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

BEFORE SHRI M.BALAGANESH, AM

&

SHRI RAVISH SOOD, JM

ITA No.6173/Mum/2016
(**Assessment Year :2011-12**)

HDFC Bank Ltd., HDFC Bank House, Senapati Bapat Marg Lower Parel, Mumbai – 400 013	Vs.	Assistant Commissioner of Income Tax – 2(3) Room No.615, 6th Floor Aayakar Bhavan M.K. Road, Mumbai - 400020
PAN/GIR No. AAACH2702H		
(Appellant)	..	**(Respondent**)

ITA No.6187/Mum/2016
(**Assessment Year :2011-12**)

Assistant Commissioner of Income Tax – 2(3) Room No.615, 6th Floor Aayakar Bhavan M.K. Road, Mumbai - 400020	Vs.	HDFC Bank Ltd., HDFC Bank House, Senapati Bapat Marg Lower Parel, Mumbai – 400 013
PAN/GIR No. AAACH2702H		
(Appellant)	..	**(Respondent**)

Assessee by	Shri J.D. Mistry and Shri. Madhur Agarwal
Revenue by	Shri S.C. Tiwari, CIT DR
Date of Hearing	**19/02/2020**
Date of Pronouncement	**08/07/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

These cross appeals in ITA No.6173/Mum/2016 & 6187/Mum/2016 for A.Y.2011-12 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-6, Mumbai in appeal No.CIT(A)-6/IT-08/2013-14 dated 29/07/2016 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 04/03/2013 by the ld. Asst. Commissioner of Income Tax-2(3),Mumbai (hereinafter referred to as ld. AO).

2. The ground No.I raised by the assessee was stated to be not pressed by the ld. AR at the time of hearing. The same is reckoned as statement made from the Bar, accordingly, the ground No.I raised by the assessee is dismissed as not pressed.

3. The ground No.II raised by the assessee is with regard to disallowance made u/s.14A of the Act r.w.Rule 8D(2) of the Rules.

3.1. We have heard rival submissions and perused the materials available on record. We find that assessee had claimed exempt income of Rs.195,79,61,072/- in the return of income. Out of this amount, a sum of Rs.36,29,04,461/- was voluntarily added back to the total income by the assessee in the return of income on some other account. The ld. AO observed that with regard to remaining exempt income of Rs.159,50,56,511/-, the assessee had voluntarily disallowed the sum of Rs.32,56,564/- u/s.14A of the Act in the return of income. The ld. AO observed that the said disallowance made voluntarily by the assessee was not in accordance with computation mechanism provided in Rule 8D(2) of

the Rules. Accordingly, ld. AO proceeded to compute the disallowance as per Rule 8D(2) of the rules as under:-

(i) Under Rule 8D(2)(ii)	-	Rs.24.69 Crores
(ii) Under Rule 8D(2)(iii)	-	Rs. 3.30 Crores
		Rs.27.99 Crores

3.2. The ld. AO reduced the amount already disallowed by the assessee u/s.14A amounting to Rs.32,56,564/- and made disallowance thereon in the assessment to the extent of Rs.27,66,43,436/-. The ld. CIT(A) deleted the disallowance of interest made under second limb of Rule 8D(2) of the Rules, against which action, the revenue is not in appeal before us. Hence, what is left to be adjudicated is only disallowance made under third limb of Rule 8D(2) of the Rules.

3.3. We find that the ld. CIT(A) with regard to disallowance made under third limb of Rule 8D(2) of the rules is concerned, held as under:-

(a) Securities held as 'stock in trade' should not be reckoned for the purpose of making disallowance u/s.14A of the Act.
(b) Strategic investments made by the assessee should be excluded for the purpose of making disallowance u/s.14A of the Act.

3.4. The ld. CIT(A) directed the ld. AO to disallow the higher of the suo-moto disallowance made by the assessee in the sum of Rs.32,56,564/- or the sum to be calculated by the ld. AO as per the above mentioned direction. The revenue is not in appeal against the said direction of the ld. CIT(A).

3.5. During the course of hearing, the ld. AR placed on record, the details of tax free investments and the details of exempt income for the year ended 31/03/2011 as under:-,

(a)	Investment held as 'stock in trade' on which dividend was received	Rs.188,59,54,587/-
(b)	Investment held as 'stock in trade' on which no dividend was received	Rs.0.00
(c)	Strategic investment made by the assessee on which dividend was received	Rs.7,20,05,226/-
(d)	Strategic investment made by the assessee on which no dividend were received	Rs.0.00
	Total	**Rs.195,79,59,813/-**

3.6. Ld. AR fairly submitted that direction be given to the ld. AO to consider these workings of details of investments held by the assessee and the receipt of dividends thereon and decide the disallowance of expenses under third limb of Rule 8D(2) of the Rules in the light of decision of the Hon'ble Supreme Court in the case of Maxopp Investments Ltd., reported in 402 ITR 640 and in the light of Special Bench of Delhi Tribunal in the case of Vireet Investments reported in 165 ITD 27. The ld. DR fairly agreed to this proposition of the ld. AO.

3.7. We find that the Hon'ble Supreme Court in the case of Maxopp Investments Ltd., reported in 402 ITR 640 had held that in the case of

bank, investments that are held as 'stock in trade' cannot be subject matter of disallowance u/s.14A of the Act. The Special Bench of Delhi Tribunal in the case of Vireet Investments referred to supra had held that those investments which had not yielded any exempt income should not be considered for the purpose of working out the disallowance u/s.14A of the Act r.w.Rule 8D(2) of the Rules.

3.7. To sum-up, we direct the ld. AO as under:-

(a) Since, assessee being a bank, investments held as 'stock in trade' should not be considered for the purpose of working of disallowance u/s.14A of the Act irrespective of the fact whether exempt income was derived from such investments or not.

(b) Strategic investments held by the assessee which had yielded exempt income alone are to be considered for the purpose of working out the disallowance u/s.14A of the Act read with Rule 8D(2)(iii) of the Rules.

Accordingly, the ground No.II raised by the assessee is disposed off as per the directions given hereinabove.

4. The ground NO.III raised by the assessee is with regard to claim of deduction for provision for bad and doubtful debts u/s.36(1)(viia) of the Act.

4.1. We have heard rival submissions and perused the materials available on record. We find from the computation of total income in the A.Y.2011-12 enclosed in page 149 of the paper book filed before us by

the assessee, assessee had claimed deduction u/s.36(1)(viia) of the Act towards provision for bad and doubtful debts as under:-

(a) 7.5% of total business income before deduction u/s.36(1)(viia)	-	Rs.516,59,81,934/-
(b) 10% of average rural advances	-	Rs.49,75,80,500/-
Total		Rs.566,35,62,434/-

4.2. This claim was made before the ld. AO by way of a letter dated 14/02/2013 during the course of assessment proceedings along with a copy of the computation of income thereof. The ld. AO did not give cognizance to this letter by placing reliance on the decision of Hon'ble Supreme Court in the case of Goetze India Ltd., vs CIT reported in 284 ITR 323 and did not give any deduction u/s.36(1)(viia) of the Act towards provision for bad and doubtful debts in the assessment. The ld. CIT(A) directed the ld. AO to grant deduction u/s.36(1)(viia) of the Act after verification of the full details submitted by the assessee before him. The ld. CIT(A) further observed that the assessee would be eligible to claim deduction u/s.36(1)(viia) in principle and the said deduction should be restricted to 7.5% of total business income and 10% of average rural advances.

4.3. We find that the ld. CIT(A) in principle had accepted to the fact that assessee would be entitled for deduction u/s.36(1)(viia) of the Act which would be restricted to 7.5% of total business income plus 10% of average rural advances. This is the benefit provided to the assessee in the statute which had to be duly provided to the assessee. The ld. AO is hence directed to apply this statutory provision and consider the claim of deduction

u/s.36(1)(viia) of the act for the year under consideration after suitable verification of the details provided by the assessee. To this extent, three lines of order of the ld. CIT(A) in para 8.6 at page 438 stand expunged / modified. Accordingly, the ground No.III raised by the assessee is disposed off as per the directions given hereinabove.

5. The ground No.IV raised by the assessee is with regard to claim of deduction towards bad debts written off u/s.36(1)(vii) of the Act.

5.1. We have heard rival submissions and perused the materials available on record. We found that there is no discussion in the assessment order regarding this issue. Hence, we proceed to adjudicate this issue on perusal of the order of the ld. CIT(A). We find that the ld. CIT(A) had observed in his order at pages 43 and 44 in paras 8.7 and 8.8 in respect of this issue as under:-

"8.7. The appellant has also stated that its claim in respect of bad debts written off u/s.36(1)(vii) be reduced by Rs 2,64,21,552/-, from the original amount claimed and allowed of Rs. 732,98,97,520/-. This is on the basis that the difference amount pertains to bad debts written off relating to rural advances which probably the appellant does not want to claim because the credit balance in the provision for bad and doubtful debts account u/s.36(1)(viia) is more than the said write off. However, no details of the credit balance in the Provision' account u/s.36(1)(via) has been filed by the appellant.

8.8. I have already held in the earlier para that the amendment made by finance Act, 2013 in inserting Explanation 2 is only a clarificatory amendment for removal of doubt and will have application for all pending proceedings including the case at hand. Therefore, the balance in provision account u/s.36(1)(viia) has to be seen for both rural and non rural branches. The claim of bad debts written off can be allowed only if it exceeds the credit balance in the provision of bad and doubtful debts made u/s.36(i)(viia) and for this purpose, the provision account has to be considered for both rural and non rural debts. Therefore, the appellant withdrawing the claim in respect of write off relating to rural branches alone is not correct The appellant has to furnish the balance

in provision account of both rural and non rural branches together by considering the provision allowed and bad debts written off of each year and if the bad debts written off is in excess of the credit balance in provision account, the excess shall be allowed as deduction. If, however, the balance in provision for bad and doubtful account is more than the bad debts written off during the year, the appellant will not be entitled to any deduction u/s.36(1)(viia) in the above manner. The AO after examining the balance in provision for bad and doubtful debts account 36(1)(viia) shall allow deduction of bad debts written off only if it exceeds the credit balance in the provision account as explained above. The ground is partly allowed for statistical purpose."

6. To adjudicate this issue, it would be relevant to reproduce the relevant portion of CBDT Instruction No.17/2008 dated 26/11/2008 which are as under:-

Instruction No.17/2008, Dated 26/11/2008

In a recent review of assessment of Banks carried out by C & AG, it has been observed that while computing the income of banks under the head 'Profit and Gains of Business & Profession, deductions of large amounts under different sections are being allowed by the Assessing Officers without proper verification, leading to substantial loss of revenue. It is, therefore, necessary that assessments in the cases of banks are completed with due care and after proper verification. In particular, deductions under the provisions referred to below should be allowed only after a thorough examination of the claim on facts and on law as per the provisions of the Income-Tax Act, 1961.

(i) Under Section 36(1)(vii) of the Act, deduction on account of bad debts, which are written off as irrecoverable in the accounts of the assessee is admissible. However, this should be allowed only if the assessee had debited the amount of such debts to the provision for bad and doubtful debt account u/s.36(1)(viia) of the Act, as required by section 36(2)(v) of the Act.

(ii) While considering the claim for bad debts under section 36(1)(vii), the Assessing Officer should allow only such amount of bad debts written off as exceeds the credit balance available in the provision for bad and doubtful debt account credited under section 36(1)(viia) of the Act. The balance for this purpose will be the opening credit balance i.e. the opening credit balance brought forward as on 1st April of the relevant accounting year.

(Underlining provided by us)

6.1. Hence the direction of the ld. CIT(A) in Para 8.8. as reproduced above requires to be modified. The relevant operative portion of the said order of the ld. CIT(A) in para 8.8 shall have to be read as under:-

> *If, however, the opening credit balance brought forward as on 1st April of the relevant accounting year in provision for bad and doubtful account is more than the bad debts written off during the year, the appellant will not be entitled to any deduction u/s.36(1)(viia) in the above manner. The AO after examining the balance in provision for bad and doubtful debts account 36(1)(viia) shall allow deduction of bad debts written off only if it exceeds the credit balance in the provision account as explained above.*

6.2. In our considered opinion, this modification in order of ld. CIT(A) suggested as above would meet the ends of justice to the assessee and to the first proviso u/s.36(1)(vii) and the CBDT Instruction No.17/2008 dated 26/11/2008. Accordingly, the ground No. IV raised by the assessee is disposed off as per directions given hereinabove.

ITA No.6187/Mum/2016 (Revenue Appeal)

7. The only issue to be decided is deletion of disallowance by the ld. CIT(A) in respect of broken period interest in the sum of Rs.1947,35,93,107/-.

7.1. We have heard rival submissions and perused the materials available on record. We find that assessee has debited an amount of Rs.1947,35,93,107/- in the profit and loss account as broken period interest. The assessee submitted that this broken period interest paid is nothing but part of the price paid for the securities at the time of its acquisition. The ld. AO observed that the said purchase price is in the nature of capital outlay and hence, the same cannot be allowed as

deduction while computing business income of the assessee. The ld. AO observed that similar disallowance was made in assessee's own case for the A.Y.2009-10 and the revenue appeal was pending before this Tribunal at the time of completion of the assessment proceedings. Hence, in order to keep the issue alive, disallowance was made by the ld. AO. We find that the ld. CIT(A) had deleted this addition by following the decision of the Hon'ble Jurisdictional High Court in assessee's own case and the decision of this Tribunal in assessee's own case for A.Y.2008-09 and 2009-10 and 2010-11 in ITA Nos.375, 722, 3465, 4367/Mum/2012 and ITA No.1795/Mum/2010 dated 12/11/2014. In all these decisions, it was held that the broken period interest paid by the assessee is allowable as deduction while computing total income of the assessee. Since, this issue is already covered in assessee's own case by various decisions of this Tribunal and Hon'ble Jurisdictional High Court, which has been rightly followed by the ld. CIT(A), we do not find any infirmity in the order of the ld. CIT(A). Accordingly, the grounds raised by the revenue are dismissed.

8. In the result, appeal of the revenue is dismissed.

9. It is pertinent to mention here that this order is pronounced after a period of 90 days from the date of conclusion of the hearing. In this regard, we place reliance on the decision of co-ordinate bench of this Tribunal in the case of JSW Ltd in ITA Nos. 6264 & 6103/Mum/2018 dated 14.5.2020, wherein this issue has been addressed in detail allowing time to pronounce the order beyond 90 days from the date of conclusion of hearing by excluding the days for which the lockdown announced by the Government was in force. The relevant observations of this tribunal in the said binding precedent are as under:-

> *7. However, before we part with the matter, we must deal with one*

procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners :—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ***ordinarily*** *(emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.*

8. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of ***Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]*** *wherein Their Lordships had, inter alia, directed that "****We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf****. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal.* ***In the meanwhile*** ***(****emphasis, by underlining, supplied by us now****), all the revisional and appellate authorities under the Income-tax***

Act are <u>directed to decide matters heard by them within a period of three months from the date case is closed for judgment</u>*". In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.*

*9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "**In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown**". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "**It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**", and also observed that "**arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020**". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC*

*(i.e. **force majeure** clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term '**force majeure'** has been defined in Black's Law Dictionary, as '**an event or effect that can be neither anticipated nor controlled**' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.*

*10.In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of **Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)]**, Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "**while calculating the time for disposal of matters made time- bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly**". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days,*

clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

11. To sum up, the appeal of the assessee is allowed, and appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

9.1. Respectfully following the aforesaid judicial precedent, we proceed to pronounce this order beyond a period of 90 days from the date of conclusion of hearing.

10. In the result, appeal of the assessee is allowed for statistical purposes and appeal of the revenue is dismissed.

Order pronounced as per Rule 34(5) of ITAT Rules and by placing the pronouncement list in the notice board on 08/07/2020.

Sd/-	**Sd/-**
(RAVISH SOOD)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 08/07/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai