

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

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.199/Viz/2016

(निर्धारण वर्ष/Assessment Year: 2012-13)

Joint Commissioner of
Income Tax (OSD), Vijayawada

Vs. The Gandhi Cooperative
Urban Bank Ltd.

Vijayawada

[PAN :AAAAT8072G]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

आयकर अपील सं./I.T.A.No.461/Viz/2016

(निर्धारण वर्ष/Assessment Year: 2013-14)

Deputy Commissioner of Income Tax
Circle-2(1), Vijayawada

Vs. The Gandhi Cooperative
Urban Bank Ltd.

Vijayawada

[PAN :AAAAT8072G]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

Cross Objection No.01/Viz/2018

(Arising out of I.T.A.Nos.199/Viz/2016)

The Gandhi Cooperative Urban
Bank Ltd., Vijayawada

Vs. Joint Commissioner of Income
Tax (OSD), Vijayawada

[PAN :AAAAT8072G]

Cross Objection No.02/Viz/2018

(Arising out of I.T.A.No.461/Viz/2016)

The Gandhi Cooperative Urban
Bank Ltd., Vijayawada

Deputy Commissioner of
Income Tax

[PAN :AAAAT8072G]

Circle-2(1), Vijayawada

निर्धारिती की ओर से/ Assessee by

: Shri C.Subrahmanyam, AR

राजस्व की ओर से/ Revenue by

: Smt U Mini Chandran, DR

सुनवाई की तारीख / Date of Hearing

: 20.08.2018

घोषणा की तारीख/Date of Pronouncement

: 05.09.2018

आदेश / O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

These appeals are filed by the Revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)], Vijayawada vide ITA No.435/CIT(A)/VJA/2014-15 dated 29.01.2016 for the assessment year 2012-13 and ITA No.194/CIT(A)/VJA/2015-16 dated 23.08.2016 for the assessment year 2013-14 and Cross Objections filed by the assessee in support of the order of the CIT(A) for the assessment years 2012-13 and 2013-14.

Since the issues involved in these appeals are common, they are clubbed, heard together and disposed off in a common order for the sake of convenience as under.

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2. The first issue in this appeal is related to the interest on Non Performing Assets. For the assessment year 2012-13, the assessee has claimed the deduction of Rs.46,79,284/- accrued interest on Non-Performing Assets. Since the assessee is cooperative bank and following mercantile system of accounting, the Assessing Officer (AO) found that the

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interest required to be offered to income on accrual basis, whereas, the assessee admitted the interest on non-performing assets on receipt basis. Since there was deviation from the method of accounting followed by the assessee, the AO held that as per the system of accounting followed, the interest required to be admitted on accrual basis. Since the assessee failed to admit the same as income, the AO made the addition of Rs.46,79,284/- representing the interest on Non-Performing Assets. Similarly for the assessment year 2013-14, the AO made the addition of Rs.72,29,895/- representing the interest on non performing assets.

3. Aggrieved by the order of the AO, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) deleted the addition following the order of this Tribunal in the assessee's own case for the assessment year 2009-10. For the sake of clarity and convenience, we extract relevant part of the order of the Ld.CIT(A) in para No.5.2.2 and 5.2.3. which reads as under :

"5.2.2. I find that the issue involved is identical to the issue in the earlier appellate orders in this case, wherein the issue was decided in favour of the appellant. For Asst. Year 2009-10 in appellant's Own case, the Hon'ble ITAT, Visakhapatnam vide order in ITA No.469/Vizag/2012 dated 30.11.2015 upheld the decision of the CIT(A). The relevant portion of the order is reproduced as under:

"10. Considering the facts and circumstances of the case and also applying the ratios of the judgements discussed above, we are of the view that interest on a loan whose recovery is doubtful and which has not been recovered by the assessee-bank, but has been

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kept in a suspense account and has not been brought to the P&L No of the assessee, could not be included in the income of the assessee. The CIT(A) rightly deleted the additions towards interest on NPAs. There is no error or infirmity in the order of CIT(A). Accordingly, we direct the AO to delete the additions made towards interest on NPAs."

5.2.3. Respectfully following the order of the Hobbie ITAT vide order mentioned above, I direct the Assessing Officer to delete the addition of Rs.46,79,282/ made on account of accrual of interest on NPAs."

4. We have heard both the parties and perused the material placed on record. During the appeal hearing, the Ld.AR submitted that on identical facts in the case of District Cooperative Central Bank, Eluru Vs. ITO, Ward-2, Eluru in ITA No.49 & 50/Viz/2012 for the assessment year 2007-08 and 2008-09 in order dated 25.01.2018, the ITAT held that the interest on Non-Performing Assets is to be recognized on actual receipt basis, but not on accrual basis. The ITAT has followed the decision of Hon'ble Gujarat High Court in the case of Mahila Sewa Sahakari Bank Ltd. (2016) 140 DTR Guj 113 while delivering the decision. For the sake of clarity and convenience, we extract relevant part of the order of this Tribunal which is made available in para No.26.1.2 to 28 which reads as under :

"26.1. We have heard both the parties and perused the materials available on record. In the case of Sri MahilaSewaSahakari Bank Ltd. (supra), Hon'ble High Court of Gujarat held the issue in favour of the assessee. The head note of the above case reads as under:

Income-Accrual – Interest on non-performing assets of co-operative bank- In so far as the computation of taxability is concerned, the same is solely governed by the provisions of the IT Act and the accounting

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principles have no role to play – However, recognition of income stands on a different footing-Insofar as income recognition is concerned, it would be the RBI Directions which would prevail in view of the provisions of s. 45Q of the RBI Act and s. 145 would have no role to play-Hence, the AO has to follow the RBI Directions-In view of the mandate of the RBI Guidelines the assessee cannot recognise income from non-performing assets on accrual basis but can book such income only when it is actually received – Until a circular is revoked, the same continues to be in force and the Circular F.No.201/21/84-ITA-II, dt.9th Oct.1984 having been issued to mitigate the hardships caused to the class of assesseees covered by the circular, such assesseees would be entitled to the benefit thereof-Merely because by virtue of the provisions of s. 43D, a certain class of assesseees is given benefit under the provisions of the Act would not mean that the same would override the circular-Tribunal was therefore right in laws and on facts in holding that interest on non performing assets is not taxable on accrual basis looking to the guidelines of the RBI.

Hon'ble High court with regard to recognition of income in para No.19 to 23 held as under:

19. Section 45Q of the RBI Act, which is relevant for the present purpose, reads thus:

"45-Q. Chapter III-B to override other laws.—The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

20. Section 45Q finds place in Chapter IIIB of the RBI Act. Thus, the provisions of Chapter IIIB of the RBI Act have an overriding effect qua other enactments to the extent the same are inconsistent with the provisions contained therein. In order to reflect a bank's actual financial health in its balance sheet, the Reserve Bank has introduced prudential norms for income recognition, asset classification and provisioning for advances portfolio of the co-operative banks. The guidelines provided thereunder are mandatory and it is incumbent upon all co-operative banks to follow the same. Insofar as income recognition is concerned, clause 4.1.1 of the circular provides that the policy of income recognition has to be objective and based on the record of recovery. Income from non-performing assets (NPA) is not recognised on accrual basis but is booked as income only when it is actually received. Therefore, banks should not take to income account interest on non-performing assets on accrual basis. Thus, in view of the mandate of the RBI Guidelines the assessee cannot recognise income from non-performing assets on accrual basis but can book such income only when it is actually received. Thus, this is a case where at the threshold, the assessee, in view of the RBI Guidelines, cannot recognise income

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from NPA on accrual basis. This is, therefore, a case pertaining to recognition of income and not computation of the income of the assessee.

21. The Supreme Court in *Southern Technologies Ltd. (supra)* has held that the 1998 Directions are only disclosure norms and have nothing to do with computation of total income under the IT Act or with the accounting treatment. The 1998 Directions only lay down the manner of presentation of NPA provision in the balance sheet of an NBFC. The court has referred to the deviations between the RBI Directions and the Companies Act as follows:

'42. Broadly, there are three deviations:


- (i) in the matter of presentation of financial statements under Schedule VI to the Companies Act;
- (ii) in not recognising the "income" under the mercantile system of accounting and its insistence to follow cash system with respect to assets classified as NPA as per its norms;
- (iii) in creating a provision for all NPAs summarily as against creating a provision only when the debt is doubtful of recovery under the norms of the accounting standards issued by the Institute of Chartered Accountants of India.

These deviations prevail over certain provisions of the Companies Act, 1956 to protect the depositors in the context of income recognition and presentation of the assets and provisions created against them. Thus, the P&L account prepared by NBFC in terms of the RBI Directions, 1998 does not recognise "income from NPA" and, therefore, directs a provision to be made in that regard and hence an "add back". It is important to note that "add back" is there only in the case of provisions." [Emphasis supplied]

22. Therefore, in terms of the above decision, where an assessee makes provision for NPA and seeks deduction of such amount under section 36(1)(vii) or section 37 of the Act, then in the computation of income, the RBI Guidelines would have no role to play, and hence, an add back. Insofar as income recognition is concerned, the Supreme Court has held thus:

"Applicability of Section 145

57. At the outset, we may state that in essence the RBI Directions, 1998 are prudential/provisioning norms issued by RBI under Chapter III-B of the RBI Act, 1934. These norms deal essentially with income recognition. They force the NBFCs to disclose the amount of NPA in their financial accounts. They force the NBFCs to reflect "true and correct" profits. By virtue of Section 45-Q, an overriding effect is given to the RBI Directions, 1998 vis-à-vis "income recognition" principles in the Companies Act, 1956. These Directions constitute a code by itself. However, these RBI Directions, 1998 and the IT Act operate in

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different areas. These RBI Directions, 1998 have nothing to do with computation of taxable income. These Directions cannot overrule the "permissible deductions" or "their exclusion" under the IT Act. The inconsistency between these Directions and the Companies Act is only in the matter of income recognition and presentation of financial statements. The accounting policies adopted by an NBFC cannot determine the taxable income. It is well settled that the accounting policies followed by a company can be changed unless the AO comes to the conclusion that such change would result in understatement of profits. However, here is the case where the AO has to follow the RBI Directions, 1998 in view of Section 45-Q of the RBI Act. Hence, as far as income recognition is concerned, Section 145 of the IT Act has no role to play in the present dispute."

Thus, insofar as income recognition is concerned, the court has held that even the Assessing Officer has to follow the RBI Directions, 1998 in view of section 45Q of the RBI Act and that as far as income recognition is concerned, section 145 of the Income-tax Act, has not role to play.

23. In the light of the above discussion what emerges is that while determining the tax liability of an assessee, two factors would come into play. Firstly, the recognition of income in terms of the recognised accounting principles and after such income is recognised, the computation thereof, in terms of the provisions of the Income-tax Act, 1961. Insofar as the computation of taxability is concerned, the same is solely governed by the provisions of the Income-tax Act and the accounting principles have no role to play. However, recognition of income stands on a different footing. Insofar as income recognition is concerned, it would be the RBI Directions which would prevail in view of the provisions of section 45Q of the RBI Act and section 145 would have no role to play. Hence, the Assessing Officer has to follow the RBI Directions.

Hon'ble Gujarat High Court has considered the decision of Hon'ble Supreme Court in the case of Southern Technologies which was relied by the Ld. CIT(A) and held that since section 45Q of the RBI Act shall have overriding effect over the income recognition, followed by the cooperative banks also the A.O. has to follow the RBI directions. In para No.14, the Hon'ble High Court has considered the issue with regard to the method of accounting applied for recognizing the income and held that the method of accounting followed by the assessee is in accordance with the accounting practice. The assessee also relied on the decision of Hon'ble High Court of Bombay in the case of CIT Vs. DeogiriNagariSahakari Bank Ltd. (2015) 128 DTR (Bom) 0209 head notes, which reads as under:

Income-Accrual-Interest on sticky advances-Assessee being a co-operative bank also governed by the RBI and thus the directions with regard to the prudential norms issued by the RBI are equally applicable to the co-operative banks-Tribunal was therefore justified in deleting addition on

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account of interest on sticky advances – UCO Bank Vs. CIT(1999) 154 CTR (SC) 88:(1999)4SCC 599 and Mercantile Bank Ltd. Vs. CIT (2006) 202 CTR (SC) 457 : (2006) 5 SCC 221 followed.

27. This Tribunal in the case of Gandhi Co-operative Urban Bank Limited in ITA No.469/Vizag/2012 dated 30.11.2015 has considered the similar issue and allowed the interest on non-performing assets. The relevant extract of this Tribunal in para No.7 to 10 is extracted as under:

7. We have gone through the reason given by the CIT(A) as well as the case laws relied upon by the assessee. The A.R. of the assessee at the time of hearing submitted that the issue is squarely covered by the decision of ITAT Visakhapatnam bench in the case of DCIT Vs. Durga Co-operative Urban Bank Ltd. (supra). We have examined the case law referred by the A.R. in the light of the facts of the present case and find that the ITAT, Visakhapatnam bench in the above mentioned case on similar facts held the issue in favour of the assessee. The relevant portion is reproduced as under:

“10. Turning to the facts of the case before us, the assessee herein is a cooperative bank and it is not in dispute that it is also governed by the Reserve Bank of India. Hence the directions with regard to the prudential norms issued by the Reserve Bank of India are equally applicable to the assessee as it is applicable to the companies registered under the Companies Act. The Hon'ble Supreme Court has held in the case of Southern Technologies Ltd (Supra), that the provision of 45Q of Reserve Bank of India Act has an overriding effect vis-à-vis income recognition principle under the Companies Act. Hence Sec.45 Q of the RBI Act shall have overriding effect over the income recognition principle followed by cooperative banks also. Hence the Assessing Officer has to follow the Reserve Bank of India directions 1998, as held by the Hon'ble Supreme Court.

10.1 Based on the prudential norms, the assessee herein did not admit the interest relatable to NPA advances in its total income. The Hon'ble Delhi High Court in the case of VasisthChayVyapar Ltd. (Supra) has held that the interest on NPA assets cannot be said to have accrued to the assessee. In this regard, the following observations of Hon'ble Delhi High Court in the above cited case are relevant:

“What to talk of interest, even the principle amount itself had become doubtful to recover. In this scenario it was legitimate move to infer that interest income thereupon has not “accrued”.

The said decision of the Hon'ble Delhi High Court is equally applicable to the issue in our hands. Accordingly we do not find any infirmity with the decision of the learned CIT (A) in holding that the interest income relatable on NPA advances did not accrue to the assessee. Accordingly we uphold his order.”

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8. An identical issue came up for consideration before the ITAT Pune Bench in the case of Vaidyanath Urban Co-op. Bank Ltd. Vs. CIT in ITA No.413/PN/2014 dated 31.3.2015, wherein the ITAT under similar set of facts held as under:

“10. Turning to the facts of the case before us, the assessee herein is a cooperative bank and it is not in dispute that it is also governed by the Reserve Bank of India. Hence the directions with regard to the prudential norms issued by the Reserve Bank of India are equally applicable to the assessee as it is applicable to the companies registered under the Companies Act. The Hon’ble Supreme Court has held in the case of Southern Technologies Ltd (Supra), that the provision of 45Q of Reserve Bank of India Act has an overriding effect vis-à-vis income recognition principle under the Companies Act. Hence Sec.45 Q of the RBI Act shall have overriding effect over the income recognition principle followed by cooperative banks also. Hence the Assessing Officer has to follow the Reserve Bank of India directions 1998, as held by the Hon’ble Supreme Court.

Based on the prudential norms, the assessee herein did not admit the interest relatable to NPA advances in its total income. The Hon'ble Delhi High Court in the case of VasisthChayVyapar Ltd (Supra) has held that the interest on NPA assets cannot be said to have accrued to the assessee. In this regard, the following observations of Hon'ble Delhi High Court in the above cited case are relevant:

What to talk of interest, even the principle amount itself had become doubtful to recover. In this scenario it was legitimate move to infer that interest income thereupon has not "accrued".

The said decision of the Hon'ble Delhi High Court is equally applicable to the issue in our hands. Accordingly we do not find any infirmity with the decision of the learned CIT (A) in holding that the interest income relatable on NPA advances did not accrue to the assessee. Accordingly we uphold his order."

Following the aforesaid discussion, which has been rendered on an identical issue under similar circumstances, we find no reasons to interfere with the ultimate conclusion of the CIT(A) in deleting the impugned addition relating to interest income in respect of NPAs."

9. The Hon’ble Supreme Court of India, in the case of UCO Bank Vs. CIT had an occasion to consider the issue. The Hon’ble Supreme Court, while

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dealing with similar issue held as under:

“The method of accounting which is followed by the assessee-bank is mercantile system of accounting. However, the assessee considers income by way of interest pertaining to doubtful loans as not real income in the year in which it accrues, but only when it is realised. A mixed method of accounting is thus followed by the assessee-bank. This method of accounting adopted by the assessee is in accordance with accounting practice. Up to the asst. yr. 1978-79, the CBDT's circular of 6th Oct., 1952 would be applicable; while from the asst. yr. 1979-80, the CBDT's circular of 9th Oct., 1984 is made applicable. In the present case, the assessment was made on the basis of the CBDT's circular of 9th Oct., 1984, since the assessment pertains to asst. yr. 1981-82 to which the circular of 9th Oct., 1984, is applicable. Under sub-s. (2) of s. 119, without prejudice to the generality of the Board's power set out in sub-s. (1), a specific power is given to the Board for the purpose of proper and efficient management of the work of assessment and collection of revenue to issue from time to time general or special orders in respect of any class of incomes or class of cases setting forth directions or instructions, not being prejudicial to assessees, as the guidelines, principles or procedures to be followed in the work relating to assessment. Such instructions may be by way of relaxation of any of the provisions of the sections specified there or otherwise. The Board thus has power, inter al/a, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars in exercise of its statutory powers under s. 119 which are binding on the authorities in the administration of the Act. Under s. 119(2)(a), however, the circulars as contemplated therein cannot be adverse to the assessee. Thus, the authority which wields the power for its own advantage under the Act is given the right to forego the advantage when required to wield it in a manner it considers just by relaxing the rigour of the law or in other permissible manners as laid down in s. 119. The power is given for the purpose of just, proper and efficient management of the work of assessment and in public interest. It is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Hard cases which can be properly categorised as belonging to a class, can thus be given the benefit of relaxation of law by issuing circulars binding on the taxing authorities. If the Board has considered it necessary to lay down a general test for deciding what is a doubtful debt, and directed that all ITOs should treat such amounts as not forming part of the income of the assessee until realized, this direction by way of a circular cannot be considered as travelling beyond the powers of the Board under s. 119. Such a circular is binding under s. 119. The circular of 9th Oct., 1984, therefore, provides a test for recognising whether a claim for interest can

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be treated as a doubtful claim unlikely to be recovered or not.”

10. *Considering the facts and circumstances of the case and also applying the ratios of the judgements discussed above, we are of the view that interest on a loan whose recovery is doubtful and which has not been recovered by the assessee-bank, but has been kept in a suspense account and has not been brought to the P&L a/c of the assessee, could not be included in the income of the assessee. The CIT(A) rightly deleted the additions towards interest on NPAs. There is no error or infirmity in the order of CIT(A). Accordingly, we direct the A.O. to delete the additions made towards interest on NPAs.*

28. *Since the facts are identical, respectfully following the view taken by the decision of Hon'ble Gujarat High Court in the case of Sri MahilaSewaSahakari Bank Limited (supra) and the other decisions cited supra, we hold that the interest on NPA is to be recognized on actual receipt basis but not on accrual basis. Accordingly, we set aside the orders of the lower authorities and delete the addition. The appeal of the assessee on this ground is allowed.”*

4.1. Since the facts are identical, respectfully following the view taken by this Tribunal in the case cited supra, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue. Accordingly, the appeals of the revenue for the assessment years 2012-13 and 2013-14 on this ground are dismissed.

5. The next issue in this appeal is related to the gratuity premium paid to LIC Gratuity Fund. For the assessment year 2012-13, the assessee debited the amount of Rs.11,00,000/- towards the gratuity premium paid to LIC of India for exclusive benefits of its employees under irrevocable

trust. Since the fund to which the said premium is seen to have been paid is not an approved fund, the AO held that the assessee's contribution (employer's contribution) to such fund is not allowable deduction u/s 36(1)(v) of the Act and accordingly disallowed the same and added back to the income. The amount disallowed for the assessment year towards the payment of gratuity premium to LIC was Rs.27,384/-

6. The assessee went on appeal before the CIT(A) and the Ld.CIT(A) allowed the appeal of the assessee following the decision of ITAT Hyderabad 'B' Bench in the case of ACIT, Circle-3(2), Hyderabad Vs. Sri Krishna Durga Limited, Hyderabad in ITA No. 2126/Hyd/2011 dated 11.04.2012.

7. We have heard both the parties and perused the material placed on record. During the appeal hearing, the Ld.AR submitted that on identical facts, the ITAT, Visakhapatnam in the case of ACIT, Circle-1(1), Guntur Vs. The Guntur District Cooperative Central Bank Ltd., Guntur decided the issue in favour of the assessee and held that the payment made to group gratuity fund of the LIC is allowable deduction. For ready reference, we

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extract relevant part of the order of this Tribunal in para No. 4 which reads as under :

“During the appeal hearing the Ld.AR argued that issue is squarely covered in favour of the assessee in the case of Dist. Co-operative Central Bank, Eluru in I.T.A. Nos. 49 & 50/Viz/2012 for the assessment years 2007-08 and 2008-09 dated 25.01.2018. The ITAT in the case supra, allowed the appeal of the assessee, following the decisions of ITAT, Hyderabad and ITAT, Ahmedabad benches. For the sake of clarity and convenience, we extract relevant para No.8 to 10 of the ITAT order which reads as under.

8. *We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee is a cooperative bank and created the group gratuity fund/trust of the District Co-operative Central Bank Employees but the same was not yet approved by the CIT. Pending receipt of approval, the assessee had made application to LIC of India under pension and group schemes, and taken policy under Master proposal for group for payment of gratuity on 1.7.2003, and is contributing the sums to the LIC of India towards the group gratuity on actuarial basis. The assessee has not made any provision and made the payment before filing the return of income. On happening the event, the assessee bank is receiving the gratuity payment from the LIC which is being paid to the employee concerned and no further deduction is being claimed by the assessee as expenditure. Thus no double deduction is claimed. The expenditure claimed by the assessee under group gratuity scheme to LIC of India was allowed in the earlier years prior to 2007-08. During the previous year relevant to the assessment year 2007-08, the A.O. disallowed the same since the payment made to LIC of India towards group gratuity scheme is not covered by section 36(1)(v), 40A(7)(b) & 40A(9) of the Act because the assessee has not satisfied the conditions. The argument of the assessee is that since the payments were made to LIC of India in Master policy scheme, the premiums contributed to the LIC of India is allowable deduction and relied on the decisions of coordinate bench of Hyderabad in the case of Capital IQ Information Systems (India) Pvt. Limited (supra). The Hon'ble ITAT Hyderabad Bench while deciding the issue on similar facts held as under:*

8. *We have heard the arguments of the parties, perused the material on record and have gone through the orders of the authorities below. We find that the issue is squarely covered by the decision of the ITAT, Hyderabad in the case of M/s. Sri Krishna Drugs Ltd. Vs. Department of Income-tax in ITA No.2126/Hyd/2011*

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for AY 2007.08 dated 11.4.2012, where the JM was one of the party.
 The Tribunal in the said case held as follows:

3. The second ground raised by the Revenue is as under:

"The learned CIT(A) erred in holding that unrecognised gratuity fund is allowable u/s. 37(1), when the case is hit by the provisions of section 40A(9) and especially when the assessee failed to comply with the provisions of section 36(1)(v)."

3. After hearing both the sides, we find this issue is covered in favour of the assessee and against the Revenue in I.T.A. No. 198/Hyd/2011 in assessee's own case for A.Y. 2006-07 order dated 16.12.2011 wherein this Tribunal held as follows:

"3. After hearing both the parties, we are of the opinion that similar issue came up for consideration in assessee's own case for assessment year 2002-03 in I.T.A. No. 349/Hyd/2006. The Tribunal decided the issue in favour of the assessee vide its order dated :15.2.2008 by holding as follows:

"4. We have considered rival submissions on either side and also perused the material available on record. Admittedly, the Group Gratuity Scheme was not recognised by the Commissioner of Income-tax. This fact is not in dispute. We have carefully gone through the provisions of sec. 36(1)(v) of the Income-tax Ac. Sec. 36(1)(v) reads as follows:

"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 -

(v) any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust".

We have also carefully gone through the provisions of sec. 37 of the Income-tax Act. Sec. 37 provides for deduction of expenditure not being in the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenditure

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of the assessee, but laid out and expended wholly and exclusively for the purposes of the business or profession, while computing income chargeable to tax. The main contention of the Revenue is that under sec. 36(1)(v), the payment made by the assessee as employer could be allowed only in respect of approved gratuity fund. Since the Group Gratuity Scheme is not approved by the CIT, according to the Revenue, it cannot be allowed. However, the contention of the assessee is that in view of the judgement of the Madras High Court in the case of Premier Spinning Mills Ltd. (supra) and the judgement of the jurisdictional High Court in the case of Warner Hindustan Ltd. (supra), it has to be allowed.

5. We have carefully gone through the judgement of the jurisdictional High Court in the case of Warner Hindustan Ltd. (supra). In the case before the jurisdictional High Court, the Provident Fund was not approved by the CIT. The Andhra Pradesh High Court after referring to the judgement of the Bombay High Court in Tata Iron & Steel Co. Ltd. v. D. V. Bapat, ITO (1975) 101 ITR 292, and the judgement of the Supreme Court in Metal Box Company of India Ltd. vs. The Workmen (1969) 73 ITR 53, held that the amount paid towards an unapproved gratuity fund can be deducted under sec. 37 of the I.T. Act, though not under sec. 36(1)(v). In view of this judgment of the jurisdictional High Court, in our opinion, even if any payment is made to an unapproved gratuity fund, it has to be allowed under sec. 37. By respectfully following the binding judgement of Andhra Pradesh High Court in the case of Warner Hindustan Ltd. (supra), we uphold the order of the CIT(A).

In view of the above discussion, we dismiss the ground taken by the Revenue."

5. In view of the above decision of this Tribunal, the ground raised by the Revenue is dismissed."

9. Since the issue under consideration is materially identical to the one decided by the ITAT in the case of M/s. Sri Krishna Drugs Ltd. (supra), respectfully following the same, we set aside the order of the CIT(A) and allow the ground of appeal of the assessee."

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9. Similarly, ITAT Ahmedabad Bench in the case of Baroda Gujarat Grameen Bank cited (supra) held that the payment made to LIC of India is not a provision but it is actual expenditure claimed under the gratuity contribution. Hon'ble ITAT Ahmedabad Bench held that since assessee has not claimed the provision and claimed on actual basis, the expenditure is allowable deduction. For ready reference, we reproduce para Nos.4 & 5 of the order of the Hon'ble ITAT Ahmedabad Bench which reads as under:

"4. We have considered the rival submissions and material available on record. Section 40A (7) of the IT Act provides that subject to provision of clause (b), no deduction shall be allowed in respect of any provision made by the assessee for payment of gratuity to his employer on their retirement or on termination of their employment for any reason. It is clear from the above provision that section 40A (7) of the IT Act would apply in respect of the provision only. However, in the case of the assessee, the assessee claimed deduction of the expenditure on account of actual expenses claimed under the head gratuity contribution. ITAT Ahmedabad Bench in the case of New Bharat Engineering Works (Jam) Ltd. (supra) held "Disallowance under s. 40A(7) - Gratuity - Actual payment of funds to LIC and not mere provision - Not hit by s. 40A(7) - CIT vs Gujarat Machine Tools (ITA 666/A hd/1985) followed". Hon'ble Punjab & Haryana High Court in the case of CIT Vs Bitoni Lamps Ltd. 144 Taxman 33 held that "Section 40A(7) of the Income-tax Act, 1961 - Business disallowance - Gratuity - Assessment year 1979-80 - Assessee-company claimed deduction under section 40A(7) (b) (i) on account of gratuity actually deposited in fund created by it - Whether such a claim could only have been disallowed if it had been proved that gratuity, in respect of which said payment had been made, had not become payable during previous year - Held, yes - Whether in absence of such a case made out by revenue, Tribunal was right in holding that grant of approval of gratuity fund was not relevant for purpose of instant case as said deduction was not being claimed on account of any provision and amount of gratuity was an allowable deduction - Held, yes".

5. Considering the above aspects, we do not find any infirmity in the order of the learned CIT(A) in deleting the addition. There is no merit in the departmental appeal. Same is accordingly dismissed."

10. In the case of Verizon Data Services India Pvt. Ltd. (supra) the coordinate bench of Madras held that payment made to gratuity fund maintained with LIC has no control over the irrevocable trust created exclusively for the benefit of employees and deduction shall be allowed. The coordinate bench of

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Madras while deciding the appeal relied on the decision of Hon'ble Madras High court in the case of Textool India Pvt. Limited (supra) (civil appeal No.447 of 2003). In the instant case the assessee has made the payments to the LIC towards group gratuity scheme directly in approved schemes. The assessee has also obtained the policy in favour of the bank. The assessee has no control over the funds contributed to LIC towards the gratuity. The assessee is receiving the gratuity payment directly from the LIC of India as per the scheme which is paid to the employee on happening of the event i.e. retirement or death or resignation. Therefore, the facts of the assessee's case are squarely covered by the decisions cited supra. The coordinate bench of Hyderabad while delivering the ruling relied on the decision of jurisdictional High Court in the case of Warner Hindustan Ltd. Since the facts are identical, respectfully following the view taken by the coordinate benches, we hold that the assessee is entitled for the deduction for payment of gratuity to LIC and accordingly, we set aside the order of the lower authorities and allow the appeal of the assessee.

8.1 Since the facts are identical, respectfully following the view taken by this Tribunal in the case cited, we hold that the actual payment made to Group Gratuity Fund of LIC needs to be allowed as deduction. Accordingly, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue."

7.1. Since the issue involved is identical, respectfully following the view taken by this Tribunal in the case cited, we hold that actual payment made to group gratuity fund of LIC required to be allowed as deduction. Accordingly, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue for both the assessment years 2012-13 and 2013-14.

8. The assessee filed cross objections supporting the order of the Ld.CIT(A). However, the cross objections are filed beyond the due date without filing condonation petition. Therefore, cross objections are dismissed in limine.

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9. In the result, appeals of the revenue for the assessment years 2012-13 and 2013-14 are dismissed and cross objections of the assessee for the assessment years 2012-13 and 2013-14 are dismissed in limini.

The above order was pronounced in the open court on 5th Sep, 2018.

Sd/-
(वी.दुर्गा राव)
(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER**
विशाखापटणम /**Visakhapatnam**
दिनांक /Dated : 05.09.2018
L.Rama, SPS

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

लेखा सदस्य/**ACCOUNTANT MEMBER**

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

1. निर्धारिती/ The Assessee-The Gandhi Cooperative Urban Bank Ltd. D.No.29-36-21, Museum Road, Governorpet, Vijayawada – 520 002
2. राजस्व/ The Revenue –
 - (i) JCIT (OSD), Circle-2(1), Central Revenues Building, M.G.Road, Vijayawada-520 002
 - (ii) DCIT, Circle-2(1), Vijayawada
3. The Pr.Commissioner of Income Tax, Vijayawada
4. The Commissioner of Income Tax(Appeals),Vijayawada
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
- 6.गार्डफ़ाईल / Guard file

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Sr. Private Secretary
ITAT, VISAKHAPATNAM