आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 776/CHNY/2023**

निर्धारण वर्ष/Assessment Year: 2016-17

IDFC First Bank Ltd., (earlier known as IDFC Bank Ltd.,) KRM Tower, 7th Floor, No.1, Harrington Road, Chetpet, Chennai – 600 031.	Vs.	**The Asst. Commissioner of Income Tax,** Corporate Circle 2(2), Chennai.
PAN: AADCI 6523Q		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Niraj Sheth, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri V. Nandakumar, CIT

सुनवाई की तारीख/Date of Hearing : 06.03.2024
घोषणा की तारीख/Date of Pronouncement : 08.03.2024

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi in Order No.ITBA/NFAC/S/250/2023-24/1052685424(1) dated 09.05.2023. The assessment was framed

by the Assistant Commissioner of Income Tax, Corporate Circle 2(2), Chennai for the assessment year 2016-17 u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 27.12.2018.

2. The first issue in this appeal of assessee is as regards to the order of CIT(A) confirming the disallowance of expenses, by AO, being relatable to exempt income by invoking the provisions of section 14A of the Act r.w.s. 8D(ii) of the Income-tax Rules, 1962 (hereinafter the 'Rules'). For this, assessee has raised the first jurisdictional issue that the provisions of section 14A of the Act does not apply to the case of assessee as it is in the banking business and the exempt income is business income from banking as the assessee has kept these shares/investments as stock in trade.

3. At the outset, the ld.counsel for the assessee stated the facts that during the year under consideration the assessee has disclosed tax free income of Rs.5,54,88,860/- and assessee suo-moto disallowed administrative expenses directly relatable to earn this exempt income at Rs.5,23,970/-. The ld.counsel for the assessee stated that the issue now stands covered by the decision of Hon'ble Supreme Court in the case of South Indian Bank Ltd., vs. CIT, reported in 130 Taxmann.com 178, wherein it is held that wherever

the assessee bank keep shares and securities and held the same as stock-in-trade and not bought to maintain Statutory Liquidity Ratio and also not kept as investment, income arising out of those is attributable to business of banking and hence, provisions of section 14A of the Act does not apply to the case of bank, wherein such exempt income is held to be business income. The ld.counsel for the assessee referred that the Tribunal in assessee's own case in ITA No.607/CHNY/2023 by following the decision of South Indian Bank Ltd., applied the Hon'ble Supreme Court decision and held that the provisions of section 14A of the Act would not attract to such income. We noted that the Hon'ble Supreme Court in the case of South Indian Bank Ltd., has held as under:-

> *25. Proceeding now to another aspect, it is seen that the Central Board of Direct Taxes (CBDT) had issued the Circular no. 18 of 2015 dated 2-11-2015, which had analyzed and then explained that all shares and securities held by a bank which are not bought to maintain Statutory Liquidity Ratio (SLR) are its stock-in-trade and not investments and income arising out of those is attributable, to business of banking. This Circular came to be issued in the aftermath of CIT v. Nawanshahar Central Cooperative Bank Ltd. [2007] 160 Taxman 48/289 ITR 6 (SC), wherein this Court had held that investments made by a banking concern is part of their banking business. Hence the income earned through such investments would fall under the head Profits & Gains of business. The Punjab and Haryana High Court, in the case of Pr CIT v. State Bank of Patiala [2017] 88 taxmann.com 667/393 ITR 476 (Punj. & Har.), while adverting to the CBDT Circular, concluded correctly that shares and securities held by a bank are stock-in-trade, and all income received on such shares and securities must be considered to be business income. That is why section 14A would not be attracted to such income.*

4. The ld.CIT-DR on the other hand heavily relied on the assessment order and the order of CIT(A) but could not controvert

that the assessee's case is not covered by the decision of Hon'ble Supreme Court in the case of South Indian Bank Ltd., *supra.*

5. After hearing rival contentions and considering the ratio of the aforesaid decision of Hon'ble Supreme Court in the case of South Indian Bank Ltd., *supra*, we hold that the provisions of section 14A of the Act would not attract to such income and such income is held by bank being shares and securities as 'stock-in-trade'. In case, stock-in-trade are held as investments then the provisions of section 14A of the Act will apply. Since there is no finding in the order of AO or CIT(A) that the shares and securities held by assessee bank as stock-in-trade and not investment, we principally agreeing with the argument of the ld.counsel for the assessee that this issue is covered but for verification purpose, we remit this issue back to the file of the AO. The AO is directed to first give a finding as regards to the fact that these shares and securities are held as 'stock-in-trade' or as 'investment' in assessee's bank balance sheet and in case, these are held as investment, the AO will recompute the disallowance by applying the provisions of section 14A of the Act r.w.rule 8D of the Rules as per law after considering the facts and circumstances of the case. Accordingly this issue of the assessee's appeal is remanded back to the file of the AO. The order of CIT(A)

and that of the AO are set aside and matter referred back to the AO. This issue of assessee's appeal is allowed for statistical purposes.

6. The second issue in this appeal of assessee is as regards to the order of CIT(A) upholding the disallowance of claim made by the assessee of loss on treasury investments being mark-to-market loss. For this, assessee has raised following the ground No.2:-

> *"2. Denial of deduction for provision for diminution in value of treasury investments*
>
> *The NFAC / learned CIT(A) erred in upholding the disallowance made by the learned ACIT for mark-to-market loss of Rs.1,02,66,292/- on treasury investments by holding that the same is in the nature of notional loss only arising due to valuation of securities.*
>
> *The deduction for diminution in value of treasury investments be granted to the Appellant."*

7. Brief facts are that the AO in his assessment order noted that the assessee was asked vide questionnaire dated 15.11.2018 to submit the details regarding provisions created for depreciation in value for investments and to justify the claim. The assessee in its written submission dated 11.12.2018 filed detailed submissions and made claim but the AO without going into the submissions simpliciter made disallowance by observing as under:-

> *"1. The assessee submission was considered. The assessee has created proration for depreciation in value of investments and claimed as*

expenditure. The proration expense is not allowable expenditure as per the IT Act, 1961 and the same was disallowed."

Aggrieved, assessee preferred appeal before CIT(A).

8. The CIT(A) noted that the AO has disallowed the mark-to-market loss debited by assessee under the head 'provision for diminution in value of investments' by holding that the losses are contingent in nature and therefore, not allowable as expenditure. The CIT(A) confirmed the action of AO and dismissed this ground of assessee's appeal by observing in para 7.4 & 7.5 as under:-

7.4 It is noted that AO has disallowed the mark to market losses amounting Rs.1,02,66,292/-, debited under the head "provision for diminution in value of investments" on the same ground i.e. the losses are contingent in nature and therefore not an allowable expenditure as per the Act. On a careful consideration of facts, I concur with the view taken by AO that Mark to market loss on the financial instruments held by the assessee as investments, is not real but a notional loss, for the reason that there was no actual transaction in those instruments carried out by the assessee. It is a way of disclosure of the market value of the financial instruments as on the date of balance sheet to show true and transparent picture of the financial position to the shareholders and other stakeholders. An anticipated loss for a future period (in the instant case, the year when the financial instruments are actually sold), however inevitable it may appear, cannot be a loss on trading of the present year. A loss which is apprehended to arise as a result of fall in the market, however probable or certain the loss may be, cannot be claimed as deduction from the profits of the accounting year, for the loss is not actually suffered in the current year. It is pertinent to not here that the deduction has been claimed by the appellant owing to valuation of investments held as per the market rate; and not on account of valuation of stock-in-hand at cost or market value whichever is lower.

7.5 In view of the facts and circumstances of the case, and the prevailing position of law applicable on such facts, and respectfully following the binding judicial precedents, find that AO has correctly made the disallowance of provision for diminution in value of investments, as the same was a notional loss only, arising due to valuation of securities at market rates. The disallowance of provision made on this account amounting Rs. 1,02,66,292/- is accordingly sustained. This Ground of appeal is dismissed.

Aggrieved, assessee came in appeal before the Tribunal.

9. We have heard rival contentions and gone through facts and circumstances of the case. We noted that the CIT(A) has recorded his finding that a loss which is apprehend to raise as a result of fall in the market, however probable or certain the loss may be, cannot be claimed as deduction. He noted that the deduction has been claimed by assessee owing to valuation of investments held as per the market rate but not as per the valuation of stock-in-hand at cost or market value, whichever is lower. The ld.counsel for the assessee countering this finding of CIT(A), argued that the finding of CIT(A) is wrong because it relates to or based on CBDT instruction No.3 of 2020, which relates to derivatives or future & options, which is not the case of the assessee. The ld.counsel argued that the assessee has rightly valued the said investments at the end of the year at cost or market value, whichever is lower and the difference arising as a result of valuation has to be assessed as loss or income. He relied

on the decision of Hon'ble Bombay High Court in the case of CIT vs. Bank of Baroda reported in 262 ITR 334, wherein the Hon'ble Bombay High Court has considered this aspect and allowed the claim of deduction on account of depreciation in the value of investment by observing as under:-

> *"In the case of UCO Bank v. CIT 1999] 240 ITR 355, the Supreme Court came to the conclusion that where the market value of shares and securities had fallen below the cost before the date of valuation and where on the date of valuation, the market value is less than the actual cost, then the Appellant was entitled to value the articles at market price and the Appellant was entitled to claim the loss which the Appellant would probably incur at the time of sale of shares and securities. That, whichever method the Appellant adopts, it should disclose the true picture of profits and gains. That, for determining the real income, the entries in the balance sheet was required to be maintained in the statutory form.*
>
> *However, such entries in the balance sheet were not decisive or conclusive. In such cases it was open to the ITO and the Appellant to ascertain true and proper income, while submitting income-tax returns. That, for valuing the closing stock, it was open to the Appellant to value the stock at cost or market price, whichever is lower. [Para 4]*
>
> *The judgment of the Supreme Court in UCO Bank's case (supra) squarely applied to the facts of instant case. In fact, that instant case was on a stronger footing because in the case of UCO Bank (supra), the loss was not debited to the profit and loss account whereas in instant case, the loss had been debited to the profit and loss account which was reflected as a provision for liability in the balance sheet and shares and securities were valued at cost on the assets side. [Para 4].*
>
> *Therefore, the Appellant was entitled to deduction on account of depreciation in the value of investments"*

9.1 The ld.counsel for the assessee also relied on the decision of Hon'ble Madras High Court in the case of Lakshmi Villas Bank Ltd., vs. CIT reported in 154 taxman 301, wherein the Hon'ble Madras High Court in similar facts allowed the claim of assessee as under:-

> *"In the instant case, the Appellant, was dealing with purchase and sale of Government securities. The profit and loss on the sale of Government securities had been assessed as business income/loss under the Act. The Appellant bank had always been treating Government securities as stock-in-trade. It was further noticed that whenever there was depreciation/appreciation in the value of the securities at the end of each accounting year, the same had been claimed as deduction /offered as income of the relevant year, while computing income taxable under the Act.*
>
> *There was no change of method of accounting of the securities since the assessment year 1976-77. It was also noticed that for the earlier assessment years, the revenue had accepted the plea of the Appellant that the Government securities were stock-in-trade and against the earlier orders, the revenue did not agitate by filing an appeal and, therefore, the same reached finality. Hence, it was too late in a day to raise instant issue when regard was particularly to the fact that the Appellant's method of treating the Government securities as stock-in-trade had all along been accepted by the Department."*

10. On the other hand, the ld.CIT-DR heavily relied on the assessment order and the order of the CIT(A).

10. The ld.counsel for the assessee drew our attention to the treatment given by the Revenue in assessment year 2017-18 wherein the AO has accepted the profit declared by assessee on account of reversal of offered amount under MTM loss. The

ld.counsel drew our attention to supplementary paper book filed at page 262 and the relevant reads as under:-

Particulars	*Amount (Rs)*	*Tax Treatment*
Pertaining to loans converted to equity	*1,800,465,325*	*Disallowed in tax computation – forming part of provisions disallowed – Rs.2,832,928,736/-*
Pertaining to reversal on mark-to-market for treasury portfolio	*(7,989,132)*	*Reversal offered to tax since MTM loss is considered as tax deductible*
Reversal pertaining to investments held as capital assets	*(223,428,170)*	*Reversal not offered to tax since provision on capital assets has been disallowed*
TOTAL	*1,569,048,023*	

The ld.counsel for the assessee stated that this has been accepted by the AO while framing assessment for the assessment year 2017-18 and for the purpose of consistency also this should have been accepted by the AO once he accepted the income on the same concept or principle. We noted that this issue stands covered by the decision of Hon'ble Madras High Court in the case of Lakshmi Villas Bank Ltd., *supra* and it is the case of valuation of investment at cost or market value whichever was lower and the difference arising as a result of valuation has to be allowed to the assessee either as loss or income. Hence, we find that the assessee's claim is perfectly alright and hence, the order of AO and that of the CIT(A) is reversed and

the claim of assessee is allowed. This issue of assessee's appeal is allowed.

11. The next issue in this appeal of assessee is as regards to the order of CIT(A) disallowing the claim of deduction claimed on account of interest on delayed payment of service tax. For this, assessee has raised the following ground No.3:-

> *"Denial of deduction for interest on delayed payment of service tax*
> *The NFAC/learned CIT(A) erred in upholding the disallowance made by the ACIT on account of interest on late payment of service tax of Rs.15,07,018/- by holding the same to be penal in nature instead of compensatory in nature."*

14. On this issue, we have heard rival contentions and gone through facts and circumstances of the case. The AO during the course of assessment proceedings on perusal of profit & loss account noticed that the assessee has claimed as deduction an amount of Rs.15,07,018/- on account of interest on late payment of service tax. According to AO, this is penal in nature and hence, the same is not allowable as deduction. The CIT(A) also confirmed the action of the AO by stating that interest expenditure of Rs.15,07,018/- being incurred for delayed payment of service tax, was not allowable within the meaning of section 37 read with Explanation 1 thereto and hence, he confirmed.

15. Now before us the ld.counsel for the assessee relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Vegetable Vitamin Foods Co.(P) Ltd., reported in [1994] 209 ITR 840, wherein it is held that the deduction claimed u/s.37(1) of the Act can be allowed being payment made by way of interest on delayed payment of sales tax being purely compensatory in nature and not penal in nature. The ld.counsel also relied on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Kaypee Mechanical India (P.) Ltd., wherein the Hon'ble Gujarat High Court held as under:-

> *"We have no hesitation in upholding the view of the CIT (A), as confirmed by the Tribunal. The amount was expended by the assessee during the course of business, wholly and exclusively for the purpose of business. If the assessee had taken proper steps and charged service tax to the service recipients and deposited with the Government, there was no question of assessee expending such sum. It is only because the assessee failed to do so, that he had to expend the said amount, though it was not his primary liability. Be that as it may, this cannot be stated to be a penalty for infraction of law. Reference to the decision of Supreme Court in case of Haji Aziz and Abdul Shakoor Bros. v. Commissioner of Income Tax, [1961] 41 ITR 350 therefore is not of any help to the Revenue. It was a case in which the assessee had imported dates from Iraq, at a time when such import was prohibited. Due to this, the dates imported by the assessee by steamers were confiscated by the customs authorities. The assessee was given an option to pay redemption fine and have the dates released. The assessee having accepted such an option, claimed the redemption fine as a deduction in computing its profit as allowable expenditure. In this background, the Supreme Court held that no expenses which was paid by way of penalty for a breach of the law, even though it might involve no personal liability, could be said to be an amount wholly and exclusively laid for the purpose of the business of the assessee. In the present case, the*

amount involved is not by way of penalty. The decision in case of Haji Aziz & Abdul Shakoor Bros. [Supra] is thus distinguishable.

It is equally well settled that payment of interest is compensatory in nature and would not partake the character of penalty. Reference in this respect can be had to the decision of Supreme Court in case of Commissioner of Income Tax v. Luxmi Devi Sugar Mills P. Limited, reported in [1991] 188 ITR 41 and in case of Mahalakshmi Sugar Mills Company v. Commissioner of Income-tax, Delhi, reported in (1980) 123 ITR 429.

As the issue is covered, we allow the claim of assessee and hence, this issue of assessee's appeal is allowed.

15. The next two issues i.e, Ground No.4 for claim of amortization of premium on HTM securities and vide ground No 5 claimed as deduction for perquisite charged in the hands of employees on exercise of ESOPS. For this, the ld.counsel raised the following ground Nos.4 & 5:-

4. Non-consideration of claim of amortization of premium on HTM securities

The NFAC/ learned CIT(A) erred in not considering the claim of deduction for amortization of premium on HTM securities of Rs 6,92,21,39 2/- merely on the basis that the claim was not made in the tax returns and disregarding the submissions made by the Appellant.
The deduction for amortization of premium on HTM securities be granted to the Appellant

5. Non-consideration of claim off deduction for perquisite charged in the hands of the employees on exercise of ESOPs

The NFAC/ learned CIT(A) erred in not considering the claim of deduction for perquisite paid to employees on exercise of ESOPs of Rs 1,53,77,100/- merely on the basis that the claim was not made in the tax returns and disregarding the submissions made by the Appellant.

The deduction for perquisite paid to employees on exercise of ESOPs be granted to the Appellant.

16. At the outset, the ld.counsel for the assessee stated that the assessee in regard to these two claims, made claim for the first time before the AO during the course of assessment proceedings and the same was repeated before CIT(A) raising the grounds before CIT(A) and also claimed by written submissions dated 08.02.2021. The assessee has debited an amount of Rs.6,92,21,392/- in its books of accounts for the financial year 2015-16 relevant to this assessment year 2016-17 in respect of amortization of premium in respect of investments held in HTM which was in accordance with the method of valuation prescribed by the Reserve Bank of India. Similarly, the assessee has granted stock options i.e., ESOPS to its eligible employees and claim was made before AO during the course of assessment proceedings but it was not claimed while filing the return of income i.e., original or revised return but neither AO nor CIT(A) has considered these two claims on the reasoning that the assessee is barred from making these two claims in view of decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd., reported in [2006]

284 ITR 323. The CIT(A) dismissed the claim in regard to amortization of premium on HTM securities by observing in para 9.3 as under:-

> *9.3 I have carefully considered the relevant and material facts on record, in respect of this ground of appeal, as brought out in the assessment order and submissions made during appeal proceedings. In this case, the appellant filed its original Return of Income for the Assessment Year 2016-17 on 17.10.2016 declaring total income of Rs. 5,21,30,22, 090/-. The appellant subsequently filed a revised return of income on 29.03.2018 declaring total income of Rs. 5,17,05,43,27O/-. This is an admitted fact that the appellant has made a suo-moto disallowance of the said premium on amortization of HTM securities amounting Rs. 6,92,21,392/- in the computation of income. The scrutiny notice under section 143(2) was issued on 18.07.2017. The appellant has filed a revised return of income on 29.03.2018, i.e. during the pendency of the assessment proceedings, wherein the appellant has again made suo-moto disallowance in the computation of income in respect of this issue. Thus, the appellant has taken a considered stand on this issue, both in the original return, as also in the revised return, which was filed during the pendency of assessment proceedings. The appellant had adequate opportunity to reconsider his stand on this issue in the revised return of income, which was filed almost eight months after the onset of the scrutiny assessment proceedings. This is not a case where merely a fresh claim has been made during the assessment proceedings by way of filing a letter. Rather, the appellant has sought to change its stand on the same issue, on same set of facts, which runs contrary to the computation of income made in both the original as well as revised return of income. On these facts, I concur with the view taken by AO that in such a case, the claim not made by way of filing any revised return of income, was liable to be rejected. This ground of appeal is accordingly dismissed.*

17. Similarly, the claim of ESOPS was denied by CIT(A) by observing in para 10.3 as under:-

> *10.3 I have carefully considered the relevant and material facts on record, in respect of this ground of appeal, as brought out in the assessment order*

and submissions made during appeal proceedings. In this case, the appellant filed its original Return of Income for the Assessment Year 2016-17 on 17.10.2016 declaring total income of Rs. 5,21,30,22,090/-. The appellant subsequently filed a revised return of income on 29.03.2018 declaring total income of Rs. 5,17,05,43,270/-. This is an admitted fact that the appellant has not made the claim of deduction of the said amount of Rs. 1,53,77,100/- in the return of income. The scrutiny notice under section 143(2) was issued on 18.07.2017. The appellant has filed a revised return of income on 29.03.2018, i.e. during the pendency of the assessment proceedings, wherein the appellant has again failed to make a claim in this respect. Thus, the appellant has taken a considered stand on this issue, both in the original return, as also in the revised return, which was filed during the pendency of assessment proceedings. The appellant had adequate opportunity to reconsider his stand on this issue in the revised return of income which was filed almost eight months after the onset of the Scrutiny assessment proceedings. This again is not a case where merely a fresh claim has been made during the assessment proceedings by way of filing a letter. Rather, the appellant has sought to change its stand on the same issue, on same set of facts, which runs contrary to the computation of income made in both the original as well as revised return of income. On these facts, I concur with the view taken by AO that in such a case, the claim not made by way of filing any revised return of income, was liable to be rejected. This ground of appeal is accordingly dismissed.

18. The ld.counsel for the assessee before us claimed that the entire claim was made before the AO during the course of assessment proceedings along with all the details and even now the assessee has filed complete details in its paper book consisting of pages 1 to 241, wherein all the details are given, which was not controverted by ld.CIT-DR. But the ld.CIT-DR again harped on the decision of Goetze India Ltd., *supra.*

19 After hearing both the sides and going through the facts, we are of the view that all the details and facts are available but none of the authorities below i.e., the AO or CIT(A) has not considered this claim. We admit these two claims and the finding of the AO and CIT(A) on these two issues are set aside and matter remanded back to the file of the AO for adjudicating the same on merits. The AO will adjudicate these two claims after examining the facts and legal position and accordingly, decide these two claims. These two issues are allowed for statistical purposes.

20. In the result, the appeal filed by the assessee is partly-allowed for statistical purposes.

Order pronounced in the open court on 8th March, 2024 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 8th March, 2024

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.