IN THE INCOME TAX APPELLATE TRIBUNAL

[SPECIAL BENCH MATTER]

"G" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT,

SHRI ABY T. VARKEY, JUDICIAL MEMBER, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.510/Chandi./2017
(Assessment Year : 2013–14)

The State Bank of India
(Successor to State Bank of Patialia)
Local Head Office – Chandigarh, 2nd Floor
Sector–17A, Chandigarh 160 017
PAN – AACCS0143D

……………. Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–Patiala

...............Respondent

ITA No.538/Chandi./2017
(Assessment Year : 2014–15)

The State Bank of India
(Successor to State Bank of Patialia)
Local Head Office – Chandigarh, 2nd Floor
Sector–17A, Chandigarh 160 017
PAN – AACCS0143D

……………. Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–Patiala

...............Respondent

ITA No.1259/Chandi./2017
(Assessment Year : 2015–16)

The State Bank of India
(Successor to State Bank of Patialia)
Local Head Office – Chandigarh, 2nd Floor
Sector–17A, Chandigarh 160 017
PAN – AACCS0143D
……………. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–Patiala
...............Respondent

Assessee by : Shri P.J. Pardiwala Sr. Adv. a/w
Shri Jeet Kamdar, Adv.
Revenue by : Shri A.B. Koli, CIT DR

Date of Hearing – 15/09/2022

Date of Order – 10/11/2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

This Special Bench has been constituted by the Hon'ble President, pursuant to reference by the Division Bench of the Tribunal, to decide the following question:

> *"Whether deduction under section 36(1)(viia) of the Income Tax Act, 1961 r.w.r. 6ABA of the Income Tax Act 1962 is to be allowed on the total outstanding advances including opening balances upon which the assessee bank has already claimed such deduction in earlier years or the same has to be allowed in respect of incremental advances made during the year?"*

2. The brief background of the case, which resulted in constitution of this Special Bench is: The assessee is a scheduled bank and has claimed deduction under section 36(1)(viia) of the Act in respect of provision made for bad and doubtful debts. The assessee, while claiming aforesaid deduction under section

36(1)(viia) of the Act, calculated the '*aggregate monthly average advances*' by taking into consideration the outstanding balances of the previous month, i.e., the opening balance for computing the amount of advance as outstanding at the end of each month as per the language of Rule 6 ABA of the Income Tax Rules, 1962. The Assessing Officer rejected the computation of the assessee and held that only incremental advances made during the month can be considered while calculating the figure of '*aggregate monthly average advances*'. The Assessing Officer was of the view that if the opening balance is also considered it would result in the assessee claiming deduction of more than actual advance especially where the advance has not been paid back. The First Appellate Authority upheld the reasoning of the Assessing Officer on this issue. Being aggrieved, the assessee preferred further appeal before the Tribunal.

3. During the course of hearing of the appeal, in support of its plea, the assessee placed reliance upon the decisions rendered by the Division Bench of the Tribunal in the following cases:

i) DCIT vs M/s City Union Bank Ltd in ITA No. 1485/Mds/2007 dated 30/10/2009;

ii) Nizamabad District Co-operative Central Bank Ltd., Nizamabad v/s ITO in ITA No.1161/Hyd./2014; and

iii) Indian Overseas Bank vs DCIT in ITA No. 2124 – 2125/Mds/2013 dated 26/09/2014.

4. After hearing the submissions of both sides, the Division Bench of the Tribunal, Chandigarh Bench, expressed its disagreement with the view so expressed by other Division Bench in aforesaid decisions. Accordingly, reference was made to the Hon'ble President for constituting the Special Bench

on this issue. The reasons mentioned in support of the reference are as follows:

"<u>Reasons for referring an issue to the Special Bench of ITAT</u>

One of the grounds raised by the assessee before us in its appeal in ITA No. 510, 538, and 1259/Chd/2017 was as under:

> *"The Ld. CIT(A) erred in holding that only the incremental advances in respect of rural branches is eligible for deduction under section 36(1)(viia) overlooking the express words in Rule 6ABA r.w.s. 36(1)(viia) and even when there was no such disallowance in any of the earlier assessment years."*

Orders of the Coordinate Benches of the ITAT were cited before us by the Ld. Counsel for the assessee in support of its contention that provision for bad and doubtful debts allowable on rural advances made by banks as specified under section 36(1)(viia) of the Act r.w.r. 6ABA of the Rules was that made on cumulative aggregate average rural advances made, including the opening balances of the advances made. The decisions relied upon before us are as under:

> *i) DCIT vs. M/s City Union Bank Ltd. in ITA No. 1485/Mds/07 dated 30.10.2009.*
>
> *ii) Nizamabad District Co-operative Central Bank Ltd.. Nizamabad vs. ITO in ITA No. 1161/H/2011 dated 10.12.2014.*
>
> *iii) Indian Overseas Bank vs. DCIT in ITA No. 2124 2125/Mds/2013 dated 26.09.2014.*

No decisions of any higher authorities was brought to our notice by either of the parties.

We are not in agreement with the decisions of the coordinate benches as cited above, since provision for bad and doubtful debts in our understanding are estimates of future losses and are made from profits of the year to cover such estimated future losses, which in the present case arises from the risk associated with making rural advances. Such an estimate can logically in our view be made only once on an advance. By allowing provision to be made on opening balance also the provision is being repeatedly made, which in our view goes against its basic nature itself and would also lead to an absurdity with the losses being provided for, exceeding the estimate itself and in some cases even exceeding the amount of advances made. Our detailed reasoning on the issue is part of our proposed order in the aforestated appeals which is annexed herewith. We therefore are referring the issue to the Hon'ble President for constituting a special bench of ITAT for deciding it, framing the following question.

> *"Whether deduction under section 36(1)(viia) of the Income Tax Act 1961 r.w.r 6ABA of the Income Tax Act 1962 is to be allowed on the total outstanding advances including opening balances upon which the assessee bank has already claimed such deduction in earlier years or the same has to be allowed in respect of incremental advances made during the year ?"*

> *The proposed common order in respect of the appeals bearing ITA No. 510, 538 & 1259/Chd/2017 is attached herewith."*

5. Accordingly, the question (as mentioned in paragraph 1) was referred to this Special Bench for adjudication.

6. During the course of hearing before us, learned counsel appearing for the assessee, after briefly explaining the facts resulting in the present reference, submitted that the issue pending for consideration before this Special Bench has been decided in favour of the taxpayer by the Hon'ble Calcutta High Court in PCIT vs Uttarbanga Kshetriya Gramin Bank, [2018] 408 ITR 393 (Cal.) and the Hon'ble Madras High Court in CIT vs M/s City Union Bank Ltd., in T.C.A. No. 961 of 2010, vide judgment dated 07/03/2022.

7. On the other hand, the learned Departmental Representative by vehemently relying upon the orders passed by the lower authorities submitted that Hon'ble Calcutta High Court upheld the conclusions of the Tribunal finding no substantial question of law in the appeal filed by the Revenue and thus, the merit of the issue was not discussed in detail.

8. We have considered the submissions of both sides and perused the material available on record. Since, it has been submitted that this issue has already been decided by the Hon'ble Calcutta High Court and the Hon'ble Madras High Court in aforesaid decisions, therefore, at the outset we have dealt with these decisions. We find that the following question of law was proposed for admission by the Revenue in its appeal before the Hon'ble Calcutta High Court in Uttarbanga Kshetriya Gramin Bank (supra):

> *"Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in allowing deduction under section 36(1)(viia) of the I.T. Act, 1961, for the same advances made for all previous years leading to multiple deductions in every assessment year by misinterpreting the Rule 6ABA of the I.T. Rules, 1962 and also against the ratio of judgment in the case of J.K Synthetics Ltd. v. UOI 199 ITR 43 (SC).?"*

9. While dismissing the Revenue's appeal and upholding the findings of the Tribunal, the Hon'ble Calcutta High Court, in the aforesaid decision, observed as under:

> *"5. The assessee's appeal, however, was allowed by the Tribunal. The Tribunal's interpretation of the aforesaid statutory provisions would appear from the following passage:—*
>
> > *"From this Rule, it is apparent that for the purpose of section 36(1) (viia), the aggregate average advance made by the rural branches of as scheduled bank shall be computed by taking the amount of advances made by each rural branch as outstanding at the end of the last day of each month comprised in the previous year has to be aggregated separately. The CIT (Appeals) instead of giving the direction to the Assessing Officer to take the amount of advances as outstanding at the end of the last day of each month in the previous year directed the Assessing Officer to take loans and advances made during the year only, we therefore, set aside the order of CIT (Appeals) on this issue and amend the direction of the CIT (Appeals) and direct the Assessing Officer to compute 10% of the aggregate monthly average advances made by the rural branch of such Bank by taking the amount of advances by each rural branch of such Bank by taking the amount of advances by each rural branch as outstanding at the end of the last day of each month comprised in the previous year and aggregate the same separately as given under Rule 6ABA of the Income Tax Rules, 1962."*
>
> *6. Mr. Nizamuddin, learned advocate appeared on behalf of the Revenue and submitted the amended direction made by the Tribunal on the ITO has resulted in the assessee getting double deduction which is not permissible on computation made under Rule 6ABA. He submitted a double deduction in the manner thus obtained by the assessee has not been expressly provided. He relied on a judgment of the Supreme Court in the case of Escorts Ltd. v. Union of India [1993] 199 ITR 43, on the following portion in the said judgment appearing in page 64 of the report.*
>
> > *"A double deduction cannot be a matter of inference, it must be provided for in clear and express language, regard being had to its unusual nature and its serious impact on the revenues of the State."*
>
> *7. Mr. Khaitan, learned senior Advocate appeared on behalf of the assessee and submitted that the computation to be made as prescribed by Rule 6ABA is for the purpose of fixing the limit of the deduction available under section 36(1)(viia). Clauses (a) and (b) in Rule 6ABA cannot be given the restricted interpretation. The amounts of advances as outstanding at the last day of each*

month would be a fluctuating figure depending on the outstanding as increased or reduced respectively by advances made and repayments received. The assessee might provide for bad and doubtful debts but the deduction would only be allowed at the percentage of aggregate average advance, computation of which is prescribed by Rule 6ABA.

8. We find from the amended direction made by the Tribunal that such direction is in terms of Rule 6ABA. The ITO had made the computation of aggregate monthly advances taking loans and advances made during only the previous year relevant to assessment year 2009-10 as confirmed by CIT (A). The Tribunal amended such direction, in our view, correctly applying the rule.

9. For the reasons aforesaid we do not find the questions suggested to be substantial questions of law involved in the case. As such the application and appeal are dismissed."

10. We further find that the following question of law came up for consideration before the Hon'ble Madras High Court in M/s City Union Bank Ltd. (supra):

"5. By order dated 29.11.2010, this court admitted the aforesaid tax case appeal on the following substantial questions of law:

1. ……

2. Whether in the facts and circumstances of the case, the Tribunal was right in deleting disallowance of provision before bad debts under Section 36 (1) (viia) of Rs.8.53 crores observing that as per Rule 62ABA of the Income Tax Rules 1962, the aggregate average advances made by the rural branches have to be computed by taking the amounts of advances made by each rural branch as outstanding at the end of last day of each month comprised in the previous year, whereas the aggregate average has to be worked out only in respect of advances made during the year as otherwise, there would be double deduction?"

11. While in principle agreeing with the submission of the taxpayer, the Hon'ble Madras High Court took into consideration the aforesaid decision of Hon'ble Calcutta High Court. The relevant observations of Hon'ble Madras High Court are as under:

"10.2 Similarly, the second issue relating to deduction of Rs.8.53 crores u/s 36(1)(viia) with regard to the provision for bad and doubtful debts, is covered

by the decision in Principal Commissioner of Income Tax, Jalpaiguri v. Uttarbanga Kshetriya Gramin Bank [(2018) 94 taxmann. Com 90 (Calcutta), in favour of the assessee and the relevant passage of the same is usefully extracted below:

> *"6. Mr. Nizamuddin, learned advocate appeared on behalf of the Revenue and submitted the amended direction made by the Tribunal on the ITO has resulted in the assessee getting double deduction which is not permissible on computation made under Rule 6ABA. He submitted a double deduction in the manner thus obtained by the assessee has not been expressly provided. He relied on a judgment of the Supreme Court in the case of Escorts Ltd. v. Union of India reported in (1993) 199 ITR 43, on the following portion in the said judgment appearing in page 64 of the report.*
>
> > *"A double deduction cannot be a matter of inference, it must be provided for in clear and express language, regard being had to its unusual nature and its serious impact on the revenues of the State."*
>
> *7. Mr.Khaitan, learned senior Advocate appeared on behalf of the assessee and submitted that the computation to be made as prescribed by Rule 6ABA is for the purpose of fixing the limit of the deduction available under section 36(1)(viia). Clause (a) and (b) in Rule 6ABA cannot be given the restricted interpretation. The amount of advances as outstanding at the last day of each month would be a fluctuating figure depending on the outstanding as increased or reduced respectively by advances made and repayments received. The assessee might provide for bad and doubtful doubts but the deduction would only be allowed at the percentage of aggregate average advance, computation of which is prescribed by Rule 6ABA.*
>
> *8. We find from the amended direction made by the Tribunal that such direction is in terms of Rule 6ABA. The ITO has made the computation of aggregate monthly advances taking loans and advances made during only the previous year relevant to assessment year 2009-10 as confirmed by CIT (A). The Tribunal amended such direction, in our view, correctly applying the rule.*
>
> *9. For the reasons aforesaid we do not find the questions suggested to be substantial questions of law involved in the case. As such the application and appeal are dismissed."*

11. This court has no disagreement with the legal proposition laid down in the aforesaid decisions. However, in the present case, though there was no double deduction, as alleged by the appellant / Revenue, there was no clear vision about the advances made by the rural and non-rural branches of the bank and the quantum of deduction was not properly determined by the assessing officer based on the materials furnished by the respondent / assessee. In this context, the relevant paragraphs of the assessment order dated 31.03.2006 passed by the assessing officer are quoted below:

> *"5.3 When the assessee was asked to clarify whether the advances which were considered to be bad and doubtful in earlier years and for which the provision was made so as to claim deduction under section 36(1)(viia) of the Act, have been recovered subsequently, it was stated that as the provision claimed was not with reference to any particular debt due to the assessee but on an overall basis, it is not possible to certify that the bad debts claimed as trading loss for deduction under section 36(1)(viia) was recovered or not. It was also stated that the*

assessee would not be able to give age-wise details of outstanding advances for the branches more so for the rural branches with reference to which the deduction was claimed, so as to determine whether any advance of earlier year for which provision was made is still outstanding.

5.4. In other words, the assessee is not in a position to give details of the advances with reference to which the deduction of Rs.14.99 crores was allowed as per Annexure 2 as deduction under section 36(1)(viia) towards unknown and anticipated trading loss by virtue of mere provision made on ad-hoc basis for bad and doubtful debts and to confirm that these advances were still outstanding as at the end of the previous year relevant to this accounting year."

"6.3.1. Therefore due to assessee's inability to relate the provision to any particular advance of a branch, it cannot be said whether it is a provision for rural advance or for non-rural advance so as to examine the monetary limit prescribed under section 36(1)(viia) for allowing deduction thereunder. Then such provision is only reserve for bad debts and not provision for bad and doubtful debts. Though the provisions of section 36(1)(viia) may be understood as a beneficial provision to the assessee company to claim deduction even in respect of reserve created by it to meet certain anticipated loss or contingency due to default of its debtors whom the assessee may not be able to easily identify at the end of the previous year, yet the computation machinery for determining the deduction admissible in the matter of write off bad and doubtful debts of rural or non-rural advance under section 36(1)(v) read with the proviso thereunder and section 36(2)(v) of the Act would fail."

Thus, it is evident from the above extract that the quantum of deduction arrived at by the assessing officer was not based on the documents produced by the respondent / assessee. The CIT(A) as well as the Tribunal also, did not look into those aspect, while allowing the deduction claimed by the respondent / assessee. Therefore, this court is of the opinion that for that limited purpose, the matter has to be re-examined by the assessing officer and the same has also been agreed upon by the learned counsel appearing for both sides."

12. We find that one of the reasons recorded by the Division Bench of the Tribunal for referring the issue to the Special Bench was "*No decision of any higher authorities was brought to our notice by either of the parties*". However, now decisions of two Hon'ble High Courts have been brought to our notice, wherein similar issue has been considered in favour of the taxpayer.

13. As noted above, the Hon'ble Calcutta High Court, vide aforesaid decision, has affirmed the findings rendered by the Division Bench of the Tribunal in Uttar Banga Kshetriya Gramin Bank vs ACIT, in ITA No. 846 and 1745/Kol/2012, wherein the Division Bench of the Tribunal vide order dated

08/07/2015 held that for the purpose of section 36(1)(viia), to compute the aggregate monthly average advance made by the rural branch of scheduled Bank, the amount of advances by each rural branch as outstanding at the end of the last day of each month comprised in the previous year be taken into consideration. The Hon'ble Madras High Court, vide aforesaid decision, has concurred with the decision of the Hon'ble Calcutta High Court. Thus, once two Hon'ble High Courts of the country have expressed their opinion in respect of the issue which arose before us, in absence of contradictory view by any other Hon'ble Court of equivalent or higher judicial hierarchy being brought to our notice, we as a matter of judicial propriety are bound to follow the view so expressed by the Hon'ble High Courts in decisions cited supra. In this regard, it is also relevant to note the following observations of the Hon'ble Supreme Court in ACCE vs Dunlop India Ltd., [1985] 154 ITR 172 (SC):

> *"8. We desire to add and as was said in Cassell & Co. Ltd. vs. Broome (1972) AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of Courts" which exists in our country, "it is necessary for lower tier", including the High Court, "to accept loyally the decisions of the higher tiers". "It is inevitable in a hierarchical system of Courts that there are decisions of the supreme appellate tribunal which do not attract the unamimous approval of all members of the judiciary.... But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted" (See observations of Lord Hailsham and Lord Diplock in Broome vs. Cassell). The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system."*

14. As regards the submission of the learned Departmental Representative that no substantial question of law was admitted by the Hon'ble Calcutta High Court, we are of the considered view that non-admission of a substantial question of law under section 260A of the Act by the Hon'ble High Court does

not render the decision of Hon'ble Court to be non-binding and the doctrine of merger would still be applicable. In any case, we find that the Hon'ble Madras High Court in the aforesaid decision concurred with the legal proposition laid down by the Hon'ble Calcutta High Court after admitting the question of law as proposed by the Revenue in its appeal on this issue. Thus, we find no merits in this plea raised by the learned Departmental Representative.

15. Therefore, respectfully following the aforesaid decisions passed by Hon'ble Calcutta High Court and Hon'ble Madras High Court, we decide the question referred for our adjudication in favour of the assessee and held that the deduction under section 36(1)(viia) r/w Rule 6 ABA is to be allowed on the total outstanding advances at the end of each month considering the opening balances. Since other issues arising in the appeals are still pending adjudication, therefore, we send the matter back to the Division Bench for disposing of the appeals in the above terms.

16. We order accordingly.

Order pronounced in the open Court on 10/11/2022

Sd/-	**Sd/-**	**Sd/-**
PRAMOD KUMAR	**ABY T. VARKEY**	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**	**JUDICIAL MEMBER**

MUMBAI, DATED: 10/11/2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai