



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2108 OF 2010

The Commissioner of Income Tax-3,
Aayakar Bhavan, M.K.Road, Mumbai-400020. ...Appellant.

Vs.

M/s. Small Industries Development Bank of India,
SME Development Centre, Plot No.,C-11, G Block,
B.K.C., Bandra (E), Mumbai-400051. ...Respondent.

Mr. Vimal Gupta for the Appellant.

Mr. J.D.Mistri,Sr. Advocate along with Mr.Atul Jasani for the
Respondent.

**CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.**

DATE : 12th September, 2012.

JUDGMENT :(Per M.S. SANKLECHA, J.):

This appeal by the revenue under Section 260A of the Income Tax Act,1961 (“the Act”) challenges the order dated 15/7/2009 of the Income Tax Appellate Tribunal (“the Tribunal”) arising in ITA No.3408/Mum/2006 relating to the assessment year 2003-04.

2) Being aggrieved, the revenue has formulated the following question of law for consideration of this Court.

Whether on the facts and circumstances of the case and in law, the Tribunal was right in allowing the assessee's claim u/s. 36(1)(vii) read with Section 36(2) of the Income Tax Act, 1961?

3) The respondent-assessee is a statutory corporation established under the SIDBI Act, 1989. The respondent-assessee is engaged in the business of promotion, financing and development of the Small Scale Industry to meet the emerging challenges of the liberalized economy. The income of the respondent-assessee was exempted from payment of income tax by virtue of Section 50 of the SIDBI Act, 1989 which reads as under:

Section 50 of the Small Industrial Development Bank of India Act, 1989

“Notwithstanding anything to the contrary contained in the Income Tax Act, 1961 or in any enactment for the time being in force relating to income tax or any other tax on income, profits or gains, the Small Industries Bank shall not be liable to pay income tax or any other tax in respect of -

- (a) any income, profit or gains accruing or arising to the Small Industries Development Assistance Fund or any amount received in that Fund; and
- (b) any income, profit or gains derived or any amount received by the Small Industrial Bank”

The aforesaid exemption as provided under Section 50 of the SIDBI Act was withdrawn from 1/4/2002 by virtue of Finance Act, 2001.

4) For the assessment year 2003-04 the respondent assessee filed its return of income declaring a total income of Rs.221/- crores. In the above return of income, the respondent-assessee claimed an amount of Rs.178.00 crores as bad debts. The Assessing officer by an order dated 28/1/2005 disallowed the deduction on

account of bad debts of Rs.178/- crores and added the same to the income for the assessment year 2003-04 on the ground that for the assessment year 2001-02 and earlier the respondent-assessee was not chargeable to income tax. The bad debts which the respondent-assessee is claiming have resulted from its business activities in the years prior to the assessment year 2002-03 in which year the respondent-assessee was not taxable. Consequently the bad debts was disallowed and added back to the respondent's income.

6) In appeal, the Commissioner of Income Tax (Appeals) by an order dated 17/3/2006 upheld the order of the Assessing officer by holding that the deduction under Section 36(1)(vii) of the Act is available subject to the satisfaction of Section 36(2) of the Act. Therefore, according to the CIT(Appeals) this deduction of bad debts would only be available when the debt being sought to be written off was taken into consideration in computing the income of the respondent-assessee in an earlier assessment year. However, as the respondent-assessee was not liable to tax upto the assessment year 2001-02 there was no occasion for the respondent-assessee including the amount now attributable to bad debts in its total income as offered for taxation. Thus, the order dated 28/1/2005 of the Assessing Officer was upheld.

7) In second appeal, the Tribunal by its order dated 15/7/2003 allowed the respondent assessee's appeal. The tribunal held that the respondent is in the business of banking for SSI units. Consequently, the bad debts claimed are allowable under Section 36(1)(vii) of the Act as it satisfies the second part of the proviso to Section 36(2) of the Act.

Therefore the deduction of Rs.178/- crores as bad debts was allowed as a deduction under Section 36(1)(vii) of the Act.

8) For better appreciation of the controversy we extract the relevant portion of Section 36 of the Act which reads as under:

“36. Other deductions.

(1) The deductions provided for in the following clauses shall be allowed in respect of matters dealt with therein, in computing the income referred to in Section 28.

vii) subject to the provisions of sub section (2), the amount of (any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year]”.

Provided

(2) In making any deduction for a bad debt or part thereof the following provisions shall apply.

(i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money lending which is carried on by the assessee;”

9) While challenging the impugned order Mr. Vimal Gupta Counsel appearing for the revenue submits as under:

a) In terms of Section 14A of the Act any expenditure incurred for earning an income which is exempted from tax will not be allowed as deduction. The bad debt was an expenditure incurred in earning income

for the earlier years when such income was not subjected to tax in view of Section 50 of the SIDBI Act.

and

b) In view of Section 50 of the SIDBI Act no income earned by the respondent-assessee were offered for tax. Consequently, Section 36(1)(vii) of the Act would not apply as the respondent-assessee fails to satisfy Section 36(2)(i) of the Act which requires such debt to be taken into account while computing its income in the previous year or earlier previous year.

In view of the above, he submits that the impugned order is bad and the question as framed should be entertained as it is a substantial question of law.

10) On the other hand Mr. Mistri, Senior Counsel for the respondent-assessee submits as under.

a) The issue of Section 14A of the Act being applicable was never raised before the authorities under the Act. In any event, Section 14A of the Act would have no application as it would only apply in respect of expenditure incurred in relation to income which does not form part of the total income under the Act. In this case, the expenditure of bad debts is in relation to the income for the assessment year 2003-04 and the same is being offered to tax.

and

(b) In any event, in view of Section 36(1)(vii) of the Act read with Section 36(2)(i) of the Act the Tribunal has correctly allowed the respondent-assessee's claim as bad debts. This is for the reason that the respondent-assessee is engaged in the business of banking and thus satisfies the requirements of Section 36(2)(i) of the Act.

In view of the above, he submits that the appeal be dismissed.

11) We find that Section 14A of the Act would have no application to the present facts. It is not the revenue's case that bad debts have been incurred in relation to income which does not form part of the total income. Section 50 of SIDBI Act, 1989 only exempts payment of income tax. It does not provide that such income of the SIDBI Bank will not be a part of the total income. This would happen in cases of income specified in Section 10 and 10A of the Act. Even otherwise this issue was not raised before the authorities and cannot be now urged in an appeal under Section 260A of the Act.

12) It is not disputed that the respondent-assessee carried on business of banking and the amounts being written off as bad debts was the money lent in the ordinary course of its business. In terms of Section 36(1)(vii) of the Act the assessee is entitled to claim deduction of an amount of debt or part thereof written off as irrevocable in the year in which business claims that a particular debt is not recoverable. In this case, the respondent-assessee in the assessment

year 2003-04 had taken a business decision that the amount of Rs.178/- crores had become bad and had to be written off as bad debt. This decision has to be of the business alone. However, this bad debt is allowable under Section 36(1)(vii) of the Act subject to satisfaction of Section 36(2)(i) of the Act. In this case admittedly the respondent-assessee satisfies the same. The debt which is being written off represents money lent in its ordinary course of business of banking. In view of the above the question as raised is not a substantial question of law requiring consideration by this Court.

12) In view of the above, the appeal is dismissed .No order as to costs.

(M.S. SANKLECHA, J.)

(S. J. VAZIFDAR, J.)