

IN THE INCOME TAX APPELLATE TRIBUNAL "A", BENCH KOLKATA

BEFORE SHRI S.S.GODARA, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.2110/Kol/2018

(निर्धारणवर्ष / Assessment Year: 2002-03)

DCIT, Circle-6(1), Kolkata	Vs.	CFL Capital Financial Services Ltd. 31, N.S. Road, Kolkata-700001.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AABCC 0704 F		
(Appellant)	..	(Respondent)

Appellant by : Shri Ram Bilash Meena, CIT

Respondent by : None

सुनवाईकीतारीख/ Date of Hearing : 15/01/2020

घोषणाकीतारीख/Date of Pronouncement : 12/06/2020

आदेश / ORDER

Per Dr. A.L. Saini, AM:

The captioned appeal filed by the revenue, pertaining to assessment year 2002-03, is directed against the order passed by the Commissioner of Income Tax (Appeal)-20, Kolkata, in appeal no. CIT(A)/Kolkata-20/10092/2007-08, which in turn arises out of an assessment order passed by the Assessing Officer u/s 147 / 143(3) of the Income Tax Act, 1961 (in short the "Act") dated 19/01/2007.

2. At the time of hearing none appeared on behalf of assessee in spite of issuance of notice for hearing more than one occasion and Ld. Departmental Representative(DR), was present for the appellant Revenue. In the absence of any appearance by the assessee, the appeal is being disposed of *ex parte qua* the

assessee, after hearing Ld. DR for the Revenue on merits in terms of Rule 24 of the Income Tax Appellate, Tribunal, Rules, 1963.

3. The grounds of appeal raised by the Revenue are as follows:

1. Whether on the facts and in the circumstances of the case, ld. CIT(A) has erred by deleting the disallowance holding that section 36(1)(viiia) contains provisions for Schedule Bank, whereas there is no such provision for NBFC.

2. Whether on the facts and in the circumstances of the case, the ld. CIT(A) has erred by deleting the disallowance holding that if a particular method of accounting is being followed by the assessee regularly it should not be disturbed in just one particular year, without appreciating the fact that the assessee is getting double deduction. In way of capital recovery and full depreciation on the assets without adjustment of written down value.

3. That the appellant craves for leave to add, deleted and modify any of the grounds of appeal before or at the time of hearing.

4. Brief facts qua the issue are that the assessee claimed that during the relevant assessment year, it was a registered NBFC and had to follow the stringent guidelines on provisioning over non-performing assets, as prescribed by RBI. It also claimed that in assessee's own case in A.Y. 1998-99, the jurisdictional Tribunal has directed that such provision, when made following the statutory RBI Guidelines, is an allowable item for computation of income as per I T Act. To further for its claim, the assessee also enclosed other Tribunal decisions too. It is noted that respectfully disagreeing with the ITAT decision, the department has filed appeal u/s 260A against all the cited decisions including the decision given in assessee's own case. Technically and on merit, analysis shows that in addition to the claim of provisions, the assessee also claimed actual write off of bad debts u/s 36(1)(vii) of the Act. Such actual write off has been allowed. The Income Tax Act allows provision for non-performing debt assets u/s 36(1)(viiia) of the Act. The Assessing Officer was of the view that no NBFC is eligible to get the deduction u/s 36(1)(viiia) of the Act. Irrespective of the fact that, the provision was made

over non-performing assets following RBI guideline. The Assessing Officer also referred the decision in the case of Jyoti Ltd. reported in 219 ITR 388 and in the case of State Bank of Patiala reported in 219 ITR 706, the Apex Court held that a provision can be allowed only when the liability has crystallized and not before that. Here, the assessee makes the provision under surmise and assumption that the debt will be bad in future. When it is actually lost, it claims it as bad debts written off and that is allowed. But no provision on unascertained liability can be allowed as a legitimate deduction from Income under the Act. Therefore, Assessing Officer denied the assessee's claim and made addition of Rs. 87,05,72,526/-.

5. Aggrieved by the order of the Assessing Officer the assessee carried the matter in appeal before the Id. CIT(A) who has deleted the addition made by the Assessing Officer observing the followings:

“5.3.1. The Hon'ble ITAT had in appellant's own case for the A.Ys 1997-98, 1998-99, 1999-2000 upheld the Id. CIT(A) decision granting relief to the appellant.

5.3.2 The Hon'ble ITAT Kolkata had many other occasions to adjudicate on the issue of provision for NPA by NBFCs.

The most elaborate decision is as pointed out by the Id. A.R. in a very recent decision 29.05.2009 also, the Jurisdictional Kolkata Tribunal in the case of ACIT vs. Spot Light Vanijya Ltd. in ITA No. 442/Kol/2008 held that provision for NPA is allowable as a deduction. The Tribunal in this case considered the various decisions rendered by the co-ordinate Benches as well as the decision of the Special Bench in the case of New India Industries Ltd. vs. ACIT dated 26.10.2007. The Tribunal also considered the various orders of the Calcutta High Court dismissing the appeals filed by the Revenue u/s 260A. The Tribunal also considered the issue of binding precedent of the decision of the jurisdictional Calcutta High Court in light of the decision rendered by the Gujrat High Court in the case of Nirma Industries Ltd. vs. CIT 283 ITR 402. After considering the issue from all angles, the Tribunal finally upheld the order of the Id. CIT(A) deleting the disallowance on account of provision for NPA and dismissed the ground of the revenue. A copy of the said order of the Tribunal is also enclosed for your kind perusal and ready reference.

5.3.3 The ACIT A.O has referred to the decision of the Hon'ble Supreme Court in State Bank of Patiala (219 ITR 706).

In my view, that decision is on different footing and context – as it is the case of a scheduled bank; whereas the instant case of the appellant is of a NBFC. In the Act – there are specific provisions on the issue of Provisions for Scheduled Bank

contained in section 36(1)(viiia); whereas there is no such provision for NBFC – and so this dispute.

[The issue has now been addressed by the insertion of clause (d) to the section 36(1)(viiia) by the Finance Act, 2016 w.e.f. 01.04.2017, which provides for such provision for NBFCs.]

5.3.4. Thus, the impugned disallowance is hereby deleted.
Ground of appeal no. 3 is allowed.”

6. Aggrieved by the order of Id. CIT(A), the revenue is in appeal before us.

7. We have heard Id. D.R. for the revenue and perused the material available on record. During the appellate proceedings, the assessee submitted that the following written submissions before Id. CIT(A), which is relevant therefore the same is reproduced below:

“ The appellant is a Non-Banking Financial Company (NBFC) having registered itself with Reserve Bank of India. The assessee has been carrying business as a Non-Banking Financial company within the meaning of Reserve Bank of India Act, 1934. The assessee being an NBFC, has to comply with the Non-Banking Financial companies Prudential Norms (Reserve Bank) Directions, 1998 which, amongst others, includes provisioning Requirements for sub-standard assets, doubtful assets and loss assets and also requires that the same shall be debited to the Profit & Loss Account. The assessee, in pursuance of the directions issued by the Reserve Bank of India has debited in the Profit & Loss Account for the previous year ended on 31.03.2002 a sum of Rs. 87,05,72,526/- as NPA. The aforesaid provision for NPA was made in conformity with the prudential norms as specified in the directions issued by the Reserve bank of India in terms of Non-Banking Financial companies Prudential Norms (Reserve Bank) Directions, 1998. Therefore, provision for NPA debited to the Profit & Loss Account of the assessee company has been claimed as an admissible deduction. The issue of allowability of provision for NPA came up for consideration before the ITAT, Kolkata in the assessee’s own case for A.Y. 1998-99 in an appeal preferred by the Department in ITA No. 1566/Kol/2004. The Tribunal in its order dated 31.05.2007 has held that the assessee is registered with RBI as an NBFC and therefore the prudential norms of RBI were binding on the assessee. The Tribunal followed the earlier decisions of the Co-ordinate Benches of the Tribunal and confirmed the deletion of disallowance made by the Id. CIT(A) in respect of provision for NPA and dismissed the ground taken by the Department. Further, the Tribunal in an appeal by the assessee in A.Y. 1999-2000 in its order dated 31.05.2007 in ITA No. 2529/Kol/2004 followed the order of the Tribunal in the assessee’s own case for A.Y. 1998-99 and directed the A.O. to allow the deduction for Provision for Non-performing asset debited to Profit & Loss Account pursuant to the prudential norms of RBI applicable to NBFCs. In a very recent decision 29.05.2009 also, the Jurisdictional Kolkata Tribunal in the case of ACIT vs. Spot Light Vanijya Ltd. in ITA No. 442/Kol/2008 held that provision for NPA is allowable as a deduction. The Tribunal in this case considered the various

decisions rendered by the co-ordinate Benches as well as the decision of the Special Bench in the case of New India Industries Ltd. vs. ACIT dated 26.10.2007. The Tribunal also considered the various orders of the Calcutta High Court dismissing the appeals filed by the Revenue u/s 260A. The Tribunal also considered the issue of binding precedent of the decision of the jurisdictional Calcutta High Court in light of the decision rendered by the Gujrat High Court in the case of Nirma Industries Ltd. vs. CIT 283 ITR 402. After considering the issue from all angles, the Tribunal finally upheld the order of the ld. CIT(A) deleting the disallowance on account of provision for NPA and dismissed the ground of the revenue. The assessee therefore submits that provision for NPA be allowed as an admissible deduction as held by the Jurisdictional Tribunal in the assessee's own case in earlier years."

8. We note that the ld. CIT(A) allowed the appeal of the assessee by following the judgment of this Tribunal in assessee's own case. We note that this Tribunal has recently passed the judgment in the case of SREI Infrastructure Finance Ltd. in ITA Nos. 1318 & 1302/Del/2012 & 1812&2003/Kol/2016 for A.Y. 2008-09 & 2011-12 dated 31/12/2019 by following the judgment of the Hon'ble Supreme Court in the case of Southern Technologies Ltd. vs. JCIT (320 ITR 577)(SC) wherein the Tribunal disallowed the provision for NPA. The finding of the Tribunal is give below:

"12. Concise and summarized ground No.2 is reproduced below for ready reference:

(2). Ld. CIT(A) erred in confirming the disallowance of provision for Non-Performing Assets (NPA) of Rs.13,71,00,000/- made in accordance with the prudential norms of the RBI, in the computation of total income under the normal provisions of the Act. (This covers ground No. 2 raised by the assessee in ITA No.1318/Del/12 for A.Y.08-09) [Hon`ble High Court Question No. (iii)].

13. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. Facts of the issue are that during the year under consideration, the company has made a provision of Rs. 1,371 lakhs towards provision for non performing assets (NPA) as per the Prudential Norms of the Reserve Bank of India (RBI). The said provision has been claimed as deduction in computing the total income. The Supreme Court in a recent case of Southern Technologies Ltd. vs. JCIT (320 ITR 577- SC) has held that "Provision for NPA" made in terms of the RBI directions does not constitute expense for purposes of section 36(1)(vii) and thus the same is not allowable. Further, the Supreme Court has also ruled that deduction can also not be claimed u/s 37(1) of

the Act. In view of the aforesaid decision of the Supreme Court, provision for NPA of Rs. 1,371 lakhs was added back by AO in the computation of total income.

We note that Ground No.2 of the assessee's appeal and question no. (iii) of High Court's order is in relation to disallowance of Provision for Non-performing assets (NPA) of Rs. 13,71,00,000/- made in accordance with the prudential norms of the RBI in computation of income under the normal provisions of the Act. In the return of income, the assessee had not added back Provision for NPA while computing its total income under normal provisions of the Act. The Assessing Officer, relying on the decision of Apex Court in Southern Technologies Ltd. -vs.- JCIT (2010) 320 ITR 577 (SC) disallowed the same. On appeal, the CIT(A) affirmed the decision of the Assessing Officer. On further appeal, the ITAT in its earlier order dated 27-02-2019 relying on the decision of Southern Technologies Ltd. (Supra) dismissed the appeal of the assessee. On appeal, before the Hon'ble Calcutta High Court, Question No. (iii) which deals with the issue under consideration was remanded back to this Tribunal for fresh consideration. Accordingly, the issue is before us for reconsideration.

14. Before us, the ld Counsel of the assessee submitted that the assessee being a non-banking finance company is required to create provision for non-performing assets in accordance with Direction 9 of the Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007 issued by the RBI pursuant to power conferred by Sec. 45JA(Ch. IIIB) of the RBI Act, 1949. Further, Sec. 45Q of the RBI Act provides that, provision of Ch. IIIB has an overriding effect on any other statutory enactment.

15. Ld DR for the Revenue has primarily reiterated the stand taken by the assessing officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity. We agree with the view taken by the Coordinate Bench in its earlier order dated 27-02-2019. Thus, the issue is squarely covered against the assessee by the decision of Apex Court in Southern Technologies Ltd. (Supra). Respectfully, following the decision of Apex Court in Southern Technologies Ltd. (Supra), we dismiss the ground raised by the assessee."

Respectfully following the judgment of the Tribunal in SREI Infrastructure Finance Ltd. (supra), we allow the appeal of the Revenue.

9. Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Coordinate Bench of the Mumbai Tribunal in the case of DCIT vs. JCB Limited in

ITA No. 6264/Mum/2018 and ITA No. 6103/Mum/2018 for A.Y. 2013-14 order dated 14.05.2020.

10. In the result, the appeal of the revenue is allowed.

Order pronounced in the Court on 12.06.2020

Sd/-
(S.S.GODARA)
न्यायिकसदस्य / JUDICIAL MEMBER

Sd/-
(A.L.SAINI)
लेखासदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata;

दिनांक/ Date: 12/06/2020

(SB, Sr.PS)

Copy of the order forwarded to:

1. DCIT, Circle-6(1), Kolkata
2. M/s CFL Capital Financial Services Ltd.
3. C.I.T(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.
6. Guard File.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches