IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñBò BENCH

Before: Shri Rajpal Yadav, Judicial Member
And Shri Amarjit Singh, Accountant Member

ITA No. 2003/Ahd/2014
Assessment Year 2009-10

National Dairy Development Board, Anand-388001 PAN: AABCN2029C (Appellant)	Vs	The ACIT, Anand Circle, Anand (Respondent)

ITA No. 1872/Ahd/2014
Assessment Year 2009-10

The ACIT, Anand Circle, Anand (Appellant)	Vs	National Dairy Development Board, Anand-388001 PAN: AABCN2029C (Respondent)

Revenue by: **Shri Alok Singh, CIT-D.R.**
Assessee by: **Shri Sanjay R. Shah, A.R.**

Date of hearing : 16-10-2019
Date of pronouncement : 04-12-2019

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

These two appeals filed by assessee and revenue for A.Y. 2009-10, arise from order of the CIT(A)-IV, Baroda dated 24-03-2014, in proceedings under section 143(3) of the Income Tax Act, 1961; in short ñthe Actò.

2. Both the appeals of the assessee and revenue are pertained to the same assessment year arising against the order of ld. CIT(A) and for the sake of convenience both the appeals are adjudicated together by this common order.

ITA No. 2003/Ahd/2014 filed by assessee

3. The assessee has raised following grounds of appeal:-

"1. The order passed by the learned Commissioner of Income Tax (Appeals) is erroneous and contrary to the provisions of law and facts and therefore requires to be suitably modified. It is submitted that it be so done now.

2. The learned Commissioner of Income Tax (Appeals) has erred in disallowing the appellant's claim of Rs.5,36,79,690/- for deduction u/s. 36(l)(viii) following ITAT's order for A.Y. 2003-04. It is submitted that appellant has satisfied necessary conditions and learned Commissioner of Income Tax (Appeals) ought to have allowed the deduction as claimed. It is submitted that it be so held now.

3. The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of Rs.13,69,559/- being grant given by the appellant to Bangalore Urban and Rural District Coop Milk Producers Societies Union Ltd. and claimed as deductible expenditure u/s. 36(l)(xii) of the Income Tax Act.

3.1 In any event, the same is allowable on deduction u/s 36(l)(vii) being in the nature of bad debts written off or u/s. 37/28 of the Income Tax Act. It be so held now.

4. The learned Commissioner of Income Tax (Appeals) has erred in confirming the disallowance Rs.2,32,10,571/- by applying section 14A following the appellate order for AY 2008-09. In the" facts and circumstances of the case it is submitted that no disallowance under section 14A is required to be made. It is submitted that it be so held now.

4.1. The learned Commissioner of Income Tax (Appeals) has erred in not appreciating the fact that section 14A is not applicable to the appellant as the investments in securities yielding tax free income were made from own funds of the appellant and no expenses are incurred in relation to earn the exempt income.

4.2. The learned Commissioner of Income Tax (Appeals) has erred in law in confirming the application of Rule 8D, where the AO has not brought on record his dissatisfaction in respect of the appellant's claim of expenditure incurred for earning tax free income.

4.3. Alternatively, the disallowance should be restricted to Rs.21,000/- which may be considered to be attributable to earn exempt income. It is submitted that it be so held now.

5. The learned Commissioner of Income Tax (Appeals) erred in taxing interest earned on North Kerala Project Development Fund, amounting to Rs 2,30,90,542/- as income of the appellant following ITAT order AY 2003-04. It is submitted that in the facts and circumstances of the case, the appellant was acting as a nodal agency and income is diverted at source. Therefore,

the appellant neither has any legal claim to retain such interest nor does it have discretion towards use of such interest.
6.1 Without prejudice to above, if the interest is considered as income of the assessee, direction be given to allow the expenditure in the same year in which they are incurred as deduction. It be so done now.
6. The learned Commissioner of Income Tax (Appeals) has erred in not granting the deduction in respect of contribution made to Employee's Recreation trust of Rs.3,20,775/- following the decision by the ITAT, Ahmedabad in its own case for AY 2003-04. It is submitted that in the facts and circumstances of the case, no disallowance was required to be made.
7. The learned Commissioner of Income Tax (Appeals) erred in confirming the interest charged under section 234B and 234D under the Act."

4. The fact in brief is that the return of income declaring loss of Rs. 33,97,340/- was filed on 4th Nov, 2011. The assessee is a statutory body constituted under the National Dairy Development Board Act, 1987 and under the Income Tax Act is assessed as company in view of the provisions of section 2(17) r.w clause (ia) of section 2(26). The case was selected for scrutiny by issuing of notice u/s. 143(2) of the act on 28th August, 2010. The assessment u/s. 143(3) was completed on 4th Nov, 2011 and total income was determined at Rs. 52,61,12,195/- after making various additions mostly on the basis of preceding assessment year after following the decision of Income Tax Appellate Tribunal, the nature of additions are briefly discussed while adjudicating the different grounds of appeal filed by the assessee and Revenue as follows:-

5. Ground No.1 is of general nature and it does not require any adjudication and the same is dismissed

<u>Ground No. 2 (Disallowance of claim u/s. 36(1)(viii) of Rs. 5,36,79,690/-)</u>

6. During assessment the assessing officer noticed that assessee has debited an amount of Rs. 5,36,79,690/- in the P & L being amount transferred to special reserves account. The assessee has claimed deduction

u/s. 36(I)(viii) on the said amount transferred to special reserves. The assessee claimed that it is entitled for deduction of 20% on profit of long term financial activity as per section 36(1)(iii) of the Act. The assessing officer stated that the assessee had made the same claim for assessment year 2003-04, however, the assessing officer had disallowed the same holding that activity of the assessee of extending long term finance to the dairy co-operative could not be termed as long term financé for agricultural and industrial development. The assessing officer has also stated that this issue was decided in favour of the revenue by the Income Tax Appellate Tribunal in A.Y. 2003-04. The ld. CIT(A) has also dismissed the appeal of the assessee holding that similar disallowance was upheld by the ITAT in its order for assessment year 2003-04 in assesseeôs own case vide ITA No. 454/Ahd/2006.

7. We have heard the rival contentions on this issue and noticed that Co-ordinate bench of the ITAT vide ITA No. 1041/Ahd/2012 for assessment year 2008-09 has also decided the issue in favour of the revenue after following the decision of ITAT for assessment year 2003-04. The relevant part of the decision of ITAT for assessment year 2003-04 is reproduced as under:-

> *"9. We have heard the rival contentions and perused the record. Through this ground assessee has challenged the action of ld. CIT(A) confirming disallowance claimed u/s 36(l)(viii) for Rs. 3,56,37,425/-. We observe that the issue in this ground stands decided by the Co-ordinate Bench in ITA No.454/Ahd/2006 pronounced on 21.04.2011 in assessee's own case for Asst. Year 2003-04. We observe that Co-ordinate Bench has adjudicated the issue by deciding as below :-*
> *51. We have heard the parties and considered the rival submissions. As regards status of Public Financial Institution as the assessee applied on 10-07-2002, i.e., within a year under consideration and though the notification granting the status of public financial institution was granted to it on 23-02-2004 it would relate back to the date of application in view of the decision of Marshall Sons & Co. Vs. ITO 88 Company cases 528. The time taken by the Department of Company Law Affairs was beyond its control. In any case it is only a procedural delay and ministerial work and therefore, the date of application should be taken as the effective date for*

granting status of Public Financial Institution. On this issue we do not agree with the C1T(A). we however find that; other conditions of section 36(1)(viii) are not complied with by the assessee. The milk produced by the assessee is not amounting to manufacture and therefore the assessee was not engaged in providing long term finance for industrial and agricultural development or development of industrial facility and again it had no capital which is necessary to compute the aggregate of the amount to be carried to special reserve account as twice the amount of the paid up share capital and of the General reserve. The assessee failed to comply with these other conditions and therefore it would not be entitled the deduction.

10. We further observe that the decision of the Co-ordinate Bench for Asst. Year 2003-04 has been followed by the Tribunal for Asst. Year 2004-05 and 2007-08 in ITA Nos. 3200 & 3201/Ahd/2010. Respectfully following the decision of Co-ordinate Bench, we are of the view that the issue now stands decided against the assessee and therefore, we find no reason to interfere with the order of ld. CIT(A). We uphold the same. Accordingly, this ground of assessee is dismissed."

Respectfully following the decision of Co-ordinate Bench as cited above, we do not find any reason to interfere in the order of ld. CIT(A). Therefore, this ground of appeal of the assessee is dismissed.

Ground No. 3 (Disallowance of Rs. 13,69,559/- being grant given to Co-operative Union Federation and other Organization u/s. 36(1)(xii) alternatively allowable u/s. 28/37

8. Regarding the claim of the assessee in respect of perspective plant expenditure, the assessing officer has accepted all such expenditure except Rs. 13,69,559/- in respect Bangaore Urban and Rural District Co-operative Milk Producers Society Union Ltd. The assessing officer has come to the conclusion that the amount given for various co-operative unions were not expenditure for purpose of allowing deduction u/s. 36(1)(xiii) but were basically grants. The assessing officer has also stated that this was travelled before the ITAT and the ITAT has decided this issue in favour of the Revenue.

9. Before the ld. CIT(A), the assessee has made a new claim that it had supplied equipment to this plant and other expenditure of 70% loan and 30%

grant basis and accordingly, Rs. 13,69,559/- was in the nature of loan which was to be paid by the said union. On verification of the evidences filed by the assessee, the ld. CIT(A) has noticed that the Bangalore unit had disputed 9 such sanction letters having loan value of Rs. 13,69,559/- as the equipment under these loans were not reported to have been received by them and the assessee had failed to prove the genuineness of such transactions. Accordingly, the appeal of the assessee was dismissed by the ld. CIT(A).

10. We have heard both the sides and perused the material on record. It is noticed that the identical issue on similar fact in assessment year 2008-09 was adjudicated by the ITAT in the case of assessee itself vide ITA No. 1041/Ahd/2012 and the matter was restored to the file of the assessing officer for re-adjudication. The relevant part of the decision of ITAT is reproduced as under:-

> *"15. We have heard the rival contentions and perused the record placed before us. The issue raised in this ground is against the action of ld. CIT(A) sustaining the disallowance of Rs.89,75,600/- being grant given to various unions and federations, claimed as expenditure u/s 36(1)(viii) of the Act. Further appreciating the contention of ld. AR that the issue has been adjudicated by the Co-ordinate Bench in the past relating to appeals for Asst. Year 2004-05 and 2007-08, we find that in ITA No.3200 & 3201/Ahd/2010 & others following issue came up before the Co-ordinate Bench wherein the matter was restored back to the Assessing Officer for re-adjudication observing as under:-*
>
> *15. The ground no.4 of the assessee is as under:*
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> *"4. The Id.CIT(A) has erred in confirming the disallowance oj grant of Rs. 78,88,592/- given to various cooperative societies and other organizations as deductible expenditure u/s.36(l)(xii) of the IT Act. It is submitted that the amount represents an expenditure incurred by the appellant for the purpose of objects of the appellant and thereby fulfills all conditions of section 36(J)(xii) of the IT Act and accordingly it is entitled to deduction it's. 56(1)(xiij. It is submitted that it be so held now "-*
>
> *16. It was submitted by the learned AR of the assessee that in A.Y.2003-2004, the Tribunal had recalled the earlier order, and it was held that the grant is allowable as an expenditure under section 36(l)(xii) of the Act, and the matter was sent back to the AO for verification (j) whether the alleged non-refundable grants are given from grants received or not, and (ii) non-refundable grants sanctioned, are claimed as only when fund are already utilised/ fund utilisation report are received. He also submitted that under similar facts, in A.Y.2004-05, 2005-2006 and 2006-2007, the Tribunal has restored back*

> *the matter to the file of the AO for readjudication. Accordingly, in the present year also, we set aside the order of the CIT(A) on this issue, and restore this matter back to the file of the AO for fresh decision with similar directions, as has been given by the Tribunal for A.Y.2004-05. 2005-2006 and 2006-2007. This ground of the appeal is allowed for statistical purpose.*
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> *16. Respectfully following the decision of the Co-ordinate Bench, we restore the matter back to the file of Assessing Officer for readjudication and set aside the order of ld. CIT(A) on the issue. Needless to mention that proper opportunity of being heard will be given to the assessee. This ground is allowed for statistical purposes"*

Respectfully following the decision of Co-ordinate bench of the as cited above, we restore this issue to the file of assessing officer for re-adjudication as directed above in the decision of the Co-ordinate Bench after providing adequate opportunity to the assessee. Therefore, this ground of the assessee is allowed for statistical purposes.

Ground No. 4 (Disallowance u/s. 14A)

11. During the course of assessment the assessing officer noticed that assessee has claimed income exempt from tax to the amount of Rs. 8,38,03,988/- and dividend amount of Rs. 3,17,16,827/- as exempt income. The assessee has submitted that investment in the securities from which exempt income received were made from own fund and no other expenses were incurred for earning the exempt income. The assessing officer has not accepted the explanation of the assessee and computed the disallowance as per section 14A r.w. Rule 8D to the amount of Rs. 2,32,10,571/- and added to the total income of the assessee.

12. The ld. CIT(A) has dismissed the appeal of the assessee.

13. During the course of appellate proceedings before us, the ld. counsel has contended that ITAT for assessment year 2008-09 vide ITA No. 1041/Ahd/2012 has held that assessee was having sufficient interest free fund compared to the investment therefore made disallowance of only Rs. 10 lacs for administrative expenditure and in that year total exempt income was Rs. 16.75 crore. On the other hand, ld. departmental representative has supported the order of the ld. CIT(A).

14. We have gone through the material on record. It is noticed that ITAT in the case of the assessee on similar issue and identical facts for assessment year 2008-09 vide ITA No. 1049/Ahd/2012 has restricted the disallowance to the extent of Rs. 10 lacs as administrative expenditure. The relevant part of the above cited decision is reproduced as under:-

> *"26. Further the interest expenditure incurred by the assessee during the year comprises interest paid to Government of India at Rs.10.94 crores and interest paid to banks at Rs.71.40 lacs. Taking both the facts together and also in view of various judicial pronouncements referred and relied by the assessee we find that assessee was having sufficient interest free funds and in order to cover the investments made which were approximately 40% of the total reserve and surplus held by the assessee at the close of the year and further Revenue has been unable to prove any nexus of flow of interest bearable funds to investments we find no reason to sustain the disallowance of Rs.10,59,435/- u/s 14A of the Act emanating out of interest expenditure incurred by the assessee.*
>
> *27. As far as disallowance of Rs.2,53,16,471/- being 0.5% of average investments of Rs.506.33 crores we observe that assessee was not taxable entity till Asst. Year 2002-03 in view of the provisions of section 44 of the NDDB Act. Most of the investments are either being carried forward from the previous years and others being mainly investments into Government securities i.e. including NABARD, IRFC, PFC and various banks. We further observe that assessee has been made suo motu disallowance of Rs.30,000/- with specific working of expenditure in relation to exempt income provided at page 51 and 52 of the paper book. However, one clear change in between the year under appeal i.e. Asst. year 2008-09 and the previous years is the amendment enacted w.e.f. Asst. Year 2008-09 under Rule 8D of the IT Rules. Further assessee has also provided a list of companies in which investments has earned exempt dividend income. We observe that there is no much reshuffling of the investment made by the assessee and they have been invested for as long term investments which do not require regular monitoring by the concerned persons. This fact gets further support with the audited balance sheet that total investments of Rs.907.23 crores at the end of the year pertains to long term investments only which too has brought forward investments in subsidiary companies at Rs.287.39 crores and remaining investments are term deposits in bank exceeding one year Rs.273.03 crores and*

debenture/bonds in the government companies, financial institution and banks at Rs.344,72 crores and miscellaneous other investments.

28. However, taking overall view in the given facts and circumstances mainly the assessee being a non taxable entity before Asst. year 2002-03 majority of investments are into Gvoernment bonds, source of funds in the investments are through Government grants for co-ordinating the activities of NDDB mainly for promoting development of dairies, specific research, training etc. and also the fact that Revenue has been unable to prove any expenditure directly incurred for earning exempt income, we intend to make an ad hoc disallowance of Rs.10 lacs taking it as a special case as against Rs.2,53,16,471/- worked out by applying 0.5% on the average investments on Rs.50.33 crores. Accordingly, out of the total disallowance of Rs.2,63,25,906/- we sustain the disallowance to the extent of Rs.10 lacs."

Respectfully following the decision of Co-ordinate Bench of the ITAT on similar facts on identical issue, we restrict the adhoc disallowance to Rs. 10 lacs being administrative expenditure incurred towards earning exempt income. Accordingly, the appeal of the assessee is partly allowed on this issue.

Ground No. 5(Interest income of NKPDF project of Rs. 2,30,90,542/-)

15. The assessee has challenged the action of the assessing officer for taxing the interest earned on North Kerala Development Fund amounting to Rs. 2,30,90,542/-. The assessee claimed it was acting as Nodal Agency and interest income was diverted at source and did not belong to the assessee. The assessee has also contended that it receives such interest only under trust for and on behalf of donar and the assessee has neither any legal claim to retain such interest nor it has discretion towards use of such interest.

16. During the course of appellate proceedings before the ld. CIT(A), the ld. CIT(A) stated that ITAT Ahmedabad in the case of the assessee itself for assessment year 2003-04 vide ITA No. 310 ITR (80) 375 Ahmedabad held that such interest is accrued to the assessee. The similar addition made in

assessment year 2004-05 and 2005-06 were also upheld by the ITAT. On perusal of the copy of agreement between the Government of Republic of India and Government of Swiss Confederation concerning the Dairy Development Project of Northern Kerala, the ld. CIT(A) has further stated that NDDB is acting as a technical consultant and the entire agreement nowhere stipulates that the interest earned by NDDB on account of funds received for development of North Kerala Dairy Project is to be utilized for the purpose of such project only. The ld. CIT(A) has also stated that annexure 3 of the agreement regarding interest received on funds given under the said agreement are applicable to IDC and not be NDDB. Considering the above facts, the ld. CIT(A) has held that the decision of the Hon'ble Gujarat High Court in the case of the SAR Infracon Pvt. Ltd. referred by the assessee is not applicable. The assessee has not been able to point out any documentary evidences in this regard. Therefore, on the basis of facts the ld. CIT(A) has accepted the action of the assessing officer of not accepting the claim of the assessee.

17. We have heard rival contentions on this issue and noticed that in the preceding assessment years the same issue was travelled upto ITAT and the ITAT in assessment year 2003-04 and subsequent years till assessment year 2008-09 has adjudicated the issue against the assessee. We have gone through the decision of ITAT for assessment year 2008-09 1041/Ahd/2012 and noticed that at para 40 of the order ITAT has held that consistently following the decision of Co-ordinate Bench for assessment year 2004-05 and subsequent years the interest income of North Kerala Dairy Project is to be considered as taxable income.

Respectfully following the decision of ITAT for assessment year 2008-09 and other preceding assessment years as cited above, we are of the view that interest income of North Kerala Dairy Project at Rs. 23090542/- is to be considered as taxable income. Therefore, this ground of appeal of the assessee is dismissed.

Ground No. 6 (Disallowance of Rs. 3,20,775/- being contribution made to Employees Recreation Trust by invoking provisions of section 40A(9) of the act)

18. The assessing officer has not considered the claim of the assessee of allowability of expenses of Rs. 3,20,775/- incurred by the staff club. The ld. CIT(A) has sustained the action of the assessing officer stating that the ITAT Ahmedabad in its decision in assessment year 2003-04 has decided this issue against the assessee.

19. We have heard rival contentions and perused the material on record. It is noticed that in assessment year 2007-08 vide ITA No. 3201/Ahd/2010 at para 29 of the order, the ITAT has adjudicated this issue against the assessee after following the decision of ITAT in the case of the assessee itself for assessment year 2003-04.

Respectfully following the decision of Co-ordinate Bench on same issue and on similar fact, the appeal of the assessee is dismissed.

ITA No. 1872/Ahd/2014 filed by revenue

20. The solitary ground of appeal of the Revenue is against the decision of the Ld. CIT(A) in deleting the addition to the extent of Rs. 45,00,00,000/- being provision written back.

21. During the course of assessment on perusal of the P & L A/c, the assessing officer noticed that assessee has written back excess provision amounting to Rs. 45 crore claimed as deduction. The assessing officer was of the view that written back provision can only be claimed as a deduction if it is proved by the assessee that the provision made in the earlier year was disallowed and subject to tax. The assessing officer has also stated that assessee has not placed any evidence that the provision made in the earlier year was subject to tax. The provisions were made in the year when the entire income of the assessee was exempt from tax. Accordingly, the assessing officer has disallowed the claim of excess provision of earlier year written back and added to the total income of the assessee.

22. The ld. CIT(A) has allowed the claim of the assessee after stating that similar addition was deleted by the ld. CIT(A) in the earlier assessment years 2007-08 and 2008-09.

23. We have heard rival contentions on this issue and perused the material on record. The ld. counsel has contended that this issue has been adjudicated by the ITAT in assessment year 2007-08 and 2008-09 in favour of the assessee and also furnished the copy of decision. The ld. departmental representative was fair enough not to contradict the above submission of the assessee. We have gone through the above cited order and it is noticed that

in assessment year 2007-08 vide ITA No. 3206/Ahd/2010 the Co-ordinate Bench has decided the similar issue on identical facts in favour of the assessee. The relevant part of the decision is reproduced as under:-

> *"34. We have considered rival submissions. We find that the addition made by the AO is not sustainahle for two reasons. The first reason is that when provision was made, the assessee was not liable to tax, hence, if the provision is reversed in the year of making the provision, it is not resulting into any tax liability, because the assessee was not taxable in that year, and therefore, reversal of such a liability cannot give rise to tax in the year of reversal, when it is not giving any benefit to the assessee, in the year of making the provision. The second reason is that even, if it is held that income has to be assessed in the year of making the provision, then this deduction on account of provision under section 36(l)(vii) is not allowable deduction in that year, because under this section, actual write allowable and -not the provision. This is a pre-requirement of section 41(1) that where the allowance or deduction has been made in the assessment for any year, in respect of loss, expenditure or trade liability incurred by the assessee, and the same is subsequently ceased or has been remitted, then there is income under section 41(1) of the Act. Since in the present case, no deduction has been allowed to the assessee, in the year of making the provision, and it cannot be allowed because provision is not allowable under section 36(1)(vii), write back of such provision cannot give rise to an income under section 41(1) of the Act, We therefore decline to interfere in the order of the learned CIT(A) on this issue. This ground is rejected."*

Respectfully following the decision of ITAT as cited above on similar issue and identical facts, we do not find any merit in the appeal of the revenue and the same is dismissed.

24. In the result, the appeal filed by assessee is partly allowed for statistical purposes and the appeal filed by revenue is dismissed.

Order pronounced in the open court on 04-12-2019

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(AMARJIT SINGH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad : Dated 04/12/2019

आदेश क□□ितिलप अ□ेषित / Copy of Order Forwarded to:-

1. Assessee

2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलय अधिकरण,
अहमदाबाद