



IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5276/Mum./2013
(Assessment Year : 2005-06)

Dy. Commissioner of Income Tax
Circle-3(1), Mumbai

..... Appellant

v/s

ICICI Bank Ltd.
(In r/o ICICI Ltd. merged with
M/s. ICICI Bank Limited)
ICICI Bank towers
Bandra Kurla Complex
Mumbai 400 051
PAN - AAACI1195H

..... Respondent

ITA no.3841/Mum./2013
(Assessment Year : 2005-06)

ICICI Bank Ltd.
(In r/o ICICI Ltd. merged with
M/s. ICICI Bank Limited)
ICICI Bank towers
Bandra Kurla Complex
Mumbai 400 051
PAN - AAACI1195H

..... Appellant

v/s

Dy. Commissioner of Income Tax
Range-3(1), Mumbai

..... Respondent

ITA no.6217/Mum./2008
(Assessment Year : 2004-05)

ICICI Bank Ltd.
(In r/o ICICI Ltd. merged with
M/s. ICICI Bank Limited)
ICICI Bank towers
Bandra Kurla Complex
Mumbai 400 051
PAN – AAACI1195H

..... Appellant

v/s

Dy. Commissioner of Income Tax
Range-3(1), Mumbai

..... Respondent

ITA no.6137/Mum./2008
(Assessment Year : 2004-05)

Dy. Commissioner of Income Tax
Circle-3(1), Mumbai

..... Appellant

v/s

ICICI Bank Ltd.
(In r/o ICICI Ltd. merged with
M/s. ICICI Bank Limited)
ICICI Bank towers
Bandra Kurla Complex
Mumbai 400 051
PAN – AAACI1195H

..... Respondent

Assessee by : Ms. Aarti Vissanji
Revenue by : Shri B. Pruseth

Date of Hearing – 09.08.2017

Date of Order – 03.11.2017

ORDER

PER BENCH

These are the two sets of cross appeals against two separate orders passed by the learned Commissioner (Appeals), Mumbai,

pertaining to assessment years 2004–05 and 2005–06. Since the appeals relate to the same assessee and the issues raised are more or less common, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

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|---|---|---------------------|
| <u>ITA no.6137/Mum./2008</u> – Revenue’s Appeal | } | A.Y. 2004–05 |
| <u>ITA no.6217/Mum./2008</u> – Assessee’s Appeal | | |

2. Ground no.1, raised by the Revenue corresponding to ground no.2, raised by the assessee are on the common issue of disallowance of expenditure attributable to earning of income exempt under section 10(23G) of the Income-tax Act, 1961 (for short "*the Act*").

3. Brief facts are, the assessee is a banking company. During the assessment proceedings, the Assessing Officer while verifying the return of income filed by the assessee found that the assessee had claimed deduction of an amount of ₹ 449,09,06,039, as exempt under section 10(23G) of the Act. Whereas, the assessee, voluntarily disallowed interest expenditure amounting to ₹ 298,44,79,282 in terms of section 14A of the Act. Subsequently, during the assessment proceedings, the assessee revised its computation of income by claiming exemption under section 10(23G) for an amount of ₹ 335,45,07,578, whereas, the assessee disallowed interest expenditure

of ₹ 224,82,91,904, relatable to exempt income. Thus, in effect, assessee claimed exemption under section 10(23G) for ₹ 110,62,15,674. The Assessing Officer, after calling for various details from the assessee and examining the same along with assessee's explanation in support of claim of deduction was of the view that exemption under section 10(23G) is to be restricted to the net income derived on account of financing of infrastructure sector and not the gross receipt. In other words, according to the Assessing Officer, the expenditure is required to be apportioned against income derived from various sources including infrastructure financing. He observed, the expenditure incurred by the assessee can be classified to two categories i.e., administrative expenditure and interest expenditure on borrowed funds. The Assessing Officer was of the view, since no part of the expenditure can be directly related to the income from infrastructure sector it has to be allocated proportionately to the gross receipt and income from infrastructure sector for computing exemption under section 10(23G). On verifying the Profit & Loss account of the assessee, he found that the profit shown by the assessee as a percentage of the gross receipts works out to 13.69%. Applying the same ratio to the gross interest receipt and income from infrastructure financing, the Assessing Officer worked out the deduction claimed under section 10(23G) to ₹ 45,92,32,087, as against assessee's claim

of ₹ 110,62,15,674. Thus, the differential amount of ₹ 64,69,83,587 was added back to the income of the assessee.

4. The learned Commissioner (Appeals) after considering the submissions of the assessee in the light of facts and material on record, held that the Assessing Officer should first work out the ratio of borrowed funds to the total funds. He observed, no interest expenditure would be allocable to infrastructure income to the extent it was out of investment made from own funds. Only to the income derived out of borrowed funds interest expenditure can be allocated. He observed, the sum of net infrastructure income out of borrowed funds would constitute total income exempt under section 10(23G). While coming to such conclusion, learned Commissioner (Appeals) followed his order in assessee's case for assessment year 2001-02. Accordingly, he directed the Assessing Officer to compute exemption under section 10(23G).

5. Learned Authorised Representative submitted, before the learned Commissioner (Appeals) the assessee has filed a revised computation claiming exemption under section 10(23G) of the Act on net basis. She submitted, the assessee's investment giving rise to exempt income were not totally made out from borrowed funds, therefore, the method adopted by the Assessing Officer to disallow part of the exempt income

by applying the gross profit rate is not correct. She submitted, in assessee's own case, in the preceding assessment year, the Tribunal while deciding the issue had directed the Assessing Officer to deduct the expenditure directly relatable to earning of exempt income for computing net income under section 10(23G) of the Act. The learned Authorised Representative submitted, in the impugned assessment year, the assessee before the learned Commissioner (Appeals) has submitted a working of net exemption claimed under section 10(23G) of the Act which has been looked into by the learned Commissioner (Appeals) while issuing appropriate direction to the Assessing Officer for computing exemption under section 10(23G) of the Act. Therefore, no further disallowance can be made.

6. We have heard rival contentions and perused the material available on record. As it appears from the facts on record, the Assessing Officer while computing deduction under section 10(23G) has presumed that the entire investment for infrastructure was out of borrowed funds which according to us is not correct. In our view, only those expenditure directly relatable to the earning of exempt income can be reduced / set-off for computing net income under section 10(32G). We have noted, identical issue came up for consideration before the Co-ordinate Bench in assessee's own case for the assessment year 1997-98 and 2000-01. While deciding assessee's

appeal in assessment year 2000-01 in ITA no.4657/Mum./2011, dated 31st January 2017, the Tribunal followed its own order in ITA no.5425/Mum./2001, and restored the matter to the file of the Assessing Officer with following directions:-

"7. Before us now, as narrated above, the assessee relied on the decision of the Coordinate Bench of the Tribunal for assessment year 1997-98 wherein no interest expense was disallowed by the assessee by claiming that it was the gross income to be allowed as exempt u/s 10(23G) of the Act. As in the earlier year, now, the assessee before us also filed alternative working of expenses, which was not before the lower authorities. Before us now, as per the working of the expenses, the same was not analyzed by the lower authorities. Hence, we remit the matter back to the file of the AO for fresh consideration. The only differential fact in the present case is that the assessee itself has disallowed direct expenses of Rs. 174,37,66,592/- by way of interest expenses for earning of income u/s 10(23G) of the Act, which has been offered for disallowance. We also agree that only those expenses which are relatable to earning of exempt income can be claimed as deduction for computing net income u/s 10(23G) of the Act. In term of the above and in term of the direction of the Coordinate Bench of the Tribunal in assessment year 1997-98 in assessee's own case in ITA No.5424/Mum/2001, the AO will decide the issue. Accordingly, this issue of assessee's appeal is allowed for statistical purposes and the issue of Revenue's appeal is dismissed."

7. We have further noted that the learned Commissioner (Appeals) while issuing fresh direction to the Assessing Officer regarding computation of net exempt income under section 10(23G) of the Act has followed his order in assessee's own case for assessment year 2001-02. However, the Tribunal, while deciding the appeal of the Revenue in ITA no.393/ Mum./2008, dated 2nd March 2016, has restored the matter back to the file of the Assessing Officer for

considering afresh. Therefore, consistent with the view taken by the Tribunal in preceding assessment year, we are inclined to restore the matter back to the file of the Assessing Officer for deciding afresh keeping in view the directions of the Tribunal reproduced herein above. At this stage, we must observe, though, the learned Departmental Representative had submitted before us that the issue relating to part disallowance of administrative expenditure was not considered earlier by the learned Commissioner (Appeals) and the Tribunal, however, we do not agree with the same. We have noted that in the preceding assessment year, the assessee itself has disallowed 1% out of the administrative expenditure while computing net exempt income under section 10(23G) of the Act. Accordingly, ground no.1 raised by the Revenue corresponding to ground no.2 raised by the assessee are allowed for statistical purposes.

8. Ground no.2, raised by the Revenue corresponding to ground no.3, raised by the assessee are on the common issue of allocation of interest and other expenditure for earning tax free interest income under section 10(15) of the Act.

9. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that in the relevant previous year assessee had earned interest income on tax free bonds issued by Konkan Railway NBARD

National Housing Bank, HUDCO, etc., amounting to ₹ 7,44,42,709. After calling for necessary details and explanation of the assessee, the Assessing Officer applying the same methodology which he adopted for computing net exempt income under section 10(23G) of the Act by applying the gross profit rate of 13.69% reduced net income exempt under section 10(15) of the Act to ₹ 1,01,91,207. The assessee challenged the disallowance made out of net exempt income under section 10(15) of the Act before the learned Commissioner (Appeals).

10. The learned Commissioner (Appeals) after considering the submissions of the assessee directed the Assessing Officer as under:—

- (a) *The A.O. will calculate the ratio of own funds and non-interest bearing funds to total funds and apply the same to the gross income claimed u/s 10(15)(iv)(h) to find out the component of tax free income out of own funds and non-interest bearing funds;*
- (b) *Thus, the A.O. will also arrive at the tax free income out of interest bearing borrowed funds;*
- (c) *The A.O. will work out ratio of allocable expenses after considering interest and administrative expenses and after reducing expenses clearly not relatable to earning of tax free income;*
- (d) *The ratio arrived at in (c) will be applied to (b) to determine interest expenses allocable to (b);*
- (e) *The difference of (b) and (d) will give net tax free income out of interest bearing borrowed funds;*
- (f) *The A.O. will add (a) to (e) will give net tax free income exempt u/s 10(15)(iv)(h) of the Act.*

The relief admissible u/s 10(15)(iv)(h) to arrive at total income exempt u/s 10(15)(iv)(h) of the Act.”

11. Learned Authorised Representative reiterating the stand taken before the Departmental Authorities submitted, no disallowance under section 14A of the Act can be made in respect of interest expenditure as the entire investment giving rise to exempt interest income was made out of own funds and no borrowed fund was utilised. Referring to the assessment order the learned Authorised Representative submitted that as on 31st March 2004, the assessee had own interest free funds of ₹ 15619.62 crore as against tax free income yielding investment of ₹ 3107.92 crore. Thus, she submitted, no disallowance of interest expenditure can be made. Further, she submitted, as far as disallowance of administrative expenditure is concerned, the learned Commissioner (Appeals) has directed the Assessing Officer to work out the allocable expenditure towards exempt income. She, therefore, submitted, in assessee's own case for the preceding assessment year, the Tribunal has decided the issue in favour of the assessee even in so far as it relates to disallowance of administrative expenses.

12. Learned Departmental Representative submitted, interest expenditure relating to utilisation of borrowed funds for earning exempt interest income should be disallowed. He further submitted,

part of the administrative expenditure allocable to earning of exempt interest income should also be disallowed.

13. We have heard rival contentions and perused the material available on record. As far as disallowance of interest expenditure for computing net exempt income is concerned, we are of the view that if the investment made in exempt income yielding assets are made out of interest free funds available with the assessee, there cannot be any disallowance of interest expenditure. Therefore, what is required to be seen is whether sufficient interest free funds are available with the assessee to make investment in exempt income yielding assets. As per facts and material on record, surplus interest free funds available with the assessee far exceeds the investment made in tax free interest income yielding assets, therefore, no disallowance of interest expenditure can be made in view of the decision of the Hon'ble Jurisdictional High Court in CIT v/s Reliance Utilities and Power Ltd., [2009] 313 ITR 340 (Bom.) and CIT v/s HDFC Bank Ltd., [2014] 366 ITR 505 (Bom.). As far as disallowance of administrative expenses is concerned, it is the contention of the assessee that in the preceding assessment year, it has voluntarily disallowed 1% of the administrative expenditure attributable to earning of exempt income. However, we have noted, in assessment year 2001-02, the Tribunal while deciding the issue in Revenue's appeal being ITA no.393/Mum./

2008, dated 2nd March 2016, has restored the issue to the Assessing Officer for considering afresh. In view of the aforesaid, we are inclined to restore the issue to the file of the Assessing Officer for deciding afresh keeping in view the directions of the Tribunal in the preceding assessment year. Thus, ground no.2, raised by the Revenue corresponding to ground no.3, raised by the assessee are allowed for statistical purposes.

14. Ground no.3 of Revenue's appeal is on allowability of assessee's claim of depreciation on leased assets.

15. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee claimed depreciation of ₹ 161,40,27,978 on leased assets. Therefore, he called upon the assessee to justify the claim. In response, it was submitted by the assessee that it had entered into lease transaction with HSBC Electronic Data Processing India Pvt. Ltd. and Millennium Realtors Ltd. under which the assessee has taken on lease some equipments. It was submitted, depreciation was claimed on these assets. The Assessing Officer after perusing the details found that assessee acquired equipment which are tailor made to individual lessees. The lessee takes possession of the equipment as an agent of the lessor. The assessee remains legal owner of the assets given on lease. He

observed, the leased transactions were actually in the nature of financing and the assets were merely for the securities of the finance given. The Assessing Officer relying upon certain judicial precedents held that since, lease transaction is really in the nature of finance transaction only, the portion relating to finance charges comprised in leased rent is only chargeable in the hands of the lessor. In this context, he relied upon similar view taken by him in assessee's own case for preceding assessment year. Accordingly, he disallowed assessee's claim of depreciation leased assets. However, since, the principal portion of the lease rentals was greater than the depreciation claimed by the assessee, the Assessing Officer worked out the net disallowance to a negative figure of ₹ 117,10,41,280 and reduced it from the total income of the assessee. While doing so, the Assessing Officer also disallowed depreciation of assets capitalized prior to assessment year 1994-95 which were not disallowed in those assessment years. Being aggrieved of such disallowance, assessee preferred appeal before the first appellate authority.

16. The learned Commissioner (Appeals) following his decision in assessee's own case for the assessment year 2001-02 as well as the decision of the Tribunal and CBDT Circular allowed assessee's claim of depreciation on leased assets.

17. We have heard rival contentions and perused the material available on record. Learned Counsels appearing for both the parties have agreed before us that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for preceding assessment year as submitted in the paper book. As could be seen from the material on record, in the impugned assessment year, there is no new lease transaction. The assessee has claimed depreciation on its own fixed assets and depreciation claimed on leased assets were continuing from past lease transactions. Notably, in assessment year 1997-98, the Tribunal while deciding the issue in ITA no.5424/Mum./2001, dated 13th July 2016, had allowed assessee's claim of depreciation. The same view was reiterated by the Tribunal while deciding the cross appeals for assessment year 2000-01 in ITA no.4657/Mum./2004 and ITA no.4826/Mum./2004 dated 31st January 2017. In view of the aforesaid, we uphold the order of the learned Commissioner (Appeals) on this issue. Ground no.3 is dismissed.

18. In ground no.4, Revenue has challenged the deletion of addition of non-cash right back made by the Assessing Officer under section 41(4) of the Act.

19. Brief facts are, during the assessment proceedings, the Assessing Officer found that the assessee has written back bad debt amounting

to ₹ 118,02,98,492. After calling for necessary details and explanation of the assessee to justify the claim, the Assessing Officer observed that this is a disputed issue between the Department and the assessee from the past years. Therefore, following the observations of the Assessing Officer in the preceding assessment year, the Assessing Officer added back the amount of ₹ 42,84,51,666, being the difference between cash right back credited to Profit & Loss account and total bad debts written back in the accounts. The assessee challenged the addition before the learned Commissioner (Appeals).

20. The learned Commissioner (Appeals), after considering the submissions of the assessee and having found that similar issue was decided in favour of the assessee in preceding assessment year deleted the addition made by the Assessing Officer by holding that non-cash right back should be excluded from charge of tax.

21. We have heard rival contentions and perused the material available on record. Learned Counsels appearing for both the parties have agreed before us that the issue is covered by the decision of the Tribunal in the preceding assessment years. Notably, in assessment year 2000-01, the Tribunal while deciding identical issue in ITA no.4657/Mum./2004 and ITA no.4826/Mum./2004, dated 31st January 2017, has restored the matter back to the file of the Assessing Officer

for considering afresh. In fact, in assessment year 2002-03 also in assessee's own case, the Tribunal while deciding identical issue in ITA no.836/Mum./2008 and ITA no.392/Mum./2008 dated 7th July 2017, has restored the issue to the Assessing Officer for considering afresh keeping in view the directions of the Tribunal in the preceding assessment year. Therefore, consistent with the view expressed by the Tribunal in the preceding assessment year as referred to above, we restore the issue to the file of the Assessing Officer for considering afresh with similar direction and only after reasonable opportunity of being heard to the assessee. Ground no.4, raised by the Revenue is allowed for statistical purposes.

22. Ground no.5, raised by the Revenue corresponding to ground no.4, in assessee's appeal are on the issue of disallowance of expenditure incurred for earning dividend income.

23. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee in the relevant previous year has earned dividend income of ₹ 223,,49,79,266, which has been claimed as exempt under section 10(34) and 10(35) of the Act on gross basis. The Assessing Officer was of the view that while claiming the income as exempt, the assessee has not disallowed any expenditure attributable to such exempt income. He, therefore, called upon the

assessee to explain why a part of interest expenditure and administrative expenditure should not be disallowed. In reply, though, the assessee justified its claim of exemption, however, the Assessing Officer did not find merit in it. He was of the view that since the assessee has paid interest on borrowed funds proportionately, expenditure attributable to earning of dividend income has to be disallowed in terms of section 14A of the Act. Accordingly, he worked out disallowable interest expenditure at ₹ 209,44,84,989. Further, the Assessing Officer also disallowed 1% of the administrative expenditure amounting to ₹ 2,23,49,793. Thus, total expenditure of ₹ 2,11,68,34,691, was deducted from exempt dividend income of ₹ 223,49,79,266 and on the balance amount of ₹ 11,81,44,575, the Assessing Officer allowed exemption under section 10(34) and 10(35) of the Act. Being aggrieved of the reduction of exemption income made by the Assessing Officer assessee preferred appeal before the learned Commissioner (Appeals).

24. The learned Commissioner (Appeals) following his order in assessee's own case for assessment year 2001-01, directed the Assessing Officer to compute exemption under section 10(34) and 10(35) of the Act, by working out the ratio of borrowed funds to the total funds thereby segregating gross exempt income arising from own funds. Thereafter, he directed the Assessing Officer to work out the

allowable interest expenditure as well as administrative expenses. Further, he directed the Assessing Officer to reduce 1% of the gross dividend income towards administrative expenditure to arrive at the net exempt dividend income.

25. Learned Authorised Representative submitted, the methodology applied by the Assessing Officer to reduce the exempt income by disallowing expenditure is totally wrong. She submitted, the assessee has made investment in dividend earning assets out of surplus available, hence, no interest disallowance should be made. In this context, she relied upon the decision of the Tribunal in assessee's own case for assessment year 2000-01 in ITA no.4657/Mum./2004 and ITA no.4826/Mum./2004 dated 31st January 2017.

26. Learned Departmental Representative relied upon the observations of the Assessing Officer.

27. We have heard rival contentions and perused the material available on record. The main contention of the assessee against disallowance of interest expenditure is, investment in dividend earning assets were made out of surplus interest free funds available with the assessee. We find substantial merit in the aforesaid submissions of the learned Authorised Representative. If surplus interest free funds are available with the assessee to take care of the investments made in

shares giving rise to dividend income, no disallowance of interest expenditure can be made in view of the decision of the Hon'ble Jurisdictional High Court in HDFC Bank Ltd. (supra). As far as managerial / administrative expenditure are concerned, we have noted, in the assessment year 1997-98, the assessee had furnished a working of disallowance of expenditure to be made for earning exempt income wherein, it has quantified the disallowance for administrative expenditure at 1% of the gross exempt income. Notably, in assessment year 2000-01, the Tribunal while deciding identical issue has restored the matter back to the file of the Assessing Officer observing as under:-

"12. We find that the assessee claimed exemption u/s 10(33) of the Act but the AO disallowed interest expenses and managerial & administrative expenses at Rs.257.63 crore and Rs.2.70 crore respectively and disallowed exemption u/s 10(33) of the Act as against the claim of the assessee of Rs.222,69,96,573/-. The CIT (A) partly confirmed the disallowance of interest expenses at Rs.134,37,32,781/- and managerial and administrative expenses at 1%. The assessee before us now claimed that no interest expenses to be allocated as the investment is made out of assessee's own funds. For this, the learned Counsel for the assessee relied upon the decision of the Hon'ble Bombay High Court in the case of CIT Vs. HDFC Bank Ltd. 366 ITR 505 (Bom.) and also in the case of CIT Vs. Reliance Utilities & Power Ltd. 313 ITR 314 (Bom.). It was contended by the learned Counsel for the assessee that the entire interest expenses are to be allowed as expenses and no interest expenses to be allocated as the investment is made out of assessee's own funds. She referred to the Tribunal's decision in assessee's own case in assessment year 1997-98 in ITA No.5424/Mum/2001 wherein the issue is decided vide Para 10.3 by observing as under:-

"10.3 It is noted that in earlier years, this issue has been decided in favour of the assessee, after considering the judgment of Hon'ble Bombay High Court in the case of Emerald Co. Ltd. (supra). It is noted that in assessment year 1995-96 (order dt. 09.09.2015), the Tribunal decided this issue after considering not only the judgment of Hon'ble Bombay High Court in the case of Emerald Co. Ltd. (supra) but after considering section 14A as well. Therefore, respectfully following the orders of earlier years, this ground is principally decided in favour of the assessee, subject to verification of facts of this year. Thus, A O is directed to follow the orders of earlier years and decide this ground after verification of facts of this year, and compute the deduction allowable to the assessee taking guidance from tribunal's orders of earlier years. This ground is treated as allowed for statistical purposes".

13. After hearing both the sides, we find that the AO while examining the assessee's own funds vis-à-vis investments in shares will follow the decision of the Hon'ble Bombay High Court in the case of HDFC Bank Ltd. (supra) and Reliance Utilities & Power Ltd. (supra). In case, the investment is made out of assessee's funds, then, no interest expenses is to be allocated to the interest income. Accordingly, we set aside this issue to the file of the AO to verify the facts. This issue of the assessee is allowed for statistical purposes and the issue in Revenue's appeal is dismissed."

28. Consistent with the view expressed by the Co-ordinate Bench of the Tribunal reproduced herein above, we direct the Assessing Officer to verify the facts and decide the issue keeping in view the directions of the Tribunal herein above. Ground no.5, raised by the Revenue corresponding to ground no.4, in assessee's appeal are allowed for statistical purposes.

29. In ground no.6, the Revenue has challenged the deletion of addition made by the Assessing Officer on account of bad debt written-off.

30. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ₹ 1683,69,54,466, on account of bad debt written-off under section 36(2)(vii) of the Act. After verifying the details of bad debt written-off furnished by the assessee, the Assessing Officer found a quantum increase in the claim of bad debt in the preceding two years. Therefore, he called upon the assessee to explain the reason for such increase in bad debt. Though, the assessee furnished an elaborate submissions justifying its claim of write-off of bad debt, however, the Assessing Officer did not find merit in the same. He observed that the Assessing Officer without establishing the fact whether debts have actually become bad has written-off. He observed, the assessee has not proved the fact that debts are not recoverable. Further, the Assessing Officer observed, even after the amendment to section 36(1)(viii) w.e.f. 1st April 1989, the assessee's claim of deduction on account of write-off of bad debt cannot be allowed, since, the assessee has advanced the loans to reputed Indian companies who have acknowledged the debts and have not refused to re-pay the loan interest and other money. Accordingly, he disallowed the claim of bad

debt and added back the amount claimed as deduction by the assessee. Aggrieved, the assessee filed appeal before the first appellate authority.

31. The learned Commissioner (Appeals) after considering the submissions of the assessee held that after amendment to the provisions of section 36(1)(vii), once the assessee write-s off the debt in its books of account as irrecoverable, it will be sufficient compliance of the statutory provisions. There is no further need for the assessee to establish that the debts have actually become bad. Relying upon a number of judicial precedents, the learned Commissioner (Appeals) ultimately accepted assessee's claim thereby deleted the addition made by the Assessing Officer.

32. The learned Departmental Representative submitted, the assessee's claim of bad debt can be allowed only upon fulfillment of conditions imposed under section 36(1)(vii) and section 36(2) of the Act. He submitted, let the Assessing Officer examine this aspect and decide the issue accordingly.

33. Learned Authorised Representative submitted, the assessee has written-off the debts in its books of account as bad debts, hence, it is sufficient compliance to the provisions of section 36(1)(vii) read with section 36(2) of the Act. She submitted, the debts were advanced in

regular course of assessee's business. She submitted, all the relevant and necessary evidence regarding write-off of bad debt were produced before the Assessing Officer during the assessment proceedings. She submitted, once the assessee has actually written-off the bad debt in its books of account, the Assessing Officer has no power to call upon the assessee to prove the fact that the debts have actually become bad and irrecoverable as per the amended provisions of section 36(1)(vii) of the Act. In this context, she drew our attention to the details of bad debt and the reasons why the write-off was necessary. Learned Authorised Representative relying upon CBDT circular no.511 dated 23rd January 1990, submitted, as per the amended provisions of the Act, the claim for bad debt is allowable in the year in which it is written-off as irrecoverable in the accounts of the assessee. In support of her contention, she further submitted, in the earlier years 2011-12 to 2013-14, the Assessing Officer himself has allowed assessee's claim of bad debt. Therefore, the learned Commissioner (Appeals) was justified in allowing assessee's claim.

34. We have heard rival contentions and perused the material available on record. We find merit in the submissions of the learned Authorised Representative that after amendment to section 36(1)(vii) from 1st April 1989, once the assessee writes-off the bad debt as irrecoverable in its accounts it will satisfy the condition of the said

provisions and the assessee is no more required to establish that the debt has actually become irrecoverable. The Hon'ble Supreme Court in TRF Ltd. v/s CIT, [2010] 230 ITR 14 (SC), has expressed this view. Further, in case of Vijaya Bank Ltd. v/s CIT, [2010] 323 ITR 166 (SC), the Hon'ble Apex Court held that mere debit to the Profit & Loss account is not sufficient to claim write-off as the assessee has to simultaneously reduce the amount from loans and advances or debtors on assets side of the Balance Sheet to claim right-off. The Hon'ble Supreme Court observed, closing down individual account of each debtor in the books of account is not necessary. However, the Hon'ble Supreme Court taking note of Explanation-1 to section 36(1)(vii) of the Act observed that mere provisions for bad debt will not entitle for deduction under section 36(1)(vii) of the Act. On a careful perusal of the assessment order, we have noted that in case of some of the debtors the Assessing Officer has alleged that they are in the nature of mere provisions, which requires examination. In view of the aforesaid, we direct the Assessing Officer to allow assessee's claim in respect of debts which are actually written-off by applying the principle laid down in the decisions referred to above. Further, the Assessing Officer is also required to examine whether there is any claim of write-off of bad debt in the nature of mere provisions, hence, not allowable in terms of section 36(1)(vii). In this context, the Assessing Officer has to apply

the law keeping in view the ratio laid down by the Hon'ble Supreme Court in *Vijaya Bank Ltd. (supra)*, wherein it was held by the Hon'ble Supreme Court that if an assessee debits an amount of doubtful debt to the Profit & Loss account and credits the asset account like sundry debtors account, that would constitute write-off of an actual debt. We may further add, even if the assessee's claim of write-off in respect of a particular debt having become bad is allowed in the impugned assessment year, the Revenue is protected under section 41(4) of the Act to bring the amount to tax in case such debt is recovered by the assessee in any subsequent assessment year. With the aforesaid observation, we restore the issue to the file of the Assessing Officer for adjudicating afresh in terms with our directions herein above. Ground no.6, is allowed for statistical purposes.

35. In ground no.7, the Revenue has challenged the deletion of addition made on account of addition made to annual letting value towards notional interest.

36. Brief facts are, during the assessment proceedings, the Assessing Officer found that the assessee has leased out certain properties and earned rental income which has been shown as business income. The Assessing Officer, however, was of the view that the income has to be assessed as income from house property. She further found that while

letting out the property, the assessee has received security deposits of substantial amount. The Assessing Officer was of the view that since the assessee is not paying any interest on such security deposit notional interest on such security deposit has to be computed and treated as part of annual letting value as per section 23(1)(a) of the Act. Having held so, the Assessing Officer proceeded to compute interest @ 12% on the security deposit and added back to the annual letting value of the leased out properties. Being aggrieved of such addition to the annual letting value the assessee preferred appeal before the first appellate authority.

37. The learned Commissioner (Appeals) after considering the submissions of the assessee followed his order in assessee's own case for assessment year 2002-03 and deleted the addition made by the Assessing Officer to the annual letting value.

38. We have heard rival contentions and perused the material available on record. Undisputedly, the addition made to the annual letting value towards interest chargeable on security deposit is purely on notional basis. Notably, while deciding identical issue in assessee's own case for assessment year 2002-03, in ITA no.836/Mum./2008 and ITA no.392/Mum./2008 dated 7th July 2017, we have upheld the

order of the learned Commissioner (Appeals) with the following observations:-

"48. We have heard the rival contentions and perused the material on record. As far as the issue relating to the proper head under which the income derived from letting out the house property is concerned, the same has to be treated as income from house property as the assessee has not challenged the decision of the learned Commissioner (Appeals) on this issue. Having said so, the only issue arising for consideration before us is, whether the notional interest charged on interest free security deposit can be considered to be a part of the fair rent. On a plain reading of section 23(1)(b), which is applicable to the case of the assessee, the actual rent received or receivable by the owner in respect thereof is to be treated as "ALV". In the facts of the present case, the Assessing Officer has not made any enquiry on the issue whether the rent received by the assessee is at actual market rate or not. Therefore, without bringing any evidence on record to demonstrate that the rent received by the assessee is not actual market rate the Assessing Officer cannot add notional interest on the interest free security deposit by treating it as part of the rent received. In this context, we rely upon the ratio laid down by the Hon'ble Jurisdictional High Court in Tip Top Typography (supra). In view of the aforesaid, we do not find any reason to interfere with the order of the learned Commissioner (Appeals) on this issue. Ground no.6 raised by the Revenue is dismissed."

48. That being the case, we uphold the order of the learned Commissioner (Appeals) by dismissing ground no.7 raised by the Revenue.

49. In ground no.8, Revenue has challenged deletion of addition made by the Assessing Officer on account of software expenditure.

50. During the assessment proceedings, the Assessing Officer having found that the assessee has claimed software expenditure of ₹

226,33,999, called upon the assessee to furnish necessary details and after examining the details furnished by the assessee, the Assessing Officer held that such expenditure incurred by the assessee is in the nature of capital expenditure. Accordingly, disallowing assessee's claim of deduction, he allowed depreciation @ 60%. Thus, excess deduction claimed by the assessee amounting to ₹ 90,53,600, was added back to the income of the assessee. Assessee challenged the addition before the first appellate authority.

51. The learned Commissioner (Appeals) after considering the submissions of the assessee deleted the addition.

52. We have heard rival contentions and perused the material available on record. As could be seen from the impugned order of the learned Commissioner (Appeals), the assessee claimed software support and maintenance expenditure for corporate office amounting to ₹ 56,48,58,160 and for branch office at ₹ 226,33,999. As it appears, the Assessing Officer allowed software maintenance expenditure of ₹ 56,48,58,160, incurred for corporate office, whereas, he disallowed similar expenditure of ₹ 226,33,999 incurred for branches. The claim of the assessee that such expenditure incurred for branches are towards maintenance of software and not for acquiring any new software remains uncontroverted. Moreover, when the Assessing Officer has allowed similar expenditure incurred for corporate office,

there is no reason why such expenditure incurred for branches should be disallowed. Therefore, we uphold the order of the learned Commissioner (Appeals) by dismissing ground no.8 raised by the Revenue.

53. In ground no.9, the Revenue has challenged deletion of addition of ₹ 19,11,850, on account of club membership fees.

54. Brief facts are, the Assessing Officer during the assessment proceedings noticing that the assessee has debited an amount of ₹ 19,11,850 towards club membership fees called upon the assessee to furnish necessary details. The Assessing Officer having found that such expenditure was incurred for acquiring corporate membership for directors / senior management officers of the assessee disallowed the expenditure by treating it as capital in nature. The assessee challenged the disallowance before the learned Commissioner (Appeals).

55. The learned Commissioner (Appeals) after considering the submissions of the assessee and following the decisions of the Tribunal in assessee's own case for assessment year 1990-91 and 1991-92, deleted the addition.

56. We have heard rival contentions and perused the material available on record. The Hon'ble Supreme Court in United Glass

Manufacturing Co. Ltd., Civil Appeal no.6649 of 2012, has held that club membership fees for employees are to be treated as business expenditure of a company under section 37 of the Act. We must also observe that in the decisions referred to by the learned Commissioner (Appeals) similar view has been expressed. That being the case, we do not find any reason to interfere with the order of the learned Commissioner (Appeals) on this issue. Accordingly, we uphold the order of the learned Commissioner (Appeals) by dismissed ground no.9 raised by the Revenue.

57. In ground no.10, the Revenue has challenged the allowance of assessee's claim of deduction under section 36(1)(viiia) of the Act.

58. During the assessment proceedings, the Assessing Officer noticing that the assessee has claimed deduction under section 36(1)(viiia) in respect of provisions for bad and doubtful debt on rural advances. The Assessing Officer observed, the assessee is not qualified to exercise his option under the first proviso to section 36(1)(viiia) of the Act. He also observed, the assessee has not produced any evidence to show that the deduction in respect of any provisions made by the assessee for any assets which classified by RBI as doubtful assets or losses in accordance with the guidelines issued by the RBI. He further opined that deduction allowable to the assessee is 7.5% of

the total income and 10% of the total rural advances. Accordingly, he proceeded to compute the deduction at ₹ 129,12,58,949. The assessee challenged part disallowance made by the Assessing Officer before the first appellate authority.

59. The learned Commissioner (Appeals) after considering the submissions of the assessee directed the Assessing Officer to allow deduction to the assessee in terms of first proviso to section 36(1)(viiia) of the Act.

60. We have heard rival contentions and perused the material available on record. A reading of section 36(1)(viiia) of the Act would indicate that the assessee at its own option can be allowed deduction in respect of any provisions made by it for any assets classified by RBI as doubtful asset or loss assets in terms of the first proviso to section 36(1)(viiia) of the Act. It is to be noted that the assessee is a Scheduled Bank and its accounts are maintained in conformity with the Generally Accepted Accounting Principle (GAAP) in India and the guidelines issued by the RBI from time to time. Further, it is evident from the annual report of the assessee that acquisition of assets including performing and non-performing asset are as per the prescribed guidelines of RBI. That being the case, there is no reason for the Assessing Officer to presume that the assessee is not qualified

to exercise option under the first proviso. Further, as per the second proviso to section 36(1)(viiia) of the Act for the assessment year commencing on/or after 1st April 2003 and ending before 1st April 2005, the deduction allowable in terms of proviso 1 to section 36(1)(viiia) of the Act is 10% instead of 5%. In view of the above, we do not find any infirmity in the order of the learned Commissioner (Appeals) on this issued. Accordingly, we uphold the order of the learned Commissioner (Appeals) by dismissing ground no.10 raised by the Revenue.

61. In ground no.11, the Revenue has raised the issue of computation of book profit under section 115JB of the Act.

62. We have heard rival contentions and perused the material available on record. As could be seen in the return of income, the assessee has computed book profit under section 115JB at ₹ 720,47,89,971. The Assessing Officer while completing the assessment enhanced the book profit to ₹ 2353,34,75,015, by adding provision for advance amount transferred to special reserve, etc. The assessee challenged the computation of book profit before the learned Commissioner (Appeals). Before the first appellate authority the assessee justified the book profit computed by it. The learned Commissioner (Appeals) after considering the submissions of the

assessee directed the Assessing Officer to compute the book profit as worked out by the assessee subject to the modification to be made on account of relief granted to the assessee towards expenditure disallowable under section 14A of the Act. Admittedly, the assessee has not challenged the aforesaid decision of the learned Commissioner (Appeals). Learned Departmental Representative has also not advanced any substantive argument to defer from the view expressed by the learned Commissioner (Appeals). In any case of the matter, as per the decision of the Co-ordinate Bench in *Krung Thai Bank v/s JDIT*, 45 DTR 218, and subsequent decisions of different Benches of the Tribunal, provisions of section 115JB AND 115J of the Act are not applicable to banking companies. In view of the aforesaid, we do not find any reason to interfere with the order of the learned Commissioner (Appeals) on this issue. Accordingly, we uphold the order of the learned Commissioner (Appeals) by dismissing the ground no.11, raised by the Revenue.

63. The only ground which now survives for consideration is ground no.5, in assessee's appeal which relates to levy of interest under section 234B and 234D of the Act.

64. Both the parties admitted before us that this ground is consequential in nature. Accordingly, we direct the Assessing Officer to

give consequential effect while re-computing the income of the assessee keeping in view our findings given above and in accordance with the provisions of law.

65. In the result, Revenue's Appeal in ITA no.6137/Mum./2008 and assessee's appeal in ITA no.6217/Mum./2008 are partly allowed for statistical purposes.

ITA no.3841/Mum./2013 – Assessee's Appeal }
ITA no.5276/Mum./2013 – Revenue's Appeal } **A.Y. 2005-06**

66. The first issue, as raised in ground no.1 by the Revenue corresponding to ground no.2 raised by the assessee relates to computation of income claimed as exempt under section 10(23G) of the Act.

67. Brief facts are, during the assessment proceedings, the Assessing Officer while examining the assessee's claim of exemption under section 10(23G) of the Act in respect of income derived from investment in infrastructure capital fund was of the view that the assessee being engaged in the business of banking is not eligible to claim exemption. Therefore, he called upon the assessee to justify its claim. In response, though, the assessee justified its claim of exemption under section 10(23G) of the Act, however, the Assessing

Officer did not find merit in assessee's claim. Referring to CBDT circular no.762 dated 18th February 1998, the Assessing Officer concluded that the assessee not being an infrastructure capital company or infrastructure capital fund set-up for mobilizing resources for the purpose of financing infrastructure facilities is not eligible to claim exemption under section 10(23G) of the Act. Accordingly, he disallowed assessee's claim for exemption for an amount of ₹ 69,24,18,459. Without prejudice to his aforesaid conclusion, the Assessing Officer also held that the expenditure attributable to earning of exempt income from investment in infrastructure facilities as claimed by the assessee are also to be disallowed on account of interest cost and administrative cost. Following his methodology for preceding assessment year, the Assessing Officer applying the gross profit ratio of 15.63% shown by the assessee quantified the expenditure attributable to earning of exempt income under section 10(23G) of the Act at ₹ 43,75,09,156, after reducing the said amount from the exempt income claimed by the assessee under section 10(23G) of the Act at ₹ 69,24,18,459, the balance amount of ₹ 25,49,09,303, was disallowed from the claim of exemption under section 10(23G) of the Act. The assessee challenged the decision of the Assessing Officer before the first appellate authority.

68. As far as the assessee's eligibility for exemption under section 10(23G) of the Act is concerned, the learned Commissioner (Appeals) following CBDT circular no.762 dated 18th February 1998, held that the assessee is eligible to claim exemption under section 10(23G) of the Act, since, as per the said circular, a company which has made investments by financing of long term loan by way of acquiring shares or providing long term finance to an enterprise wholly engaged in the business of infrastructure development shall be treated as infrastructure capital company. The learned Commissioner (Appeals) observed, the companies in which the assessee has made investment the income from which is claimed exempt under section 10(23G), are wholly in the business of infrastructure development. Accordingly, assessee fulfills the condition for claiming exemption under section 10(23G) of the Act. In this context, he also relied upon the decision of the Tribunal, Amritsar Bench, in Jammu & Kashmir Bank v/s ACIT, 114 TTJ 728. As far as disallowance of expenditure under section 14A of the Act for computing net exempt income under section 10(23G) of the Act, the learned Commissioner (Appeals) followed his orders in assessee's own case for preceding assessment years and directed the Assessing Officer to re-compute the disallowance under section 14A of the Act.

69. The learned Authorised Representative submitted before us, the assessee having fulfilled the conditions of infrastructure capital company is eligible for exemption under section 10(23G) of the Act. As far as the disallowance of expenditure under section 14A of the Act, the learned Authorised Representative relied upon the decisions of the Tribunal in assessee's own case for preceding assessment years.

70. Learned Departmental Representative supporting the observations of the Assessing Officer submitted that the provisions contained under section 10(23G) of the Act does not extent to commercial banks.

71. We have heard rival contentions and perused the material available on record. The following two issues arise for consideration before us in this ground. Firstly, whether the assessee is eligible to claim exemption under section 10(23G) of the Act and secondly, what should be the quantum of disallowance under section 14A of the Act. As far as the first issue is concerned, it is the case of the Revenue that the assessee being a banking company cannot be treated as an infrastructure company, since, it is not directly involved in development of infrastructure facility. In this context, the Assessing Officer has relied upon Para-17.2 of CBDT Circular no.762 dated 18th February 1998. However, in our opinion, Para-17.2 of the aforesaid

CBDT cannot be read in isolation. In Para-17.4 of the Circular, it has been clarified that infrastructure capital company shall mean a company which has made investment by way of acquiring shares or providing long term finance to an enterprise engaged in the business of providing infrastructure facilities like roads, highway, bridges, Airport, Port, Rail system or any other public facilities of a similar nature has made notified by CBDT. Further, the expression long term finance has been explained to mean any loan or advance which is repayable along with interest during the period not less than five years. Thus, a reading of CBDT circular no.762 dated 18th February 1998, makes it clear that even a company which is directly not carrying out development of infrastructure facilities would also be eligible for exemption if invests in shares or providing long term finance to an enterprise engaged in the business of providing infrastructure would be treated as infrastructure capital company. Undisputedly, the assessee has fulfilled the aforesaid condition as it has made investments or has advanced loans to companies engaged in the business of infrastructure development. Therefore, the assessee is eligible for claiming exemption under section 10(23G) of the Act. The decision of the Tribunal, Amritsar Bench, in case of Jammu & Kashmit Bank (supra), is also applicable to the facts of the present case. Moreover, in the preceding assessment years, the Revenue has never

questioned assessee's eligibility to claim exemption under section 10(23G) of the Act. There being no material difference in fact, a departure cannot be made in the impugned assessment year for disallowing assessee's claim under section 10(23G) of the Act by questioning its eligibility. Therefore, we uphold the order of the learned Commissioner (Appeals) on the first issue.

72. Insofar as the second issue regarding quantum of disallowance under section 14A of the Act is concerned, following our decision while deciding similar issue raised in the cross appeals for assessment year 2004-05 in the earlier part of the order vide Para-6 & 7, we restore the issue to the Assessing Officer for deciding afresh in terms of our directions given therein.

73. Ground no.3, raised by the Revenue corresponding to ground no.3, raised by the assessee are on the common issue of disallowance of expenditure under section 14A of the Act in respect of exempt income earned under section 10(15) of the Act.

74. This issue is identical to the issue raised in ground no.2, in Revenue's appeal and ground no.3, in assessee's appeal for assessment year 2004-05. Following our decision in Para-13 of this order, we restore the issue to the file of the Assessing Officer for deciding afresh keeping in view our directions therein.

75. Grounds no.4 and 5 of Revenue's appeal are on the issue of allowance of assessee's claim of depreciation on leased assets.

76. This issue is identical to the issue raised in ground no.3 of Revenue's appeal for assessment year 2004-05. Following our decision in Para-17 of this order, we uphold the order of the learned Commissioner (Appeals) on this issue.

77. In ground no.6, the Revenue has raised the issue of non-cash write back made under section 41(4) of the Act.

78. This issue is identical to the issue raised in ground no.4 of Revenue's appeal for assessment year 2004-05. Following our decision in Para-221 of this order, we uphold the order of the learned Commissioner (Appeals) on this issue.

79. Ground no.7 raised by the Revenue corresponding to ground no.4, raised by the assessee are in relation to computation of exemption under section 10(34) and 10(35) of the Act qua the expenditure attributable for earning such income. These issues are identical to similar issue raised by the Department in assessment year 2004-05. Following our decision in Para-27, we restore the issue to the file of the Assessing Officer for deciding afresh in terms with our direction contained therein.

80. In grounds no.8 and 9, the Revenue has raised the issue of allowance of assessee's claim of bad debt written-off.

81. This issue is identical to the issue raised by the Revenue in ground no.6 of its appeal for assessment year 2004-05. Following our decision in Para-34 of this order, we uphold the order of the learned Commissioner (Appeals).

82. In ground no.10, the Department has challenged deletion of addition made by the Assessing Officer on account of club membership fees.

83. This issue is identical to the issue raised in ground no.9 by the Revenue for assessment year 2004-05. Following our decision in Para-56 of this order, we uphold the order of the learned Commissioner (Appeals).

84. Ground no.11, relates to computation of book profit under section 115JB of the Act.

85. This issue is identical to the issue raised in ground no.11 by the Revenue for assessment year 2004-05. Following our decision in Para-62 of this order, we uphold the order of the learned Commissioner (Appeals).

86. The only ground which now survives for consideration is ground no.5, in assessee's appeal which relates to levy of interest under section 234B and 234D of the Act.

87. Both the parties admitted before us that this ground is consequential in nature. Accordingly, we direct the Assessing Officer to give consequential effect while re-computing the income of the assessee keeping in view our findings given above and in accordance with the provisions of law.

88. In the result, Revenue's appeal and assessee's appeal are partly allowed for statistical purposes.

89. In nut shell all these appeals are partly allowed for statistical purposes.

Order pronounced in the open Court on 03.11.2017

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 03.11.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai