आयकर अपीलीय अधिकरण, मुंबई "बी" खंडपीठ मे

Income-tax Appellate Tribunal -"B"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं अमरजीत सिंह, न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and Amarjit Singh,Judicial Member

आयकर अपील सं./I.T.A./5729/Mum/2014,**निर्धारण वर्ष** /Assessment Year: 2009-10

BFIL Finance Limited Eucharistic Congress Building No.1, 4th Floor, 5, Convent Street, Colaba Mumbai-400 005. **PAN:AAACI 3193 H**	Vs.	The ACIT circle-1(1) Aayakar Bhavan, M.K. Road Mumbai-400 020.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent)**

राजस्व की ओर से / **Revenue by:** Shri Suman Kumar-DR

अपीलार्थी की ओर से /**Assessee by:** Shri F.V. Irani

सुनवाई की तारीख / **Date of Hearing: 05/04/2018**

घोषणा की तारीख / **Date of Pronouncement: 23/05/2018**

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

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

लेखा सदस्य ,राजेन्द्र के अनुसार -PER RAJENDRA, AM-

Challenging the order dated 30/06/2014 of the CIT(A)- 1,Mumbai,the Assessee has filed present appeal. The assessee is an NBFC company, filed its return of income on 24/09/2009 declaring total income at NIL.The case was selected for scrutiny and the AO completed assessment on 29/12/2011, determining its income at Rs.47.45 lakhs u/s.143(3) of the Act.

2.First ground of appeal is about upholding the disallowance of bad debts of Rs.4.71 crores written off by the assessee during the year under consideration.During the assessment proceed-ings,the AO found that the assessee had claimed bad debts of Rs.4,71,27,259/- with regard to two parties,namely,ATV Projects India Ltd(ATV)-Rs.2.24 and VHEL Ltd.(VHEL)-Rs.2.47 crores,that the assessee claimed that the above amounts represented the earlier years' provision for bad debts,that same were offered to tax.The AO directed the assessee to justify the stability of the present deduction as per the provisions of section 36(1)(vii) of the Act. After considering the reply of the assessee,dated 03/11/2001,he held the amounts claimed represented reduction in value of lease assets to ATV and reduction in HP gross asset value and un-matured finance charges with VHEL upon settlement of the claims,that the very nature of the amounts claimed on account of reduction in asset value could not be regarded as revenue expenditure,that the assessee had not brought anything on record to substantiate the claim that amounts were earlier offered for taxation, that the basic conditions stipulated by the provisions of section 36 (1) (vii) and 36 (2) of the Act were not fulfilled,that the assessee

made contradictory claim,that it could not arbitrarily, irrelationally or malafiedly treat a good debt is bad debt and write it off in its books of accounts,that the assessee had not established that amounts written off were in fact trading debts.Finally,he disallowed the claim, made by the assessee, to the tune of Rs. 4.71 crores.

2.1. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority(FAA)and made detailed submissions.After considering assessment order and submissions of assessee,he held that the it had given assets to ATV and VHEL on hire-purchase, that under the said arrangements the amount of hire charges/rentals became due from such policies which had been subsequently claimed as bad debt,that the disputed amounts were un -realised rental/hire charges for the assets given on lease. He referred to the provisions of section 36(vii) read with section 36 (2) of the Act and relied upon the case of Travancore Tea Estates Company Ltd.(197 ITR 528) and observed that amounts in question were outcome of breach of obligation by the lessee/agents of the assessee, that it had admitted that legal proceedings were initiated for breach of obligations by the contracting parties, that there was some mutual arbitration/settlement, that as a result of such understanding amounts had been waived off by the assessee,that the amounts could not be treated as bad debts and would not qualify for deduction u/s. 36 of the Act, that the dues from the respective parties who was amounts by way of lease rentals,that same were not in the nature of advances made to them or other sums due from them as a result of trading transactions.Finally, upholding the order of the AO, he dismissed the appeal filed by the assessee.

2.2. During the course of hearing before us, the Authorised Representative (AR) stated that the assessee had leased certain assets to above-mentioned two entities, that it filed cases against both of them for cheque bouncing, that one-time settlement was arrived at, that in one case out of total outstanding the assessee had written off Rs. 2.24 crores, that in the case the other party it had written off Rs. 2.47 crores, that assessee was a NBFC,that the loss incurred by it was for carrying on its normal business,that in the earlier year the assessee had shown the income from lease rentals under the head business income, that the AO had accepted the claim of the assessee.He relied upon the cases of Shreyas Morarka (342 ITR 285) and Progressive Stock Management Company Private Ltd.(ITA/1487/Kolkata/2016).He further argued that the second limb of the section 36(2)(i) would apply to the transaction in question, that the AO and the FAA were applying first limb of the subsection.

The Departmental Representative(DR)contended that the assessee did not make any provision for bad debts, that it had not explained as to how the amount of the earlier years were accounted for.

2.3. We have heard the rival submissions and perused the material before us.We find that the assessee made a claim under the head bad debts of Rs.4.71 crores,that it was claimed that ATV and VHEL had failed to pay the rentals, that assessee had initiated court proceedings against both the parties,that the matter was settled mutually,that out of the total dues the assessee could recover only a part of said amount,that the AO disallowed the claim made by the assessee under the head bad debts written off.It is a fact that the assessee is a NBFC and was advancing loans to its customer as one of its objects.It is not denied that assessee was entitled to get rentals from both the parties and that they did not make the payments. The decision of the assessee to write off Rs.4.71 crores was a commercial/business decision.The AO/FAA's cannot question the business prudence of an assessee.It is said that AO should not enter into the shoes of the assessee.Provisions of section 36 (2)read as under:

> "*In making any deduction for a bad debt or part thereof, the following provisions shall apply-*
> *(i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year,* ***or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee ;"*****(emphasis supplied).**

The above provisions clearly stipulate that in case of companies engaged in the business of lending normal provisions of section 36 would not apply and that bad debts written off by them have to be given separate treatment.Here,we would like to refer to the case of Progressive Stock Management Company Private Ltd.(supra),wherein similar issue was decided in favour of the assessee.Otherwise also,the expenditure is allowable as business loss, as per the provisions of section 28 of the Act. There is no dispute that the disputed transaction is a business transaction and therefore loss suffered by the assessee has to be allowed. Considering the above,we decide the first ground of appeal in favour of the assessee.

3.Second ground of appeal is about disallowance of Rs.10 lakhs,being amount paid for reaching an out of court settlement. During the assessment proceedings, the AO found that the assessee had debited the profit and loss account by an amount of Rs.10 lakhs under the head legal and professional fees. He directed the assessee to file an explanation in that regard. After considering the same, he observed that disputed amount was paid by the assessee to its 100% subsidiary entity, namely,MRR Trading and Investment Company Ltd.(MRR),that the assessee had claimed that it had no officer space for its operation in Mumbai,that MRR had agreed to allow it to use the office premises hired by it and owned by Roman Catholic Cathedral Trust (RCCT),that RCCT file a suit against the subsidy company for eviction of the premises stating that other group businesses of MRR were using the premises, that an out of

court settlement was reached with RCCT, that the assessee agreed to pay an amount of Rs. 10 lakhs, that as per the agreement with the subsidy company the assessee made the payment.The AO further observed that disputed amount could not be allowed as revenue expenditure.Holding it to be a capital expenditure,he negated the claim made by the assessee.

3.1. During the appellate proceedings,before the FAA,the assessee made detailed submissions and relied upon certain cases.After considering the available material, he held that the amount had been paid for use of the premises,that an out of court settlement was reached,that the nature of the expenditure was towards defending and ensuring the rights and privileges in the nature of entitlements which were part of an asset,that the payment involved was not for any of the direct business activities and operations of the assessee,that it was not clear as to whether the premises was actually used exclusively for the business of the assessee, that the amount of Rs. 10 lakhs was not allowable u/s. 37 (1) of the Act.

3.2. Before us,the AR contended that no assets had come into existence,that assessee was using the premises of MRR,that the payment was made as per the agreement made with MRR,that it was revenue expenditure.Alternatively(GOA-3), it was argued that depreciation should have been allowed by departmental authorities if the expenditure was treated as capital expenditure.He relied upon the case of Madras Auto Services Private Ltd (233 ITR468).The DR supported the order of the FAA.

3.3. We have heard the rival submissions.The undisputed facts are that assessee was using the premises of its subsidiary company,that RRCT initiated court proceedings,that out of court settlement was made by the assessee,that it paid Rs.10 lakhs on behalf of the subsidiary company,that the AO and the FAA held that the disputed amount was of capital nature.We find there is no doubt about incurring of expenditure.The assessee has not acquired any capital asset by paying Rs.10 lakhs to RCCT.So,reversing the order of the FAA and relying upon the case of Madras Auto Services Private Ltd (supra),we decide second ground in favour of the assessee.

4.Third ground of appeal is an alternative ground to the earlier ground. As we have allowed the second ground of appeal, so,we allow the third ground of appeal for statistical purposes.

5.Next effective ground of appeal(Gs.AO.4 & 5) is about set off and carryforward of unabsorbed depreciation pertaining to AY.s 1997-98 to 2000-01 and not directing the AO to

quantify the amount of business loss and unabsorbed depreciation to be carried forward for set off against the income of subsequent years.

Before us,the AR relied upon the case of Hindustan Unilever Ltd (394 ITR 73)and the DR supported the order of the FAA.

5.1. We find that the honorable jurisdictional High Court in the case of Hindustan Unilever Ltd (supra)has dealt with the same issue,that in the cases of Schott glass India Private Ltd. (ITA/867/Mum/2015-AY.2010-11,dated,08/03/2017),New Holland Fiat (I) Private Ltd. (ITA/ 7574/Mum/2012-AY.2008-09,dated,03/05/2017)and GSM Structures Ltd (ITA/4086/ Mum/ 2014-AY.2008-09,dated,30/03/ 2016) identical issue has been decided against the revenue and in favour of the assessee.We would like to reproduce the relevant portion of the judgment of the honorable Bombay High Court in the case of Hindustan Unilever Ltd. (supra) and it reads as under:

"6. Regarding question No. 7 :
(a) The impugned order of the Tribunal has allowed the respondent- assessee's appeal on the issue of allowing unabsorbed depreciation pertaining to the assessment years 1996-97 and 1997-98 which was carried forward to be set off in the subject assessment year.
(b) The grievance of the appellant is that in view of the fetter (of eight years) in carrying forward depreciation for the assessment year 1997-98 up to the assessment year 2002-03, the set off of the same cannot be allowed in this assessment year.
(c) We find that the impugned order of the Tribunal while allowing the assessee-respondents' claim follows the decision of the Gujarat High Court in General Motors India Pvt. Ltd. v. Deputy CIT reported in [2013] 354 ITR 244 (Guj) wherein on identical facts it was held that the unab sorbed depreciation for the assessment year 1997-98 up to the assessment year 2001-02 could be allowed to be set off, if it was still unabsorbed on April 1, 2001. The above decision also placed upon the Central Board of Direct Taxes Circular No. 14 of 2001, dated November 22, 2001 (see [2001] 252 ITR (St.) 62) to hold that any unabsorbed depreciation which is available on 1st day of April, 2001 would be dealt with in accordance with the provisions of section 32(2) of the Act as amended by the Finance Act of 2001. Moreover, the Circular No. 14 of 2001 issued by the Central Board of Direct Taxes clarifies that restriction of eight years to carry forward and set off the unabsorbed depreciation has been dispensed with. Consequently, unabsorbed depreciation for the intervening periods between assessment years 1997-98 up to 2001-02, if available in the assessment year 2002-03 would be allowable as part of carried forward depreciation from the assess ment year 2002-03 onwards. No decision contrary to the decision of the Gujarat High Court has been shown to us. It is clarified that although the decision of the Gujarat High Court was rendered in the context of reopening notice it has also examined the issue on merits and drew support from the Central Board of Direct Taxes circular which is beneficial to the assessee to conclude as aforesaid. Nothing has been shown to us to indicate why the decision of the Gujarat High Court in General Motors (India) Ltd. should not be followed in the present facts."

Respectfully following the above judgment,we decide ground number four and five in favour of the assessee.The AO is directed to quantify the amount of business loss and unabsorbed depreciation to be carried forward for the set of against income of the subsequent years.

As a result, appeal filed by the assessee stands allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है.

Order pronounced in the open court on 23rd May , 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 23 मई, 2018 को की गई ।

Sd/-	**Sd/-**
(अमरजीत सिंह / **Amarjit Singh**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 23.05.2018
Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR “B” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**