IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No.29/Coch/2018
Assessment Year : 2009-10

The Assistant Commissioner of Income-tax,Circle-1(1), Trivandrum.	**Vs.**	M/s. Kerala State Electricity Board, Vydyuthi Bhavan, Pattom, Trivandrum-695 004. [PAN:AABCK 5896J]
(Revenue-Appellant)		**(Assessee-Respondent)**

I.T.A. No.30/Coch/2018
Assessment Year : 2009-10

M/s. Kerala State Electricity Board, Vydyuthi Bhavan, Pattom, Trivandrum-695 004. [PAN:AABCK 5896J]	**Vs.**	The Assistant Commissioner of Income-tax,Circle-1(1), Trivandrum.
(Assessee-Appellant)		**(Revenue-Respondent)**

Revenue by	Smt. A.S. Bindhu, DR
Assessee by	Shri Pankajakshan C. Govind, CA

Date of hearing	23/10/2018
Date of pronouncement	01/11/2018

O R D E R

Per CHANDRA POOJARI, AM:

The appeal filed by the Revenue and the appeal filed by the assessee are directed against the order of the CIT(A), Trivandrum dated 24/11/2017 and pertain to the assessment year 2009-10.

2. The Revenue has raised the following grounds:

> 1. The CIT(A) erred in deleting the addition made u/s. 43B of the I.T. Act amounting to Rs.248,91,12,986/- bein the electricity duty payable to Govt. of Kerala.
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> 2. The CIT(A) failed to note that the Hon'ble Kerala High Court's decision in the assessee's owncase for the earlier years (AYs 2002-03 to 2005-06) reported in 329 ITR 91 and relied on by him has not become conclusive as the SLP filed by the department is pendin before the Apex Court s
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> 3. The CIT(A) ought to have noticed that the electricity duty payable to Govt. of Kerala were receipts by the assessee which were kept outside the P&L account to take a stand that these are not expenses to be disallowed u/s. 43B and ought to have upheld the additions made by the Assessing Officer.
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> 4. The electricity charges are in the nature of payments receivable by the Govt. of Kerala and M/s. KSEB is a person who is managing the business of collection of these charges (as this activity is vested with this board and governed by the Electricity Duty Act, 1963 and read with Electricity Supply Act, 1948 and hence clearly it is an income from business u/s. 28(ii)(d). Hence the duty collected by the assessee constitutes trading receipts received during the ordinary course of its business and consequently when the payment is made to the Govt., the deduction under the Income Tax Act is allowed as business expenditure. Thus, if any sum is not paid within the due date fixed by the statute under Electricity Duty Act, it is to be disallowed u/s. 43B of the Income Tax Act.

5. The CIT(A) ought to have brought his attention to the decision of the High Court of Gujarat on identical issue as reported in CIT vs. Ahmedabad Electricity Company (262 ITR 97) wherein the High Court has held, after an analysis of the provisions of Bombay Electricity Duty, 1958, whose provisions are analogous to the provisions of Kerala State Electricity Duty Act, 1963, that, "the liability of the electricity company to pay the duty collected to the Government had been spelt out in clear terms in the relevant statute and it cannot be held as not liable to pay the duty collected to the State Government on the ground that the relationship is only one of principal qua agent and hence provisions of section 43B is applicable".

3. The facts of the case are that the Assessing Officer noticed that the assessee had not remitted the amounts payable to the Government within the time stipulated under the relevant Act. As per the provisions of section 43B of the I.T. Act, any amount payable by way of tax, duty, cess or fee under any law for the time being in force is allowable as deduction only in that previous year in which such sum is actually paid. In the absence of such payment made during the year under consideration, the Assessing Officer brought the said amount of Rs.248,91,12,986/- by invoking the provisions of section 43B of the Act.

4. On appeal, the CIT(A) deleted the addition by relying on the judgment of the Jurisdictional High Court in assessee's own case in ITA Nos. 1703 of 2009, 1710 of 2009, 1716 of 2009 and 127 of 2010 dated 12/11/2010 pertaining to AYs 2002-03 to 2005-06 wherein it was held as under:

"27. On a plain reading of section 43B we are of the opinion that the only clause if at all, is relevant in the context of the facts of the appellant's case is clause (a) which deals with "any sum payable by the assessee by way of tax, duty,.....under any law for the time being in force". In our opinion, the words 'by way of tax' are relevant as they are indicative of

the nature of liability. The liability to pay and the corresponding authority of the State to collect the tax (flowing from a statute) is essentially in the realm of the rights of the sovereign. Whereas the obligation of the agent to account for and pay the amounts collected by him on behalf of the principal is purely fiduciary. The nature of the obligation, in our opinion, continues to be fiduciary even in a case wherein the relationship of the principal and agent is created by a statute. We are of the opinion that, when section 43B(a) speaks of the sum payable by way of tax etc., the said provision is dealing with the amounts payable to the sovereign qua principal. We are therefore of the opinion that section 43B cannot be invoked in making assessment of the liability of the appellant under the Income Tax Act with regard to the amounts collected by the appellant pursuant to the obligation cast on the appellant under section 5 of the Electricity Duty Act, 1963".

4.1 Thus, by following the above judgment, the CIT(A) deleted the addition of electricity duty and surcharge payable to the Government of Kerala which in turn was brought to tax by invoking the provisions of section 43B of the Act.

5. Against this, the revenue is in appeal before us.

6. After hearing both the parties, we are of the opinion that this issue is squarely covered by the judgment of the Jurisdictional High Court in assessee's own case cited supra. Hence, we do not find any infirmity in the order of the CIT(A) in allowing the claim of the assessee and confirm the same. This ground of appeal of the Revenue is dismissed. Thus, the appeal of the Revenue in ITA No.29/Coch/2018 is dismissed.

7. In the assessee's appeal in ITA No.30/Coch/2018, has raised the ground with regard to addition of an amount of Rs. 53,91,29,948/- which is related to the provision for bad and doubtful debts.

8. The facts of the case are that a sum of Rs.153,91,29,948/- was claimed as provision for bad and doubtful debts written off. It was found that the assessee was not able to submit complete details of the bad and doubtful debts written off including the particulars of the years in which the respective amounts were accounted for. The contention of the assessee that the bad debts written off/provided for is reckoned as an allowable deduction as the condition of section 36(2) of the Act would be fulfilled so as to write off the debts in the books of account was not accepted by the Assessing Officer since Explanation to section 36(1)(vii) of the Act allowed deduction only for the bad and doubtful debts actually written off. The Explanation to section 36(1)(vii) clearly states that 'for the purpose of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the assessee shall not include any provision for bad and doubtful debts made in the accounts of the assessee". In view of the above Explanation and the assessee could not produce any evidence to show that the amounts were actually written off and were accounted as income in the preceding years as required u/s. 36(2), the claim of provision for bad and doubtful debts amounting to Rs.153,91,29,948/- was rejected and accordingly, brought to tax.

9. Against this, the assessee went in appeal before the CIT(A). The CIT(A) confirmed the finding of the Assessing Officer by observing that the reliance placed on the decision of the Hon'ble Supreme Court in the case of Vijaya Bank vs. CIT (3 taxman.com 90) is totally misplaced and is not applicable to the case of the assessee since the issue involved in the assessee's case is centered around to Explanation to Section 36(l)(vii) which clarified that any bad debt written off as irrecoverable in the accounts of the assessee shall not include any provision for bad and doubtful debts made in the accounts of the assessee. Similarly, the CIT(A) observed that by virtue of section 36(2), no deduction shall be allowed unless such debt is taken into account in computing the income of the assessee of the previous year. It emanates from the above that the bad debt shall not include any provision for bad and doubtful debt and deduction can be allowed only when such debt is taken into account in computing the income in previous years and actually written off. It is not the case of the assessee that Explanation to section 36(l)(vii) is not applicable to them and they have debited the bad debt written off to the provision created for bad and doubtful debts. The deduction u/s 36(l)(vii) is subject to clause(v) of section 36(2) which specifically states that any bad debt written off should be claimed as deduction only after debiting it to the provision created for bad and doubtful debts.

9.1 The CIT(A) relied on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. South Indian Bank Ltd (326 1TR 174) wherein it was

observed that in order to qualify for deduction of the bad debt written off, the requirement of section 36(2)(v) is that such amount should be debited to the provision created under clause (viia) of section 36(1). It is also not the case of the assessee that the debt has been taken into account in computing the income of previous years as required u/s 36(2). From the above, the CIT(A) observed that the assessee had failed to explain the basis on which the disallowance was made, instead, it was contended that the Assessing Officer had overlooked the fact that it is practically impossible for the assessee to give any party-wise details of bad debts written off considering the large number of consumers in the State of Kerala. The CIT(A) observed that a greater amount of responsibility is casted upon the assessee so as to file the details of the bad and doubtful debts written off and the years in which the respective amounts were accounted for. In the circumstances, it was observed that the assessee ought to have filed not only the details of bad and doubtful debts written off but also the years in which the respective amounts were accounted for. According to the CIT(A), instead of filing the requisite details, the assessee had resorted to explaining certain difficulties which in no way would help the assessee to get away from the limitations of the provisions of sections 36(l)(vii) and 36(2) which the Assessing Officer had invoked to disallow the claim made. Accordingly, the disallowance made by the Assessing Officer was confirmed. The CIT(A) rejected another argument of the assessee that in the immediate previous year, appeal on the same ground was allowed in favour of them since appeal in the previous year was allowed under

different circumstances in which substantial amount of the debt was liable to be paid by the Kerala Water Authority and under a direction from the State Government, the assessee was to write off the debts against the assurance that the written off money would be paid to the assessee through budget allocation. In view of all the above, the CIT(A) was of the opinion that the assessee had not explained satisfactorily as to why the provisions of sections 36(l)(vii) and 36(2) should not have been invoked and accordingly, found no infirmity in the decision of the Assessing Officer to disallow the claim for provision for bad and doubtful debts.

10. Against this, the assessee is in appeal before us. The Ld. AR submitted that the provision for doubtful debts of Rs.153,91,29,948/- created during the year was debited to the Profit & Loss a/c of the year and also reduced from trade receivables as on 24.09.2008 in the balance sheet thus, fully satisfying the two conditions stipulated by the Hon'ble Supreme Court in the case of CIT vs. Vijaya Bank Ltd. reported in (2010) 323 ITR 166. It was submitted that from a reading of para -7 of the order of the Supreme Court in the case of Vijaya Bank Ltd., that if the provision for doubtful debts is debited to Profit & Loss a/c and reduced from the balance of sundry debtors in the balance sheet and the net amount is disclosed on the asset side of the balance sheet, this amounts to a write off as provided in Sec.36(2)(v) of the Income-tax Act, 1961 and therefore, qualifies fully for deduction of bad debts written off in the assessment for the year. It was

also held by the Supreme Court that it was not necessary for the tax payer to close the debtors account in such cases by eliminating it from the books of accounts in order to qualify for allowance of the bad debts u/s.36(2)(v) of the Act.

10.1 The Ld. AR relied on the judgment of the Division Bench of Gujarat High Court in the case of Indian Petrochemical Ltd. in ITA No. 1773/2008 order dated 19.07.2016 wherein the above principle was applied by following the judgment of the Karnataka High Court in the case of CIT vs Yokogawa India Ltd. reported in (2012) 17 Taxmann.com (Kar) and also CIT vs Kriloskar System Ltd reported in (2013) 40 Taxmann.com 124 (Kar) in the context of the admissibility/ allowability of the same in MAT computation u/ s. 115JB also. It was submitted that the larger Bench of Gujarat High Court to whom the above matter was referred concurred with the Division Bench ruling in the case of Indian Petrochemicals Ltd. (in contrast to another Division Bench ruling in Deepak Nitrite Ltd. case - ITA No.1918/2009 order dated 17.06.2011) post amendment to Section 115JB introducing upward adjustment in computation of income with retrospective effect from 01.04.2011. It was thus held that even for MAT computation U/S.115JB, the provision is not to be added back as was confirmed by larger Bench of Gujarat High Court interpreting the decision of Supreme Court of India in the case of Vijaya Bank Ltd. cited supra.

10.2 Therefore, it was submitted that on grounds of law the action of the CIT(A) is not in conformity with the order of the Supreme Court in the cases referred to above, which are directly on the point. As regards, the statement of the CIT(A) in para 3.4 that, the assessee had not furnished party-wise details of bad debts written off and also the years in which the debt was taken credit for as income, it was submitted that the assessee is a large public sector utility undertaking engaged in the generation and distribution of electricity to millions of consumers across the State of Kerala and therefore, there was sheer practical difficulty in furnishing a consumer list of bad debts, which would run into thousands of pages considering the large population being serviced / looked after by the public utility undertaking. It was submitted that a one-to-one correlation and matching of the debt with the income taken credit for in the earlier years is a sheer impossibility due to practical difficulties on account of large volume of consumers involved and that as per the accounting system followed by the assessee, what is debited under trade receivables is credited to Sale of Power a/c (income account) only. However, this was not accepted by the CIT(A) stating that the assessee failed to discharge the obligation cast under the statute. It was submitted that in a similar situation, in the appeal of the assessee for the preceding assessment year, the then CIT(A) had accepted the submissions of the assessee and allowed the claim for deduction of provision for doubtful debts of Rs.5,29,80,02,551/- for the A.Y. 2008-09 as satisfying the provisions of Sec.36(2) of the Act and it was also submitted that the Department

had accepted the order of the CIT(A) for the A.Y. 2008-09 and no second appeal was filed against the order of CIT(A).

10.3 The Ld. AR submitted that the break up details of major accounts, i.e., balances in excess of Rs.50,000 under sundry debtors outstanding more than six months considered for making provision for doubtful debts was filed and all these debts have been taken credit for income in prior years as per accounting system / procedure in force. Thus, It was prayed that the Tribunal may allow deduction of the claim for provision of bad and doubtful debts written off amounting to Rs.153,91,29,948/- due to genuine practical difficulties involved in this particular case as stated above.

11. The Ld. DR relied on the order of the lower authorities.

12. We have heard the rival submissions and perused the record. The provisions of section 36(1)(vii) reads as under:

> *"36. Other deductions – (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 s. 28:*
>
> *…….*
>
> *(vii) subject to the provisions of sub-s.(2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year:*
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> *Provided that in the case of an assessee to which cl.(viia) applies, the amount of the deduction relating to any such debt or part thereof shall be*

limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause.

Explanation – For the purposes of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the assessee, shall not include any provision for bad and doubtful debts made in the accounts of the assessee".

12.1 Now the question is whether an express provision in section 36(1)(vii) of the Act which prohibits granting deduction of any provision for bad and doubtful debts can be got over by the assessee by relying on the judgment of the Supreme Court in the case of Vijaya Bank Ltd. (supra). In fact, section 36(1)(viia) is a complete answer to this query raised by the assessee wherein special provisions are made in the I.T. Act for allowing provision for bad and doubtful debts of scheduled banks, non-scheduled banks, co-operative banks etc. to the extent permissible thereunder. In fact, u/s. 36(1)(viia), the eligible banks are authorized to create provision subject to certain limits in respect of rural advances and other loans referred to therein and claim deduction of the same. This provision clearly indicates that Parliament is well aware of the risk undertaken by the banks in making advance to the rural sector in terms of the guidelines issue by the Government and the RBI and only such cases are treated as exception to the general provision contained in Explanation to section 36(1)(vii), which prohibits granting of deduction of any provision for bad and doubtful debts. Unfortunately, the present assessee is not covered by section 36(1)(viia) of the I.T. Act and so much so, explanation to section 36(1)(vii)

squarely applies or in other words, the assessee is not entitled to deduction of any provision created for bad and doubtful debts, no matter such provision is created based on the prevalent accounting policies. The same view was taken by the Jurisdictional High Court in the case of Art Leasing Ltd. vs. CIT (229 CTR 272). Accordingly, we uphold the order of the lower authorities. This ground of appeal of the assessee is dismissed. Thus, the appeal of the assessee in ITA No. 30/Coch/2018 is dismissed.

13. In the result, the appeals filed by the assessee as well as by the Revenue are dismissed.

Order pronounced in the open Court on this 1st November, 2018.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 1st November, 2018
GJ
Copy to:
1. M/s. Kerala State Electricity Board, Vydyuthi Bhavan, Pattom, Trivandrum-695 004.
2. The Assistant Commissioner of Income-tax, Circle-1(1),Trivandrum.
3. The Commissioner of Income-tax(Appeals),Trivandrum.
4. The Pr. Commissioner of Income-tax,Trivandrum
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin