IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'B', KOLKATA
(Before Shri A.T. Varkey, J.M. & Dr.A.L.Saini, A.M.)

ITA No. 2405/Kol/2016 : Asstt. Year : 2008-09

ITA No. 2406/Kol/2016 : Asstt. Year : 2010-11

ITA No. 878/Kol/2017 : Asstt. Year : 2011-12

The Burdwan Central Co-operative Bank Limited PAN:AABAT3547P	Vs	ACIT, Cir-2, Burdwan
(Appellant/Assessee)		(Respondent/Department)

Appellant by : Shri Pratp Kanti Ghosh, FCA, ld.AR
Respondent by : Shri Pijush Mukherjee, Addl. CIT, ld. Sr.DR

Date of Hearing : 03-01-2019		Date of Pronouncement:23.01.-2019

ORDER

Per Dr. A.L.Saini, A.M.:

The captioned three appeals filed by the Assessee, pertaining to assessment year 2008-09, 2010-11 & 2011-12, are directed against the separate orders passed by the Commissioner of Income-tax (Appeals)-10,Burdwan, in Appeal Nos. 20/CIT(A)/Asl/ACIT/Cir-2/Bwn/2014-15, 265/CIT(A)/Asl/ACIT/Cir-2/Bwn/2013-14 & 21/CIT(A)/Asl/ACIT/Cir-2/Bwn/2014-15 dated 27-09-2016, 27-09-2016 & 31-01-2017 respectively, which in turn arise out of separate assessment orders passed by the Assessing Officer u/s.263/143(3) of the Income-Tax Act, 1961 (in short, the Act).

2. Since these three appeals relate to same assessee, different assessment years, and common and identical issues involved therefore, these have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. Common ground no. 1 raised by the assessee in these three appeals relate to addition made on account of "provision for loss of investment" on securities held by the assessee bank in stock-in-trade, in the course of banking business. Addition for the A.Y 2008-09 of Rs. 3,03,58,000/-, addition for the A.Y 2010-11 of Rs.1,86,97,502/-, and addition for the A.Y 11-12 of Rs.15,25,022/-.

4. When this appeal was called out for hearing, learned counsel for the assessee invited our attention to the order dated 02-09-2016, in ITA No. 1243/Kol/2013, for the A.Y 2009-10, in assessee's case, whereby the issue of 'provision for loss on investment, was discussed and adjudicated. Learned counsel for the assessee submitted that the present appeal is squarely covered by the aforesaid order of the Tribunal, a copy of which was also placed before the Bench.

5. Learned Departmental Representative did not have much to say but he nevertheless relied upon the orders of the authorities below.

6. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of this Tribunal in assessee's own case vide order dated 02-09-2016, in ITA No. 1243/Kol/2013, for the A.Y 2009-10 (supra) in assessee's own case. In this order, the Tribunal has inter alia observed as follows:

"6. We have heard the submissions of the ld. Counsel for the assesseee, who reiterated the stand taken by the assessee before the AO. He further brought to our notice that the CBDT issued a circular/Instruction No.17/2008 dated 26.11.2008 wherein the CBDT has given instructions with regard to the claim for deduction on account of loss on investments of securities held by a bank which are as follows :-
"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 stockin-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.

According to him the securities held by the assessee in the present case were admittedly in the category of "available for sale" and therefore even as per the CBDT instruction the claim of the assessee has to be allowed. The ld. DR relied on the order of AO.

7. We have given a careful consideration. In our view the issue is squarely covered by the decision of the Hon'ble Kerala High Court in the case of Nedungadi Bank Ltd. The Hon'ble Kerala High Court also considered the decision rendered by the Hon'ble Supreme Court in the case of Vijaya Bank (supra) referred to by the AO in the order of assessment and has taken the view that securities held by banks constitute their stock-in-trade and consequently the notional loss claimed by the assessee-banks on valuation of such securities at the close of the year is allowable as deduction, has held that same view has been taken by the CBDT in Circular No. 599, dt. 24th April, 1991. The Court further held that it is now settled by a series of decisions that the securities held by the banks constitute their stock-in-trade or investment and consequently the loss claimed by the banks on the valuation of their securities should be allowed as a deduction in computing the taxable profits. In fact, the CBDT in Circular No. 599, dated 24th April, 1991, has taken the very same view which is consistent with the view taken in the decisions of this Court and of the Supreme Court. For all these reasons, the Tribunal has rightly held that the securities held by the assessee-bank in all these cases are the stock-in-trade of the business of the assessee-banks and the notional loss suffered on account of the revaluation of the said securities at the close of the year is an allowable deduction in the computation of the profits of the appellant. The Hon'ble court referred to the following judgments —CIT vs. South India Bank Ltd. 241 ITR 374 (Ker), Malabar Co-operative Central Bank Ltd. vs. CIT 101 ITR 87 (Ker), UCO Bank vs. CIT 240 ITR 355 (SC), CIT vs. Karnataka State Co-operative Apex Bank 251 ITR 194 (SC) and Mehsana District Central Co-operative Bank Ltd. vs. ITO 251 ITR 522 (SC) and distinguished the decision in the case of Vijaya Bank Ltd. vs. Addl. CIT (1991) 94 CTR (SC) 216 : (1991) 187 ITR 541 (SC). The Hon'ble Court finally concluded that Securities held by banks constitute their stock-in-trade and consequently the notional loss claimed by the assessee-banks on valuation of such securities at the close of the year is allowable as deduction in computing the taxable profits. The Hon'ble Court distinguished the decision of the Hon'ble Supreme Court in the case of Vijaya Bank (supra) as follows:

> *"20. Here, it must be noted that the assessing authority had in fact reopened the assessment on the basis of the decision of the Supreme Court in Vijaya Bank Ltd. vs. Addl. CIT (supra). In that case, the question which arose for consideration was as to whether a sum of Rs. 58,568 representing interest accrued on securities taken by the assessee-bank from the Jayalakshmi Bank Ltd. and another sum of Rs. 11,630 representing interest accrued upto the date of purchase in the case of*

securities purchased by the assessee-bank from the open market are admissible as deduction under the provisions of ss. 19, 20 and 37 of the Act. In that context, the Supreme Court relied on a decision of the Court of Appeal in IRC vs. Pilcher (1949) 31 Tax Cases 314 (CA) where it was observed that outlay on purchase of an income-bearing asset is in the nature of capital asset. The Supreme Court observed in Vijaya Bank's case that the price paid for the securities was determined with reference to their actual value as well as the interest which had accrued on them till date of purchase, that whatever was the consideration which prompted the assessee to purchase the securities the price paid for them was in the nature of a capital outlay and no part of it can be set off as expenditure against income accruing on those securities. Here, it must be noted that the Supreme Court has not at all considered the question with regard to the character of securities from which interest income is earned. No contention is seen taken by any of the parties that the securities involved in the said case represented stock-in-trade. Hence, the decision rendered in the said case cannot be taken as an authority for the position that the securities held by the assessee in the present case in compliance with the provisions of the Banking Regulation Act is to be held as a capital investment. As we have already noted, this Court and the Supreme Court have clearly taken the view that the Government securities acquired by the assessee-bank in compliance with the provisions of the Banking Regulation Act has to be treated as stock-in-trade of the business of the bank. In fact, the Central Board of Direct Taxes in the circular extracted above has taken the very same view which, according to us, is consistent with the view taken in the decisions of this Court and of the Supreme Court discussed above. Here, it must be noted that till the decision of the Supreme Court in Vijaya Bank's case (supra) the assessing authority has been taking the consistent view that the assessees are entitled to depreciation on account of the notional loss suffered by them on revaluation of the securities. In fact, in all the reassessment cases, the assessing authority had originally granted deduction by way of depreciation of the notional loss incurred by the assessee and the only reason for denying the said relief to the assessees is the decision to the Supreme Court in Vijaya Bank's case. Vijaya Bank's case (supra) as we have already noted, does not lay down any clear proposition that the securities held by a bank cannot be considered as stock-in-trade of the business of the bank.

21. For all these reasons, we are of the view that the Tribunal has rightly held that the securities held by the assessee-bank in all these cases are the stock-in-trade of the business of the assessee-banks and the notional loss suffered on account of the revaluation of the said securities at the close of the year is an allowable deduction in the computation of the profits of the appellant. This disposes of the first two questions mentioned in para 10 above."

8. In the light of the above judicial pronouncements, we are of the view that the claim for deduction made by the assessee should be allowed. Accordingly, the AO is directed to allow the claim of the assessee for deduction of the aforesaid sum. Gr.No. A is accordingly allowed."

7. As the issue is squarely covered in favour of assesse in assessee's own case (supra) and there is no change in facts and law and the ld. DR for the revenue has not controverted the findings of the order of Tribunal in assessee's own cases (supra) and therefore, respectfully following the said order of the Tribunal in assessee's own case supra, we allow ground no. 1 in all the assessee's appeals.

8. Ground no. 2 raised by the assessee in ITA No. 2406/Kol/2016 for the A.Y 2010-11 relates to addition of Rs. 3,50,00,000/- made on account of "provision for arrear salary."

9. At the outset itself, the ld. Counsel for the assessee invited our attention that ground no.2 raised by the assessee in assessee's appeal in ITA No. 2406/Kol/2016 for the A.Y 2010-11 is squarely covered in favour of assessee by the order dated 02-09-2016 in ITA No. 1243/Kol/2013, for the A.Y 2009-10, in assessee's own case. Relevant portion of which is reproduced herein below:-

"12. We have heard the rival submissions. The allowability with regard to claiming deduction on account of provision has been laid down by the Hon'ble Supreme Court in the case of Bharat Earth Movers 245 ITR 428. In the aforesaid decision of the Hon'ble Supreme Court it has been held that if a business liability has definitely arisen in the accounting year, deduction is allowable although the liability may have to quantified and discharged at a future date. The Court held that what should be certain is the incurring of the liability and its quantification with reasonable certainty. At the time of hearing the ld. Counsel for the assessee pointed out that an agreement has been reached with the employees union and fresh pay scales have been finalised. We are of the view that now that the actual salaries quantified are available, it would be just and proper to compare and see as to whether the estimate of the liability made by the assessee based on which provision on account of arrears of salary payable was made was reasonable. If the estimate is found to be reasonable then the deduction claimed by the assessee should be allowed. In this regard we are of the view that in the present case the

liability of the assessee was certain in the sense that as per the agreement with the employees union, salary scales had to be revised w.e.f. 01.11.2007. It is only the quantification of the liability based on which provision was made by the assessee that needs to be examined. We therefore set aside the order of CIT(A) and direct the AO to examine the claim of the assessee in the light of the directions given above."

10. As the issue is squarely covered in favour of assesse in assessee's own case (supra) and there is no change in facts and law and the ld. DR for the revenue has not controverted the findings of the order of Tribunal in assessee's own cases (supra) and therefore, respectfully following the said order of the Tribunal in assessee's own case supra, we allow ground no. 2 in assessee's appeal ITA No. 2406/Kol/2016 for the A.Y 2010-11.

11. Common ground no. 3 raised by the assessee in the assessee's appeals in ITA Nos. 878/Kol/2017 & 2406/Kol/2016 for the A.Ys 2011-12 & 2010-11, relates to disallowance of expenditure u/s. 14A of the Act of Rs. 6,50,000/- & Rs. 7,75,000/- by the ld. CIT(A).

12. During the course of hearing before us the ld. Counsel for the assessee submitted that this issue is no longer res integra. He submitted that the assesse has its own surpuls funds, which is more than the investment made by the assesse. Therefore, the disallowance made u/s. 14A/r.w.r 8D(2)(ii) does not attract. The ld. DR for the revenue has fairly agreed with such submissions of the ld. Counsel for the assessee except to disallowance under Rule 8D(2) (iii) of the I.T. Rules. The Ld DR pointed out that in order to maintain the huge investment portfolio, the assessee must have incurred administrative expenses and the same should be disallowed under Rule 8D(2) (iii) of the I.T. Rules.

13. We have heard the rival submissions and perused the material available on record. We note that the assessee has own funds more than the investment made in shares and securities. Therefore, no disallowance should be made u/s. 14A of the Act/r.w.r 8D(2) (ii) of

the I.T Ruels, 1962. We note that the assessee under consideration is involved in banking business and supposed to follow the RBI guidelines to make investments in bonds, mutual funds and shares of public sector undertaking. Therefore, following the principle, as mandated by the RBI, the assessee has made investments in SBI- MFs (mutual funds), which was made by the assesse out of its own surplus funds. We note that when the own funds are more than the investments made, there should not be any disallowance u/s. 14A/r.w.r 8D(2) (ii).

14. We note that Hon'ble Delhi High Court in the case of CIT vs. Holcim India Pvt. Ltd. in ITA No.486/2014 wherein it was held that in the absence of any tax free income, the corresponding expenditure could not be worked out for making disallowance u/s. 14A of the Income Tax Act, 1961.The Hon'ble Delhi High Court in the case of Chemnivest vs. Commissioner of Income Tax-Vl, ITA 749/2014 order dated,02.09.2015 held that section 14A will not apply if no exempt income is received during the relevant previous year. Therefore, in view of above, the disallowance made u/s 14A of the Act r.w.r. 8D is not sustainable. We note that the Coordinate Bench of ITAT Kolkata in the case of REI Agro Ltd. Vs. DCIT 144 ITD 141 (Kol-Trib) has held that it is only the investments which yields dividend during the previous year that has to be considered while adopting the average value of investments for the purpose of Rule 8D(2)(ii) & (iii) of the Rules. The aforesaid view of the Tribunal has since been affirmed as correct by the Hon'ble Calcutta High Court in G.A.No.3581 of 2013 in the appeal against the order of the Tribunal in the case of REI Agro Ltd. (supra).

15. In the light of the above noted judicial precedents, we direct the AO not to make disallowance under rule 8D (2) (ii) as the bank has made investments out of surplus funds. In those years where no exempt income in available, the AO should not make any disallowance. Under Rule 8D (2) (iii) the AO can make disallowance by taking into account

only the dividend bearing securities as per the principles laid down by judgment of the coordinate Bench in the case of REI Agro Ltd. (supra).

Therefore, the common ground no. 3 raised by the assessee in ITA No. 878/Kol/2017 for the A.Ys 2011-12 and 2406/Kol/2016 for the A.Y 2010-11 are allowed for statistical purpose.

16. In the result, these three appeals of assessee for the A.Ys 2008-09, 2010-11 & 2011-12, are allowed as per the discussion made supra.

Order Pronounced in the Open Court on 23-01-2019

Sd/-	Sd/-
(A.T Varkey)	(Dr. A.L.Saini)
Judicial Member	Accountant Member

Dated: 23-01-2019

*PRADIP (Sr.PS)

Copy of the order forwarded to:

1. The Appellant/Assessee : The Burdwan Central Co-operative Bank Limited Head Office: G.T Road, P.O & Dist: Burdwan, PIN 713101.
2 The Respondent/Department: Assistant Commissioner of Income Tax, Cir-2, Burdwan, Aaykar Bhawan, Court Compound, P.O Burdwan, PIN 713101.
3. The CIT-, 4. The CIT(A)-,
5. DR, Kolkata Benches, Kolkata

True Copy, By order, Asst. Registrar

ITAT, Kolkata Benches