

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM AND SHRI PAVAN KUMAR GADALE, JM

ITA No. 1339/PN/2007

(Assessment Year 2002-03)

ITA No. 289/PN/2010

(Assessment Year 2002-03)

ITA No.1738/PN/2005

(Assessment Year 2002-03)

IDBI Bank Ltd. (successor to the United Western bank Ltd.) 22 nd Floor, Taxation Cell, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai-400 005	Vs.	Asst. Commissioner of Income Tax (LTU), WTC Complex, Cuffe Parade, Mumbai -400 005
(Appellant)		(Respondent)
PAN NO.AABCI8842G (successor to AABCT0177D)		

Assessee by	:	Shri C Narseh, AR
Revenue by	:	Shri Ajay Kumar/ Vivek Upadhay, DR

Date of hearing:	12.01.2022
Date of pronouncement :	23.03.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. These are three appeals pertaining to one assessee IDBI Bank Ltd (successor to United Western Bank Ltd.) for one Assessment Year 2002-03.

02. ITA No. 1738/Pn/2005 is filed by the assessee against the order passed by the Commissioner of income-tax (Appeal)-2, Pune [in short the learned CIT(A)] dated 1st September, 2005 for Assessment Year 2002-03, where the appeal filed by the assessee against the order passed by Asst. Commissioner of Income-tax, Satara, Circle Satara (the learned Assessing Officer) under section 143(3) of the income-tax Act, 1961 (hereinafter referred to as 'Act') on 30th November, 2004 is partly allowed.
03. The assessee is aggrieved with some of the additions confirmed by the learned CIT(A) and therefore has preferred this appeal by raising following grounds of appeal:-

"1. The learned C.I.T.(A) has failed in sustaining disallowances of Rs.44563/-in respect of Indore Branch, Rs.37124/- for Gwalior Branch, Rs.100000/- for Andheri Branch and Rs.1112/- for Mhasurne Branch towards Earlier Year Expenses out of total disallowance of Rs.204359/- made by the A.O. He failed to consider the facts and merits each of the disallowances sustained as above.

1A. The reasons stated for not allowing the set off against these expenses for provision of Rs.10 lac made by the Appellant for Contingent Expenses and duly added back in Return of Income are also wrong and contrary to the facts and law.

2. The learned CIT(A) has failed in sustaining disallowance of Rs.700000/- which represents 1/5th of the expenditure on stamp duty for increasing the authorised share capital of the Assessee in A.Y. 2001-02.

He ought to have held that Banking is recognised as an Industry and the context of Sec. 35D does not require manufacture of an article to qualify for deduction and failed to appreciate that the claim was under Sec. 35D (2) (c)(iv) and not U/s 37 as was the case in Punjab State Industrial Development Corporation V/S CIT 225 ITR 792 which he purported to follow.

3. The learned CIT(A) has erred in upholding the disallowance of Rs.72300000/ U/s 14A without appreciating the scope and purpose of Sec. 14A.

He ought to have held that it was for the A.O. to establish a direct nexus between tax-exempt income and expenditure to earn such income.

He also ought to have held that unless expenditure is incurred wholly and exclusively for the purpose of making or earning such income, no disallowance can be made on an ad-hoc basis. He failed to appreciate that there was no expenditure incurred in relation to income, which is not included in the total income of the previous year.

3A. The learned CIT(A) has erred in holding that the Appellant is not carrying one composite business and the apportionment of expenditure is justified.

4. The learned CIT(A) has erred in upholding the disallowance of Rs.2,68,54,381/ made by the A.O. on account of Bad Debts after deducting provision U/s 36(1)(viia) of the current year of Rs.15,88,11,799/- from total amount of Bad Debts written off.

He failed to appreciate the true scope and meaning of Section 36(1)(viia). The view taken by the Department that the entire current year's provision was disallowable is wholly contrary to the object and wording of Section 36(1)(viia). He ought to have allowed deduction for Bad Debts U/s 36(1)(vii) from the total income computed before making deduction under clause (viia) and before deduction under chapter VIA and therefore, Bad Debts written off and allowable under clause (vii) must be deducted prior to provision.

He failed to appreciate that provision can be made only after ascertaining income out of which it is to be made and hence, current year's provision will be available for set off only in the next year.

4A. The learned CIT(A) has erred in holding that the case decided by Hon'ble Bombay Tribunal reported in 92 ITD 725 does not help the case of the Appellant

and which is contrary to the facts and law which in fact is precisely similar to that of the issue involved in our case.

5. The learned CIT(A) has erred in sustaining the addition made by A.O. of Rs.5,00,000/- in respect of levy of penalty by RBI. He failed to appreciate that the penalty was compensatory in nature.

6. The Appellant craves leave to add, alter, amend or modify any of the Ground of Appeal”

04. ITA No. 1339/PN/2007 is filed by the assessee against the order passed by Commissioner of income-tax (Appeals)-2, Pune [the learned CIT(A)] dated 17.07.2007, wherein the appeal filed by the assessee against the order passed by the Dy. Commissioner of Income-tax Satara, Circle Satara [the learned Assessing Officer) under section 143(3) read with section 147 of the Act for Assessment Year 2002-03 was dismissed, upholding the reopening of the assessment as well as confirmation of the disallowance of Rs. 2,35,00,000/- as losses written off.

05. The assessee is aggrieved on following grounds of appeal:-

"Aggrieved by the Appellate Order dated 17.07.2007, passed by the Commissioner of Income Tax (Appeals) II, Pune [CIT (A)] for the Assessment Year 2002-03 u/s 250 of the Income Tax Act, the Appellant begs to file this appeal, and raise the following grounds of

appeal, which are independent of and without prejudice to each other.

1. Reopening of Assessment

The Hon'ble CIT (A) erred in upholding the action of the learned assessing officer in reopening of assessment. In the facts and the circumstances of the case the reopening of the assessment by the A.O, was bad in law. The Hon'ble CIT (A) ought to have held that the action of the A.O. in reopening the assessment, as bad in law.

2. Disallowance of expenditure

The Hon'ble CIT (A) erred in following his predecessor and in confirming the disallowance of Rs. 2,35,00,000 claimed as expenditure by the appellant. The Hon'ble CIT (A), in the facts and circumstances of case ought to have deleted the addition made by the A.O amounting to Rs. 2,35,00,000.

The appellant craves leave to add, alter and amend or to modify any of the grounds of appeal till the final disposal of the appeal."

06. ITA No. 289/PN/2010 is filed by the assessee against the order passed by the Commissioner of income-tax (Appeal)-3, [the learned CIT (A)] Pune dated 17.11.2009, wherein the penalty levied under section 271(1) (c) of the Act by the Asst. Commissioner of Income-tax Satara, Circle Satara, as per order dated 28th March, 2009 of

Rs.83,94,975/- for Assessment Year 2002-03 was confirmed.

07. The assessee has raised following grounds of appeal:

"Aggrieved by the Appellate Order dated 17.11.2009 passed under section 250 of the Income Tax Act, 1961, by the Commissioner of Income Tax (Appeals) -III, Pune, [CIT (A)] for the Assessment Year 2002-03, the appellant begs to file this appeal and raise the following grounds, which are independent of and without prejudice to each other.

1. As per the facts and circumstances of the case, the learned CIT(A) erred in upholding order of the Assessing officer levying penalty u/s 271(1)(c) of the Income Tax Act 1961.

2. The learned CIT (A) erred in upholding the penalty levied by the Assessing officer u/s 271 (1)(c) of the Income Tax Act, on account of disallowance of the claim for deduction of loss incurred, arising out of a scheme of employee stock options during the course of business of the appellant.

The appellant craves leave to add to, amend, alter, modify, delete and/ or substitute all or any of the above grounds of appeal till the final disposal of the appeal."

08. Coming to ITA No. 1738/PN/2005, the facts of the case shows that the assessee is a United Western Bank Ltd.

filed its return of income on 20th September, 2002 of Rs.10,28,40,690/- which was subsequently revised on 31st March, 2004 at Rs.35,02,62,985/-. The case of the assessee was picked up for scrutiny and assessment order under section 143(3) of the Act was passed on 30th November, 2004 determining the total income of the assessee at Rs.44,84,43,920/-.

09. The learned Assessing Officer made seven disallowances amounting to Rs. 10,33,48,354/- which are as under:-

"ANNUEXURE-A TO COMPUTATION OF TOTAL INCOME

1. Earlier years' expenses (Para No 08 Page Nos 3 to 8)	Rs.	2,04,359
2. Unpaid Bonus (Para No 09 Page Nos 8 to 9)	Rs.	4537
3. 1/5th of expenditure on stamp duty etc for increasing authorised capital (Para No.10 Page Nos. 9 to 14)	Rs.	7,00,000
4. Proportionate expenditure on income not includible in total income (Para No. 11 Page Nos.14 to 21)	Rs.	7,23,00,000
5. Depreciation on leased commercial vehicles & other vehicles (Para No.12 Page Nos 21 to 26)	Rs.	27,85,077
6. Excess claim Bad debts u/s 36(1)(vii) (Para No. 13 Page Nos. 26 to 28)	Rs.	2,68,54,381
7. Penalty (Para No.14 Page Nos. 28 to 35)	Rs.	5,00,000
Total Addition	Rs.	10,33,48,354

010. The assessee aggrieved with the same preferred the appeal before the learned CIT (A), who partly allowed the appeal of the assessee and the issue on which the addition is confirmed the assessee is in appeal before us.
011. Ground No. 1 of the appeal with respect to disallowance of expenditure of Rs. 72,956/- for prior period expenditure. The learned Assessing Officer noted that as per annexure-17 of tax audit report a total expenditure of Rs. 16,15,010/- is expenditure relating to earlier years debited to the profit and loss account. On question, the assessee explained that these are the expenses related though earlier period however incurred during the year. The assessee submitted that as the liability to above sum has been crystallized during the previous year these are not in fact prior period expenditure but are expenditure allowable under section 28 of the Act for this year. The learned Assessing Officer rejected the contention of the assessee and held that as the assessee has not been able to prove that the liability for payment of the above expenditure arose during the year, he disallowed a sum of Rs.2,04,359/-. The assessee preferred the appeal before the learned CIT(A) who sustained the disallowance of Rs.44,563/- in respect of rent paid for the month of October, 2000 with respect to Indore Branch, the disallowance of Rs.37,124/- with respect to water charges, rent and electricity of Gwalior branch, of Rs.1 lacs with

respect to Andheri Branch. The assessee challenges the same before us.

012. The learned Authorised Representative submitted that identical issue arose in case of the assessee for Assessment Year 2001-02 wherein the co-ordinate Bench vide order dated 17th December, 2020 in ITA No. 1585/PN/2005 vide Para No. 17 to 20 has deleted the disallowance.
013. The learned Departmental Representative supported the orders of the lower authorities.
014. On careful perusal of the order of the co-ordinate Bench for Assessment Year 2000-01, we find that the identical disallowance of Rs. 2,42,190/- confirmed by the learned CIT (A) was deleted. The co-ordinate Bench held that where the activities of the assessee are carried out through multiple branches situated at distant places naturally, there would be overflow of information. However, assessee is following mercantile system of accounting and as and when the expenditure are approved then the same are said to be incurred and for that year those claim are allowable. Naturally, though the expenses may relate to period of earlier year but when the liability to pay such sum is acknowledged during the year, the same is allowable. In the present case, Rs.44,563/- is with respect to rent, Rs.37,124/- is also of water charges and electricity and expenditure of Rs.1,112/- of different

branches are also disallowed for the same reason. With respect to the sum of Rs.1 lac that was given, as advance in earlier years but accounted for expenditure during the current year on completion of the work. Therefore, it cannot be said to be an expenditure pertaining to earlier year because the event of completion of work falls in this year. Therefore, respectfully following the decision of coordinate Bench in assessee's own case for earlier years we direct the learned Assessing Officer to delete the disallowance of Rs.2,04,359/- which is expenses pertaining to earlier year but incurred during the year. Ground No.1 of the appeal is allowed. In view of our decision of ground No.1, alternative plea for ground no. 1A do not survive.

015. The 2nd ground of appeal, with respect to the sustaining of disallowance of Rs. 7 lacs being 1/5th expenditure on stamp duty for increasing the authorized share capital of the assessee in Assessment Year 2011-12. In the computation of the total income assessee has claimed 1/5th of expenditure incurred on stamp duty and registration charges for increase in assessee bank's authorised share capital under section 35D(2)(c)(iv) of the Act. The assessee submits that the claim of the assessee is based on the decision of Hon'ble Rajasthan High Court in the case of 199 ITR 151. The learned Assessing Officer considered the provision of section 35D of the Act and held that as the assessee bank is not

eligible for deduction under that section since the provisions are applicable to 'industrial undertaking' and not to bank. As the above expenditure is also not incurred before the commencement of the business assessee is not eligible. It was further held that only underwriting commission, brokerage and charges for the prospectus are eligible for deduction under that section, stamp duty and registration charges are not eligible for deduction. The learned Assessing Officer cited several judicial precedents, where the expenditure incurred on increasing capital base is held to be capital in nature. He disallowed the above sum. The learned CIT (A) confirmed the above disallowance based on his order for Assessment Year 2001-02. Therefore, this issue is agitated as per ground no. 2.

016. The learned Authorised Representative submitted that this issue is covered in favour of the assessee by the decision of the co-ordinate Bench in assessee's own case for Assessment Year 2001-02. He specifically referred to paragraph No. 8-11 of the order. The learned Departmental Representative relied on the order of the lower authorities.

017. We have carefully considered the rival contentions and perused the orders of the lower authorities. Identical issue arose first in Assessment Year 2001-02 where the first appellate authority confirmed the disallowance made

by the learned Assessing Officer. On appeal before us, co-ordinate Bench relying on the decision of Hon'ble Karnataka High Court in the case of CIT s. Buhler India Ltd. [2012] 20 taxmann.com 191 (Karnataka), in case of Dhanalakshmi Bank Ltd. vs. CIT [2019] 102 taxmann.com 442 (Kerala) and CIT vs. Nuchem Ltd. [2015] 59 taxmann.com 455 (Punjab & Haryana), has held that assessee bank extending financial services would be entitled to amortization of preliminary expenses for public subscription. The Hon'ble Punjab and Haryana High Court has also held that fees of ROC, for enhancement of authorized capital is deductible over a period of ten years under section 35D(2) of the Act. Further, this is the second year of amortization period expenses challenged before us. In the first year, co-ordinate bench has decided the above issue in favour of the assessee, respectfully following the decision of co-ordinate Bench in assessee's own case; we also allow the ground No.2 of the appeal.

018. Ground No.3 and 3A of the appeal is with respect to disallowance under section 14A of the Act. During the year assessee has claimed tax-free income of Rs.33,12,67,172/-. In the return of income as note no. 3 assessee has stated that no expenditure is incurred attributable to tax-free income, as the amount of investment made in those equity is less than the amount of share capital and free reserve of the assessee and therefore there cannot be any interest expenditure

disallowable under section 14A of the Act. During the assessment proceedings also the assessee submitted that it has interest free funds of Rs.682 crores and investment in securities generating tax free income is 206 crores and therefore no disallowance is warranted on account of interest expenditure. The learned Assessing Officer rejected the contention of the assessee stating that the assessee has only given explanation with respect to interest expenditure but not other expenditure. He therefore applied the ratio of investment in securities compare to gross investment in securities and advances of 38.70 % and held that interest-bearing funds of 71.79% at the rate of 9.05% resulting into interest of 7.23 crores is disallowable. Accordingly, the disallowance under section 14A of 7.23 crores was made. The learned CIT (A) following his own order for Assessment Year 2001-02 confirmed the above disallowance.

019. The learned Authorised Representative submitted that for Assessment Year 2001-02, the matter was agitated before the co-ordinate Bench wherein as per Para No. 12 of the order the above disallowance was deleted. The learned Authorised Representative relied upon the orders of the lower authorities.

020. We have carefully considered the rival contentions and perused the orders of the lower authorities as well as orders of the co-ordinate Bench on identical issue for

Assessment Year 2001-02. In the present case, we find that the interest free funds available with the assessee are far important in excess of investment of the assessee in tax free income generating instruments, therefore, there cannot be any disallowance on account of interest under section 14A of the Act. The learned Assessing Officer has not held that any other expenditure other than the interest income is also disallowable under section 14A of the Act. In view of this, the learned Assessing Officer is directed to delete the disallowance under section 14A of the Act of Rs. 7.23 crores under section 14A of the Act with respect to interest expenditure. Accordingly, ground No. 3 of the appeal is allowed. In view of our decision in ground No. 3 ground No. 3 A with respect to alternative contentions becomes infructuous.

021. Ground No. 4 is against the disallowance of Rs. 2,68,54,381/- made by Assessing Officer on account of bad debts. The facts shows that the assessee has claimed total bad debts written off of Rs.83,01,10,149/-, whereas balance in the provision u/s 36 (1) (viiia) is of Rs.22,69,44,299/- and made a net claim of Rs.60,31,65,150/-. The learned Assessing Officer on the basis of the work found that assessee has gross bad debt of Rs. 83,01,10,149/- and the balance of the provision as on 31.03.2001 was Rs.9,49,87,381/-. The assessee has made the provision for current year of Rs.15,88,11,299/- resulting into balancing figure of gross bad debt of

Rs.57,63,11,469/-, which at maximum could have been claimed . The assessee has claimed bad debts of Rs.60,31,65,850/- and therefore, the learned Assessing Officer held that Rs.2,68,54,381/- is an excess claim of bad debts under section 36(1) (vii) of the Act. Against this disallowance of assessee preferred the appeal before the learned CIT (A) who confirmed the above disallowance. While confirming the same, he noted that decision of the co-ordinate Bench in assessee's own case for AY 1993-94 has decided this issue against assessee and therefore following the same he is confirming the disallowance. Therefore, the assessee is in appeal before us.

022. The learned Authorised Representative submitted that there is no excess claim made by the assessee. He relied on the decision of the Hon'ble Supreme Court in the case of Catholic Syrian Bank Ltd. vs. CIT [2012] 18 taxmann.com 282 (SC) 342 ITR 270 and decision of the Hon'ble Gujarat High Court in the case of CIT vs. UTI Bank Ltd. [2013] 29 taxmann.com 79 (Gujarat). The learned Authorised Representative submitted that there is no excess claim made by the assessee.

023. The learned Departmental Representative vehemently supported the orders of lower authorities.

024. We have carefully considered the rival contentions and perused the orders of the lower authorities. According to

the provisions of section 36(1)(viia) banking companies are entitled to claim bad debts to the extent of the actual bad debts exceeds amount of balance in the provision made under section 36(1)(viia) of the Act. The actual bad debts written off for the bank was Rs. 83,01,10,149/- whereas the balance in the provision account was Rs. 22,69,44,299/- thus, the claim of bad debts of Rs. 60,31,65,850/- was made. The assessee has also claimed deduction of Rs. 15,43,09,093/- under section 36(1) (viia) of the Act. The Hon'ble Supreme Court in the case of Catholic Syrian Bank Ltd. (supra) as well as the Hon'ble Gujarat High Court in the case of UTI Bank Ltd. (Supra) held that where there is a claim by the bank under section 36(1)(vii) and 36(1)(viia) are different and under both these section the deduction is allowable. Therefore respectfully following the decision of the Hon'ble Gujarat High Court wherein the decision of the Hon'ble Supreme Court is followed, we direct the learned Assessing Officer to delete the disallowance of Rs. 2,68,54,381/- on account of bad debts. Accordingly, ground No. 4 of the appeal is allowed.

025. Ground No. 5 is with respect to disallowance of penalty levied of Rs. 5 lacs by Reserve Bank of India. The assessee has paid a penalty of Rs. 5 lacs levied by RBI as the assessee allowed to transfer of bank shares acquired by employee equity trust in excess of 5% stipulated for holding of any one entity. The Reserve Bank of India

issued a show cause notice. After hearing the assessee, RBI levied the penalty of Rs. 5 lacs, which is claimed by the assessee as deduction. The learned Assessing Officer held that penalty is not a deductible expenditure under section 37(1) of The Act and disallowed the same. The learned CIT (A) confirmed the same.

026. The learned Authorised Representative contested that RBI is a regulatory authority and the penalty is not levied for infraction of any law or any criminal offence and therefore it is not disallowable. He also referred to several judicial precedents including in assessee's own case where disallowance made of penalty levied by RBI is deleted. Before us, the assessee has relied upon the decision of coordinate Bench in the case of Bapunagar Mahalla Co-operative Bank Ltd. in ITA No. 2423/Ahd/2010 dated 02.07.2015 and Hon'ble Bombay high Court in the case of Stock and Bond Trading Co. in ITA No.4117 of 2010 dated 14th October 2011 stating that the above payment is not prohibited by law and therefore it should be allowed.

027. The learned Departmental Representative vehemently supported the orders of the lower authorities.

028. We have carefully considered the rival contentions and perused the orders of lower authorities. Firstly, we have asked the assessee to produce the order of the Reserve bank of India for levy of penalty. The penalty was levied for the reason that assessee has allotted shares in excess

of 5 % of capital of the bank. Because of such violation, assessee was directed by RBI to liquidate such shares and assessee has incurred huge losses. Such a Violation of the Guidelines of RBI cannot be considered as mere technical or venial breach of law. For this, RBI has levied penalty on the assessee. This penalty was disallowed by the LD AO and confirmed by the LD CIT (A). On careful consideration, we find that the penalty is levied by Reserve Bank of India for allowing the transfer of bank's shares by trust for ESOP in excess of 5% stipulated by the Reserve Bank of India. According to the Provision of Section 37(1) of the Act, if assessee incurs any expenditure for any purpose which is an offence and prohibited by law shall not be deemed to have been incurred for the purpose of the business and should be disallowed. The assessee has violated the provisions of section 12 of the banking regulation Act, 1949 by allowing one person to hold the shares of the assessee company more than specified percentage. Section 46 of the above Act provides for levy of penalty whenever the provisions of the banking regulation Act are violated. Therefore, it is apparent that above penalty is levied under section 46 of the banking regulation Act for violating provision of banking regulation Act. Hence, it is an offence committed by the assessee bank under the banking regulation Act for which penalty is levied and therefore same is covered by explanation to 37(1) of the Act. Coordinate bench in ANZ

Grindlays Bank (2004) 88 ITD 53 (Delhi) has held that the - RBI directions/guidelines are statutory and violation of the same are akin to violation of statutory provisions. The Supreme Court in the case of Bank of India Finance Ltd. v. Custodian [1997] 10 SCC 488, has also held that the directions of the RBI are binding on the banks; such violations are punishable under the provisions of the Banking Regulation Act. Hence, any payment in violation of the RBI directions is not allowable as deduction under section 37. Explanation to section 37(1) makes it clear beyond doubt that any expenditure prohibited by law cannot be allowed as deduction under section 37. We find that Hon'ble Supreme Court in ICCI Bank Vs. official liquidator in 2010 SCC online Supreme Court 1102 has also held that guideline issued by Reserve Bank of India in exercise of various powers conferred under the banking Regulation Act and they have force of law. Therefore, in view of the above decision relied up on by the learned Authorised Representative does not apply as none of those decisions have considered the decision of Honourable Supreme court in case of ICICI bank [supra]. More so, we do not find that violation of the above provisions of the banking Regulation Act is merely technical or venial in nature. In view of this, we confirm the action of the learned lower authorities in disallowing the above sum of Rs. 5 lacs under section 37(1) of the Act. Ground no 5 of the appeal is dismissed.

029. In view of this, the ITA No.1738/PN/2005 is partly allowed.
030. Now, we come to the ITA No.1339/PN/2007 filed against the order passed by the learned Commissioner of Income-tax Appeals-3, Pune dated 17.07.2007, wherein the appeal filed by the assessee against the order passed by the Dy. Commissioner of Income-tax, satara Circle, Satara passed under section 143(3) of the Act read with section 147 of the Income-tax Act, 1961 (hereinafter referred to as 'Act') was dismissed.
031. The learned CIT (A) upheld the reopening of the assessment as well as disallowance of Rs. 2,35,00,000/- claimed as expenditure by the assessee on account of ESOP.
032. The assessee filed its return of income that was assessed under section 143(3) of the Act on 30th November, 2004. After that, the notice under section 148 of the Act was issued on 20 February 2006 served on assessee on 1 March 2006.
033. The reason for reopening recorded by the learned Assessing Officer are as under:-

"Return for the Assessment year 2002-03 declaring income of Rs. 10,40,690/- has been filed by the assessee on 29-10 2002, the assessee bank has filed revised return of income filed on 31 3-2004, declaring

total income at Rs. 35,02,62,985/-. Subsequently the case being falls under the clause of compulsory scrutiny case has been completed on 30-11-2004, assessing total income at Rs. 44,84,43,420/- u/s. 143(3) of the I.T. Act, 1961.

2. The assessee is a domestic company in which the public is substantial interested. The assessee company is engaged in banking business. On verification of the return of income and other documents filed by the assessee it is revealed as under:

It is seen from assessment records of A.Y. 2001-02 that in the year 2000-01, RBI directed the assessee bank to recall the loan from the United Western Bank Employees Equity Trust by offloading the shares of the Trust. The statutory Auditors in their report for the year 2000-01 (A.Y. 2001-02) have mentioned in Note No. 7 of Schedule 17 that pursuant to directives by RBI, loss of Rs. 7.45 crores pursuan on interest free loans given to "Employees Equity. Trust" being fall in value of the securities held by the Trust is charged off as extra ordinary item during the year. The director's also have reported in 64th Annual Report that the Bank has introduced Employees Stock Option Plan (ESOP) for the welfare of the employees. The scheme was implemented by forming a Trust and a interest free loan was granted to the Trust to purchases the shares of bank through secondary market and subsequent allotment to the employees.

However, the said scheme was subsequently objected to by the RBI and provision to the extent of depreciation in value of shares held by Trust on 31-3-2001 was insisted. This resulted in abandonment of scheme and Bank had to write off loss of Rs. 7,42,64,353/- from loan account in A.Y. 2001-02. In a scrutiny assessment of Bank for A.Y. 2001-02, the Assessing Officer has disallowed this loss treating the Bank's participation in the scheme by way of contribution but not as a loan U/s. 40A(a). The A.O. has further examined the Bank's claim that deduction be allowed as a Bad Debit since the loss has arisen in the normal banking business of advancing loans' and held that claim on the ground also cannot be allowed as such.

It is seen from assessment records of A.Y. 2002-03 that the assessee bank has written off loss of Rs. 2,35,00,000/- being the balance amount in above credited loan account of Employees Equity Trust'. This loss has been allowed to be written off by the A.O. The claim of Bad Debts of Bank on this account cannot be admitted in view of the provisions of Sec. 36(2)(i) and with the fact that interest free loan to the Employee's Trust is not an ordinary course of business of banking. Therefore, the loss claimed should have been disallowed on merit as well as, as per consistent basis on which it was disallowed in A.Y. 2001-02. Omission to do so has resulted in underassessment of income of Rs. 2,35,00,000/- and consequent short

levy of tax of Rs. 1,69,67,000/- including interest U/s. 234-B.

In view of the aforesaid, discussion, I have reason to believe that Income to this extent chargeable to tax has escaped assessment within the meaning of provision of action U/s. 147 of the I.T. Act, 1961. Issue of notice under section 148 as per directions of the Addl. CIT, SR, Satara's No.Str/Addl.CIT/SRS/proposal/263/532/2005-06 dated 06.02.2006."

034. Assessee was questioned on the above reasons, assessee replied the same which was rejected and thereafter the addition of Rs.2,35,15,322/- was made to the total income of the assessee and assessment order under section 143(3)/ 250 read with section 147 of the Act was passed on 18th December, 2006.
035. The assessee challenged the same before the learned CIT (A) who confirmed the reopening of the assessment as well as on the merits of the case. Therefore, the assessee is in appeal before us.
036. The learned Authorised Representative submitted that reopening of the assessment has been made on mere change of opinion and in absence of any tangible material. He submitted that assessment records for Assessment Year 2001-02 was the only basis for reopening of the assessee, which was already there in the assessment

proceedings where full and true disclosure was made by the assessee. He also submitted that note No. 5 to the notes on financial statements clearly shows the above transaction. Therefore, it is mere change of opinion by the Assessing Officer and reopening is invalid.

037. On the merits of the case he submitted that the assessee has introduced employee stock option plan scheme and a trust was created for that and interest free loan of Rs. 6 crores was given to Trust after obtaining approval from Reserve Bank of India. This limit was further enhanced to Rs. 20 crores. The Trust acquired 8.15% of the bank equity at the cost of Rs. 15,22,00,000/-. As the enhancement of limit from Rs 6 crores as well as the acquisition of shares by more than 5% was without obtaining the permission of the RBI, assessee was directed to unwind the above scheme and recover loan from the above Trust. The entire loan granted to the Trust was to be recalled by selling of the shares and making the provisions of loss in the balance sheet of the assessee based on the current market value of the shares as on 31.03.2001. Accordingly, the assessee made a provision of Rs. 7,42,64,353/-. For Assessment Year 2001-02, the above sum was disallowed. For this year i.e. Assessment Year 2002-03, the same was also disclosed in the annual report in notes to financial statements in schedule 18 that there would be a further write off of Rs. 2,35,00,000/- relating to employees stock option plan. This was so

because of the reason that assessee was granted a further period of 6 months i.e. up to 30th September, 2001 for sale of shares by RBI which resulted in the above loss and therefore it was booked in Assessment Year 2002-03. The Authorised Representative submitted that the learned CIT(A) has confirmed this disallowance following his own order for Assessment Year 2001-02, he submitted that identical ground for Assessment Year 2001-02 has been decided by the co-ordinate Bench wherein the issue was set aside to the file of the learned Assessing Officer. He referred to the paragraph no. 3 to 8 of the above order.

038. The learned Departmental Representative supported the orders of the lower authorities.
039. We have carefully considered the rival contentions and perused the orders of the lower authorities. The first ground of appeal is with respect to the reopening of the assessment which is challenged by the assessee stating that there is absence of any tangible material and even otherwise, it is a mere change of opinion. On careful analysis of the reasons recorded by the learned Assessing Officer, it is apparent that original assessment under section 143(3) of the Act was completed on 30 November 2004 for Assessment Year 2002-03. The notice under section 148 of the Act was issued on 28 February 2006. The reasons for reopening is assessment records for Assessment Year 2001-02, wherein there is disallowance

of Rs. 7,42,64,353/-. The similar loss was claimed by the assessee for Assessment Year 2002-03. On completion of the assessment for Assessment Year 2001-02, the LD Assessing Officer found that the above claim is not allowable and therefore as similar claim was made for this assessment year too, he noticed above reasons. No doubt, the treatment of similar sum in earlier year is a tangible material coming in to the possession of the assessee. In the present case, it was not shown that whether above issue was at all examined or even looked at by the learned Assessing Officer. The facts shows that the Assessing Officer has applied his mind on this issue while making an assessment for Assessment Year 2001-02, wherein it is found that the above sum was not allowable as deduction to the assessee, identical sum was also claimed by assessee in this year. Therefore, we find that there is a fresh material available before the Assessing Officer to take a prima facie view that income of the assessee had escaped assessment and it definitely forms a tangible material to invoke provision under section 147 of the Act. Further, the learned CIT (A) also considered the fact that as per the note mentioned in the financial statements there was no mention of claim of the provision made in the earlier year. Had there been such a reference, the LD Assessing Officer would not have allowed claim, as he has already disallowed this sum in Assessment Year 2001-02. In view of all facts, we do not

find any infirmity in the action of the learned Assessing Officer in reopening of the above assessment. Therefore, ground no. 1 of the appeal is dismissed.

040. With respect to the ground No. 2, as the issue has already been set aside by the co-ordinate bench in assessee's own case for Assessment Year 2001-02 in ITA No. 1585/PN/2005 dated 17th December, 2020 vide Para No. 3 to 8 of the order, Therefore, following those direction, we also set aside this ground of appeal back to the file of the learned Assessing Officer to decide it afresh. Accordingly, ground no. 2 of the appeal is allowed with above direction.

041. Accordingly, ITA No. 1339/PN/2007 is partly allowed.

042. ITA no. 289/PN/2010 is with respect to levy of penalty under section 271(1)(c) of the Act for the Assessment Year 2002-03 levied by the learned Assessing Officer as well as confirmed by the learned CIT(A) under section 271(1)(c) of the Act of Rs. 83,94,975/- on the disallowance of Rs. 2,35,15,332/- on account of loss of sale of shares claim as bad debts per order under section 143(3) read with section 147 of the Act. The same order was also subject matter of appeal before us in ITA no. 1339/PN/2007. As the issue of disallowance on which penalty has been levied has been restored back to the file of learned Assessing Officer, issue of levy of penalty thereon is also set aside to the file of the learned



Assessing Officer to decide it afresh after deciding about allowability of loss of Rs. 2.35 crores. If the same is disallowed, the LD AO is free to initiate penalty proceeding u/s 274 rws 271(1) (c) of the act afresh, after giving assessee an opportunity of hearing.

043. Accordingly, the appeal of the assessee is allowed for statistical purposes.

044. In the result, all the three appeals filed by the assessee are disposed of as above.

Order pronounced in the open court on 23.03.2022.

Sd/-
(PAVAN KUMAR GADALE)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 23.03.2022

Sudip Sarkar, Sr.PS



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai