**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND**

**SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA No. 4736/Mum/2010 (Assessment Year-1999-2000)**

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| State Bank of India<br>Financial Reporting, Compliance & Taxation Department, 19th Floor, Corporate Centre, Madam Cama Road, Mumbai-400021.<br>**PAN: AAACS8577K** | **Vs.** | ACIT Circle (2)(2),<br>Mumbai. |
| (Appellant) | | (Respondent) |

**ITA No. 4598/Mum/2010 (Assessment Year-1999-2000)**

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| ACIT Circle (2)(2),<br>Mumbai. | **Vs.** | State Bank of India<br>Financial Reporting, Compliance & Taxation Department, 19th Floor, Corporate Centre, Madam Cama Road, Mumbai-400021.<br>**PAN: AAACS8577K** |
| (Appellant) | | (Respondent) |

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| Assessee by | : | Shri Girish Dave & Urvi Mehta (AR) |
| Revenue by | : | Shri R.P. Meena (CIT-DR) |
| Date of hearing | : | 16.01.2018 |
| Date of Pronouncement | : | 31.01.2018 |

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. These cross appeal under section 253 of the Income-Tax Act ("The Act") is directed against the order ld. CIT(A)-5, Mumbai dated 23.10.2010 for

Assessment Year (AY) 1999-2000. The assessee has raised the following grounds of appeal:

The appellant objects to the order of the Commissioner of Income-tax (Appeals) 5, Mumbai ("CIT(A)") dated 23 March 2010 for the aforesaid assessment year on the following among other grounds:

1. The learned CIT(A) erred in confirming the addition of Rs. 7,98,63,710/- under the head "Deferred Payment Guarantee Commission".
   The learned CIT(A) erred in not following the decision of the Calcutta High Court in the case of Bank of Tokyo Ltd. (71 Taxman 85).

2. The learned CIT(A) erred in confirming the disallowance of Rs. 10,13,45,532 in respect of depreciation on securities which had fallen due for redemption during year ended 31 March 1999 but redemption proceeds were not received.

3. The learned CIT(A) erred in confirming the disallowance of Rs. 38,89,011/- in respect of payments for scientific research.

4. The learned CIT(A) erred in upholding the action of the Assessing Officer in disallowing expenditure of Rs. 4,48,16,70,145 by applying the provisions of section 14A read with rule 8D.

   The learned CIT(A) erred in not appreciating that the appellant has not specifically borrowed any funds for making investment in tax-free bonds, the appellant has sufficient own funds to make investment in tax-free bonds and that only the actual expenditure could be considered for disallowance and not the notional expenditure.

   The learned CIT(A) erred in not appreciating that the Bank's investment in securities yields two streams of income viz. business income which is taxable and dividend income which is exempt and accordingly the expenditure (if any) to be disallowed can be only in relation to exempt dividend income.

5. The learned CIT(A) erred in upholding the action of the Assessing Officer in disallowing the appellant's claim in respect of depreciation of Rs.4,43,22,69,791 on leased assets.

   The learned CIT(A) erred in holding that the so called lease transactions are nothing but finance transactions.

6. The learned CIT(A) erred in not accepting the claim of the appellant that the interest of Rs. 42,61,69,956 was in the nature of unearned income on non performing assets as envisaged by section 43D of the Act and that the write-off of the same was allowable as a deduction.

7. The learned CIT(A) erred in upholding the action of the Assessing Officer in disallowing Resurgent India Bonds issue expenses of Rs. 25,20,81,440

under section 40(a)(i) on the ground that no TDS was deducted under section 195.

The learned CIT(A) erred in holding that the payments for commission, law charges and advertising is in the nature of fees for technical services.
The learned CIT(A) erred in not appreciating that as the sums payable were not liable to tax in India, they were not liable to TDS under section 195 and accordingly no disallowance could be made under section 40(a)(i).

8. The learned CIT(A) erred in confirming the addition in respect of contribution of Rs. 10,00,00,000 to SBI Retired Employees Medical Benefit Fund.
The learned CIT(A) erred in not following the decision of the Cochin Tribunal in the case of State Bank of Travancore (306 ITR (AT) 128).

9. The learned CIT(A) erred in upholding the action of the Assessing Officer of granting deduction for Rs. 7,93,82,28,183 under section 36(1)(viia) instead of the entire provision of Rs. 14,41,42,98,921.

10. The learned CIT(A) erred in upholding the action of the Assessing Officer of not allowing the provisions made by the appellant in respect of its foreign offices.

11. Each one of the above grounds of appeal is without prejudice to the other.

The assessees vide its application dated 16.09.2016 raised following additional ground of appeal:

The appellant objects to the order of the Commissioner of Income-tax (Appeals)-5, Mumbai [CIT(A)] dated 23 March 2010 for the aforesaid assessment year on the following among other grounds:

1. The appellant submits that it is 'entitled to a deduction for write off of bad debts under section 36(1)(vii) as per the judgment of the Supreme Court in the case of Vijaya Bank Limited (323 ITR 166).
It is submitted that necessary directions may be given to the Assessing Officer to allow the claim of write-off bad debts.

2. The appellant submits that the recovery of bad debts written off should not be liable to tax under section 41 (4) as the appellant had not claimed a deduction under section 36(1)(vii), as held by the Bangalore Tribunal in the case of State Bank of Mysore (ITA No. 647/Bang 2008).

It is submitted that necessary directions may be given to the Assessing Officer to not tax the recovery of bad debts where deduction under section 36(1)(vii) has not been claimed.

3. The appellant submits that the income earned by the foreign branches of the appellant should not be liable to tax in India in terms of the relevant tax treaties in light of various judicial pronouncements.

It is submitted that necessary directions may be given to the Assessing Officer to not tax income of foreign branches based in countries with which India has a tax treaty.

4. Each of the above grounds of appeal is without prejudice to the other.

2. In ITA No. 4598/Mum/2010, the Revenue has raised the following grounds of appeal:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in allowing relief to the assessee to the extent impugned in the ground enumerated below:-

1. The order of the CIT (A) is opposed to law and facts of the case.

2. On the facts and in the circumstances of the case and in law, the CIT(A) was not justified in deleting the disallowance of Rs. 58.15 lakhs made by the Assessing Officer being payment made to schools attended by the children of the employees of the assessee, even though such an expenditure is not related to the business activity of the assessee.

3.a) On the facts and in the circumstances of the case and in law, the CIT(A) was not justified in deleting the addition made by the Assessing Officer by treating the exchange gain on repatriation of GDR issue proceeds of Rs. 1655518946/- as revenue in nature without appreciating the fact that GDR issue was utilized by the assessee company as circulating capital, which is a circulating commodity for the banking company.

b) On the facts and in the circumstances of the case and in law, the CIT(A) has erred in not considering that such gain had been disclosed by the assessee as taxable in the return of income.

c) On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition without appreciating the fact that exclusion of the exchange gain from the total income was claimed by the assessee during the assessment proceedings without filing the revised return as was required keeping in view the decision of the Apex Court in the case of Goetze (India) Ltd vs CIT as reported in 284 ITR 323 (SC).

d) On the facts and in the circumstances of the case and in law, the CIT(A) has erred in not considering that the claim of the assessee for excluding such income from the total income was inconsistent with the method of accounting followed by the assessee itself.

> 4. On the facts and in the circumstances of the case and in law, the CIT(A) has erred in deleting the addition made by the Assessing Officer on account of interest on securities on accrual basis even though the assessee followed the mercantile system of accounting in accordance with the Banking Regulation Act.

3. Brief facts of the case are that the assessee is Nationalized Bank, filed its return of income for relevant Assessment Year (AY) on 30.12.1999 declaring total income of Rs. 860,81,77,400/-. The assessment was completed under section 143(3) on 04.02.2002. The Assessing Officer (AO) while completing assessment made a number of additions/disallowances as per para-18 of the assessment order. On appeal before the ld. Commissioner of Income Tax (Appeals) [(CIT(A)], the assessee was granted partial relief on certain additions/disallowances in the impugned order. Being aggrieved by the order of ld. CIT(A), the assessee as well as revenue both have filed their cross appeal raising various grounds of appeal as referred in para-1 and 2 above.

4. We have heard the ld. Authorized Representative of assessee and ld. Departmental Representative (DR) for the Revenue and perused the orders of authorities below and the various decisions relied by ld. representatives. First we are taking appeal filed by assessee in ITA No. 4736/Mum/2010.

5. Ground No.1 relates to Deferred Payment Guarantee Commission of Rs. 7,98,63,710/-. The ld. AR of the assessee argued that this ground of appeal is covered in favour of assessee in assessee's own case for AY 184-85 to 1989-90 and 1996-97. The copies of the decision are filed in legal Paper Book placed on record. After going through the decision of Tribunal, the

ld. DR for the Revenue not disputed the contention of ld. AR of the assessee. We have gone through the orders of authorities below and the decision of Tribunal in assessee's own case for AY 1984-85 to 1990-91 & 1996-97.We have noted that in ITAs No. 2448/Bom/1998, 1636/Bom/1989, 9254 & 9255/Bom/1990, 306/Bom/1992, 146/Bom/1993, 5840/Bom/1995 dated 22.08.2006, the co-ordinate bench of the Tribunal on identical grounds of appeal passed the following order:

*"5. Ground No 4 relates to deferred Guarantee Commission of Rs.3,97,99,363/- treated as income.*

*5.1 The learned counsel of the assessee stated that this issue has been decided by the ITAT against the assessee in its appeal relating to the Assessment Year 1979-80 and subsequently followed by the ITAT in the assessee's appeals relating to 1980-81 to 1983-84. However, he submitted that during the assessment year under consideration i.e., 1984-85, the assessee received Rs.5,32,03,978 on account of deferred Guarantee Commission. Under the consistence method of accountancy being followed by the assessee, the guarantee commission to the extent of coverage during the accounting period i.e., Rs. 1,34,04,615 accounted to tax and the Guarantee Commission of the balance amount of Rs.3,97,99,163 attributable to the expired period of Guarantee was not accounted for tax and the same was accounted for on the basis of actual coverage (hiring the previous year on pr o rata basis. The learned counsel of the assessee stated that this method of accounting is recognized by AS-9 issued by the Institute of Chartered Accountants of India vide paragraph 3(c). Further he submitted that the claim of the assessee is to be allowed in view of the decision of the Calcutta High Court in the case of Bank of Tokyo Ltd. (71 Taxman 85), and the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. (225 ITR 802) (SC). It was further submitted that these two decisions were not available at the time when the ITAT decided similar issue in the assessee's appeals relating to earlier Assessment Years i.e., 1978-79 to 1963-84. The ld. Departmental Representative on the other hand, supported the orders of the authorities below.*

*5.2 After hearing both the parties and going through the material on record and*

*also the decisions relied upon by the assessee, we find that undisputedly the assessee is a banking company. The assessee is following the mercantile system of accounting and therefrom, income is eligible to tax upon accrual. The system of accounting followed by the assessee is bona fide. The assessee receives the commission for the entire period of the debt repayment that it guarantees at the time when the guarantee agreement is entered into. The assessee had consistently followed the books of account deferred guarantee commission receivable in respect of future periods, should not be taxed in the year. In other words, when the commission related to a period beyond the previous year, the proportionate commission was deferred and shown as income in the year to which it related. The guarantee related to more than 12 months and/pr the guarantee period extended beyond the period covered by the previous year relevant to the Assessment Year. Refund of upto 50% of guarantee commissioner for the unexpired period to valued clients may be permitted by the assessee's officials on receiving back the discharged guarantee bond in those cases also where the purpose for which the guarantee was issued has been fulfilled in a shorter period. Thus, the right to receive commission for the un-expired period of the guarantee became perfected and crystallized only with the expiry of the unexplained period. Accordingly, the right to receive commission for the unexpired period of the guarantee became perfected and crystallized only with the expiry of the unexpired period and income from deferred guarantee commission did not accrue or rose in the relevant Assessment Year 1984-85. However, this issue has been decided by the Tribunal against assessee in case of assessee itself. Now it is stated that in case of Bank of Tokyo (supra) the Hon'ble Calcutta High Court has decided this issue in favour of the assessee. The counsel of assessee has stated that decision of the Hon'ble Court in the case of Madras Industrial Corpn. (supra) also support the case of the assessee. These decisions were not available, when Tribunal decided the issue against assessee. To meet the ends of justice we restore this issue to the file of the AO and the AO to decide the issue a fresh after taking into consideration the decision in case of Bank of Tokyo and in case of Madras Industrial Corpn. (supra) and if it is found that facts are identical then the decision of the Hon'ble High Court in case of bank of Tokyo (supra) has to followed. We order accordingly.*

6. We have noted that in appeal for AY 1996-97 in ITA No.5470/Mum/2002, the Tribunal allowed the similar relief to the assessee by following the decision of earlier years. Thus, respectfully following the decision of co-ordinate bench in assessee's own case for AY 1984-85 to 19989-90 & 1996-97, this ground of appeal is allowed in favour of assessee.

7. Ground No. 2 relates to Disallowance of Depreciation on Matured Investments of Rs. 10,13,43,332/-. The ld. AR of the assessee conceded that this ground of appeal is covered against the assessee by the order of Tribunal in assessee's own case for AY 1996-97, 1997-98 & 1998-99. The ld. AR of the assessee submits that the copy of decision of Tribunal dated 26.07.2013 in ITA No. 5470/Mum/2002 and in ITA No. 3823-24/Mum/2005 for AY 1997-98 & 198-99 dated 29.04.2016 is placed on record. On going through the order of Tribunal referred above, the ld. DR for the Revenue submits that the similar issue has already been decided against the assessee. Hence, this ground may be dismissed.

8. We have considered the contention of the parties and have gone through the orders of authorities below. We have noted that similar ground of appeal has been dismissed by the Tribunal in assessee's own case, with the following order:

> 38. *Additional Ground No. 2 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:*
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> *"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 non- performing 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 Travancore vs. CIT 158 ITR 102, 155 (SC) which was followed in Western India Oil Distributing Co. Ltd. Vs. CIT 206 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. Karnani Karnani vs. CIT 185 ITR 408 (Bom), (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. Ltd. vs. CIT 37 ITR 66 (SC) and Standard Mills Co. Ltd. Vs.CIT Vs.CIT 229 ITR 366(Bom) 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.*

9. Again in appeal for AY 1997-98 & 1998-99, the Tribunal by following the decision of AY 1996-97 dismissed the identical ground of appeal by passing the following order:

***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 tate 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.*

10. Thus, respectfully following the decision of Tribunal in assessee's own case for AY 1996-97, 1997-98 & 1998-99 in ITAs No. 5470/Mum/2002 and ITA No. 3823-3824/Mum/2002, this ground of appeal is dismissed.

11. Ground No. 3 relates to Disallowance of Rs. 38,89,011/- in respect of payments for Scientific Research. The ld. AR of the assessee conceded that this ground of appeal is covered against the assessee in assessee's own case for AY 1997-98 & 1998-99. On going through the decision of Tribunal, the ld. DR for the Revenue submits that this ground of appeal may be dismissed.

12. We have considered the submission of the ld. representative and have gone through the orders of authorities below. We have noted that the similar ground of appeal was decided against the assessee by the Tribunal in assessee's own case for AY 1997-98 and 1998-99 in ITA No. 3823-3824/Mum/2005 dated 29.04.2016 with the following order:

*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 assessee.*

13. We have noted that the similar ground of appeal was rejected by the Tribunal in assessee's own case for AY 1998-99 in ITA No. 3824/Mum/2005. Thus, considering the decision of Tribunal in assessee's own case in earlier years, this ground of appeal is dismissed.

14. Ground No. 4 relates to disallowance of expenses of Rs. 4,48,16,70,145/- for earning exempt income u/s. 10(15)(iv)(c) & (f), 10(15)(iv)(h), 10(23G) and 10(33) by applying the provisions of section 14A r.w.r. 8D. The ld. AR of the assessee argued that the assessee is one of the leading Bank of the Country and having sufficient own funds. The loans granted and the investment made are out of own interest free funds available with the assessee's Bank. No disallowance in relation to interest expenses was warranted as own interest free fund are far exceeding investment. The assessee has placed on record the financial statement of the assessee's Bank as per page no. 286 to 361 of Paper Book. In support of this

submission, the ld. AR of the assessee relied upon the decision of various Hon'ble High Court viz; Bombay High Court in CIT vs. HDFC Bank Ltd. (383 ITR 529), CIT vs. HDFC Bank Ltd. (366 ITR 505), decision of Hon'ble Delhi High Court in CIT vs. Tin Box Co. (260 ITR 367), Gujarat State Fertilizers & Chemicals Ltd. (Tax Appeal No. 82 of 2013(Gujarat HC), UTI Bank Ltd. (32 taxmann.com 370) (Guj HC). It was further argued that Rule 8D is not applicable for AY 1999-2000. On this submission the ld. AR of the assessee relied upon the decision of Hon'ble Bombay High Court in Godrej Boyce Manufacturing Company Ltd. vs. DCIT (2010) 328 ITR 81. The ld. AR of the assessee further argued that no disallowance under section 14A is warranted, if investments are held as stock-in-trade. In support of his submission, the ld. AR relied upon the decision of CIT vs. India Advantage Securities Ltd. (2016 380 ITR 471) (Bombay High Court), State Bank of Patiala (78 taxmann.com 3) (Punjab and Haryana High Court), CCI Ltd. vs. JCIT (2012 206 taxman 563) (Karnataka High Court), Oasis Securities Ltd. vs. DCIT (59 SOT 302) (Mumbai Tribunal), Ganjam Trading Co. Pvt. Ld. vs. DCIT (ITA No. 3724/Mum/2005 and others) (Mumbai Tribunal), State Bank of Hyderabad (63 taxmann.com (Hyderabad ITAT) & Gulshan Investment Co. Ltd. (ITA No. 666/Kol/2012). In alternative submission, it was submitted that the assessee made investment in subsidiary and investment is strategic investment in support of his submission, the ld. AR relied upon the

decisions of CIT vs. Rajeeva Lochan Kanoria (1994] (208 ITR 616) Calcutta High Court, Garware Wall Repes Ltd. vs. ACIT [2014] taxmann.com 18) Mumbai Tribunal, JM Financial Limited (ITA No. 4521/Mum/2012) (Mumbai Tribunal), Interglobe Enterprises Ltd. Vs. DCIT (ITA No. 1362 & 1032/Del/2013) (Delhi Tribunal, EIH Associated Hotels Ltd. vs. DCIT (ITA No. 1503/Mds/2012) (Chennai Tribunal), CIT vs. Oriental Structural Engineers (P.) Ltd. (35 taxmann.com 210) (2013) (Delhi HC), CCI Ltd. vs. JCIT (250) CTR 291) (Karnataka HC), CIT vs. Delite Enterprises (ITA No. 110 of 2009 (Bombay HC), CIT vs. Shivam Motors (P.) Ltd. (ITA No. 88 of 2014) (All HC) (2014). It was further submitted that section 14A applies only when expenditure is actually incurred and there are numerous judicial decision in favour of assessee's Bank viz. CIT vs. Central Bank of India 264 ITR 522(Bom), CIT vs. General Insurance Corpn. Of India 254 ITR 203(Bom), Eicher Ltd. (101 TTJ 369) (Del), Dhanlakshmi Bank Ltd. vs. ACIT 12 SOT 625 (Cochin), CIT vs. Hero Cycles Ltd. 323 ITR 518) (Punjab & Haryana High Court). The ld. AR further argued that as per guidelines laid down by Reserve Bank of India, the bank has to invest interest free securities to maintain Statutory Liquidity Ratio (SLR). The rate of return on tax free deployment of funds lower in view of the tax exemption available. The Borrowings and interest expenses incurred in the normal course of banking business. Without prejudice, it was argued that disallowance under

section 14A in relation to Administrative Expenses may be calculated on the basis of certain percentage of exempted income as has been held in a number of decision by various Tribunal and Hon'ble High Courts. Reliance was made in case of Cheminvest Limited vs. CIT (378 ITR 33), ACB India Ltd. vs. ACIT (374 ITR 108). The ld. AR further conceded that similar ground was restored to the file of AO in assessee's own case for AY 1996-97 & 1998-99. It was submitted that the AO despite direction of Tribunal passed a non-speaking order and no relief was granted. It was finally prayed that the Tribunal may issue appropriate directions while setting aside the matter following the earlier precedent. On the other hand, the ld. DR for the Revenue relied upon the order of authorities below.

15. We have considered the rival submission of the parties and have gone through the orders of authorities below. At the time of hearing, the ld. representative for the assessee pointed out that earlier AYs 1997-98 & 1998-99 vide its order dated 29.04.2016 (supra), the issue relating to the disallowance under section 14A of the Act was remanded back by the Tribunal to the file of AO. He conceded that the circumstances which prevailed with the Tribunal to remand the matter with the file of AO continued to prevail in this year too. It is pointed out that when the impugned assessment was finalized, the jurisprudence on the implication of section 14A was not developed but by the time, the matter travelled to the Tribunal, law had considerably developed on the subject. By noticing this,

the Tribunal restored the matter back to the file of AO for fresh adjudication so that the benefit of the later developed law could be available to the AO. So, however, it is pointed out that in the order giving effect to the directions of the ITAT for AY 1997-98, the AO vide order dated 27.03.2017 had cryptically disposed of the matter. For the said purpose our attention was drawn to paragraph-6 of the order of AO which merely says that he agrees *"with the contentions raised in the earlier assessment order and maintain the disallowance in this regard at Rs. 45,51,91,557/- as detailed in 143(3) order of the said year".* Quite clearly, the aforesaid manner of determination by the AO leaves much to be desired. In fact in the earlier part of this order, we have enumerated in some detail, the various propositions which have been raised by the assessee in the context of the disallowance under section 14A of the Act which require specific determination by the AO. Therefore, following the earlier precedent, the matter relating to section 14A is remanded back to the file of AO, with the directions to allow the assessee an opportunity to make submissions, and the AO shall pass a speaking order giving determination on each of the propositions as per law. Thus, with these directions, the matter is restored back to the file of AO to adjudicate afresh as per law. Hence, this ground of appeal is allowed for statistical purpose.

16. Ground No.5 relates to disallowance of depreciation of Rs. 443,22,69,791/- on leased assets. The ld. AR of the assessee submitted that similar ground

of appeal was decided against the assessee by the Tribunal in assessee's own case for AY 1996-97 and again in AY 1997-98 & 1998-99 and the assessee's appeal has been admitted by the Hon'ble Bombay High Court against the order of Tribunal for AY 1996-97 dated 23.08.2016. The ld. DR for the Revenue submits that this ground of appeal may be dismissed as similar ground of appeal has already been admittedly dismissed by the Tribunal for AY 1996-97 to 1998-99.

17. We have considered the submission of the parties and have gone through the order of authorities below and the orders passed by co-ordinate bench of Tribunal in assessee's own case for AY 1996-97 wherein similar ground of appeal was decided against the assessee. Again in the appeal for AY 1997-98 & 1998-99, the similar grounds of appeal was dismissed by following the decision of Tribunal in AY 1996-97 with the following order:

> ***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.*

*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, lighting, 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 passion 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 my 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 form 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 server 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 it, is provided that the lessee shall pay the entire arrears of the lease as well the future installment 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 installments. 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 tinance 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 peiod 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 obsolences, 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.

18. Thus, respectfully following the order of co-ordinate bench on similar ground in earlier years in assessee's own case this ground of appeal is dismissed.

19. Ground No.6 relates to unearned interest on doubtful advances as per section 43D not allowed as a deduction. The ld. AR of the assessee argued that similar ground of appeal was restored back by the Tribunal to the file of AO assessee's own case for AY 1997-98 in its order dated 29.04.2016. The ld. DR for the Revenue expressed his no objection, if, this ground of appeal is also restored back to the file of AO to decide the same in accordance with the direction of Tribunal in order dated 29.04.2016 in appeal for AY1997-98.

20. We have considered the submission of the parties and perused the orders of authorities below. We have noted that similar ground of appeal was restored back to the file of AO by the Tribunal with the following direction:

**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 un-reaslised 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.

21. Thus, considering the decision of co-ordinate bench, this ground of appeal is restored to the file of AO with similar direction as per order dated 29.04.2016 in ITA No. 3823/Mum/2005. In the result, this ground of appeal is allowed for statistical purpose.

22. Ground No.7 relates to disallowance of expenses incurred in connection with issue of Resurgent India Bonds u/s. 40(a)(i) on account of non-deduction of tax at source u/s.195.In this context, the relevant facts are that during the year under consideration, the assessee-bank launched foreign currency denominated Resurgent India Bonds Scheme (RIBS). It was noticed by the AO that in the P&LA/c, the assessee-bank had claimed various expenses

in connection with the issue of RIBs. The AO noted that a sum of Rs. 32,49,40,434/- was incurred on law charges, Advertisement and Commission by way of payment to non-residents. These expenditures related to the services offered by the recipients being collecting banks in the nature of brokerage, commission, etc. As per the AO, tax was required to be deducted at source on such payments. Out of the total payment of Rs. 32,49,40,434/- to the non-residents, an amount of Rs. 7,28,58,994/- representing commission paid to foreign branches of India Banks was reduced and the balance of Rs. 25,20,81,440/- was disallowed under section 40(a)(i) of the Act for not having deducted tax at source. The claim of the assessee before the lower authorities as well as before us is to the effect that the payments are made to the non-residents for services rendered abroad and therefore, no amount is taxable in India and therefore, there was no need to deduct any tax at source. The ld. CIT(A) has also affirmed the action of the AO against which the assessee is in appeal before us.

23. Before us, the representative for the assessee pointed out that the lower authorities have wrongly treated the payments in the nature of fees for technical services, whereas the services were in the nature of brokerage for collecting the bonds proceeds etc. and that entire services were rendered outside India. It is also pointed out that the recipients do not have any place of business operations in India and therefore, no income can be deemed to

have accrued or arisen in India in the hands of the non-residents. In the course of hearing reliance has been placed on the following decisions:

(i) CIT vs. Toshoku Ltd. [1980] 125 ITR 525 (SC)

(ii) Ind. Telesoft P. Ltd. (267 ITR 725) (AAR)

(iii) Raymond Ltd. vs. DCIT [2003] 86 ITD 791 (Mum-Trib.)

On the other hand, ld. DR relied upon the order of authorities below.

24. We have carefully considered the rival submissions. Factually speaking, the discussion in the assessment order clearly points out that the expenditure has been paid towards the services in connection with the issue of RIBs and are in the nature of advertisements, collecting bank commission etc. Broadly speaking the payments are in the nature of commission paid to non-residents for services of mobilizing deposits, etc. showing that the services have been rendered abroad. It is also not the case of the AO that any of the non-residents in question have any business operation in India. Therefore, in the said background, the ratio of the judgment of Hon'ble Supreme Court in case of CIT vs. Toshoku Ltd. (supra) is clearly attracted which lays down that commission earned by non-resident for services rendered abroad could not be construed as incomes accrued or arisen in India. Thus, on this point itself, we are inclined to uphold the stand of the assessee and accordingly the disallowance made by lower authorities by invoking section 40(a)(i) of the Act is hereby set-aside. On this ground assessee succeeds. Hence, this ground of appeal is allowed.

25. Ground No.8 relates to disallowance of contribution to SBI Retired Employees Medical Benefit Fund of Rs. 10,00,00,000/-. The ld. AR of the assessee submitted that this ground of appeal is covered in favour of the assessee as similar ground of appeal was allowed by the Tribunal in assessee's own case for AY 1997-98 & 1998-99. The ld. DR conceded that similar ground of appeal was allowed by Tribunal in assessee's own case in earlier years, but relied on the order of the authorities below.

26. We have considered the submission of the parties and perused the orders of authorities below. We have seen the order of tribunal for AY 1997-98 & 1998-99 in ITA No. 3823 & 3824/Mum/2005 dated 29.04.2016 wherein similar ground of appeal was allowed by the Tribunal holding as under:

> **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 theTrustees, 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.

27. Thus, considering the decision of Tribunal in assessee's own case for AY 1997-98 & 1998-99 in ITA No. 3823 & 3824/Mum/2005 dated 29.04.2016 and respectfully following the same this ground of appeal is allowed.

28. Ground No.9 relates to entire provision for bad and doubtful debts to be allowed u/s. 36(1)(viia) of Rs. 1441,42,98,921/-. The ld. AR of the assessee argued that this ground of appeal is also covered in assessee's own case as the similar ground of appeal was dismissed by the Tribunal in assessee's own case in AY 1996-97 vide ITA No.5470/Mum/2002 dated 26.07.2013 and again in AY 1997-98 & 1998-99 in ITA No. 3823 & 3824/Mum/2005 dated 29.04.2016. It was further submitted that in the appeal before Hon'ble Bombay High Court, the order of Tribunal for AY 1996-97 has been confirmed in ITA No. 2721 of 2014 dated 23.08.2016. The ld. DR submits that this ground of appeal is liable to be dismissed as the High Court has already dismissed the appeal of assessee for AY 1996-97.

29. We have considered the submission of the parties and gone through the orders of authorities below. We find that similar ground of appeal was dismissed by the Tribunal in assessee's own case for AY 1996-97 vide ITA No. 5470/M/2002 dated 26.07.2013. Further, the similar ground of appeal was dismissed by Tribunal in appeal for AY 1997-98 & 1998-99 in ITA No. 3823 & 3824/Mum/2005 dated 29.04.2016 holding as under:

> **8.** Next Ground is about not allowing deduction for provision for bad and doubtful debts at Rs.706.29 crores u/s. 36(1)(viia) as against Rs.833.30crores.
>
> **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)(viia) 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 sided 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)(viia) 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 Rs. 5,36,21,32,507/- u/s 36(1)(viia) 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)(viia).*

*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)(viia). When the allowable claim has been accepted by the AO under the provision of section 36(1)(viia) 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)(viia). It is pertinent to note that when the claim of deduction specifically provided u/s 36(1)(viia) 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 .

30. Thus, considering the decision of Tribunal in assessee's own case wherein similar ground of appeal has been dismissed and the order of Tribunal for AY 1996-97 has been affirmed by the jurisdictional High Court, hence, we do not find any merit in the ground of appeal raised by assessee and the same is dismissed.

31. Ground No.10 relates to disallowance of provision in respect of foreign offices. The ld. AR of the assessee argued that similar ground of appeal was restored back by the Tribunal to the file of AO in assessee's own case for AY 1998-99 in its order dated 29.04.2016. The ld. DR for the Revenue expressed his no objection, if, this ground of appeal is also restored back to the file of AO to decide the same in accordance with the direction of Tribunal in order dated 29.04.2016 in appeal for AY1997-98.

32. We have considered the submission of the parties and perused the orders of authorities below. We have noted that similar ground of appeal was restored back to the file of AO by the Tribunal with the following direction:

> *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 05.09.2000 along with the annexure 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 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.*

33. Thus, considering the decision of Tribunal in assessee's own case for AY 1998-99, wherein similar ground of appeal has been restored to the file of AO, hence, this ground of appeal is also restored to file of AO to decide it

afresh in accordance with law and considering the direction in order dated 29.04.2016 in appeal for AY 1997-98. Hence, this ground of appeal is allowed for statistical purpose.

34. Additional Ground No.1 relates to write- off of bad debts u/s. 36(1)(vii), Additional Ground No.2 relates to recovered of bad-debts written off should not be liable to tax u/s 41(4) and Additional Ground No. 3 relates to income earned from foreign branches should not be liable to tax in India. The ld. AR of the assessee argued that all additional grounds of appeal are purely legal in nature, the failure to raise these additional ground initially were neither intentional nor deliberate and prayed for consideration of all additional grounds of appeal. It was further argued that additional ground no.1 is covered by the decision of Hon'ble Supreme Court in Vijaya Bank vs. CIT(323 ITR 166), Ground No.2 is covered by the decision of Bangalore Tribunal in State Bank of Mysore vs. DCIT (33 SOT 7) (Bang.) and Ground No.3 is covered by the decision of Mumbai Tribunal in Bank of India vs. DCIT in ITA No. 2781/Mum/2011 and similar grounds of appeal was remanded back to the file of AO for fresh examination and adjudication by the Tribunal for AY 1996-97 vide order dated 03.01.2014 in M.A No. 371/M/2014. On the other hand, the ld. DR for the Revenue submits that he has no objection for admission of additional grounds of appeal, provided all three additional grounds of appeal are restored back to the file of AO for examining the issues afresh.

35. We have considered the rival submission of the parties and have gone through the orders of Tribunal in M.A. No. 371/M/2013 wherein similar grounds of appeal was restored back to the file of AO with the following order:

3. On the other hand Ld. DR has submitted that there is no apparent error in the impugned order of the Tribunal regarding the additional grounds raised by the assessee which were remitted to the record of the AO for examination and adjudication as per law.

4. Having considered the rival submissions and careful perusal of the records, we note that the assessee has advanced arguments in respect of additional grounds no. 1- 3 which reads as under:-

| Sl. No. | Additional Grounds of Appeal | Remarks |
|---|---|---|
| 1 | Write-off of bad debts u/s 36 (1) (vii) | Covered by the decision of the Supreme Court in the case of Vijaya Bank Vs. CIT (2010) 323 ITR 166 |
| 2 | Recovery of bad-debts written off should not be liable to tax u/s 41(4) | 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 | Income earned from foreign branches should not be liable to tax in India | 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) |

4. The Tribunal has disposed of the issue in para 37 of the order which reads 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 impugn 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.

6. In the result, miscellaneous application of the assessee is allowed as impugned order is modified above.

36. Thus, considering the decision of co-ordinate bench in assessee's own case for AY 1996-97 vide order dated 03.01.2014 in M.A No. 371/M/2014 the additional ground No. 1 to 3 of appeal are restored to the file of AO to decide the same in accordance with law by following the order dated 30.01.2014 passed by Tribunal in M. A. No. 371/M/2013.

37. In the result the appeal of the assessee is partly allowed.

**ITA No. 4598/Mum/ 2010 appeal by Revenue**

38. Ground No.1 relates to deleting the addition on account of Staff Welfare expenses of Rs. 58.15 lakhs. The ld. DR for the revenue supported the order of the assessing officer. On the other hand the ld R for the assessee argued that this ground of the appeal is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for AY 1992-93 in

ITA No.3400/M/1999 dated 19.05.2008, for AY 1995-96 in ITA No. 3403/M/1999 dated 19.09.2009 and for AY 1996-97 in ITA No 5470/M/2002 dated 26.07.2013.

39. We have considered the rival submission of the parties and have gone through the orders of Tribunal in assessee's own case for AY 1992-93 in ITA No.3400/M/1999 dated 19.05.2008, for AY 1995-96 in ITA No. 3403/M/1999 dated 19.09.2009 and for AY 1996-97 in ITA No 5470/M/2002 dated 26.07.2013 for AY 1992-93 in ITA No. 3400/M/1999 the coordinate bench of the Tribunal passed the following order.

> *"30. The next issue is regarding deduction amounting to Rs. 32,2,7534/- being staff welfare expenses on account of payments made to educational institution for reservation of seat to the children of employees. The ld. authorized representative of the assessee has pointed out that the amount paid to schools for reservation of seats for children of the employees.*
>
> *31. The facts, in brief, are that the assessing officer disallowed these expenses as these were not staff welfare expenses in the true sense of the word, because, they were meant for only few officers of the bank and because of this, these were contrary to the Constitutional provision of law and opposed to the public policy also. The ld.CIT (A), following his appellate order for assessment year 1987-88, also confirmed the same. Aggrieved by this, the assessee is in appeal before us.*
>
> *32. The ld counsel submitted that the officers of the assessee bank was subject to frequent transfer, hence, to avoid difficulty to them in getting admission for their children in good educational institution, the assessee had made a policy to contribute to few institution for some seats in various cities and, therefore, the expenditure incurred on this account was allowable as staff welfare expenses. The ld. counsel contended that it was available to all officers of the bank and not merely to some officers of the*

*rank as held by the AO. The ld counsel contended that in AY 1987-88, this issue arose before the tribunal and was decided against the assessee for the reasons that assessee did not furnished details of expenditure before the revenue authorities, however, in the present year, the details of payments were available and referred to the relevant pages of compilation. Accordingly, he contended that the aforesaid decision of the tribunal was not applicable for the year under consideration. The ld counsel, therefore, placed strong reliance on the decision of the Hon'ble jurisdictional High Court in case of Mahindra & Mahindra as reported in (261 ITR 501) where the assessee provided donation to an education Society which ran a school in which children of the employees of the company were studying and the Hon'ble court held the same allowable as expenditure incurred for business purpose. The ld. counsel also contended that Mumbai Tribunal in the following two cases also held so.*

*Indian oil Corporation Ltd (ITA Nos 4923& 6063/Mum/1989(Mum) pages 432 to 8 of the compilation.*

*Nuclear Power Corporation of India Ltd (ITA No. 336/Mum/1999 (page 29 to 32 of compilation.*

*The ld counsel also placed reliance on the following judicial decision in this regard.*

*Shri Venkatsatyanarayana Rice Mills vs CIT [223 ITR 101](SC)*

*CIT versus Indian radiators Ltd 436 ITR 719 Madras*

*CIT versus Emiici Engineering Ltd 242 ITR 86*

*CIT versus Travancore Cochin chemicals Ltd 243 ITR 284*

*33. The ld DR on the other hand, contended that this facility was restricted to only officers and not employees, hence, it was arbitrary and unreasonable, hence, assessee being a government owned bank falling within the definition as per Article 12 of the Constitution of India could not do so and, therefore, expenditure was correctly disallowed by the revenue authorities.*

*34. We have considered the submissions made by both the sides, material on record and orders of authorities below. We find that the Tribunal in earlier assessment years 1987-88 rejected the claim of the assessee for want of details whereas in the present case the assessee has submitted these details,*

*hence, this decision of the tribunal in that year is not applicable. We find that both the revenue sources have treated this expenditure as opposed to the public policy, however, in our view the same cannot be a valid reason for disallowing the expenditure because this aspect does not come within the provision of IT Act 1961. We are further of the opinion that it is a matter of corporate policy where policies of this type are framed after due consultation with employees/officers Association, hence, it cannot be treated as arbitrary. Further, the officers of the bank to not get any bonus whereas the employees get bonus which can also be treated as arbitrary in the similar manner, if the contention of the revenue are accepted. As far as incurrence of this expenditure for business purpose is concerned, that is not doubted. In this background, we hold that the expenditure incurred by the assessee is allowable as revenue expenditure. Thus, this ground of the assessee stands accepted."*

40. Thus, considering the order of coordinate bench in assessee's own case for 1992-93, which was followed by the Tribunal in appeal for AY 1995-96 in ITA No. 3403/M/1999 dated 19.09.2009 and for AY 1996-97 in ITA No 5470/M/2002 dated 26.07.2013 and allowed the similar ground of appeal. Thus, respectfully following the order of Tribunal the ground of appeal raised by the revenue is dismissed.

41. Ground No.2 relates to deleting the exchange Gain on repatriation GDR issue proceeds of Rs. 165,55,18,946/-. The ld. DR for the revenue filed a written synopsis on this ground. In the written synopsis the ld. DR contended that assessee bank created Global Depository receipt (GDR), but later on remitted GDR issue receipts for utilizing the same in India for business. Hence, at the time of issue of remittance of GDR issue proceeds whatever gain on account of exchange is there, it is the additional benefit,

not because of appreciation of GDR kept ideally but, while remitting the same, this gain came into account, which is incidental to the business. Therefore, such exchange gain is to be regarded as revenue income of a banking company, because of very purpose of remittance and utility thereof. The assessing officer rightly appreciated in the assessment order that GDR proceed is not for the purpose of capital asset, but for utilization as circulating capital itself in the normal course of banking business. Obviously, such income has incurred in the course of carrying on business as such GDR funds were utilized in normal course of business for advancing and investment, having interest element. As such exchange gain, as accepted by the appellant, in Note No.11 of the computation of income, has profit through exchange gain on inward remittance and is definitely revenue in nature. This arguments gets support from the proposition of the case of CIT versus Vs V.S. Dempo & Co (P) Ltd [1994] 72 taxman 134(Bom). On the other hand ld. AR of the assessee supported the order of CIT(A) and contended that in Note No. 11 to the return of income the assessee has explained the facts. The ld AR of the assessee argued that the gain has not occurred in the normal course of assessee's business. The GDR issue was in the nature of foreign currency held on capital account, accordingly, the profit through exchange gain on inward remittance is capital in nature. The ld AR for the assessee relied upon the decision in CIT Versus Canara Bank (63 ITR 328)(SC), Sutlej Cotton Mills Ltd versus

CIT (166 ITR 108), Laurids Knudsen Maskinfabrik Ltd Vs ITO (77 ITD 212), SSI Ltd Vs DCIT (85 TTJ 1049), CIT Vs Telco Ltd (60 ITR 405) (SC), Homi Mehta & Sons Pvt Ltd Vs CIT (222ITR 528) (Bom) and EID Parry Ltd (174 ITR 11) (Mad).

42. We have considered the rival submission of the parties and have gone through the orders of authorities below. The assessing officer disallowed exchange Gain on repatriation GDR holding that gain of the amount arise from the money raised against the equity capital, had been realized in the normal course of business and was utilized as circulating capital in banking. We have noted that the AO has not disputed the facts that the money raised by way of GDR was raised against capital equity. Before the ld. CIT (A) the assessee contended the similar submissions as before us. After considering the submissions of assessee the ld CIT (A) concluded that the law has been laid down by various courts that the test to be applied in case of exchange at fluctuation is whether the depreciation/ appreciation in value has taken place in a capital asset or in a trading asset or in other words in fixed capital or circulating capital. It was further held by ld CIT (A) that GDR's form part of the share capital of the bank and are not in the nature of loan. The exchange gain has arisen on account of holding of GDR proceed and their subsequent repatriation to India. Accordingly, the exchange gain is capital in nature and not liable to tax. Moreover, the assessing officer has not disputed those facts that the money

raised by way of GDR was raised against capital equity. Thus, we find that the ld CIT (A) allowed the ground of appeal after considering the fact that GDR proceeds are part of capital receipt. Hence, do not find any illegality or infirmity in the order passed by CIT (A). In the result this ground of appeal is dismissed

43. Ground No3 relates to deleting of disallowance of interest on securities. The ld. DR for the revenue relied upon the order of assessing officer. On the other hand the ld AR of the assessee argued that this ground of appeal is covered in favour of assessee is in assessee's own case for assessment year 1991-92 by the order of Tribunal dated 19th May 2008, which was followed by Tribunal in subsequent assessment year assessment year 195-96. And again allowed similar relief in appeal for assessment year 1996-97 in its order dated 26 July 2013. Further the Hon'ble Bombay High Court on the appeal of the revenue in assessment year 1996-97 upheld the decision of Tribunal, vide order dated fasteners 2016.

44. We have considered the rival submission of the parties and gone through the orders of authorities below. We have also perused the order of Tribunal in earlier assessment years. We have noted that the coordinate benches of Tribunal in appeal for AY 1996-97 in ITA NO. 5470/M/2002, while following the order of earlier year passed the following order:

> 31. Ground No. 10 is regarding interest on securities due to difference between accrual and due method. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. We note that an identical issue has been considered and decided by this Tribunal in assessee's own case

for the assessment year 1991-92. Further for the assessment year 1995-96 again the Tribunal has considered and decided this issue in para 16 & 17 as under:

"16. As regards ground No. 8 relating to the addition of Rs. 2,45,42,24,967/- made by the A.O. and confirmed by the ld. CIT(A) on account of interest on securities holding the same to be taxable on accrual basis instead of due basis, it is observed that this issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for earlier years vide its order dated 19.05.2008 (supra) wherein a similar addition was deleted by the Tribunal for the following reasons given in Para 20:

"We have considered the submissions made by both sides, material on record and orders of authorities below. We find that the Tribunal in the case of Union Bank of India (supra) after going through various facts and various judicial decisions held as under:

"In the course of the arguments, the ld. Counsel for the assessee had made a submission that though in the profit & loss account the Interest on Govt. securities are credited on day to day basis, for purposes of computation of total income under the Income Tax Act, the credit entries are deleted from the net profit and are substituted by the interest that has become due during the year on specified dates and offered to tax. It was pointed out that the interest that is offered to tax in the return of income has also been assessed to tax by the A.O. In order to verify the submission, we directed the assessee to furnish the relevant statements to us. These were filed along with a covering letter which was taken on record. We find that in the profit & loss account the year ended 31.12.1987, interest on Govt. securities amounting to Rs. 138,06,30,075/-has been included in the credit side. However, in the computation of total income for income tax purposes, the interest has been reduced from the net profit and interest of Rs. 138,06,30,075/- has been included in the coupon date basis. In the assessment order for the A.Y. 1988-89, a copy of which was also filed before us. The Assessing Officer has accepted the above computation made by the assessee.

With regard to the contention that the assessee cannot set up a claim in the return of income which is altogether different from the manner in which entries are made in its accounts, we may notice the judgment of the Supreme Court in the case of United Commercial Bank in 240 ITR 355(SC). While reversing the judgment of the Calcutta High Court reported in 200 ITR 68 (Cal), wherein it was held that the assessee cannot prepare the computation of its income from income tax purposes in a manner different form the method under which it keeps accounts. It was held by the Supreme Court that preparation of the balance sheet in accordance with the statutory provisions of the banking Regulation Act would not disentitle the assessee in submitting the income tax return on the real taxable income in accordance with a method of accounting adopted by the assessee consistently and regularly. For the purpose on income tax, what is to be taxed is the real income and in assessing the real income, the assessee cannot be bound by the manner in which its balance sheet is prepared under a particular statute. Thus, merely because in the balance sheet or the profit & loss account, the assessee bank before us has taken credit for the interest on Govt. securities on day today basis, it cannot be prevented from urging in the return that such interest accrues not on day to

day basis but only on the specified coupon dates and that this is the correct legal position on the basis of which its income should be computed. Therefore, we reject the contention of the ld. (D.R.).

For the above reasons, we accept the assessee's claim and hold that the interest on Govt. securities cannot be assessed "de die in diem". We direct the A.O. to assess the interest on the basis of the coupon dates. Ground No. 2 is allowed."

Similarly, the Tribunal in the case of Housing Development and Finance Corporation (supra), following the aforesaid decision of the Tribunal, has also held that Section 145 of the Act could not override the provisions of Section 5 and, therefore, no person could be assessed unless the income accrued to him and in the cases of Securities, interest accrued to the assessee on specified dates and not on day today basis as the assessee has no right to receive the income before fixed date, hence, interest was taxable on the due basis only. In this view of the matter, we accept this ground of the assessee."

17. Moreover, as rightly submitted by the learned counsel for the assessee, the decision of Mumbai bench of Income Tax Appellate Tribunal in the case of Dy. CIT Vs Housing Development & Finance Corporation Ltd. 98 ITD 319 and that of the Hon'ble Kerala High Court in the case of C.I.T Vs Federal bank Ltd., 301 ITR 188 also support the assessee's case on this issue. Respectfully following these judicial pronouncements, we delete the addition made by the A.O. and confirmed by the ld. CIT(A) on this issue and allow ground No. 8 of assessee's appeal."

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

45. Thus, considering the order of coordinate bench in assessee's own case for 1992-93, which was followed by the Tribunal in appeal for AY 1995-96 in ITA No. 3403/M/1999 dated 19.09.2009 and for AY 1996-97 in ITA No 5470/M/2002 dated 26.07.2013 and allowed the similar ground of appeal. Thus, respectfully following the order of Tribunal the ground of appeal raised by the revenue is dismissed.

46. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 31st day of January 2018.

| Sd/- | Sd/- |
|---|---|
| **(G.S. PANNU)** | **(PAWAN SINGH)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Mumbai; Dated 31/01/2018
S.K.PS

**Copy of the Order forwarded to :**

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

BY ORDER,

(Asstt.Registrar)
**ITAT, Mumbai**