

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "J" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 6042/Mum/2008  
Assessment Year: 2002-03**

**&**

**ITA No. 1898/Mum/2011  
Assessment Year: 2002-03**

BFIL Finance Ltd. (formerly  
ITC Bhadrachalam Finance &  
Investment Ltd.) Eucharistic  
Congress Building No. 1, 4<sup>th</sup>  
floor, 5, Convent Street,  
Colaba,  
Mumbai-400039.

Vs. The Income-tax  
Officer-1(1)-1  
Aayakar Bhavan,  
Maharshi Karve Road,  
Mumbai-400020.

**PAN No. AAACI3193H**

**(Appellant)**

**(Respondent)**

Assessee by : Mr. F. V. Irani, AR  
Revenue by : Ms. Arju Garodia, DR

Date of Hearing : 08/03/2018  
Date of pronouncement: 28/03/2018

**ORDER**

**PER N.K. PRADHAN, AM**

The captioned appeals filed by the assessee/appellant are directed against the order of the Commissioner of Income Tax (Appeals)-I, Mumbai and arise out of the assessment completed u/s 143(3) and penalty order u/s 271(1)(c) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to

dispose them off through a consolidated order for the sake of convenience.

**ITA No. 6042/Mum/2008**  
**Assessment Year: 2002-03**

2. The 1<sup>st</sup> ground of appeal

The CIT(A) erred in confirming the disallowance of balance of Rs.1,79,80,120/-, out of the total loss of a sum of Rs.2,21,92,554/- claimed on termination of a Hire Purchase Contract with a one Zen Global Finance Ltd., after allowing a sum of Rs.42,12,434/-, representing bad debts.

2.1 Briefly stated, the facts of the case are that the assessee had entered into a hire purchase agreement with Zen Global Finance Ltd. (in short 'ZGFL') whereby the assessee had given its plant and machinery costing Rs.3,05,63,112/-. As per the terms of agreement, the said ZGFL had pledged some of equity shares as security. Subsequently, ZGFL defaulted in making payment of hire purchase instalment from September 1996. Consequently, the assessee sold the shares pledged to it by ZGFL to recover a part of the dues. ZGFL submitted a written proposal on 24.05.2001 for payment of a total sum of Rs.25 lacs for settlement of the dues. The assessee submitted before the AO that since no recovery could be made till that date from ZGFL, it agreed to accept the above payment towards settlement of dues. Accordingly, the assessee worked out the loss on termination of contract and claimed the same as bad debt. The details are as under:

	Amount in Rs.
Value of stock on hire (unpaid installments unpaid of future	26014707
Less: unmatured finance charges (unpaid hire	5534587

charges to future)	
Net balance (unpaid principal component)	20480120
Add: Balance in sundry debtors a/c	4212434
Amount due	24692554
Less: Amount received towards settlement - as discussed above	25,00,000 -----
Balance shown as loss on termination of contract	2,21,92,554 =====

2.2 The AO was not convinced with the above working of the assessee and held that the assessee-company was managed by prudent and experienced managerial personal and it was not possible to agree for settlement of huge dues for a paltry sum of Rs.25 lacs. He considered it to be a concocted story which is not to be believed. He further asked the assessee to explain why no steps had been taken to acquire and sell the assets of ZGFL for realizing the dues.

The assessee explained to the AO that ZGFL was a finance company and it was having no major assets. The assessee had filed a case u/s 138 of the Negotiable Instrument Act, which did not enable the assessee to obtain their dues. Even after the promoters of the company were sent to jail, there was no settlement proposal from their end. The assessee could not get possession of its assets given on hire purchase because ZGFL had given it on further lease to another company which was closed.

However, the AO was not convinced with the above explanation of the assessee and relying on the decision in *Mc Dowell & Co. Ltd. v. ITO* 154 ITR 148 (SC), disallowed the claim of loss of Rs.2,21,92,554/-.

2.3 Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held :

“3.6 I have carefully considered the submissions of the Ld. AR and gone through the assessment order. So far as the outstanding lease rentals amounting to Rs.42,12,434/- are concerned, this can be allowed as a bad debt, if the amount has been offered as income earlier on mercantile principles. The AO is therefore directed to verify the correctness of the claim and allow it.

3.7 So far as the major amount of outstanding principal and interest in respect of leased assets is concerned, the disallowance of the loss is justified. The appellant was doing the business of leasing and financing. When it leased out such huge machines to ZGFL, it must have done its homework regarding the financial position of the said party. In any case if ZGFL became a defaulter by not paying the lease rent, the easiest and surest way of recovery was at least to get back the leased machines. The appellant is a businessman and it has leased out such costly machines to ZGFL. There is no evidence that the appellant has made any effort at least to retrieve these assets. Such huge machines cannot just vanish without trace, without any possibility of recovery. Under the circumstances I am not satisfied that this is a genuine case of loss arising out of termination of assets contract. Under the circumstances the loss arising out of the leased deal has been correctly disallowed by the AO and added to the appellant's income. Out of the total loss of Rs.2,21,92,554/- claimed, Rs.42,12,434 represents bad debt which is allowed. The disallowance of balance loss of Rs.1,79,80,120/- is confirmed.”

2.4 Before us, the Ld. counsel of the assessee submits that the assessee had entered into a hire purchase agreement with ZGFL dated 08.03.1995, whereby it had given plant and machinery costing Rs.3,05,63,112/-. As per the terms of agreement, ZGFL had pledged some equity shares as security. ZGFL had defaulted in making payment

of hire purchase instalments from 30.09.1996. Consequently, the assessee had sold the shares pledged by ZGFL to recover a part of the dues. The assessee had also initiated legal proceedings against ZGFL in Chennai and Mumbai u/s 138 of the Negotiable Instruments Act for default by ZGFL in making the payments. There was not much progress against the case filed at Mumbai, since the accused was not attending the cases. During 1998-99, M/s Jamsheed Pandey and Mathew Sebastian (Promoters of ZGFL) were arrested in Chennai in connection with some other cases (Indian Bank case) and were in Chennai jail. When the assessee came to know about this, it had taken a PIT Warrant (Prisoner in Transit) against them and their detention in jail was extended by three more months against the case of the appellant. The above mentioned promoters had requested the assessee to withdraw the cases filed against them on the plea stating that they did not have any money to pay the assessee in view of the default by their debtor. The following Banks/Institutions also had exposure in ZGFL:

- a) Indian Bank
- b) Times Bank
- c) Dhanalaxmi Bank
- d) Bank of Madura
- e) IREADA
- f) Transcorp Finance

In connection with the Indian Bank Scam, the Income Tax Department had also attached the Bank Accounts of ZGFL.

Even after the promoters were jailed, the assessee was not able to recover any dues from ZGFL. On May 24, 2001, ZGFL submitted a written proposal for payment of a total sum of Rs.25 lacs in instalments for settlement of their dues. Since no recovery could be made till that date from ZGFL, the assessee agreed to accept this

payment towards settlement of the dues from ZGFL. Accordingly, after receiving payment of Rs.25 lacs, the balance outstanding amount of Rs.2,21,92,554/- was written off in the books of account in December, 2001, as loss on termination of contract.

2.4.1 Referring to the chart narrating the net amount written off in December, 2001, the Ld. counsel submits that in appeal the Ld. CIT(A) has allowed the balance in sundry debtors account of Rs.42,12,434/-. So there is no reason to confirm the balance amount of Rs.1,79,80,120/-.

Reliance is also placed by him on the decision in *CIT v. Dhanrajgirji Raja Narasingirji* (1973) 91 ITR 544 (SC).

2.5 On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

2.6 We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision is given below.

In the instant case, the assessee had initiated legal proceedings against ZGFL in Chennai and Mumbai u/s 138 of the Negotiable Instruments Act for default by ZGFL in making the payments. On 24.05.2001, ZGFL submitted a written proposal for payment of a total sum of Rs.25 lacs in instalments for settlement of their dues. Since no recovery could be made till that date from ZGFL, the assessee agreed to accept this payment towards settlement of their dues from ZGFL. In *Dhanrajgirji Raja Narasingirji* (supra), it is held :

“that the assessee had incurred the expenditure for the purpose of his business. It was for the assessee to decide how best to protect his own interest. It was the duty of the assessee to see that the prosecution was

properly conducted. The fact that he did not leave the carriage of the case in the hands of the prosecuting agency of the Government was no ground for disallowing the expenditure. It was not open to the department to prescribe what expenditure the assessee should incur and in what circumstances he should incur that expenditure.”

In the case of *TRF Ltd. v. CIT* (323 ITR 397) (SC), the Hon’ble Supreme Court has held that:

“After 01.04.1989, for allowing deduction for the amount of any bad debt or part thereof under section 36(1)(vii) of the Act, it is not necessary for assessee to establish that the debt, in fact has become irrecoverable; it is enough if bad debt is written off as irrecoverable in the books of accounts of assessee.”

In the case of *DIA v. Oman International Bank* (313 ITR 128) (Bom.) it has been held that after amendment to section 36(1)(vii), it is neither obligatory nor is there any burden on the assessee to prove that debt written off by him is indeed a bad debt as long as it is *bona fide* and is based on commercial wisdom or expediency.

In the case of *CIT v. Star Chemicals (Bombay) Limited* (313 ITR 126) (Bom), it has been held that if assessee has written off debt as bad debt, that would satisfy purpose of section 36(1)(vii).

We find that the assessee after receiving payment of Rs.25 lacs, has rightly written off the balance outstanding amount of Rs.2,21,92,554/- in the books of account in December, 2001 as loss on termination of contract. This view is supported by the ratio laid down in the decisions mentioned hereinbefore.

2.7 In view of the above reasons, we delete the disallowance of Rs.1,79,80,120/- made by the Ld. CIT(A) and allow the 1<sup>st</sup> ground of appeal.

3. The 2<sup>nd</sup> ground of appeal

The CIT(A) erred in confirming the disallowance of depreciation of Rs.34,65,465/- on assets acquired and given on lease, based on the appellate order of earlier years.

3.1 The assessee had claimed a sum of Rs.34,65,465/- towards depreciation on leased assets which was included in the depreciation claimed amounting to Rs.1,43,20,292/- u/s 32(1) of the Act. The AO was guided by the assessment order for AY 2001-02 which has been confirmed by the Ld. CIT(A). Thus the AO made a disallowance of Rs.34,65,455/- and added back to the total income of the assessee.

3.2 In appeal, the Ld. CIT(A) followed the decision in *Mid East Portfolio Management v. DCIT* 87 ITD 537 (Mum), *Asia Brown Bavary* 154 Taxman 512 (SC) and also the order of the Tribunal in *Marico Industries* (ITA No. 3373/Mum/2002), *J.M. Shares & Stock* (ITA No. 4658/Mum/1998) and confirmed the disallowance of Rs.34,65,465/- made by the AO by following the order of his predecessor for AY 1996-97.

3.3 Before us, the Ld. counsel of the assessee submits that the above issue has been set aside by the Tribunal in assessee's own case for the AY 1996-97 and therefore, the matter may be restored to the AO.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

3.4 We have heard the rival submissions and perused the relevant materials on record. As mentioned earlier, the Ld. CIT(A) has followed the appellate order of his predecessor for AY 1996-97. However, the ITAT 'J' Bench, Mumbai in assessee's own case for AY 1996-97 (ITA No. 4502/Mum/2004) held:

"6. Thus, from the above, it is seen that he has relied upon the order of the Commissioner (Appeals) for assessment year 1995-96 for dismissing the assessee's claim on merits without appreciating that the learned Commissioner (Appeals), in the said order, has not discussed the issue on merit. The proper opportunity of hearing on merits has not been provided by the learned Commissioner (Appeals) as evident from the records. Before us, the learned Counsel has contended that the matter should be restored to the file of the Assessing Officer to re-examine this issue afresh because even the Assessing Officer has placed reliance on certain material without confronting to the assessee and has also violated the principles of natural justice. Under these facts and circumstances, we restore the matter back to the file of the Assessing Officer to deal and decide this issue afresh after giving due and effective opportunity of hearing to the assessee and direct the Assessing Officer to provide relevant material to the assessee as are available in his assessment record and decide the issue in accordance with the provisions of law. While framing the assessment, the Assessing Officer may also consider the Special Bench decision of the Mumbai Tribunal, in *Indusind Bank Ltd. v/s ACIT*, [2012] 135 ITD 161 (SB) (Mum.) if it is found applicable on the facts of the case. We order accordingly. Thus, grounds no.1 and 2, along with additional grounds as above are treated as allowed for statistical purposes."

Facts being identical, we set aside the order of the Ld. CIT(A) and direct the AO to follow the above order of the Co-ordinate Bench for the impugned assessment year.

Thus the 2<sup>nd</sup> ground of appeal is allowed for statistical purposes.

3.5 The Ld. counsel of the assessee submits that the assessee would not press the 3<sup>rd</sup> ground of appeal due to smallness of the amount. Hence, the 3<sup>rd</sup> ground of appeal is dismissed as not pressed.

4. In the result, the appeal filed by the assessee is partly allowed.

**ITA No. 1898/Mum/2011**  
**Assessment Year: 2002-03**

5. The grounds of appeal raised by the assessee in this appeal are against the order of the Ld. CIT(A) upholding the order of the AO u/s 271(1)(c).

5.1 The AO levied a penalty of Rs.76,61,777/- in respect of the following disallowances/additions made by him.

(i) loss on termination of contract Rs.1,79,80,120/-

(ii) depreciation on leased assets Rs.34,65,465/-

(iii) disallowance u/s 14A Rs.15,976/-

5.2 In appeal, the Ld. CIT(A) confirmed the penalty levied by the AO on item no. (i) and (ii) whereas he deleted the penalty levied on item no. (iii).

5.3 On merits, we have deleted the disallowance of loss on termination of contract of Rs.1,79,80,180/-. The order of the Ld. CIT(A) confirming disallowance of depreciation of Rs.34,65,465/- on leased assets has been set aside and the matter has been restored to the file of the AO for a *de novo* order. It has been held by the Hon'ble Supreme Court in *K. C. Builders v. ACIT* (2004) 265 ITR 562,569 (SC) that where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no

basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled. Similar is the position in case the order of the CIT(A) is set aside and the matter is restored to the file of the AO.

In view of the above position of law, the penalty confirmed by the Ld. CIT(A) on disallowance of termination of contract of Rs.1,79,80,120/- and depreciation on leased assets of Rs.34,65,465/- is set aside.

6. In the result, the appeal filed by the assessee is allowed.

7. To sum up, the appeal in ITA No. 6042/Mum/2008 is partly allowed whereas the appeal in ITA No. 1898/Mum/2011 is allowed.

**Order pronounced in the open court on 28/03/2018.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 28/03/2018

*Rajiv Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

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

//True Copy//

BY ORDER,

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