

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.211 & 212 /Viz/2018
(निर्धारण वर्ष/Asst.Years :2012-13 & 2013-14)

Asst.Commissioner of
Income Tax,
Central Circle-1
Visakhapatnam

Vs. The Maharaja Co-operative
Urban Bank Ltd.
49-9-14, Ganta Arcade
Dwarakanagar
Visakhapatnam

[PAN : AAAAT4196K]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

Cross Objection Nos. 32 & 33/Viz/2018
Arising out of I.T.A.Nos.211 & 212 /Viz/2018
(निर्धारण वर्ष/Asst. Years : 2012-13 and 2013-14)

The Maharaja Co-operative Urban
Bank Ltd.
49-9-14, Ganta Arcade
Dwarakanagar
Visakhapatnam

Vs. Asst.Commissioner of
Income Tax,
Central Circle-1
Visakhapatnam

[PAN : AAAAT4196K]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

राजस्व की ओर से/ Revenue by
निर्धारिती की ओर से/ Assessee by

: Shri Deba Kumar Sonowal, DR
: Shri G.V.N.Hari, AR

सुनवाई की तारीख / Date of Hearing

: 08.08.2018

घोषणा की तारीख/Date of Pronouncement

: 17.08.2018

आदेश /ORDER

Per Bench:

1. These appeals are filed by the Revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-1, Visakhapatnam vide ITA Nos. 89&226/2015-16/AC,C-1(1),VSP/2016-17 dated 15.02.2018 and the cross objections filed by the assessee for the assessment years 2012-13 & 2013-14.

2. The Revenue has raised 14 grounds in total and during the appeal hearing the Ld.DR submitted that all the grounds of appeal are related to three issues representing the 'interest on share capital', disallowance u/s 40(a)(ia) on interest paid to members for non-deduction of tax at source and the disallowance of amortization of premium paid for acquisition of HTM securities.

3. The first issue in this case is related to the interest on share capital paid to the members of the Bank. The Assessing Officer (AO) found that the assessee had debited the sum of Rs.4,55,61,020/- for the assessment year 2012-13 towards the interest paid and out of which the amount of Rs.23,64,321/- was paid towards interest on share capital for the year

2010-11. The AO issued the show cause notice calling the assessee's explanation as to why the interest on share capital should not be disallowed and the assessee has filed the explanation stating that the interest on share capital is required to be paid to the members as compulsory obligation without any choice as per A.P. Mutually Aided Cooperative Societies Act, 1995. The assessee further submitted that the share capital of the Cooperative Bank is not like equity share capital of a company registered under the Companies Act and the members having share capital are either the borrowers or the deposit holders of the bank and at the time of liquidating the deposit or the loan the share capital is required to be paid along with interest. The assessee further submitted that the members are directly or indirectly contributing to the business of the banks in the sense it is more akin to partnership business, where the interest on capital is allowed under the Act. The Cooperative Law envisages membership fee as share capital and equity deposit and thereby provides for payment of mandatory interest on the amount so contributed by the members. Therefore requested the AO to allow the expenditure debited to the P&L account. The AO not being convinced with the explanation of the assessee disallowed the interest and added back to the income holding that the interest on share capital is not an allowable deduction.

4. Aggrieved by the order of the AO, the assessee went on appeal before the Ld.CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee following the order of the ITAT, Visakhapatnam in the case of Visakhapatnam Cooperative Bank for the assessment year 2007-08 in ITA Nos.5&9/Vizag/2011 dated 29.08.2011.

5. We have heard both the parties and perused the material placed on record. The Ld.CIT(A) followed the order of this Tribunal in ITA Nos. 444 & 445, 449, 450/VIZ/2012, which is in favour of the assessee. The relevant part of the order of the ITAT, Visakhapatnam is reproduced which reads as under :

“22. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. In this case, the assessee has debited an amount of Rs.1,57,53,620/- towards interest on share capital. It was submitted that as per the section 16 of the A.P. Mutually Aided Cooperative Societies Act, 1995, it is an allowable expenditure. The A.O. has not accepted the explanation of the assessee and he has observed that the assessee has to allocate the interest on share capital only upon determination of the surplus arising from the business i.e. net profit. This is nothing but appropriation of profits but not an expenditure incurred for carrying on the business. The Ld. CIT(A) by following the decision of the coordinate bench of the Tribunal in assessee’s own case for the assessment year 2007-08 in ITA No.5/Vizag/2011 & 19/Vizag/2011 for A.Y. 2007-08 vide order dated 29.8.2011 has directed the A.O. to delete the addition made by him. It is submitted across the bar that the very same issue in the assessee’s own case is pending before the Hon’ble High Court. In view of the above, by following the coordinate bench of the Tribunal, in view of the doctrine of precedent, we dismiss this ground of appeal raised by the Department.”

5.1. Since the facts of the case are identical, respectfully following the view taken by the Coordinate Bench, we uphold the order of the Ld.CIT(A). However, we observe from the order of the AO that the interest on share capital was related to the year 2010-11 which is relevant for the assessment year 2011-12, but not the impugned year. Neither the Ld.CIT(A) nor the AO has given a clear finding with regard to the correct assessment year in which the interest was accrued. Therefore, we remit the matter back to the file of the AO to examine the issue with regard to the accrual of liability as per the system of accounting followed by the assessee and decide the issue afresh on facts and merits. The appeal of the revenue on this issue is allowed for statistical purpose.

6. The next issue is interest paid on deposits of members u/s 40(a)(ia) of the Act. This issue is involved for the assessment year 2012-13 and 2013-14. The AO found that the assessee has made the payment of Rs.2,52,84,556/-as interest to the members over and above Rs.10,000/- without deducting the TDS. Therefore, the AO disallowed interest u/s 40(a)(ia) of the Act.

7. Aggrieved by the order of the AO, the assessee went on appeal before the Ld.CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee

following the order of this Tribunal in the case of Visakhapatnam Cooperative Bank Ltd. for the assessment year 2007-08 (supra) and also order of this Tribunal in ITA Nos. 444 & 445, 449, 450/VIZ/2012 (supra).

8. Aggrieved by the order of the Ld.CIT(A), the revenue is in appeal before this Tribunal.

9. We have heard both the parties and perused the material placed on record. This issue is squarely covered by the order of this Tribunal in ITA Nos. 444 & 445, 449, 450/VIZ/2012. We extract relevant part of the order of this Tribunal which reads as under :

"43. In so far as another appeal filed by the revenue for the same assessment year i.e. 2010-11 vide ITA No.38/Vizag/2014 is concerned, the facts are in brief that the assessee has paid interest to various depositors and no TDS was deducted. The A.O. of the opinion that assessee being a cooperative society engaged in the banking business is under obligation to deduct the TDS on interest payment exceeding Rs.10,000/- in view of the specific provision u/s 194A(3)(i)(b) of the Act and the assessee has failed to deduct TDS. Therefore, the A.O. has disallowed the claim of the assessee. The Ld. CIT(A) initially confirmed the order of the A.O. Subsequently, the assessee has filed a rectification u/s 154 of the Act dated 14.12.2013 and submitted that the very same issue has been considered by the CIT(A) as well as ITAT for earlier years and decided in favour of the assessee. The Ld. CIT(A) has considered the submissions of the assessee and directed the A.O. to delete the addition by observing as under:

5.2. I have considered the submissions. The issue considered in the above appellate order was whether the assessee, a cooperative bank is required to effect TDS on payment of interest made to its members, when the amounts exceed Rs.10,000/-. A view was taken that in the above order dtd.22.10.2013 that if the interest amount exceeds Rs.10,000/- then the appellant is required to deduct TDS even if the payment was made to the members. Such a view was taken with reference to provision contained in

section 194A(3)(i)(b) and it was held that section 194A(3)(i)(b) would prevail over section 194A(3)(v) of the Act. Such a view was taken without considering the clarification given in the CBDT circular No.9 of 2002 dtd.11.09.2002. The relevant clarification in the circular reads as under:

Under section 194A of the Income-tax Act, 1961, tax is deductible at source from any payment of income by way of interest other than income by way of interest on securities. Clause(v) of sub-section (3) of section 194A exempts such income credited or paid by a cooperative society to a member thereof from the requirement of TDS. On the other hand, clause (viia) of sub-section(3) of section 194A exempts from the requirement of TDS such income credited or paid in respect of deposits (other than time-deposits made on or after 1st July, 1995) with a cooperative society engaged in carrying on the business of banking.

Representations have been received in the Board seeking clarification as to whether a member of a cooperative bank may receive without TDS interest on time deposit made with the cooperative bank on or after 1st July, 1995. The Board has considered the matter and it is clarified that a member of a cooperative bank shall receive interest on both time deposits and deposits other than time deposits with such cooperative bank without TDS under section 194A by virtue of the exemption granted vide clause (v) of sub-section (3) of the said section. The provisions of clause (viia) of the said sub-section are applicable only in case of a non-member depositor of the cooperative bank, who shall receive interest only on deposits other than time deposits made on or after 1st July, 1995 without TDs under section 194A. (emphasis underlined)

Thus the circular clarifies that provisions of section 194A(3)(v) would prevail.

5.3. In view of the clarification given in the circular the view taken in the appellate order dtd.22.10.2013 suffers from mistake and, as such a view was taken without consideration of the above referred CBDT circular clarifying the position of law, it would amount to mistake apparent from record and rectifiable u/s.154 of the I.T. Act. Further, it is noted that the assessee had relied on the CBDT circular No.9/2002 dtd.11.09.2002 and the decision of Bombay High Court in the case of Jalgaon District Central Co-operative Bank, in its appeal for A.Y.2007-08, which has been discussed and considered by the learned CIT(A) while deciding the assessee's appeal for A.Y.2007-08. The relevant extract of the CIT(A) order has been referred and discussed in the Hon'ble ITAT's order for A.Y.2007-08, (copy of which submitted as part of paper-book in the original appeal). Therefore, it cannot be said that this aspect was not considered by the Hon'ble ITAT while passing order in the assessee's appeal for A.Y.2007-08.

5.4 In view of the above discussion, I am convinced that the appellate order dtd.22.10.2013 suffers from mistake apparent from

record and the mistake is rectified by substituting the following operative para in the place of the para 6.3, 6.4 & 6.5 of the appellate order dtd.22.10.2013.

6.3 I have considered the submissions made. In view of the clarification given in the CBDT circular No.9/2002, it is held that the assessee is not required to effect TDS on the interest payment made to its members even if it exceeds Rs.10,000/-. The impugned disallowance made in the assessment is not in accordance with the clarification given in the CBDT Circular No.9/2002 and accordingly the AO is directed to delete the impugned disallowance made of Rs.5,64,79,087/-. This ground of appeal is allowed in favour of the appellant.

5.5. The appellate order dtd.22.10.2013 in ITA No.0297/12-13 be considered to be modified and rectified accordingly with reference to ground No.3 of the appeal.

44. The Ld. CIT(A) by following his own decision for the assessment year 2007-08 and also order of the Tribunal for the very same year in the rectification order he has deleted the addition made by the A.O. We find no reason to interfere with the order passed by the Ld. CIT(A). This appeal raised by the revenue is dismissed."

9.1. Since the facts are identical and the Ld.CIT(A) followed the order of Tribunal, we decide the issue in favour of the assessee and uphold the order of the Ld.CIT(A). The revenue's appeal on this ground is dismissed.

The appeal of the revenue for the assessment year 2012-13 and 2013-14 on this issue is dismissed.

10. The 3rd issue is amortization of premium paid for acquisition of HTM securities. During the assessment proceedings, the AO found that the assessee made the claim of Rs.34,037/- for the assessment year 2012-13

and Rs.26,903/- for the assessment year 2013-14 as amortization on Government securities. The AO observed that the expenditure claimed by the assessee was not actually incurred but only a provision and is in the nature of contingent liability which may be payable on future dates. Since the contingent liability does not constitute expenditure and cannot be held to be accrued or crystallized in mercantile system of accounting, the AO has allowed the expenditure actually incurred and the expenditure which was claimed over and above the actual expenditure was disallowed and added back to the income.

10.1 Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) followed CBDT Instruction No.17/2008 dated 26.11.2008 and observed that though the investment was qualified under HTM category, the premium should be amortized over the period of maturity. The Ld.CIT(A) directed the AO to examine whether the securities held by HTM category and directed that the premium paid over the cost of acquisition may be amortised over the period of maturity and the allowance may be granted. For the sake of clarity, we extract relevant part of the Ld.CIT(A) which reads as under :

7.2. 1 have considered the submissions made, In this regard, it is relevant to refer to the CBDT Instruction No.17/2008, dated 26.11.2008, wherein at para (vii), it is stated :

(vii) As per RBI guidelines dated 16th October 2000, the investment portfolio of the banks is required to be classified under three categories viz. Held to

Maturity (HTM), Held for Trading (HFT) and Available for Sale (AFS). Investments classified under HTM category need not be marked to market and are carried at acquisition cost unless these are more than the face value, in which case the premium should be amortised over the period remaining to maturity. In the case of HFT and AFS securities forming stock in trade of the bank, the depreciation / appreciation is to be aggregated scrip wise and only net depreciation, if any, is required to be provided for in the accounts. The latest guidelines of the RBI may be referred to for allowing any such claims.

7.3. *In view of the CBDT Instruction in respect of the investments classified under HTM category, the premium should be amortized over the period remaining to maturity. The AO may examine whether these securities are held under HTM category, and in such case the premium paid over the cost of acquisition may be amortized over the period of maturity and accordingly allowance may be granted."*

11. We have heard both the parties and perused the material placed on record. The issue on identical facts has come before this Bench for the assessment year 2011-12 and 2012-13 in the case of Visakhapatnam Cooperative Bank Ltd. in ITA No.362 and 371 dated 31.12.2016. For the sake of clarity and convenience, we extract para No.67 of the order of this Tribunal which reads as under :

"67. The very similar issue came up for consideration before the ITAT in the Assessment Year 2008-09 in ITA No.444/Vizag/2012, order dated 30.09.2016. The Tribunal has considered and remitted the matter back to the file of the Assessing Officer for fresh examination to decide in accordance with law. We find in the Assessment Year 2008-09, amortization of premium on government securities has been dissolved by the Assessing Officer on the ground that it is a contingent liability. The Commissioner of Income Tax (Appeals) has confirmed the order the of Assessing Officer. On appeal, ITAT remanded the matter back to the Assessing Officer for fresh consideration. In the year under consideration, the Commissioner of Income Tax (Appeals) allowed the ground raised by the assessee by following the CBDT Instruction No.17/2008 dated 26.09.2008 and also the decision of the Hon'ble Gujarat High Court in the case of Rajkot District Co-operative Bank (supra) directed the Assessing Officer to allow this claim. In our opinion, to maintain a consistency, the issue has to be remitted back to the Assessing Officer to consider the factual matrix of the case and decide in accordance with law. We therefore, set aside the order passed by the Commissioner of Income Tax (Appeals) and direct the Assessing Officer to

consider the issue afresh keeping in view of the directions given by the Commissioner of Income Tax (Appeals) for the year under consideration and also following the observations of the Tribunal for the Assessment Year 2008-09 after giving opportunity of hearing to the assessee. This ground of appeal raised by the Revenue is allowed for statistical purpose.”

11.1. Following the rule of consistency, the issue is remitted back to the file of the AO with a direction to decide the appeal afresh as per the directions given by the Ld.CIT(A) and also keeping in view of latest direction of the RBI. Accordingly appeal of the revenue on this ground is allowed for statistical purpose.

Cross Objection Nos.32/Viz/2018 and 33/Viz/2018

12. Ground No. 1 and 2 of CO No.32/Viz/2018 and Ground No.1 of CO No.33/Viz/2018 are related to the addition in respect of the interest on share capital and interest on deposits paid to the members of the society u/s 40(a)(ia) supporting the order of the Ld.CIT(A). Since the appeals filed by the Revenue are dismissed, the cross objections stand allowed.

13. Ground No.3 in CO No.32/Viz/2018 is related to sustaining the addition of Rs.28,24,916/- towards provision for standard assets. During the assessment proceedings, the AO found that the assessee claimed a sum of Rs.28,24,916/- as bad debt and reduced the same from the total income.

The AO called for the explanation of the assessee as to why the said claim should not be disallowed u/s 40(a)(ia) of the Act, since the assessee had also claimed the provision for Non Performing Asset u/s 36(1)(viia) of the Act. The assessee had replied that a sum of Rs.28,24,916/- is required to be allowed as a bad debt since the same was offered to income in the earlier assessment years and incurred over and above the provision for bad debts. Before the AO the assessee has furnished a letter from Anakapalle Municipal Corporation (AKMPC) in support of its claim for the bad debt and stated that the assessee had extended the loans to 111 employees of AKMPC to the extent of Rs.43.50 lakhs and there was default in loan repayment. The AKMPC had recovered the loans partly from the salaries of these employees and repaid to the Cooperative Bank. Meanwhile, the assessee had approached the Hon'ble A.P.High Court for settlement of the issue and the court directed the AKMPC to pay an amount of Rs.40.95 lakhs and by that time the AKMPC had paid the sum of Rs.88.02 lakhs which was over and above the sum directed by the Court and there was no need for further payment by AKMPC. Hence, the assessee bank written off the balance and bad debt. However, complete correspondence regarding the actual liability, the amount recovered and the balance remained was not produced before the AO. The assessee also did not arrive at the total

amount due, the amount recovered and the actual bad debt. There was contradictory information with regard to the bad debts recovered, reported by the bank and as reflected in the letter. The assessee also claimed the provision for bad debt in the same year. Since there was no clarity in the information submitted by the assessee and made only the provision for bad debts and non-verifiability of the bad debt claim, the amount debited by the assessee under the head 'bad debt' amounting to Rs.28,24,916/- was disallowed and added back to the income.

14. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the order of the AO holding that the amount claimed by the assessee was provision for standard assets. For the sake of clarity and convenience, we extract relevant part of the order of the Ld.CIT(A) which reads as under :

"8.3. 1 have considered the arguments of the assessee. What is provide for by the assessee is a provision on performing assets and not on the non-performing assets. it is not the case of the assessee that any of these assets have become bad or are non recoverable. It s also not the case that any of these loans/assets are written off. Assessee's only argument in this regard is that the said amount is provided as per RBI norms. As per Income-tax Act what is allowable in the hands of the normal assessee is assets that are written off as per section 36 and the provision for bad debts made as per section 36(viia). It is time and again held by many judicial forums that the norms laid down by RBI, NABARD etc are not the governing factors for allowance of any deduction. Any allowance on the bad loans has to be allowed as per the provisions of Income-tax Act and as per the circulars issued by CBDT from time to time as held by the Hon'ble Supreme Court in the cases of UCO Bank Vs. CIT 237 ITR 889; State Bank of Travancore Vs. CIT 158 ITR 102 and also in the case of Mercantile Bank Ltd Vs. CIT 283 ITR 84. Reliance in this regard is also placed on the decision of Delhi Special Bench in the case of New India Industries Lt

Vs CLI 18 SOT 51 and jurisdictional Hyderabad Special Bench decision in the case of DCIT Vs. Nagarjuna Investment Trust Ltd. Hon'ble Lucknow Tribunal in the recent decision in the case of Ameerpur District Co-operative Bank Ltd 25 Taxman 306 held that the similar view. Respectfully following all the above decisions I hold that the provision claimed by the assessed is not allowable deduction as per Income-tax Act and hence the disallowance made by AO is confirmed."

15. We have heard both the parties and perused the material placed on record. As per the AO, the assessee claimed the amount as provision for bad debts under the head 'provision for standard assets'. The assessee has not produced the correspondence between the AKMPC and the bank. The assessee has not produced any evidence to compute the correct amount of bad debt. It was also not proved by the assessee that the said amount of bad debt of Rs.28,24,916/- was not claimed as provision for bad and doubtful debts u/s 36(1)(viiia) of the Act. Due to non-verifiability of the claim made by the assessee from the angles of the provision for bad and doubtful debts and the provision for standard assets, the AO made the addition. The Ld.CIT(A) was under the impression that the claim made by the assessee was provision for standard assets. During the appeal hearing, the Ld.AR submitted that the said amount was not representing the provision for standard assets, it was in fact a bad debt, incurred over and above the provision made by the assessee u/s 36(1)(viiia). The Ld.AR also submitted that the said amount was completely written off in the books of accounts and claimed as bad debt. Therefore, argued that the said amount

is allowable as deduction. It appears from the discussion of the AO as well as the Ld.CIT(A) that the issue was not properly verified by the lower authorities. The assessee also did not furnish the required information before the lower authorities. It was also not clear, whether the assessee has claimed the said deduction u/s 36(1)(viiia) or not. Therefore, we are of the considered opinion that the issue needs detailed verification, hence, in the interest of justice, we remit the matter back to the file of the AO to examine the issue in detail and decide the issue afresh on merits after giving due opportunity to the assessee. Accordingly, this ground of the assessee in CO is allowed for statistical purpose.

16. In the result, appeals of the revenue are partly allowed for statistical purpose and the cross objections of the assessee are allowed for statistical purpose.

The above order was pronounced in the open court on 17th Aug, 2018.

Sd/-
(डि.एस. सुन्दरसिंह)
(D.S. SUNDER SINGH)

लेखा सदस्य/**ACCOUNTANTMEMBER**

विशाखापटणम /**Visakhapatnam**

दिनांक /Dated : 17.08.2018

L.Rama, SPS

Sd/-
(वी.दुर्गराव)
(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant- The Maharaja Co-operative Urban Bank Ltd.
49-9-14, Ganta Arcade, Dwarakanagar, Visakhapatnam
2. प्रत्यार्थी / The Respondent- Asst.Commissioner of Income Tax, Central Circle-
1, Visakhapatnam
3. The Pr.Commissioner of Income Tax-1, Rajahmundry
4. The Commissioner of Income Tax (Appeals)-1, Visakhapatnam
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
6. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM