

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
and  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.1616/Del./2014  
(ASSESSMENT YEAR : 2003-04)**

**ITA No. 1617/Del./2014  
(ASSESSMENT YEAR : 2004-05)**

**ITA No. 1618/Del./2014  
(ASSESSMENT YEAR : 2005-06)**

**ITA No. 1619/Del./2014  
(ASSESSMENT YEAR : 2006-07)**

**ITA No. 1620/Del./2014  
(ASSESSMENT YEAR : 2008-09)**

**ITA No. 1621/Del./2014  
(ASSESSMENT YEAR : 2009-10)**

M/s. National Housing Bank, vs. ACIT, Circle 31 (1),  
Core – 5A, India Habitat Centre, New Delhi.  
Lodhi Road,  
New Delhi.

**(PAN : AABCN2600H)**

**(APPELLANT)**

**(RESPONDENT)**

ASSESSEE BY : Shri Ashok Chopra, CA  
REVENUE BY : Shri Ravi Jain, CIT DR

Date of Hearing : 01.02.2017  
Date of Order : 20.02.2017

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The Appellant, M/s. National Housing Bank (hereinafter referred to as 'the assessee') by filing the aforesaid appeals sought to set aside the composite order dated 27.01.2014 passed by the Commissioner of Income-tax (Appeals)-XXVI, New Delhi qua the assessment years 2003-04, 2004-05, 2005-06, 2006-07, 2008-09 and 2009-10 on the same set of grounds except the difference in the amount of the penalty imposed for different assessment years inter alia that :-

- “1. On the facts and in the circumstances of the case, the CIT(A) had erred, both on facts and in law, in upholding the illegal order of levy of penalty passed by the Respondent and dismissing the appeal of the appellant without fair and objective consideration of all the factual and legal submissions, records and documents and case law, placed by the appellant and the impugned order is liable to be vacated.***
- 2. On the facts and in the circumstances of the case, the authorities below have erred in levying a penalty of Rs.58,99,67,356/- u/s 271(1)(c) of the I T Act ignoring the fact that the appellant is not liable to be levied with the penalty under the said provisions of The Income Tax Act, 1961.***
- 3. On the facts and in the circumstances of the case, the lower authorities have erred in holding that***

*the assessee had concealed the particulars of its income and that it had furnished inaccurate particulars of its income and has ignored the fact that the assessee income, regarding loss claimed on securities transactions and its had not concealed any facts or submitted inaccurate particulars of claim under section 36(1)(viii). The notes to accounts for the year had also made complete disclosure of the loss incurred in respect of the securities transactions.*

4. *The authorities below have erred in holding that the assessee had concealed particulars of its income whereas the additions/ disallowances made during the course of assessment were on the basis of opinion formed by the assessing officer and were not otherwise legally and expressly disallowable under any of the provisions of the Income Tax Act, 1961.*
5. *The authorities below have also erred in levying the penal under section 271(1)(c) without considering the fact that dealing in securities was one of the objectives of the assessee as laid out in the National Housing Bank Act and that such securities were held under the categories 'Available for sale' as well as 'Held to maturity'. In the instant case the idle funds were intended to be deployed for earning trading profits and thus amount lost in the process was incorrectly considered as capital loss instead of it being considered as business loss.*
6. *The authorities below also erred in disallowing the appellant's claim rightly made u/s 36(1)(viii) of the Act on the erroneous view that in view of the amendment to the Section made by the Finance Act, 2009 being only prospective for granting deduction with effect from AY 2010-11 ignoring the fact that it is nothing but a clarificatory amendment which is clearly applicable retrospectively for all past and pending cases as the objective is to remove unintended*

*hardship and consequences arising from the incorrect and negative view of the Revenue which was sought to be redressed by the legislative clarificatory amendment retrospective in nature. Further the said amendment had only enlarged the scope of the applicability of the said section by allowing activities beyond the financing of purchase and construction of residential houses. By disallowing the appellant's claim under the said provisions the lower authorities have erred in considering such claim to be concealment and submission of inaccurate particulars by the appellant, of its income and thus wrongfully levying the penalty.*

7. *The authorities below also erred in ignoring the fact that the matter of the appellant being eligible under' section 36(l)(viii) having been considered by the competent authorities while allowing the exemption in earlier years to Asian Development Bank under the provisions of Section 10(15)(iv)(g) in respect of incomes received from National Housing Bank. The exemption so granted under the provisions of Section 10(15)(iv)(g) was available only in respect of incomes earned from entities who were otherwise eligible for deduction under Section 36(1)(viii) as per the provisions of section 10(15)(iv)(g). The authorities have completely ignored the said fact placed on their records thus vindicating the appellant's claim that the amendment brought out by Finance Act 2009 was nothing but clarificatory.*
8. *The authorities below also erred in disallowing the loss of Rs.150,45,32,696/- on the erroneous view of the loss being of capital nature ignoring the fact that the records, documents, submissions and explanations provided by the appellant show clearly that the appellant had held securities both as investments and also as stock in trade and that the securities under consideration to which the loss relates had been clearly held as part of the*

*appellant's trading activities and stock-in-trade and hence the revenue loss in the normal course of business of the appellant cannot be held to be capital in nature for being disallowed and the impugned orders. Thereby considering the same as concealment of income and levying a penalty under section 271(1)(c).*

*9. The authorities below had erred in making /sustaining illegal levy of penalty by applying completely distinguishable cases and ignoring the cases cited during the proceedings which were applicable in the appellant's case. Thus sustaining the illegal levy of penalty under the stated provisions.*

*10. The appellant prays for further/additional submissions and grounds to be allowed to be filed before final hearing and further prays for early out-of-turn hearing to allow the appeal with consequential relief, after hearing both sides.”*

3. Briefly stated facts of this case are : assessee is a banking and financial institution established under the National Housing Bank Act, 1987 deriving interest income from loans and advances. Since all the cases are based on the identical facts, the facts leading to the present appeal pertaining to Assessment Year 2003-04 are discussed for the disposal of present appeal. For AY 2003-04, assessee filed return of income showing income of Rs.25,56,62,610/- by claiming deduction of Rs.10,08,20,653/- under section 36(1)(viii) of the Income-tax Act, 1961 (for short 'the Act') and by showing the business loss to the tune of Rs.1,50,45,32,696/- on account of security transactions.

4. Assessment of the assessee was completed u/s 143 (3) of the Act at the income of Rs.1,86,10,15,960/- by disallowing the deduction of Rs.10,08,20,653/- u/s 36(1)(viii) on the ground that assessee was only promoting housing financial institutions and does not promote long term finance for the purchase or construction of residential houses in India. AO also assessed the loss of Rs.1,50,45,32,696/- regarding the security transactions as capital loss instead of business loss claimed by the assessee.

5. In the first round of litigation, in an appeal filed by the assessee, CIT (A) allowed part relief but the said order was set aside by the Tribunal by restoring the entire matter to the file of AO who has again made the aforesaid addition on account of disallowance u/s 36(1)(viii) and the said order was affirmed by CIT (A) vide order dated 17.12.2012.

6. On the basis of completed assessment u/s 143(3) of the Act at 1,86,10,15,960/- for AY 2003-04, at Rs.2,11,16,8,300/- for A 2004-05, at Rs.90,15,39,670/- for AY 2005-06, at Rs.1,42,96,77,110/- for AY 2006-07, at Rs.2,32,85,40,790/- for AY 2008-09 and at Rs.2,89,46,06,090/- for AY 2009-10, penalty proceedings u/s 271(1)(c) of the Act were initiated.

7. Assessee's claim of deduction u/s 36(1)(viii) amounting to Rs.10,08,20,653/- was disallowed and assessee's claim of set off to

the tune of Rs.1,50,45,32,696/- on account of security transactions of 1991-92 from business income of Rs.1,74,39,81,747/- was also disallowed by the AO. Finding the explanation furnished by the assessee, “that there was no occasion for the assessee to conceal particulars of income or furnishing of inaccurate particulars of income”, not tenable, AO came to the conclusion that assessee bank was exempted from payment of income-tax up to the AY 2001-02 as from section 48 of the NHB Act and this exemption was withdrawn by the legislature by omitting section 48 of the Act w.e.f. 01.04.2004 and as such, this is a case of furnishing of inaccurate particulars of income during assessment proceedings and imposed the penalty of Rs.58,99,67,356/- for AY 2003-04, Rs.37,14,13,268/- for AY 2004-05, Rs.19,58,96,230/- for AY 2005-06, Rs.7,10,22,600/- for AY 2006-07, Rs.3,80,45,227/- for AY 2008-09 and Rs.3,92,34,114/- for AY 2009-10, being 100% of the tax sought to be evaded, u/s 271(1)(c) of the Act.

8. Assessee carried the matter before the Id. CIT (A) by filing the appeals who has dismissed the appeals except for AY 2004-05 which was partly allowed by sustaining the penalty imposed on income of Rs.70,00,000/-. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals.

9. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

10. Undisputedly, assessment has been completed in appeal for AYs 2004-05, 2005-06, 2006-07, 2008-09 and 2009-10 by disallowing the claim of the assessee u/s 36(1)(viii) of the Act and on the basis of assessment order, penalty has been imposed on the ground that while claiming deduction, the assessee has furnished inaccurate particulars of income.

11. However, in AY 2003-04, the assessee claimed two deductions :-

- (i) deduction claimed u/s 36(1)(viii) of the Act to the tune of Rs.10,08,20,653/-; and
- (ii) claimed set off on account of loss on security transaction to the tune of Rs.1,50,45,32,696/-.

12. It is also not in dispute that so far as ground no.8 raised by the assessee in appeal no.1616/Del/2014 for AY 2003-04 qua disallowance of Rs.1,50,45,32,696/- is concerned, the Tribunal while deciding the appeal no.1512/Del/2013 qua the assessment made by the AO and affirmed by the CIT (A) vide order dated 14.02.2017 on the basis of which penalty is imposed, the issue has

been set aside and restored the case to the Id. AO to reexamine the claim as to the dis-allowability of the loss of the security transaction during the year. So, in these circumstances, we are of the considered view that the issue as to imposing penalty for disallowing the claim of the assessee on account of loss of security to the tune of Rs.1,50,45,32,696/- is also required to be restored to the AO to decide afresh on the basis of outcome of the quantum proceedings in accordance with law.

13. Undisputedly, Tribunal vide order dated 14.02.2017 dismissed the ground of the assessee claiming deduction u/s 36(1)(viii) by holding that the assessee is not entitled to deduction u/s 36(1)(viii) prior to AY 2010-11.

14. In the backdrop of the facts and circumstances of the case, the sole issue arises for determination in all the aforesaid appeals is:-

*“as to whether the assessee has furnished inaccurate particulars of income while claiming deduction in the return of income u/s 36(1)(viii) of the Act?”*

15. Assessee by claiming deduction u/s 36(1)(viii) of the Act come up with an argument that since the assessee is into the

business of providing long term finance for the construction of residential houses in India, though the money is lent to the housing finance companies, institution and banks, but was on the basis of loans granted by them for housing purposes only and the assessee was honestly of the view that it was entitled to the relief under the provisions of the said section. Assessee also argued that it does not amount to concealment or furnishing of inaccurate particulars of income.

16. Keeping in view of the undisputed facts and circumstances, argument addressed by the Id. Representatives of the parties and case law cited, we are of the considered view that impugned penalty orders passed by AO and affirmed by Id. CIT (A) are not sustainable in the eyes of law for the reasons inter alia :-

- i. that even there is no findings returned by AO in the penalty order that any details supplied by the assessee in its return of income is found to be incorrect or erroneous or false so as to attract the provisions contained u/s 271(1)(c) of the Act.
- ii. that merely claiming deduction by the assessee bank u/s 36(1)(viii) of the Act on the strength of amending provisions by Finance Act, 2009 does not amount to

concealment of income or furnishing of inaccurate particulars in any manner whatsoever.

- iii. that when the assessee has honestly come up with correct facts and figures on the basis of its audited balance sheet “that the assessee is entitled for relief u/s 36(1)(viii) of the Act”, which have never been disputed by the Revenue, it amounts to opinion of the assessee which cannot be taken as an act of furnishing inaccurate particulars of income;
- iv. that since the assessee being a financial institution constituted under National Housing Bank Act, 1987 enacted by the Parliament, works in accordance with the expert opinion rendered by account professionals and lodged the claim u/s 36(1)(viii) under their guidance, it does not amount to an act of concealment of particulars of income or furnishing of inaccurate particulars of income in any manner whatsoever;
- v. that the purpose of scrutiny initiated against the assessee is only to examine the sustainability of the claim lodged by the assessee in its return of income;

- vi. that penalty proceedings in this case is initiated on the basis of perception and interpretation of provision of section 36(1)(viii) of the Act which may vary from person to person and cannot be branded as furnishing of inaccurate particulars of income;
- vii. that when the assessee has come up with correct and complete disclosure of facts and particulars of income by claiming specific deductions, it does not lie in the mouth of the Revenue that the assessee has concealed particulars of income or has furnished inaccurate particulars of income;
- viii. that even, in the penalty order, it is categorically observed that amending provisions of Finance Act, 2009 are applicable w.e.f. AY 2010-11 whereas the assessee claimed the same to be retrospective in nature. So, this being an issue pertaining to interpretation of the statute it does not amount to furnishing of inaccurate particulars of income;
- ix. that moreover, the amount claimed by the assessee as deduction u/s 36(1)(viii) was not claimed under any wrong head of the deductions nor any understated

figure of income has been given and all the particulars are explained through the Notes to the account for the year under assessment;

- x. that Hon'ble Apex Court in *CIT Vs Reliance Petro Products Pvt. Ltd. 322 ITR 158 (S.C.)* while interpreting the provisions contained u/s 271(1)(c) has categorically held that, ***“by no stretch of imagination, making an incorrect claim by the assessee tantamount to furnishing of inaccurate particulars.”***

17. In view of what has been discussed above, aforesaid appeals bearing ITA No. 1617/Del./2014 for AY 2004-05, ITA No. 1618/Del./2014 for AY 2005-06, ITA No. 1619/Del./2014 for AY 2006-07, ITA No. 1620/Del./2014 for AY 2008-09 and ITA No. 1621/Del./2014 for AY 2009-10 are allowed and penalty of Rs.37,14,13,268/- for AY 2004-05, Rs.19,58,96,230/- for AY 2005-06, Rs.7,10,22,600/- for AY 2006-07, Rs.3,80,45,227/- for AY 2008-09 and Rs.3,92,34,114/- for AY 2009-10 are hereby deleted.

18. However, in ITA No.1616/Del./2014 for AY 2003-04, penalty amount of Rs.10,08,20,653/- on account of disallowance of deduction claimed u/s 36(1)(viii) is deleted. Whereas, issue as to

claiming of business loss to the tune of Rs.1,50,45,32,696/- on account of loss of securities of AY 1991-92 and consequent penalty imposed on the basis of same is restored to the AO to decide afresh in accordance with law. So, this appeal is partly allowed for statistical purposes.

**Order pronounced in open court on this 20<sup>th</sup> day of February, 2017.**

**Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 20<sup>th</sup> day of February, 2017  
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-XXVI, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**