

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

ITA No.269/Coch/2019
Assessment Year: 2014-15

M/s. Gulf Asia Contracting Co. Pvt. Ltd., XXV/812, Srivalsam, Thavally P.O., Kollam-691 009 [PAN:AAECGI332Q]	Vs.	The Assistant Commissioner of Income-tax, Circle-1, Kollam
(Assessee -Appellant)		(Revenue-Respondent)

Assessee by	Shri Yadu Krishnan, CA
Revenue by	Shri Mritunjaya Sharma, Sr. DR

Date of hearing	09/03/2020
Date of pronouncement	11/03/2020

ORDER

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order passed u/s. 263 of the I.T. Act by the Pr. CIT, Trivandrum dated 13/03/2019 and pertains to the assessment year 2014-15.

2. The facts of the case are that the assessee is engaged in running a shopping mall. For the assessment year 2014-15, the return of income was filed on 06/09/2015 declaring a 'nil' income. The Assessing Officer completed the

assessment u/s. 143(3) of the I.T. Act vide order dated 22/12/2016 by accepting the nil return of income filed by the assessee.

2.1 Later, on scrutiny of the assessment records, the Pr. CIT noticed that the Assessing Officer allowed deduction u/s. 36(1)(vii) of the I.T. Act towards bad debts written off at Rs.1,58,02,810/-. On this, the Pr. CIT observed that the bad debts did not represent debts which had become irrecoverable or written off as bad debts in the accounts in the previous year. Further, the Pr. CIT found that in computing the total income, the assessee had added back Rs.1,00,00,000/- and hence, he directed the Assessing Officer to examine the applicability of sec. 115BBE of the I.T. Act. Since these issues were not verified by the Assessing Officer, the Pr. CIT held the order passed u/s. 143(3) of the I.T. Act dated 22/12/2016 as erroneous and prejudicial to the interest of the Revenue and remitted the issue to the file of the Assessing Officer for re-examination of the above two issues.

3. The assessee is in appeal before us with regard to re-examination of bad debts allowed in the original assessment u/s. 36(1)(vii) of the I.T. Act. The Ld. AR submitted that the Principal Commissioner of Income Tax erred in exercising his powers under 263 since twin conditions stipulated in section 263 have not been fulfilled i.e., there should be an error in the assessment order passed u/s. 143(3) and also that the assessment should be prejudicial to the interest of revenue. In this case there is no error in the assessment order passed since the assessing officer had examined the facts of the case and allowed the claim on the basis of forming

an opinion that the judgment of the Supreme Court in the case of Vijaya Bank Ltd reported in 323 ITR 166 is applicable to the facts of the case. The Ld. AR relied on the following decisions which prescribe / stipulate ban/ bar on the jurisdiction on the Commissioner of Income Tax u/s. 263 in case the twin conditions stipulated are not cumulatively satisfied / fulfilled:

- 1) Malabar Industrial Co. Limited vs. CIT (243 ITR 83) (SC)
- 2) CIT vs. Vikash Polymers (194 Taxman 57) (Delhi High Court)
- 3) S. Murugan vs. ITO (135 ITD 527) (ITAT, Chennai Bench)
- 4) J.K. Construction Co. vs. ITO (162 Taxman 46) (ITAT, Jodhpur Bench).

3.1 The Ld. AR submitted that the Pr. CIT erred in setting aside the assessment order passed u/s. 143(3) dt. 22.12.2016 by substituting his opinion /judgment over that of the assessing officer in the matter of applicability of the judgment of the Supreme Court in the case of Vijaya Bank Ltd (supra) to the facts of the case of the assessee. The Ld. AR submitted that as per the facts of the case, the assessing officer had raised a query on the admissibility for the provision of bad and doubtful debts and advance during the course of assessment made u/s.143(3) of the Act. The assessee had vide letter No.F.005/485/16-17 dt.18.12.2016 furnished detailed information/ clarification on the binding nature of the judgment of the Supreme Court in the case of Vijaya Bank Ltd. (supra). According to the Ld. AR, the assessing officer had examined the facts of the case and after proper application of mind formed a definite opinion on the allowability /admissibility of the claim under section 36(1)(vii) of the Act with regard to the provision for doubtful debts and advance which was held to be in the nature of write off as provided in section 36(l)(vii) where such provision is reduced from the trade receivable in the Balance

Sheet and net amount only is shown in the Balance Sheet. The Ld. AR submitted that the provision for bad and doubtful debts which was included as an expenditure in Note 21 under other expense was reduced from in trade receivable in note 13 and 15 in the Balance Sheet. According to the Ld. AR, the Supreme Court clearly held that there is no need to close the account of individual account of debtor in the books of accounts which means that the provision for doubtful debts and the debt due under trade receivable can be carried forward in the books of accounts without being closed by mutual set off in the books of accounts. The Ld. AR relied on the relevant para in page 7 & 8 of the judgment of the Supreme Court in the case of Vijaya Bank Ltd. (supra) which reads as follows:

" However, as stated by the Tribunal, in the present case, besides debiting the Profit and Loss Account and creating a provision for bad and doubtful debt, the assessee - Bank had correspondingly/simultaneously obliterated the said provision from it's accounts by reducing the corresponding amount from Loans and Advances/debtors on the asset side of the Balance Sheet and, consequently, at the end of the year, the figure in the loans and advances or the debtors on the asset side of the Balance Sheet was shown as net of the provision "for impugned bad debt". In the judgment of the Gujarat High Court in the case of Vithaldas H. Dhanjibhai Bardanwala [supra], a mere debit to the Profit and Loss Account was sufficient to constitute actual write off whereas, after the Explanation, the assesses (s) is now required not only to debit the Profit and Loss Account but simultaneously also reduce loans and advances or the debtors from the asset side of the Balance Sheet to the extent of the corresponding amount so that, at the end of the year, the amount of loans and advances/debtors is shown as net of provisions for impugned bad debt. This aspect is lost sight of by the High Court in it's impugned judgment. In the circumstances, we hold, on the first question, that the assessee was entitled to the benefit of deduction under Section 36(I)(viii) of 1961 Act as there was an actual write off by the assessee in it's Books, as indicated above ".

3.2 From the above details, the Ld. AR submitted that the assessing officer had applied his mind and formed a definite opinion on the subject matter and issues

involved. Thus, the Ld. AR submitted that the Pr. CIT in his order u/s. 263 had substituted his own opinion / view with that of the assessing officer which is not permitted by law as per the established position as per legal pronouncements given below :

- 1) Antala Sanjaykumar Ravjibhai v. CIT [2012] 135 1TD 506 (Rajkot) (Trib.),
- 2) Manish Kumar v. CIT[2012] 134 ITD 27 (Indore) (Trib.)
- 3) Roshan Lal Vegetable Products (P) Ltd. v. ITO
[2012] 51 SOT 1 (URO) (Asr.) (Trib.)
- 4) Fine Jewellery (India) Ltd. v. ACIT [2012] 19 ITR 746 (Mum.)(Trib.)

3.3 The Ld. AR submitted that the facts of the case are similar to the decision of Delhi Bench of ITAT in the case of NIS Sparta Ltd vs DCIT reported in (2019) 56 CCH 0083. It was submitted that even though this decision was rendered in the context of re- assessment u/s.147 and not under 263 but facts were similar. In view of the above, the Ld. AR submitted that the order passed u/s. 263 of the I.T. Act by the Pr. CIT may be set aside as void ab initio.

3.4 Further, the Ld. AR submitted that Pr. CIT had given direction to the assessing officer to make addition/disallowance of provision for bad and doubtful debts amounting to Rs. 1,58,02,810/- which is not permitted by law as per the legal decisions cited below :

- (i) CIT vs. J. I. Morrison (India) Ltd reported in [2014] 46 taxmann.com 215 (Cal.)
- (ii) *PCIT vs. Ballarpur Industries Limited* [2017] 85 taxmann.com 10 (Bombay)

On this account also, it was submitted that the order of the Pr. CIT passed u/s. 263 of the Act may be set aside.

3.5 Further, the Ld. AR submitted that the issue regarding the claim on account of Rs.1,00,00,000/- added back in the computation of income was examined by the assessing officer based on the direction of the Commissioner of Income-tax u/S.263 and has been found to be not warranting any modification in the order u/s. 143(3). The Ld. AR drew our attention to the order of the assessing officer giving effect to the order u/s. 263 of the I.T. Act dt. 28.06.2019 wherein in Para 3(iii) of the order of the assessing officer, the details of claim of Rs..1,00,00,000/- were given and the AO had noted that there was no debit of Rs.1,00,00,000/- in P&L account and also no such amount was added either in the computation of income part of return of income. Thus, according to the Ld. AR, the order u/s.263 passed by the Pr. CIT by on this ground was not based on any facts.

3.6 Regarding the claim for deduction of aggregating to Rs.1,58,02,810/- towards provision for bad and doubtful debts/advances, the Ld. AR submitted that the admissibility of deduction of Rs. 1,20,99,633/- towards provision for bad and doubtful debts and Rs.37,03,177/- towards doubtful advances was examined in detail by the assessing officer by verifying the facts of the case as detailed in the written submission filed by the authorised representative of the assessee and Pr. CIT had referred to the submission of the assessee in para 2.(i) page 1 of his order passed u/s. 263 of the I.T. Act. The Ld. AR submitted that the assessing officer had

formed a view / opinion after examining the written submissions of the assessee. The Ld. AR relied on the judgment of the Supreme Court of India in the case of Vijaya Bank Ltd reported in 323 ITR 166, where it was held that debit of provision to P&L account and at the same time reducing the same from receivables in the balance sheet would constitute write off for the purpose of Section 36(1)(vii). The Ld. AR relied on the order of CIT(A) in another case ie., of Kerala State Electricity Board in ITA No.105-T/10-II dt.03.02.2014 wherein the same issue involving much larger amount allowed as deduction was considered by the assessing officer while forming an opinion as above in favour of the assessee. Further, the Ld. AR relied on the decision of this Tribunal in the case of Hi build Coatings Pvt Ltd in ITA No.310/Coch/2014 dated 19/09/2014 for the assessment year 2010-11 which had allowed similar claim. The Ld. AR also relied on the following decisions of High Court/Tribunal:

- a) CIT v. Yokogawa India Ltd (204 Taxmann 305)
- b) CIT v. Kirloskar Systems Ltd (220 Taxmann 1)
- c) Arrow Coated Products Ltd v. ACIT (136 ITD 315) (Mum. Trib.)
- d) Tainwala Chemicals & Plastics Ltd v. ACIT (47 Sot 169) (Mum. Trib.)

The Ld. AR also relied on the order of the ITAT, Cochin in the case of DCIT vs. DCIT vs. Apollo Tyres Limited in ITA No.359/Coch/2014 and C.O. No.44/Coch/2014 dated 15/01/2018 for the assessment year 2006-07. Further, The Ld AR placed reliance on the order of the Tribunal in the case of Kerala State Civil Supplies Corporation Ltd. vs. ACIT in ITA No. 34/Coch/2017 dated 14/12/2017 for the assessment year 2012-13.

3.7 Thus, the Id. AR submitted that order of the assessing officer was not based on wrong assumption of facts or incorrect application of law or without due application of mind without following the principles of natural justice. According to the Ld. AR it is a settled position of law that action u/s. 263 cannot be invoked for change of opinion when the assessing officer had taken one of the possible view on the matter. The Ld. AR relied on the judgment of the Supreme Court in the case of CIT vs. Kwaliti Steel Suppliers Complex [2017] (84 taxmann.com 234) wherein it was held that where two views are possible and the Assessing Officer has taken one view, the Commissioner is not within his rights to revise the order u/s. 263 by substituting his view with that of assessing officer. On the above grounds, the Ld. AR submitted that the order of learned Pr. CIT passed u/s. 263 of the I.T. Act may be set aside as being not in accordance with the provision of the section read along with jurisdictional pronouncements as above.

4. The Ld. DR relied on the order of the Pr. CIT. The Ld. DR submitted that the Assessing Officer allowed deduction towards provision for bad and doubtful debts in the profit and loss account without writing off such debts in the individual accounts in the books of accounts of the assessee. Being so, the Ld. DR submitted that excessive deduction was given to the assessee which is erroneous and prejudicial to the interests of the Revenue. Hence, the CIT(A) was justified in exercising power u/s. 263 of the I.T. Act.

5. We have heard the rival submissions and perused the material on record. Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner is well within his powers to treat an order as erroneous on the ground that the Assessing Officer should have made further inquiries before accepting the wrong claims made by the assessee. The Assessing Officer cannot remain passive in the face of a claim, which calls for further enquiry to know the genuineness of it. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. The Assessing Officer should protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return. The order passed by the Assessing Officer becomes erroneous when an

enquiry has not been made before accepting the genuineness of the claim which resulted in loss of revenue. In the present case, the Assessing Officer without examining the issue allowed the provision for bad debts as deduction though it was not written off by crediting to the individual accounts of the parties concerned in the books of accounts of the assessee so as to claim deduction u/s. 36(1)(vii) of the I.T. Act which is erroneous and prejudicial to the interests of the Revenue. Being so, we do not find any infirmity in exercising power u/s. 263 of the I.T. Act by the Pr. CIT.

5.1 The main contention of the Ld. AR is that the Assessing Officer had duly verified the accounts of the assessee and allowed deduction and also there is no mandate to write off of bad debts by debiting to the P&L account so as to claim deduction u/s. 36(1)(vii) of the I.T. Act. The Ld. AR relied on the judgment of the Supreme Court in the case of Vijaya Bank Ltd. (323 ITR 166). We are unable to accept the proposition because profit and loss account is the final computation of profit made by the assessee based on which assessment is to be framed. Unless the bad debt is written off by debiting to the P&L account which necessarily means that the debtors' account should be credited or so much of the amount debited in the profit and loss account should be written off from the amount due from the debtors, the condition as contemplated u/s. 36(1)(vii) of the I.T. Act is not satisfied. Even though the assessee's Counsel contended that when bad debt is recovered, there is provision for assessment of the same u/s. 41 of the I.T. Act, we do not think that such a safety provision will entitle the assessee to claim bad debt as a deduction without satisfying the conditions contained in section 36(1)(vii) of the

I.T. Act. The same proposition was laid down by the Jurisdictional High Court in the case of Sampanna Kuries Pvt. Ltd. vs. DCIT (249 CTR 210). Further, in the case of Art Leasing Ltd. vs. CIT (229 CTR 272), it was held as under:

“Any other law referred to in s. 45Q of RBI Act does not cover IT Act which applies to all assessees in the computation of taxable income. May be the provisions of Chapter III-B of the RBI Act has an overriding effect over the provisions of the Money Lenders Acts or similar Acts made by various States, which may otherwise apply to NBFCs. The Accounting Standards prescribed by the RBI, so long as they are consistent with the IT Act, are certainly applicable to the IT authorities in the computation of taxable income. Under s. 36(1)(viiia), the eligible banks are authorised to create provision subject to certain limits in respect of rural advances and other loans referred to therein and claim deduction of the same. This provision clearly indicates that Parliament is well aware of the risk undertaken by the banks in making advance to the rural sector in terms of the guidelines issued by the Government and the RBI and only such cases are treated as exception to the general provision contained in Explanation to s. 36(1)(vii), which prohibits granting of deduction of any provision for bad and doubtful debts. NBFCs are not covered by s. 36(1)(viiia) and so much so, Explanation to s. 36(1)(vii) squarely applies or in other words, the appellant-NBFCs are not entitled to deduction of any provision created for bad and doubtful debts, no matter such provision is created based on the guidelines issued by the RBI.”

5.2 Further, in the case of State Industrial Development Corporation Ltd. vs. CIT (281 ITR 413), the Jurisdictional High Court held as follows:

“The expression “provision for bad and doubtful debts” cannot be construed as writing off bad debts. Above narration may give a ray of hope of recovery even though there is only a remote possibility, Assessee may retain a ray of hope but it cannot be said that the assessee has written off the debts. Whatever be the attendant circumstances, unless and until debt has been written off “as irrecoverable in the accounts of the assessee” as provided under s. 36(2)(i)(b), assessee cannot claim any deduction for bad debts. “Irrecoverable” in s. 36(2)(i)(b) means the amount that is not recoverable. Assessee, in the P&L a/c, has made a provision for bad and doubtful debts. Such a provision will not fall within the meaning of s. 36(2)(i)(b). Doubtful debt had not been written off as bad debt. Consequently, the Tribunal is justified in holding that the claim of

bad debt was not legally sustainable and allowable,—Travancore Tea Estates Co. Ltd. vs.CIT (1992) 102 CTR (Ker) 253 : (1992) 197 ITR 528 (Ker), Travancore Tea Estates Co. Ltd. vs. CIT (1999) 151 CTR (SC) 231 : (1998) 233 ITR 203 (SC) and CIT vs. Coates of India Ltd. (1998) ISO CTR (Cat) 311 : (1998) 232 ITR 324 (Cal) relied on.”

5.3 In the case of CIT vs. Hotel Ambassador 253 ITR 430),the Jurisdictional High Court held as follows:

“Writing off of bad debts, without charging the same in the P&L a/c is not a write off at all because assessment is made based on the audited accounts and the P&L a/c and balance sheet filed along with the returns. It is not enough if the assessee writes off the same in some of the books maintained by it, which do not form part of the audited accounts including the P&L a/c based on which assessment is made. Unless the write off took place at the time of finalisation of the accounts and is reflected in the books of account, it cannot be treated as a write off at all. There was no special circumstance under which the Tribunal has accepted the write off stated to have been done by the assessee in the personal account, of the debtors maintained by the assessee, as against the normal practice of charging the same to the P&L a/c. The reassessment proceedings under s. 147 is income escaped assessment where the Department has reopened the assessment for the purpose of assessment of escaped income. Whatever claims may be eligible for deduction in reassessment proceedings, a deduction of bad debts is not permissible in reassessment proceedings because in reassessment proceedings, there is no finalization of accounts to write off bad debts.”

5.4 In view of the above, we are of the opinion that the judgment of the Supreme Court in the case of Vijaya Bank Ltd. (supra) relied on by the assessee's Counsel applies mainly to Banking companies and not to other assessees. Accordingly, we hold that the Pr. CIT is justified in exercising his power u/s. 263 of the I.T. Act so as

to reconsider the allowability of bad debts claimed by the assessee at Rs.1,58,02,810/-. Thus, the grounds of appeal of the assessee are dismissed.

6. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 11th March, 2020.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 11th March, 2020

GJ

Copy to:

1. M/s. Gulf Asia Contracting Co. Pvt. Ltd., XXV/812, Srivalsam, Thavally P.O., Kollam-691 009
2. The Assistant Commissioner of Income-tax, Circle-1, Kollam.
3. The Pr. Commissioner of Income-tax, Trivandrum.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin