material before us. We find that the AO had allowed expenditure to the extent of Rs.25.43 crores and had disallowed expenditure of Rs.45.51 crores on proportionate basis, that the FAA directed the assessee to furnish details to prove that borrowed funds were not used for making investment yielding exempt income, that the assessee had admitted that it was not possible to co-relate the investment with own funds, the assessee had claimed that its own funds including reserves and surpluses were about Rs.30,000 crores for the year under consideration. The AO had applied the provisions of section 14A of the Act. In our opinion law relating to allowing expenditure with regard to exempt income has evolved since the appeal was decided by the FAA for the year

under consideration. The AO/FAA did not have the benefit of the cases dealing with the provisions of section 14A, while making the assessment /deciding the appeal. We are of the opinion, that matter needs further verification/investigation. Therefore, in the interest of justice we are restoring back the issue the file of the AO for fresh adjudication. He is directed to afford reasonable opportunity of hearing to the assessee. Ground No.4 is decided in favour of the assessee in part.

5. Ground No.5 is about reduction u/s.80M of the Act. Dealing with the claim made by the assessee u/s.80M of the Act, the AO allowed a sum of Rs.14.04 crores, as against Rs.39.16 crores. The assessee had claimed deduction of Rs. 39,16,45,149 @ 60% of the gross dividend (Rs.65.27 crores). The assessee preferred an appeal before the FAA and stated that the Tribunal had, while deciding the appeal for the AY.s 1982-83 and 1983-84 held that 1% of the dividend shall be treated as expenditure incurred for earning dividend income. After considering the submission of the assessee and the assessment order the FAA held that the Tribunal had in the earlier years held that only one percent of dividend income should be treated as expenditure incurred for earning dividend income. Following the order of the Tribunal, he held that in respect of dividend on shares, purchased prior to 31.3.96 the AO should allocate only 1% of dividend income as expenditure and compute the deduction u/s. 80M on the resultant net dividend income. As regards dividend earned on shares purchased on or after 1.4.96, he held that AO was justified in allocating proportionate expenses towards earning of dividend income. However, he stated that he was not in agreement with the method adopted by the AO for computing disallowance, that the interest and other expenses could not be estimated to be a percentage of dividend income, that the interest expense should be allocated on the basis of funds utilised for investment in shares. The FAA referred to the discussion held with regard to the expenditure incurred for earning tax free exempt income. He held that the assessee had not proved that borrowed funds were not used for the purpose of investment, that it would be reasonable to assume that the investment in shares had been made out of own funds as well as borrowed funds. Finally, he directed the AO to allocate interest expenditure towards investments in shares in ratio of own funds and borrowed funds as on 31.3.1997 and applied average rate of borrowings on that part of investment in shares in the year under consideration which was funded through borrowings.

5.1. Before us, the AR stated that arguments advanced for gr.No.4 were applicable to this ground also, that deduction had to be allowed on gross. He relied upon the case of Modern Terry Towels Ltd. (357ITR750). The DR supported the order of the FAA.

We find that the issue stands decided in favour of the assessee by the above judgment of the Hon'ble Bombay High Court which reads as under:

The provisions of section 80HHC of the Income-tax Act, 1961, are entirely different from those of sections 80M and 80AA. There is no basis for importing the provisions of section 80HHC for interpreting section 80M. That would not lead to a satisfactory computation of the net dividend under section 80M.....the Tribunal was justified in law in allowing special deduction under section 80M in respect of gross dividend without deducting estimated expenses therefrom."

6.Next Ground of appeal is about disallowance of depreciation of Rs.61.75 crores on leased assets. During the course of hearing before us, the AR fairly conceded that identical issue has been decided against the assessee by the Tribunal. While adjudicating appeal for AY.1996-97 dt.26.7.13 in ITA No.5470/Mum/2002 the Tribunal held as under :

15. Ground No. 8 is regarding depreciation on lease assets given to Konkan Railway Corporation Ltd. The assessee has entered into an agreement dated 30.3.1996 with Konkan Railway Corporation Ltd. for leasing transaction with respect to the asset of Rs. 25,00,00,000/-. The assets have been categorised as plant and machinery in the shape of Railway Tracks comprising of rails, sleepers and associated fitting. The assessee claimed depreciation on these assets at the rate of 12.5% as used for less than 180 days. The assets in question were originally acquired by Konkan Railway Corporation Ltd. and thereafter to arrange the funds the same were sold to the assessee Bank and taken back on lease for a period of 84 months against the lease rental payable at monthly instalment. The Assessing Officer held that the transaction is in the nature of loan or financial assistance provided to the Konkan Railway Corporation Ltd. (KRCL) by the assessee Bank. The transaction has been given the shape of lease transaction only in order to enable the bank to claim depreciation and reduce its taxable income. Accordingly, the AO held that the sale and lease back transaction is in the nature of financial transaction, therefore, the claim of depreciation was disallowed. On appeal, the CIT(A) confirm the action of the AO and held that the so-called lease agreement is only a finance lease on which the depreciation can be allowed to a person who vests the dominion over the property/asset, who is entitled to use it in his own right and using the same for the purpose of his business or profession. The CIT(A) has observed that in the present case the lessee retained the asset in its own dominion at the exclusion of others including the assessee because the lessee has constructed the equipments and uses it as integral part of railway system. In order to get finance KRCL made an arrangement to issue a sale invoice but retained the asset for itself. However, the CIT(A) while confirming the disallowance of depreciation directed the AO to exclude the capital recovery component from the lease rentals assessed to tax.

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20. We have considered the rival submissions as well as relevant material on record. The assessee has claimed that as per the lease agreement the assessee has entered into an operating lease of the asset in question. In order to determine the real nature of transaction and arrangement between the parties, the substance of the document intention of the parties and surroundings circumstances under which the parties have entered into the transaction are material and relevant to be considered. Therefore, mere nomenclature words used in the agreement cannot be looked into in isolation of the substance of the document, the real intentions of the parties and the surroundings circumstances under which the transaction took place. Undisputedly in the case in hand the asset in question is the railway track which is already owned by the lessee Konkan Railway Corporation Ltd. (KRCL) but because of the requirement of funds the KRCL decided to raise the funds by making the arrangement of sale and lease back of the asset. Thus, the real object as far as KRCL is concerned for entering into the transaction of sale and lease back is to raise/arrange the funds. The two transaction of sale of the asset in question to the assessee bank and lease back cannot be separated as there was no choice with either of the party to restrict the transaction of sale alone independently because it was neither possible nor permissible to sell out the asset in question by the Konkan Railway Corporation being the integral part of their railway system which is the very basis of the existence of the KRCL. Thus, we have not doubt that the sale transaction in question is merely on paper and to facilitate the financial arrangement by the assessee to the KRCL without involving any real intention of transfer of the asset in question. Even otherwise the transfer of asset in question is impossible in the facts and circumstances of the case and therefore it was not the real intention of the parties even reflected from the lease agreement. Some of the relevant clauses of the agreement are as under:

“1.5 The Acquisition Cost of the equipment shall be the Invoice Value of the Equipment inclusive of levies on important of the Equipment, Customs Duty, Central Excise Duty, Sales Tax, Additional Tax, Surcharge on Sales Tax, Interest Tax, where applicable, Turnover Tax, where payable and all other costs and expenses, as the case may be such as Freight, Octroi, Entry Tax, Erection and Installation \Charges, Commissioning Charges, Testing Charges paid or payable in respect of the Equipment or value assessed by the valuers as per clause 2.2. Below whichever is lower. In case the Lessee proposes to avail MODVAT on the specified Excise Duty paid in terms of the Central Excise Rules, 1944, of which due intimation will be given by the Lessee to the Lessor, the acquisition cost will not include Excise duty payable on the equipment.

1.6 The Lessee hereby takes on lease the Equipment for the Fixed period from the Commencement Date as hereinafter referred to subject to the terms, conditions, covenants and stipulations contained herein and in the Schedules

hereto. The Fixed period or the primary period of the Lease as defined in Part II of the First Schedule hereto is non-cancellable by the Lessee and/or the Lessor except as provided in Clause 13 hereof. The fixed period of the lease may be renewed for a further fixed term referred to as “the secondary period” at the option of the Lessee on the same terms and conditions as are contained in this agreement subject to payment by the Lessee of lease rentals in advance as stipulated in Part II of the First Schedule hereto.

5. Insurance It is agreed by and between the Parties hereto that the Lessee shall, for and on behalf of the lessor.

5.1 Take out insurance on the Equipment against loss in transit, erection and installation risks, maritime risks, where necessary prior to the despatch of the Equipment, or alternatively to ensure that the insurance on the Equipment in respect of the said risks is effected by the Manufacturer/Supplier before delivery of the Equipment.

5.2 immediately after the delivery of the Equipment, insure the Equipment and keep the same insured throughout the term of this Agreement against loss or damage by accident, lightning, fire, flood, storm, earthquake, tempest, falling aircraft, malicious damage, riot, strike, civil commotion, explosion, implosion and where necessary against third party claims in respect of Equipment used in hazardous industries and those requiring environmental protection as also for other risks usually covered by insurance in the type of business for which the Equipment is for the time being used to the satisfaction of the Lessor upto the full replacement value thereof under a Comprehensive Policy of Insurance, in the joint names of the Lessor and the Lessee with an endorsement showing the Lessor as the owner and Loss payee.

8. Lessor’s Interest and Title:

The Lessee agrees and undertakes that it will-

8.1 ensure that in so far as the Equipment is installed in or affixed to any land or building, such Equipment shall be capable of being removed without material injury to the said land or building and that all such steps shall be taken as are necessary to prevent title to the Equipment from passing to the Owner/Lessor/Occupier of the said land or building:

8.2 Keep the Equipment at all times in the possession and control of the Lessee at the Lessee’s Factory or Premises as indicated in the Proposal and at the address as specified in Part II of the First Schedule hereto and not

remove the same from the place so specified where it is installed without the consent in writing of the Lessor:

8.3 notify the Lessor of any change in the Lessee's address and upon request by the Lessor promptly inform the Lessor of the whereabouts of the Equipment:

8.4 not do or omit to do any act which may result in seizure and/or confiscation of the Equipment by the Central or State Government or Local Authority or any Public Officer or Authority under any law for the time being in force:

8.5 not sell, assign, sub-let, pledge, mortgage, charge, encumber, or part with possession of or otherwise deal with the Equipment or any interest therein nor create or allow to be created any lien on the Equipment whether for repairs or otherwise and in the event of any breach of this sub-clause by the Lessee, the Lessor shall be entitled to call upon the Lessee to have the lien or charge or other encumbrance lifted at its cost and in the event of the Lessee failing to do so within a reasonable time, the Lessor shall be entitled (but shall not be bound) to pay to any third party such sum as is necessary to procure the release of the Equipment from any lien charge or encumbrance and shall be entitled to recover from the Lessee forthwith all such expenses as might have been incurred for such release:

8.6 not sell, mortgage, charge, demise, sub-let or otherwise dispose of any land or building on or in which the Equipment are kept or enter into any contract to do any of the aforesaid things without giving to the Lessor at least six weeks prior notice in writing and the Lessee shall in any event ensure that any such sale, mortgage, charge, demise, sub-lease, or other disposition as the case may be is made subject to the right of the Lessor to repossess the Equipment at any time (whether or not the same or any part thereof shall have become affixed to the said land or building) and for that purpose to enter upon such land or building and sever any Equipment affixed thereto:

8.7 punctually pay all registration charges, licence fees, rent, rates, taxes including in particular Sales Tax and other outgoings payable in respect of the Equipment under this Agreement or for storage, installation, or use thereof, or in respect of any premises in which the Equipment from time to time may be placed or kept and produce to the Lessor, on demand, the latest receipts for all such payments and in the event of the Lessee making default

under this sub-clause the Lessor shall be at liberty to make all or any of such payments and to recover the amount thereof from the Lessee forthwith.

8.8 not claim any relief by way of any deduction, allowance or grant available to the Lessor as the owner of the Equipment, under the Income Tax Act, 1961 or under any other Statute, rule, regulation or guideline issued or that may be issued by the Government of India or any Statutory Authority and not do or omit to do or be done any act, deed or thing whereby the Lessor is deprived, whether wholly or partly of such relief by way of deduction, allowance or grant. The Lessee shall at the end of each financial year of the Lessor provide to the Lessor such information as it may require to claim relief by way of any deduction allowance or grant as the owner of the Equipment under the Income Tax Act, 1961 and the Lessee undertakes to comply with and observe at all times all the terms and conditions to be complied with or observed in respect of the use and operation of the Equipment so as to entitle the Lessor to obtain such relief.

8.9 The Lessee irrevocably agrees that if due to incremental taxes whether on account of the impact of the sales tax legislation in the various States as applicable or on account of customs duty or excise duties or any other related and consequential taxes or charges levied or leviable on this transaction now or hereafter as also due to any increase in the purchase price of the Equipment covered by this Agreement on account of purchase tax and/or any other tax or imposition or due to tax on the right to use goods as may be applicable to the Equipment the Acquisition Cost of the Equipment stands increased, then the Lessor reserves the right to increase the Lease rentals proportionate thereto and on such notification by the Lessor to the Lessee, the Lease Rentals shall correspondingly stand increased from the date specified by the Lessor in such notification.

12. Events of Default:

An event of default shall occur hereunder, if the Lessee-

12.4 without the Lessor's consent, sells, transfers, or attempts to sell or pledge, parts with possession or sub-lets or charges or encumbers or creates any lien on the Equipment or any item of the Equipment is endangered in the opinion of the Lessor or the interest of the Lessor is jeopardised:

13. Termination in the even of default:

13.2 On the termination of this Agreement the Lessor shall without any notice be entitled to remove and repossess the Equipment and for that purpose by itself its servants or agents enter upon any land buildings or

premises where the Equipment is situated or is reasonably believed by the Lessor to be situated for the time being and detach and dismantle the same and the Lessor shall not be responsible for any damage which may be caused by any such detachment or removal of the Equipment.

13.3 Without prejudice to and in addition to the Lessor's rights provided in Clause 13.2 hereinabove the Lessor shall also be entitled to recover from the Lessee and the Lessee shall be bound to pay to the Lessor the following amounts viz:

13.3.1 The entire amount of the lease rentals for the fixed period of the lease computed in the manner set out in Part II of the First Schedule hereto on the footing and as if the Agreement had not been terminated to the end and intent that the Lessee shall pay to the Lessor not only arrears of instalments of lease rentals upto the date of termination of this Agreement but also such further instalments for the then unexpired residue of the term which the Lessee would have been bound to pay to the Lessor had this Agreement continued.

14. Redelivery/Repossession of Equipment:

14.1 Upon the expiration of this Agreement if the Lessee does not propose to renew the lease for further fixed period or secondary period the Lessee shall if required by the Lessor deliver the Equipment to the Lessor at the address of the Lessor stated in this Agreement or at such other addresses as the Lessor may specify or if not so required shall hold the Equipment in trust for the lessor so as to make it available to the Lessor for collection by itself or by its employees or agents; the Lessor or its employees or agents shall be entitled to retake possession of the Equipment and may for that purpose enter upon any land or building Lessor or its employees or agents to be situated and if the Equipment or any part thereof is affixed to such land or buildings, the Lessor or its employees or agents shall be entitled to sever the same therefrom and to remove the Equipment or part thereof so severed and the Lessee hereby agrees that it shall not hold the lessor for any damage done responsible for and to make good at its expense all damage caused to the land or buildings by such removal.

15. Sale of Equipment on termination of the Agreement:

Upon the termination of this Agreement unless the Lessee has elected to renew the lease for a further fixed period or secondary period the Lessor shall as the absolute owner of the Equipment be at liberty to sell any or all

of the Equipment at a public or private sale or otherwise dispose of, hold, use, operates, lease to others or keep idle such Equipment, all free and clear of any rights of the lessee and without any duty to account to the Lessee for such action or inaction or with respect to any proceeds thereto and if such Equipment is sold the price obtained upon such sale shall not be questioned or challenged by the Lessee more shall the Lessee question or dispute the exercise or non-exercise by the Lessor of any one or more of the rights and remedies as set out in Clause 13 hereinabove.

16. Assignment:

16.1 The Lessor may hypothecate the Equipment owned by it and leased out hereunder in favour of any bank, Financial Institution or any other Institution whatsoever as and by way of security for the financial assistance arranged therefore by the Lessor for the acquisition of such Equipment. The Lessor may assign to any person any of its rights under this Agreement and in particular may assign such rights by way of a charge and any person to whom such rights are assigned shall be entitled to the full benefit of all such rights of the lessor.

21. It is manifest from the terms and conditions of the lease agreement that the lease is for a fixed period of 84 months and as per clause 1.6 it is non-concealable by the lessee and/or by the lessor except on the default on the part of the lessee. Even in case of default and consequential termination of lease its is provided that the lessee shall pay the entire arrears of the lease as well the future instalment for the unexpired period of the lease term, therefore the lease agreement has been framed and constructed in such a way that the assessee recovers its entire cost along with the interest in equated monthly instalments. Even in the schedule to the lease agreement the period of 84 months is a fixed non-concealable period. As per clause 5 of the agreement the lessee is required to take out the insurance on the asset in question and also bear all the damages, loss and risk attached to the leased asset, therefore, it is agreement between the parties that all the risk and reward attach to the lease asset shall be born and enjoyed by the lessee. The so-called restrictions on the sale, creating charge, lien by the lessee are necessary being a security against the funds provided by the assessee to the lessee. Even otherwise in case of simple finance, the asset which is being financed is always kept as a security/mortgage with the bank to protect the interest of the bank till the repayment of the finance. Therefore, the restrictions provided in the lease agreement are only to secure the interest of the bank till the recovery of the full amount along with the interest. Some of the terms of the agreement appear to be only for sake of the conditions as to protect to the interest of the bank but the same could not be given effect in practical. For instance, in case of default if the assessee terminates the lease agreement in question then it is not possible for the assessee either to take the possession of the asset

in question because of the nature of asset which could not be separated from the railway network or remove the asset from the place of its existence being part of the railway network. Further apart from the lessee the asset cannot be transferred or assigned to anybody else as it is not possible to use only a particular stretch of railway track without connecting or being a part of the entire network. Thus, the terms and conditions as heavily relied upon Ld. AR would not help the case of the assessee to establish that the asset in question could actually be taken in possession by the assessee. Therefore, the assessee cannot exercise the real and actual ownership over the asset keeping in view the facts and circumstances and nature of the asset in question. The Special Bench of this Tribunal in case of IndusInd Bank Ltd. (supra) by following the decision of Hon'ble Supreme Court in case of Asea Brown Boveri Ltd. Vs Industrial Finance Corporation of India (IFCI) 154 Taxman 512 as well decision in case of Association of Lease and Financing Service Company Vs Union of India (supra) has enumerated various features which make distinction between operating lease and finance lease in para 5.20 as under:

“5.20 In view of the fact that the Id. AR has lodged a strong claim to consider the present agreement as that of operating and not a finance lease, it is imperative to understand the distinction between the two as under :-

a. In the case of an operating lease, the lessor provides the asset for use for a certain period of time to the lessee for rent. On the expiry of such lease period, the lessor has to inevitably repossess the asset. On the other hand, a case of finance lease is in essence an arrangement for borrowing. The role of lessor is limited to that of financier only.

b. In operating lease, it is the lessor who bears the loss and obsolescence of the asset leased, whereas in &se of finance lease it is the lessee who always bears such loss.

c. In the case of an operating lease, the lessor remains the owner of the asset throughout the lease period and thereafter also, whereas in a finance lease it is the lessee who becomes the real owner. The lessor's title over the asset is only symbolic to serve as security for the rentals, which are nothing but the return of his investment with interest.

d. Operating lease is cancellable, whereas finance lease is always non-cancellable. In a case of finance lease, the lessor is interested in lease rentals and not the asset.

e. In the case of an operating lease, substantial risks and rewards of ownership of the asset remain with the lessor, whereas in the case of finance lease these ab initio vest with the lessee.

f. In the case of an operating lease, the fixation of lease rental bear no symmetry with the economic life of the asset and the possibility of the asset

reverting back to the lessor can never be ruled out. However in the case of a finance lease, the lease period is ordinarily equal to the economic life of the asset and lease rentals are fixed in such a way so as to recover the investment with interest during the lease period itself. The possibility of the asset reverting back to the lessor is never there.

g. In the case of an operating lease, the asset is ordinarily common use utility whereas in case of finance lease the asset is normally selected by the lessee himself so as to suit his particular requirements

h. Normally an operating lease is non payout whereas a finance lease is full payout. Full payout lease means that the lessor recovers the full value of the leased asset plus the finance cost over the period of first lease. Full payout lease is peculiar to finance lease. On the other hand, a non payout lease is one where the lessor is not interested in recovering his principal investment plus interest from one lessee only because he may lease out the same asset over and over again. Though no single lease recovers the principal amount plus interest component of the lessor but all the leases taken together make it a full payout. That is why the non payout lease is peculiar to operating lease.”

22. The Special Bench then analysed the various factors of distinction between operating lease and finance lease in para 5.21-5.23 as under:

“5.21 From the above points of distinction between operating lease and finance lease, the salient features of operating lease have become glaring. Now let us ascertain as to whether the above clauses, claimed by the id. AR as amply proving it to be a case of operating lease agreement, do in fact prove it so. IA an earlier para we have observed that this lease agreement fully satisfies all the characteristics of finance lease. The position which, therefore, emerges is that some clauses of the agreement tend to give impression of this being an operating lease whereas the others largely indicate it to be a finance lease. How to resolve the conflict? In order to decide as to whether the instant lease agreement be characterized as operating or finance lease, we need to take shelter of the doctrine of pith and substance. This rule stipulates that if there is some overlapping in the contents of the clauses of an agreement, then it becomes necessary to examine the pith and substance of the agreement. It can be done by seeing as to whether it predominantly satisfies the conditions of operating lease or finance lease. The crux is that we should find out the substance of the agreement.

5.22 We have highlighted the broad features of operating lease such as, the lease is cancellable; the lessor provides services, maintenance and insurance; total of all the lease payments by the lessee does not provide for the recovery of the investment with interest. Further the operating lease generally covers the asset which can be needed by different users so that the lessor may make available to one lessee after another.

5.23 Now let us try to find out the substance of the extant lease agreement as to whether it predominantly satisfies the conditions of an operating lease. On reading the lease agreement as a whole, we find that except for naming the lessor as owner at some places in the agreement and inserting certain cosmetic clauses to give the colour of operating lease, there is nothing in substance which satisfies the inherent requisites of operating lease. It can be observed that the lease is not cancellable prior to the expiry period of seven years. The cost of repairs and insurance is to be borne by the lessee. Sum total of the lease rentals by the lessee recoups the amount invested by the lessor plus interest. There is a clause that after the expiry of seven years period, the boiler will be sold to the lessee at predetermined value. It is the lessee who has to bear the loss due to obsolescence. All the risks and rewards vest with the lessee. When we consider the cumulative effect of all the factors for and against the operating lease, it can be easily found out that if one has to choose between the finance lease and operating lease, there can be no difficulty in reaching the irresistible conclusion that it is a case of finance lease agreement. In pith and substance this agreement is nothing but a finance lease.”

23. In the case in hand the lease is for fix period of 84 months during which the assessee would recover the full value of lease asset with finance cost being interest as agreed between the parties. All the costs regarding loss and obsolescences, repairs, maintenance, insurance etc. are to be born by the lessee. Thus the risk and reward of ownership of the asset vested with the lessee and therefore for all practical purposes the ownership of the asset was vested with the lessee and not with the assessee. The terms of the agreement are designed in a manner so that in any eventuality the assessee would recover the investment (cost of asset) with interest and not the asset in question. As discussed in the foregoing paras the title over the asset as per the lease agreement is only for securing the financial interest of the assessee and not intended to really take the asset in its possession on the expiry of lease term or on the termination of the lease agreement. Therefore all the features and attributes of finance lease as discussed by the Special Bench in case of IndusInd Bank do exist in the case of the assessee.

24. Apart from the terms and conditions as stipulated in the lease agreement one more important aspect which is very relevant in deciding the issue is that as per the Banking Regulation Act, 1949, a

Banking company is not permitted to engage in the activity of leasing of asset. Section 6 of the Banking Regulation Act specifies various business in which a banking company may engage as under:

“6. Forms of business in which banking companies may engage. — (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:—

(a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller’s cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a 1[managing agent or secretary and treasurer] of a company;

(c) contracting for public and private loans and negotiating and issuing the same;

(d) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;

(e) carrying on and transacting every kind of guarantee and indemnity business;

(f) managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(h) undertaking and executing trusts;

(i) undertaking the administration of estates as executor, trustee or otherwise;

(j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;

(k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(m) acquiring and undertaking the whole or an part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).”

25. As it is clear from the sub-section 2 that no banking company shall engaged in any form of business other than those referred in subsection 1 of section 6. However, as per circular dated 19.2.1994 the Reserve Bank of India has allowed the banking companies to undertake the activities of equipment leasing but the same should be treated on par with the loan and advances. Therefore, the activity of equipment leasing permitted by the RBI vide said circular is only in the nature of finance

lease. The said circular has also been considered and discussed by the Special Bench in para 5.24-5.27 as under:

“5.24 Our view is fortified by the RBI Circular No. FSCBC 18/24- 01-001/93-94 dated 14.02.1994 which inter alia deals with equipment leasing. It is needless to say that this circular is binding on the assessee bank. Para 1(i) of it provides that the activities like equipment leasing, hire purchase and factoring services should be undertaken only by certain selected branches of the Bank. Para 1 (ii) which is relevant for our purpose reads as under:

“(ii) These activities should be treated on par with loans and advances and should accordingly be given risk weight of 100 per cent for calculation of capital to risk asset ratio. Further, the extant guidelines on income recognition, asset classification, asset classification and provisioning would also be applicable to them.”

Paras 1(v) and (vi) which are also relevant read as under:-

“(v) Banks undertaking equipment leasing departmentally should follow prudential accounting standards. The entire lease rental should not be taken to the bank’s income account. It would be recognized that lease rentals comprise two elements a finance charge (i.e. interest charge) and a charge towards recovery of the cost of the asset. The interest component alone should be taken to the income account. The component representing the replacement cost of the asset should be carried to the balance sheet in the form of a provision for depreciation.

(vi) As a prudent measure, full depreciation should be provided for during the primary lease period of the asset. The period of lease should not normally exceed five years. In exceptional cases, lease period not exceeding 7 years may be fixed in respect of lease transactions covering assets of Rs. 1 crore and above, as the recovery of cost may not be possible in a period of 5 years.”

5.25 On perusal of the above paras of the above circular it becomes patent that the equipment leasing activity should be treated by banks “on par with loans and advances”. The further contents of para 1 (ii) which provides that the guidelines on income recognition, asset classification and provisioning would also be applicable to them, make it clear that the activity of equipment leasing should be considered as an act of advancing loans and advances. It is so for the reason that the guidelines on income recognition and asset classification etc. as referred to herein, are applicable to loans and advances. Further para 1 (v) provides that the entire lease rental should not be taken to the bank’s income account. Only the interest component being the finance charge should be taken to the income account and the second component being charge towards recovery of the cost representing the replacement cost of the asset should be carried to the balance sheet in the

form of a provision for depreciation. Para 1 (vi) states that as a prudent measure full depreciation should be provided for during the preliminary lease period of the asset. It is impermissible to read para 1 (vi) of the Circular in isolation to support the contention that the RBI permits claiming depreciation on the leased assets. It is in fact not so because the Circular as a whole treats the activity of equipment leasing as that of loans and advances and the reference to full depreciation in para 1 (vi) should be read in juxtaposition to para 1(v) which talks of the second component of the lease rental being the replacement cost of the asset. When we read this Circular in entirety, there remains no doubt that the activity of equipment leasing has to be considered by a bank on par with the loans and advances.

5.26 In view of the above circular we do not find any scope for argument that the instant lease agreement be treated as that of operating lease. Since the loans and advances encompass finance lease, naturally such type of equipment leasing cannot be given any name other than the finance lease. Here it is relevant to note that the assessee claimed depreciation on leased asset and also showed full amount of lease rental as income in contravention of para 1(v) of the afore noted RBI ITA No. 5470/M/2002 State Bank of India . 36 Circular. When the Assessing Officer concluded that the instant lease cannot be characterized as finance lease, the assessee requested the A.O. that in case the depreciation on the leased asset to assessee is not to be granted by treating it as a loan transaction, then the capital recovery embedded in the lease rental should not be charged to tax. This issue has been discussed in para 2.30 of the assessment order. Acceding to the assessee's request, the Assessing Officer excluded the portion of capital recoveries from the rental income. Thus it can be observed that the action of the A.O. is fully in consonance with the RBI Circular which states that in case of equipment leasing the entire lease rental should not be treated as bank's income but only that component of such lease rental which represents finance charges i.e. interest should be recognized as income alone.

5.27 We, therefore, approve the view taken by the authorities below in coming to the conclusion that the lease agreement under consideration is that of finance lease and not operating lease.”

26. As it is clear from the circular that the banks undertaking equipment leasing departmentally should follow prudential accounting system and only the interest charge component should be recognised as income and the recovery of cost of asset should be carried to balance sheet on the form of provision of depreciation. Therefore under the circular the transaction of equipment lease is

treated at par with the loan transaction and accordingly only the interest component of the receipt is recognised as income. Since it is not permitted to recognise the entire receipt being lease rentals as income the assessee has also recognised only interest component of the receipt of the lease rental as income in the profit and loss account and the balance which represents the capital component is taken to the balance sheet. Thus, in the books of account, the assessee has treated the transaction in question as finance lease and not as an operating lease because the banks are permitted only to carry out the transaction of finance lease of equipments.

27. It is pertinent to note that in case of ICDS Ltd. (supra) it was not a lease by a bank but the assessee in the said case is a non-banking financial institution and one of the business of the assessee was leasing out the vehicles as the facts recorded by the Hon'ble Supreme Court in para 2 of the said decision as under:

“2. The assessee is a public limited company, classified by the Reserve Bank of India (RBI) as a non-banking finance company. It is engaged in the business of hire purchase, leasing and real estate etc. The vehicles, on which depreciation was claimed, are stated to have been purchased by the assessee against direct payment to the manufacturers. The assessee, as a part of its business, leased out these vehicles to its customers and thereafter, had no physical affiliation with the vehicles. In fact, lessees were registered as the owners of the vehicles, in the certificate of registration issued under the Motor Vehicles Act, 1988 (hereinafter referred to as “the MV Act”).”

28. Therefore the Hon'ble Supreme Court has decided the issue in the case of non-banking financial company which is engage in the business of leasing whereas in the case of bank it is not permitted under the Banking Regulation Act to engage in the business of leasing of equipments. Following the decision of Special Bench of this Tribunal in case of IndusInd Bank Ltd., we hold that the transaction in question is finance lease and not operating lease. Accordingly, we uphold the orders of the authorities below qua this issue.”

Respectfully, following the above order of the Tribunal Ground No.6 is decided against the assessee.

7. Ground No.7 deals with un-earned interest on doubtful advances as per sec.43D of the Act. During the assessment proceedings the AO did not allow deduction of Rs.35.03 crores u/s. 43 of the Act. Before the FAA the assessee contended that it had informed the AO that the unrealised interest on non-performing asset was not taxable as per the sec.43D of the Act, that and as per the RBI Guidelines unrealized interest of earlier years relating to NPAs could not be considered as income, that it had debited P&L account with Rs.35,03,36,189/- being the unrealized interest of the earlier years of NPAs. After considering the submission of the

assessee the FAA held that the contention of the assessee was contrary to the provisions of the Act, that there was no provision in Sec.43D for reversal of entries of interest credited or for claiming deduction in subsequent years, that it was entitled for any relief.

7.1. Before us, the AR stated that the amount in question had already been disallowed in the past, that there cannot be disallowance of the same amount in two years. He relied upon the case of American Express Bank Ltd.(55SOT136). The DR stated that section 43D was a charging section, that the order of the FAA was in accordance with the provisions of the Act.

7.2. We have heard the rival submissions and perused the material before us. We find that the claim made by the assessee of double disallowance of the same amount has not been considered. Therefore, in the interest of justice we are reverting back the issue to the file of the AO to decide the issue afresh after affording reasonable opportunity of hearing to the aa. Gr.No.7 stands partly allowed in favour of the assessee.

8. Next Ground is about not allowing deduction for provision for bad and doubtful debts at Rs.706.29 crores u/s. 36(1)(viiia) as against Rs.833.30 crores.

8.1. In the appellate proceedings, before the FAA, the assessee argued that it had made provision for bad and doubtful debts on the basis of RBI Guidelines, that the entire amt of provision had to be allowed as a deduction. The FAA after considering the assessment order and the assessee's order held that section 36(1)(viiia) prescribed upper limit for deduction in respect of provision for bad and doubtful debts, that the assessee could not allow deduction for any amt exceeding the limit even if the provision had been created as per the directions of the RBI. During the course of hearing before us, representatives of both the sides agreed that issue stand decided against the assessee by the Tribunal order dt.26.7.2013 (supra). We find that the Tribunal had decided the issue as under .

“32. Ground No. 11 is regarding provision for doubtful debts. The assessee has claimed deduction for provision for bad and doubtful debts u/s 36(1)(viiia) amounting to ` 5,63,32,54,326/-. The said provision was stated to be made on the basis of RBI guidelines. The AO allowed a sum of ` 5,36,21,32,507/- u/s 36(1)(viiia) of the Income Tax Act. On appeal, the CIT(A) has confirmed the action of the AO and held that the entire amount cannot be allowed as deduction merely on the basis of RBI guidelines. Before us the Ld. AR of the assessee has relied upon the decision of Chennai Bench of this Tribunal in case of Overseas Sanmar Financial Ltd. Vs JCIT 86 ITD 602. On the other hand, the Ld. DR has relied upon the order of the authorities below and submitted that the provisions of statute will prevail over the RBI guidelines for the purpose of deduction u/s 36(1)(viiia).

33. We have considered the rival submissions as well as relevant material on record. There is no dispute regarding the claim allowed by the AO is proper as per the provisions of section 36(1)(viiia). When the

allowable claim has been accepted by the AO under the provision of section 36(1)(viiia) then merely the provision made on the basis of RBI guidelines does not become allowable for deduction in contravention of the provision of section 36(1)(viiia). It is pertinent to note that when the claim of deduction specifically provided u/s 36(1)(viiia) then the same cannot be allowed by applying any other provision. Accordingly, we do not find any merit or substance in the claim of the assessee. Hence dismissed.”

Respectfully following the above order of the tribunal, we decide Ground No.8 against the assessee .

9.Last Ground deals with disallowance of contribution to SBI Retired Employees Medical Fund. During the year under consideration the assessee had contributed Rs.20 crores towards the fund. The AO found that the assessee had in the return of income mentioned that it was a welfare measure and should be allowed as a deduction from the computation of total income even though the assessee itself had added back the sum to its income for the year under consideration. The AO did not allow the claim made by the assessee .

9.1.Before the FAA, it was stated that the bank had been contribution every year certain amt out of its tax profits, towards contribution to SBI Employees medical Fund. The FAA held that as per the provisions of Section 40A(9) of the Act no deduction was allowable in respect of any sum paid by the assessee as an employer towards setting up or formation of or as contribution to any fund trust except where such sum was paid for the purposes and to the extent provide by sec.36(1)(iv) and (v) and as required under any other law for the time being enforced, that the payment in question did not satisfy any of the requirements. The assessee was not entitled for deduction.

9.2.Before us, the AR relied upon the case of State Bank of Travancore (306ITR-AT128) and stated that it was a welfare measure. The DR supported the order of the FAA.

We have heard the rival submissions and perused the materials before us, We find that in the case of State Bank of Travancore (supra), the AO had disallowed the claim of the Bank in respect of the contribution to medical benefit scheme, amounting to Rs.50.00 lakhs. The AO was of the opinion that the provision of section 40A(9) of the Act were applicable and the assessee was not entitled to claim the expenditure as an allowable item. Matter travelled upto the Tribunal and it deliberated upon the provisions of Section 40A(9) of the Act at length. The Tribunal held that the basic intention of the legislature for insertion of sub section 9 of section 40A was to discourage the practice of creation of camouflage Trust funds, ostensibly for the welfare of the employees and transferring huge funds to such Trusts by way of contribution, that in those cases the investment of the trust corpus was also left to the complete discretion

of the Trustees, that to avoid hardship in the case where Trust/Funds had been set up wholly and exclusively for the welfare of the employees prior to 1.4.1984 sub section (10) was also inserted to section 40A. The Tribunal was of the opinion that provisions of section 40A(9) should not make any harm to the expenditure incurred bonafide, that the contribution by the assessee bank was not disputed by the AO, stating that the same was not bonafide, that the funds were not controlled by the assessee banks, that the bonafide contribution made by the assessee as an employer was not hit by section 9 of section 40A of the Act. In the case under consideration, there is no doubt about genuineness of payment nor it is the case of the AO or FAA that Trust was not bonafide or the expenditure was not incurred wholly and exclusively for the employees. Considering these facts of the case and following the judgment of State Bank of Travancore (supra), Ground No.9 is decided in favour of the assessee.

10. The assessee had also raised additional grounds for the year under consideration. Considering the fact that they were purely of legal nature, same were admitted. Now, we would like to deal with them. First three Additional Grounds deal with write off bad debts u/s. 36 (1) (iii), Recovery of bad debts written off u/s. 41(4) and Income earned from foreign branches. During the course of hearing the AR relied upon the cases of Vijaya Bank(323ITR 166), State Bank of Mysore(33 SOT7) and Bank of India(ITA/2781/Mum/2011). He further stated that the Tribunal vide its Order 03.01.2014, in MA 371/M/14, in assessee's own case for 1996-97, had restored all the three issues back to the file of AO for fresh examination and adjudication.

We find that the Tribunal has in its order dated 03.01.2014 (supra) has held as under :-

“In additional Ground no. 1-3 are raised first time by the assessee and involves legal issue, therefore as prayer by the assessee the same are remitted to the record of the Assessing Officer for examination and adjudication as per law after giving a opportunity of hearing to the assessee”.

5. It is apparent from the finding of the Tribunal in para 37 (Supra) that the decisions relied upon by the Ld. AR have escaped consideration, accordingly we are of the view that to that extent there is an apparent error in the impugned order of the Tribunal which requires to be rectified u/s 254(2) of the Income Tax Act. Since these issues were raised for the first time and remitted to the record of the AO for examination and adjudication, therefore, we modify our finding on the additional grounds no. 1-3 in para 37 which reads as under:-

37. “Additional ground no. 1-3 are raised first time by the assessee and involves legal issue. Though the assessee has relied upon the following decision in support of its claim ;-

1. Covered by the decision of the Supreme Court in the case of *Vijaya Bank Vs. CIT (2010) 323 ITR 166*

2. Covered by the decision of the Bangalore Tribunal in the case of *State Bank of India Mysore Vs. DCIT (2009) 33 SOT 7 (BANG.)*

3. Covered in favour of the appellant by the decision of the Mumbai bench of Tribunal in the case of *Bank of India Vs. DCIT (ITA No. 2781/Mum/2011)*

However since the issue has not been examined by the AO, therefore, in the interest of justice we remit these grounds to the record of the Assessing Officer for fresh examination and adjudication after considering the decisions relied upon by the assessee as well as after giving opportunity of hearing to the assessee.”

Respectfully following the above we are remitting back all the three issue to the file of the AO for fresh adjudication. AO may afford a reasonable opportunity of hearing to the assessee. Additional Grounds No.1 to 3 are decide in favour of the assessee, in part.

11. Next additional ground pertains to disallowance of depreciation on matured investments Rs.18,35,53,508/-. The AR fairly conceded that the issue is covered against the assessee by the decision of the Tribunal in its own case for assessment year 1996-97 (para 38 & 39) in ITA No.5470/M/2002 which reads as under :-

“38. Additional Ground No. 4 is regarding depreciation on matured securities. The assessee has claimed a sum of Rs. 2,23,86,418/- towards depreciation of investments. The AO disallowed the claim of the assessee and the CIT(A) has confirmed the action of the AO. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The CIT(A) has decided the issue in para 9 as under:

“9. The ninth effective ground of appeal is against the disallowance of Rs.2,23,86,418/- being the provision for diminution in the value of securities which had matured and become due for redemption during the year but were not redeemed. It was contended before the A.O. that in some cases, the companies or the State Governments who had issued the relevant securities were not able to pay the amount due on redemption. The appellant treats these securities as nonperforming assets and a provision is made at a certain percentage for diminution in their value as in the case of other non-performing assets. There may be some delay on the part of the companies or the State Governments in paying the redemption amount. But, whenever the payment would be made it cannot be expected to be less than the face value. On the date of maturity, the whole of the amount of redemption money becomes due under the mercantile system of accounting followed by the appellant unless a portion of this amount is written off as bad debt. It is a real income and hence has to be taxed as such under the mercantile system followed by the appellant. Reliance in this regard is placed on State Bank of State Bank of

Travancore vs. CIT 158 ITR 102, 155 (SC) which was Travancore vs. CIT 158 ITR 102, 155 (SC) followed in Western India Oil Distributing Co. Ltd. Vs. CIT 206 ITR 359 (Bom). ITR 359 (Bom). It was held in this decision that the concept of real income should not be so read as to defeat the provisions of the Act. Extension of the concept of real income to a field so as to negate accrual after the amount had become receivable is contrary to the postulates of the Act, the Supreme Court held (p. 146 of 158 ITR). Moreover, as held in the case of Navin R. avin R. Karnani vs. CIT 185 ITR 408 (Bom) Karnani vs. CIT 185 ITR 408 (Bom) ani vs. CIT 185 ITR 408 (Bom), it was not possible to waive any amount of income which had accrued under the mercantile system of accounting on the ground of diminished hope of recovery. Furthermore, any liability de futuro is not an ascertained liability in praesenti and cannot be allowed as deduction under the Income-tax Act as held in the case of Indian Molasses Co. Pvt. Molasses Co. Pvt.Ltd. vs. CIT 37 ITR 66 (SC) Ltd. vs. CIT 37 ITR 66 (SC) and Standard Mills Ltd. vs. CIT 37 ITR 66 (SC) Standard Mills Co. Ltd. Vs.CIT 229 ITR 366(Bom Co. Ltd. Vs.CIT 229 ITR 366(Bom) CIT 229 ITR 366(Bom). Hence, no such ad hoc deduction could be allowed against the amount receivable on redemption of securities which had matured and become due for payment before the close of the accounting year. This ground therefore fails.”

39.The findings of the CIT(A) is based the on the various decisions of the Hon’ble Supreme Court as well Jurisdiction High Court. No contrary decisions has been brought before us accordingly we do not find any error or illegality in the impugned order of CIT(A) qua this issue. The same is upheld.”

Respectfully following the above additional ground No.4 is decided against the assessee.

12.Fifth Additional Ground is regarding loss on revaluation of permanent category invest - ments.The AR and the DR agreed that the issue is decided in favour of the assessee by the decision of the Tribunal in its own case for the assessment year 1995-96 (paras No.6 to 10) or in assessment year 1996-97 (para No.40):

“40.Additional Ground No. 5 is regarding loss of revaluation of permanent category investment. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. At the outset we note that an identical issue has been considered and decided by this Tribunal is assessee’s own case for the assessment year 1995-96 in para 10 as under:

“10. After considering the rival submissions and perusing the relevant records, we find it difficult to agree with the stand of the Revenue Authorities that the loss claimed by the assessee on revaluation of the concerned investment cannot be allowed while computing the income of the assessee from banking business. As held by the Hon’ble Kerala High Court in the case of Malabar Co-operative Central Bank Ltd. (supra), the banking institution as a part

of business activity will have to have ready resources to meet its liability the extent of which could never be foreseen. It was held that even though the legislature has made it obligatory for the banking institutions to maintain certain percentage of its assets in the form of securities at any given day taking the interest of the public into consideration, this does not detract from the proposition that by so holding the securities, the bank is carrying on its business and securities so held are stock in trade. In the case of Bihar State Co-operative Bank Ltd. (supra), it was held by the Hon'ble Supreme Court that it is a normal mode of carrying on banking business to invest moneys in a manner that they are readily available. It was held that howsoever a security capital is employed, it is a part of normal course of business of a bank and the money which was not lend to the borrower but was invested in the form of deposits in another bank cannot be said to have become ceased to be part of stock in trade of bank. Keeping in view the ratio of these judicial pronouncements, we hold that the investment in question very much represented stock in trade of the baking business of the assessee and the loss on the revaluation thereof is allowable as deduction. Accordingly, the impugned order of the Id. CIT(A) on this issue is set aside and the A.O. is directed to allow the deduction claimed by the assessee on account of loss on revaluation of investment. Ground No. 3 of assessee's appeal is accordingly allowed."

Following the earlier order of this Tribunal, we decide this issue in favour of the assessee against the revenue."

Considering the above, last additional ground is decided in favour of the assessee.

ITA/3824/Mum/05-AY.1998-99:

13.Ground No.1 deals with interest credited to interest suspense account. We have decided the issue in favour of the assessee while adjudicating the appeal for the earlier AY. Ground No.1 is allowed.

14.Next Ground is about disallowance of Rs.27.52 lakhs in respect of payment for Scientific research.Following our order for the earlier AY.(para No.3-3.2)Ground No.2 is decided against the assessee.

15.Ground No.3 deals with interest claimed exempt under various sub-sections of section 10 of the Act.While deciding the Appeal for AY.1997-98,we have restored back the issue to the file of the AO. Following the same matter is remitted back to the file of the AO.Ground No. 3 is decided in favour of the assessee,in part.

16.Ground of appeal No.4 pertains to exemption u/s.10(33) of the Act.The issue was sent back to the AO,by us,for fresh adjudication, in the appeal for the earlier AY.Considering the fact,that except for the amount involved,there is no difference in the facts,we are sending back the issue to the file of the AO for deciding the same afresh.Ground 4 is partly allowed in favour of the assessee.

17.Next Ground is about disallowance of Rs.93.75 crores under the head depreciation on leased assets.We find that we had decided the issue against the assessee, while deciding the appeal for the last AY. Accordingly Ground No.5 stands decided against the assessee.

18.Ground No.6 deals with disallowance of contribution towards SBI Retired Employees Medical Benefit Fund.Following our order for last year Ground No.6 stands allowed.

19.Seventh Ground of appeal is about provision for bad and doubtful debts amounting to Rs.13,02,24,75,974/-.We had decided the issue against the assessee,while deciding the appeal for AY 1997-98, following the same seventh ground of appeal stands dismissed.

20.Last Ground of appeal pertains to disallowance of provision in respect of foreign offices. Before us,the AR referred to note No.19, of the return of income and the letter submitted on 5.9.2000 along with the annexures which form part of the Paper book.We are of the opinion that the issue needs further verification.Therefore,matter is restored back to the file of the AO for fresh adjudication,who would decide the case after hearing the assessee.Ground no.8 stands decided in favour of the assessee,in part.

21.The assessee has raised additional grounds for this year also.First three additional Grounds are identical to the additional grounds of the earlier year-the only difference is the amounts involved.Following our order for the last AY.we are restoring back the issues to the file of the AO for fresh adjudication. He is directed to afford a reasonable opportunity of hearing to the assessee. Additional ground No.1-3 are decided in favour of the assessee, in part.

22.Additional Ground No.4 is about disallowance of Rs.12,15,90,793/- towards depreciation on matured securities.Identical Ground raised by the assessee has been decided against it by

us, while adjudicating the appeal for the earlier AY. Following the same Additional Ground no.4 is decided against the assessee.

As a result,appeals filed by the assessee for both the AY.s.stand partly allowed.

फलतः निर्धारिती द्वारा दाखिल की गई दोनों निर्धारण वर्षों की अपीलें अंशतःमंजूर की जाती हैं।

Order pronounced in the open court on 29th April, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 29 अप्रैल ,2016 को की गई ।

Sd/-

(अमित शुक्ल/ Amit Shukla)

न्यायिक सदस्य/Judicial Member

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य/Accountant Member

मुंबई Mumbai, दिनांक Date:29 .04.2016

व.नि.स. Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “D ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, A खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.