

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5845/DEL/2016 [A.Y 2008-09]

ITA No. 5846/DEL/2016 [A.Y 2009-10]

The A.C.I.T.
Circle - 19(1)
New Delhi.

Vs.

Oriental Bank of Commerce
Central Account Office
2nd Floor, Plot No. 5
Sector - 32, Institutional Area
Gurgaon, Haryana

PAN: AAACO 0191 M

(Applicant)

(Respondent)

Assessee By : Shri K.V.S.R. Krishna, CA

Department By : Ms. Pramita M. Biswas, CIT-DR

Date of Hearing : 10.12.2019

Date of Pronouncement : 11.12.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above two separate appeals by the Revenue are preferred against the common order of the Commissioner of Income Tax [Appeals] - 36, New Delhi dated 06.09.2016 pertaining to assessment

years 2008-09 and 2009-10. In both the appeals, the Revenue has challenged the order of the first appellate authority who deleted the penalty levied u/s 271(1)(c) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'], though the quantum differs.

2. The addition/disallowance on which the Assessing Officer has proceeded to levy penalty u/s 271(1)(c) of the Act relates to the claim of depreciation on fall in value of investment and claim of depreciation on software.

3. At the very outset, the ld. counsel for the assessee brought to our notice that the quantum addition in respect of claim of depreciation on fall in value of investment has been deleted by the Tribunal and claim of expenditure on software has been allowed by the Hon'ble High Court of Delhi. The ld. counsel for the assessee furnished copies of orders of the co-ordinate bench and the Hon'ble High Court of Delhi.

4. The ld. DR fairly conceded.

5. We have given thoughtful consideration to the orders of the authorities below and have carefully perused the orders of the coordinate bench and that of the Hon'ble High Court of Delhi. We find force in the contention of the ld. counsel for the assessee.

6. In so far as the first issue is concerned, the Tribunal in quantum appeal in ITA Nos. 6795 and 6796/DEL/2013 has held as under:

"4. We have heard the submissions of both the parties and have gone through the entire material available on record. A perusal of the impugned order reveals that while deciding this issue against the assessee, the ld. CIT(A) has relied on earlier order of first appellate authority in appeal of the assessee for A.Y. 2007-08. However, the said order of first appellate authority has been 7 ITA No.6795 & 6796/D/13 and 242 & 243/D/14 reversed by the Tribunal on this issue in ITA No. 1937/Del./2011 (2007-08) vide order dated 04.11.2015, wherein the coordinate bench has decided the issue in favour of the assessee as under : "13. We have carefully considered the rival contentions. During the year, assessee has debited the loss of Rs. 205.43 crores arising of on account of transfer of securities of Rs. 1664.32 crores from 'available for sale' category to 'held to maturity' category in terms of resolution of the Board of Directors of the appellant. Claim

has arisen because of the circular issued by Reserve Bank of India on prudential norms for classification, valuation and operation of investment portfolio bank dated 1st July, 2006. According to that circular the banks are allowed to transfer securities from one category to another category once every year at the least value of following :- (a) Acquisition cost (b) Book value and (c) Market value. It is further provided that if because of such transfer any depreciation arises, it should be fully provided for. The claim of the assessee is that this loss should be allowed as deduction because of transfer of securities from one category to another category. Therefore, the issue in appeal is that whether a banking company claims the loss, based on circulars and instructions of Reserve Bank of India, is allowable because of transfer of security from category of "available for sale" to "held to maturity". This issue now no longer survives in view of two decisions of Hon'ble Karnataka High Court in case of Karnataka Bank Ltd. vs. Assistant Commissioner of Income Tax 356 ITR 549 and CIT vs. Bank of Baroda 262 ITR 334 and a decision of honourable Bombay High Court in case of CIT vs. HDFC Bank Ltd. reported at 368 ITR 377 considering decision of honourable supreme court in case of United Commercial Bank V CIT 240 ITR 355 and Southern Technologies Limited V Jt CIT 320 ITR 577, wherein Hon'ble High Court has held as under:- "9. In the present case, we find that the facts and issues that are covered by the aforesaid judgment squarely

apply to the facts and issues raised in the present Appeal. Not only are we in full agreement with the judgment of this Court in the case of Bank of Baroda (supra) but we are bound by the same. We therefore respectfully follow the ratio laid down in the said judgment. "10. We find that even the judgment of the Karnataka High Court in the case of Karnataka Bank Ltd. (supra), reliance on which was placed by Mr Mistry, squarely covers the issue raised in this Appeal. The facts in the case before the Karnataka High Court were that the Assessee was holding securities in different categories as mandated by the RBI Master Circular dated 1st September 2003. The Assessee treated such securities as stock-in-trade and 8 ITA No.6795 & 6796/D/13 and 242 & 243/D/14 claimed depreciation on the book value after valuing the securities at cost or market value whichever was lower. The Revenue refused to accept the Assessee's plea for the deduction and disallowed the same and added back to the total income the said amount. Aggrieved by the said order, the Assessee preferred an Appeal before the CIT (Appeals). The same was dismissed upholding the contention of the Assessing Authority. Aggrieved thereby, the Assessee preferred an Appeal to the Tribunal. The Tribunal inter alia held that since the securities on which the depreciation had been claimed on the earlier years had not been identified, the issue was restored to the file of the Assessing Officer for consideration afresh and partly allowed the Appeal. Being

aggrieved by the said order, Karnataka Bank Ltd. preferred an Appeal to the Karnataka High Court under section 260A of the Act. After discussing various judgments of the Supreme Court, the Karnataka High Court held as under :— "From the aforesaid judgments of the apex court, now it is clear that a method of accounting adopted by the taxpayer consistently and regularly cannot be discarded by the Departmental authorities on the view that he should have adopted a different method of keeping the accounts or on valuation. Financial institutions like bank, are expected to maintain accounts in terms of the RBI Act and its regulations. The form in which, accounts have to be maintained is prescribed under the aforesaid legislation. Therefore, the account had to be in conformity with the said requirements. The RBI Act or the Companies Act do not deal with the permissible deductions or exclusion under the Income Tax Act. For the purpose of the Income Tax Act, if the Assessee has consistently been treating the value of investment for more than two decades the investments as stock-in-trade and claimed depreciation, it is not open to the authorities to disallow the said depreciation on the ground that in the balance-sheet it is shown as investment in terms of the RBI Regulations. The RBI Regulations, the Companies Act and the Income Tax Act operate altogether in different fields. The question whether the assessee is entitled to particular deduction or not will depend upon the provision of law relating

thereto and not the way, in which the entries are made in the books of account. It is not decisive or conclusive in the matter. For the purpose of the Income Tax Act whichever method is adopted by the assessee, a true picture of the profits and gains, i.e. real income is to be disclosed. For determining the real income, the entries in the balancesheet is required to be maintained in the statutory form may not be decisive or conclusive. It is open to the Income Tax Officer as well as the assessee to point out true and proper income while submitting the income tax returns. Even if the assessee under some misrepresentation or mistake fails to make an entry in the books of account, although under law, a deduction must be allowed by the Income Tax Officer, the assessee will not lose any right on claiming or will be debarred from being allowed the deduction. Therefore, the approach of the authorities in this regard is contrary to the well settled legal position as declared by the apex court. 9 ITA No.6795 & 6796/D/13 and 242 & 243/D/14 In the instant case, the assessee has maintained the accounts in terms of the RBI Regulations and he has shown it as investment. But consistently for more than two decades it has been shown as stock-in-trade and depreciation is claimed and allowed. Therefore, notwithstanding that in the balance-sheet , it is shown as investment, for the purpose of Income Tax Act, it is shown as stock-in-trade. Therefore, the value of the stocks being closely connected with the stock market, at the end of

the financial year, while valuing the assets, necessarily the bank has to take into consideration the market value of the shares. If the market value is less than the cost price, in law, they are entitled to deductions and it cannot be denied by the authorities under the pretext that it is shown as investment in the balance-sheet." (emphasis supplied) 11. We therefore find that the issue raised in this Appeal is also squarely covered by the judgment of the Karnataka High Court in the case of Karnataka Bank Ltd. (supra). 12. In view thereof, we find no infirmity in the order passed by the ITAT. The present Appeal does not raise any substantial question of law as projected by the learned counsel appearing for the Appellant. The Appeal is therefore dismissed." 14. Therefore, we find that the issue raised in this appeal squarely covered by the decision of Hon'ble Karnataka High Court as well as Mumbai High Court in favour of assessee. Therefore, respectfully following those judicial precedents, we reverse the order of CIT (A) and delete the disallowance of Rs. 205.43 crores on account of claim of loss of transfer of security from 'available for sale' category to 'held to maturity' category by the appellant bank in accordance with direction/circular of Reserve Bank of India." This decision has been confirmed by the Hon'ble High Court in appeal of the Revenue No. 306/2016 vide order dated 11.05.2016 holding as under :

"3. The ITAT found that the Assessee has been consistently reflecting the investment as stock-in-trade in its balance

sheet. The ITAT has noted that the Assessee had in compliance with the direction of the Reserve Bank of India (RBI) transferred SLR securities appreciating to Rs. 1664.32 crores from the 'available for sale' category to the 'held to maturity' category during the AY in question. This resulted in mark to market devaluation of Rs. 205.43 crores which was debited to the P&L account, regarding maintaining a minimum amount of stock as reserve. The AO disallowed this by terming it as a notional and not a real loss. The ITAT disagreed and reversed the AO in light of the legal position explained in the decision of the High Court of 10 ITA No.6795 & 6796/D/13 and 242 & 243/D/14 Karnataka in Karnataka Bank Ltd. v. Assistant Commissioner of Income Tax [2013] 356 ITR 549 (Kar.) and the decisions High Court of Bombay in Commissioner of Income Tax v. Bank of Baroda [2003] 262 ITR 334 (Bom) and Commissioner of Income Tax v. HDFC Bank Ltd. [2014] 368 ITR 377 (Bom). The ITAT has noted that the above decisions referred to the decisions of the Supreme Court in United Commercial Bank v. Commissioner of Income Tax [1999] 240 ITR 355 (SC) and Southern Technologies Ltd v. The Joint Commissioner of Income Tax [2010] 320 ITR 577 (SC). 4. However, Mr. Shivpuri, learned Senior standing counsel appearing for the Revenue, seeks to place reliance on another decision of High Court of Karnataka in Commissioner of Income Tax v. ING VYSYA Bank Ltd. [2013] 356 ITR 532 (Kar.) where, in the facts of that case it

was held that where the Assessee invested in securities for the purpose of complying with RBI instructions, such investments could not be termed as investment in the form of security ready for sale. The Court is not persuaded to concur with the view expressed in *ING VYSYA Bank Ltd. (supra)* which appears to have been decided in the peculiar facts of that case. The Court prefers to adopt the reasoning in the decision the Karnataka High Court in *Karnataka Bank Ltd. (supra)* and the Bombay High Court in *HDFC Bank Ltd. (supra)*. The Court accordingly declines to frame a question on this issue." Therefore, respectfully following the above decisions of coordinate Bench and of Hon'ble Jurisdictional High Court, we decide this issue in favour of the assessee by deleting the additions of Rs.209.99 crores and Rs.119.55 crores respectively for A.Yrs. 2008-09 and 2009-10. Accordingly, grounds Nos. 1 to 4 in both the appeals of the assessee are allowed

7. In so far as the second issue is concerned, though the Tribunal has dismissed the appeal of the assessee and upheld the disallowance by holding as under:

"8. We have heard the submissions of both the sides and perused the material available on record and we find that the Id. CIT(A) has made an elaborate discussion on this issue. The

Id. AR had submitted the details of AMC charges which has been allowed by the Id. CIT(A) as revenue expenditure, but in case of license fee for oracle database, antivirus software etc., the appellant could not establish that the same were for a particular period. The case laws relied upon by the appellant has rightly been distinguished by the Id. CIT(A). We, therefore, find that the Id. CIT(A) has passed a good order which needs no 20 ITA No.6795 & 6796/D/13 and 242 & 243/D/14 interference on this issue. Accordingly, grounds No. 7 in both the appeals of the assessee are dismissed.

8. The matter travelled upto the Hon'ble High Court and the Hon'ble High Court, in ITA Nos.129 of 2018 and 415 of 2017 and 56 of 2018 has held as under:

"7. The mere circumstance that the depreciation rate is spelt out in the Schedule to the [Income-tax Act](#) in our opinion is not conclusive as to the nature of the expenditure and whether it resulted an enduring advantage to a particular assessee. It is nobody's case that assessee is dealing with computer softwares or is in the business of any related services. Rather it uses specific customized software, which is specific to its banking activities. But for the use of such software, the nature of expenditure otherwise incurred for streamlining its functions i.e. towards fee payable to the

consultants for systems and employment of special professionals to carry on the tasks that the software in fact performs, would have fallen undoubtedly in the revenue stream. Taking these into account and the further circumstance that the software itself would have run its course or life span as it were, given that the earlier assessment year in question is 2008-09, we are of the opinion that the question of law framed is to be answered in favour of the assessee and against the revenue. The appeals are consequently allowed. No order as to costs."

9. As the foundation has been removed, the super structure must fall. We, therefore, decline to interfere with the findings of the Id. CIT(A).

10. In the result, both the appeals of the Revenue in ITA Nos. 5845 & 5846/DEL/2016 are dismissed.

The order is pronounced in the open court on 11.12.2019.

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 11th December, 2019

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	