आयकर अपीलीय अधिकरण, मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'B' MUMBAI

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य /**एवं**
BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER /AND

श्री राजेन्द्र, लेखा सदस्य
SHRI RAJENDRA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 4907/Mum/2011
निर्धारण वर्ष /Assessment Year 2006-07

Bombay Mercantile Co-operative Bank Ltd., 78, Mohammadali Road, Mumbai – 400 003. **PAN: AAAAB 2359 J**	Vs.	Dy.CIT – 1(1), Mumbai.

आयकर अपील सं. / ITA No. 4908/Mum/2011
निर्धारण वर्ष /Assessment Year 2007-08

Bombay Mercantile Co-operative Bank Ltd., 78, Mohammadali Road, Mumbai – 400 003. **PAN: AAAAB 2359 J**	Vs.	Dy.CIT – 1(1), Mumbai.

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by	:	Shri W. Hasan
प्रत्यर्थी की ओर से/Respondent by	:	Shri Pravin Varma
सुनवाई की तारीख/ Date of Hearing	:	03-01-2013
घोषणा की तारीख / Date of Pronouncement	:	09-01-2013

आदेश / O R D E R

PER BENCH,

The present appeals are directed against the order dt. 09-03-2011 of the CIT(A)-1, Mumbai. Following Grounds of Appeal have been raised by the Assessee:

Grounds of Appeal for the A.Y. 2006-07

1.On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding the income of Rs.1,11,663/- as income from house property and not as income from business.

2.On the facts and circumstances of the case and in law, the learned CIT(A) erred in restoring the matter back to the AO for verification in respect of excess provision of NPA of earlier years of Rs. 23,54,05,000/- when full details of these provisions were filed before him.

3.On the facts and circumstances of the case and in law, the learned CIT (A) erred in restoring the matter back to the AO for verification in respect of addition of Rs.25,58,000/- on account of reversal from reserve for fraud and other Asset when full details of these provisions were filed before him.

4.On the facts and circumstances of the case and in law, the learned CIT (A) erred in disallowing the Amortization of Depreciation amounting to Rs. 4,02,00,000/-.

The appellant craves leave to amend, alter or modify any of the grounds of appeal.

Grounds of Appeal for the A.Y. 2007-08

1.On the facts and circumstances of the case and in law, the learned CIT (A) erred in holding the income of Rs.4,26,836/- as income from house property and not as income from business.

2.On the facts and circumstances of the case and in law, the learned CIT (A) erred confirming the addition of Rs. 4,87,93,000/- on account of Depreciation on Investment.

3.On the facts and circumstances of the case and in law, the learned CIT (A) erred confirming the addition of:

(a) 4,02,00,000/- Amortization of depreciation (March 2005).
(b) 1,60,07,715/- Amortization of depreciation (March 2006).

The appellant craves leave to amend, alter or modify any of the grounds of appeal.

A.Y. 2006-07

2. Assessee - co-operative Society, engaged in the business of banking, filed its return of income on 30-10-2006 declaring a loss of Rs. (-) 21.37 Crores. Assessing Officer (AO) finalised the assessment u/s. 143(3) of the Income-tax Act, 1961(Act) on 29-12-2008 determining the income of the assessee at Rs. 14.15 Lakhs.

3. Before us, Authorised Representative (AR) of the assessee did not press the Ground No.1.Hence the same is treated as dismissed.

3.1 Ground No.2 is about restoring the matter back to the AO by the First Appellate Authority (FAA) for verification in respect of excess provision of Non-Performing Assets (NPA) of the earlier years. AR submitted that similar issue in the last year was restored back to the file of the FAA by the Tribunal. We find that 'B' Bench of the ITAT, Mumbai vide its order ITA No. 5163/Mum/2010 dt. 30-08-2011 has decided the issue as under:

"2.On the facts and in the circumstances of the case and in law, the learned C1T(A) erred in

restoring the matter back to the A.O. for verification in respect of excess provision of NPA of earlier years of 15,68,52,000 and excess provision of standard assets written back for Rs.55,00, 000 when full details of these provisions were filed before him.

3.On the facts and in the circumstances of the case and in law, the learned C1T(A) ought to have deleted the additions in respect of excess provisions of NPA of earlier years of Rs.*15,68,52,000 and the excess provision of standard assets written back for* Rs.*55,00,000 as the appellant had filed full details of these provisions to the CIT(A) during the course of the hearing."*

Both parties agree before us that the Commissioner (Appeals) erred in restoring the issue back to the file of Assessing Officer for fresh adjudication after 'verification, though, he is not empowered to do so after the amendment brought in statute by Finance Act, 2001, with effect from 1st June,2001. Under these circumstances, since the Commissioner (Appeals) committed. a mistake, we deem it fit to set aside the order passed by the Commissioner (Appeals) and restore the issue back to his file for denovo adjudication in accordance with law. If the Commissioner (Appeals) deems it necessary, he may call for the remand report from the Assessing Officer and thereafter dispose off the appeal in accordance with law after providing reasonable opportunity of being heard to the assessee. These grounds are, thus, allowed for statistical purposes.

6.In the result, assessee's appeal is partly allowed."

3.2 We find that the facts and circumstances of the matter under consideration are the same as of the last year. Following the order of the 'B' Bench of ITAT (supra), we restore the issue back to the file of the FAA for fresh adjudication. He is directed to afford a reasonable opportunity of hearing to the assessee, FAA may call for the Remand Report from the AO, if he thinks same is necessary. Ground No. 2 is Partly Allowed in favour of the assessee.

4. Ground No.3 pertains to 'reversal from reserves for fraud and other assets'. During the assessment proceedings, AO found that assessee had made provision under the head "Frauds and Other Assets" amounting to Rs. 25.58 Lakhs. After considering the submission of the assessee, AO dis-allowed the claim made by the assessee. Assessee preferred an appeal before the FAA. After considering the order of the AO and the submissions made before him by the assessee, he held that the appellant was making provisions for local frauds in its banking business, that provisions were added to be the computation of income, that it amounted to double additions. He directed the AO to delete the addition after making verification of the respective Books of a/cs. of the assessee.

4.1 Before us, AR submitted that, as in the case of NPAs details with regard to reserve for fraud and assets were also filed before the FAA, that he should have called for a Remand Report from the AO, that he should have decided the issue on merits rather than restoring it back to the file of the AO, that matter should be sent back to the FAA to decide the issue on the basis of material available. Departmental Represen -tative (DR) agreed to the proposal of the AR that matter should be restored back to the file of the FAA. We are of the opinion that FAA should have decided the issue on merits while passing the order. Therefore, we restore back the matter to the file of the FAA for fresh adjudication after affording a reasonable opportunity of hearing to the assessee. Ground No.3 is Partly Allowed in favour of the assessee.

5. Ground No.4 is about dis-allowance of Amortization of Depreciation amounting to Rs. 4.02 Crores. During the assessment proceedings, AO noticed that assessee had claimed deduction in respect of Amortization of Depreciation on diminishing value of investments. AO directed the assessee to justify the claim of deduction and after taking into consideration, the reply filed by the assessee, vide its letter dt. 08-12-2008, he held that assessee had not offered satisfactory explanation about allowability of Amortization of Depreciation, that there was no provision in the act to allow the Amortization of Depreciation. Finally, he held at Rs. 4.02 Crores to the income of the assessee.

5.1 Assessee preferred an appeal before the FAA. After considering the detailed written submission of the assessee, he held that appellant had made its claim on the basis of RBI guidelines, that the claim of amortization pertained to reserve, that mere provision made as per RBI guidelines could not be allowed as deduction unless and until it was supported by the corresponding provisions of the Act. Relying upon the order that Hon'ble Supreme Court delivered in the case of Southern Technology Ltd., (320 ITR 577), he confirmed the order of the AO.

5.2 Before us, AR submitted that Amortization of Depreciation was made in accordance with the RBI guidelines, that as per RBI guidelines, necessary provisions for diminishing in value of investment was required to be made over a period of five years, that in the year under consideration, because of change in heads of securities-assessee had suffered loss of more than Rs. 20 Crores, that bank was following the instructions issued by the RBI from time to time. He relied upon the cases of State Bank of Mysore [33 SOT 7 (Bangalore)] and Madras Industrial Investment Corporation Ltd., (91 Taxman 340). He also referred RBI Circular dt. 28-03-2005 and 29-03-2006. DR submitted that losses of earlier year could not be allowed in the P&L A/c of current year, circulars issued by the RBI were not binding on the AO, that as per the provisions of the Act, actual expenditure should have been incurred or arisen before an item of expenditure could be allowed.

5.3 We have heard the rival submissions and perused the material put before us. As per the facts available on record, it is found that assessee had converted its securities from Available For Sale (AFS) category to Held To Maturity (HTM) category during the year under consideration. The securities were valued at market rate before conversion and as a result of the said valuation, value of such securities got diminished. AO and FAA were of the opinion that diminishion in value of AFS as on date of their conversion to HTM not allowable business expenditure. It is a fact that assessee had followed the guidelines issued by RBI.

6. In our opinion, preparing the accounts in a particular manner/following guidelines of RBI and taxability of income are totally different thing. Assessee can claim deduction of any expenditures as per the provisions of Chapter-IV of the Act. Section 29 to 37 deal with the deductions available to the assessee while carrying out the business or profession. The assessee is entitled to write his Books of Accounts/ present his account in the manner it wants as per the guidelines of RBI or any other authority, but for claiming an expenditure, onus lies on him to prove that expenditure was incurred during a particular Assessment Year and the same was incurred wholly and exclusively for that business or profession. In other words, nature of expenditure under the Act cannot be conclusively determined by the manner in which accounts are presented in terms of the guidelines/Circulars issued by RBI. Fact that the Reserve Bank of India had allowed the assessee to treat securities in particular manner does not mean that such guidelines/Circulars can override the mandatory provisions of the Income-tax Act. While deciding the issue or provisions made by the assessee as per the guidelines of RBI, the Hon'ble Supreme Court has in the case of Southern Technology Ltd., (supra), has held that mere provisions made by an assessee did not entitle him to claim deduction under the Act. We find that cases relied upon by the AR were delivered before the judgment of the Hon'ble Supreme Court and hence are not applicable to the case under consideration. Therefore, respectfully following the order of the Hon'ble Apex Court, we confirm the order of the FAA and decide Ground No.4 against the assessee.

As a result, appeal filed by the assessee for the AY 2006-07 stands Partly Allowed.

A.Y. 2007-08

7. First Ground of Appeal is related to an addition of Rs. 4.26 Lakhs under the head 'Income from House Property' by the AO. During the AY, assessee had received Rs. 3.10 Lakhs under the head 'Rent from Flats' and Rs. 1.16 Lakhs as 'Rent from Property'. Assessee claimed that rent received from these properties should be assessed under the head 'Income from Banking'. As per AO, income received as rent from flats/property not treated as 'Income from Banking Business'. Assessee preferred an appeal before the FAA, who decided the issue against the assessee-society following his order dt. CIT(A)-1/IT-349/09-10 dt. 03-02-2010 for the AY 1996-97. We find that same issue had arisen in the previous AY also and FAA had rejected his appeal in this regard.

8. Before us, AR submitted that income from the flats/property should be assessed under the head 'Business'. AR relied upon the case of Grain Merchants Co-Op. Bank Ltd., (134 Taxman 249). DR supported the orders of the AO and FAA. He further submitted that rent received by the assessee was not to be treated as 'Business Income'.

8.1 We have heard the rival submissions and perused the material put before us. It is found that assessee has rented out flats and house properties and it is receiving rent from the same. Assessee has not brought any evidence to show that renting out property was his business. Assessee-society is working as Urban Co-operative Bank and doing the business of banking only. In these circumstances, if it receives some rental income from the properties rented out, it cannot be assessed under the head 'Business'. In our opinion, order of the FAA is as per the law and does not need any interference from our side. We have perused the order of the Grain Merchants Co-op. Bank Ltd (supra), the facts of that case are totally different from the facts of the case under consideration. In that case a portion of Bank Building was given on rent. In the case under consideration assessee had rented out the house properties that were constructed for residential purposes and it was never claimed that assessee was in business of renting out house properties, as stated earlier. Therefore, Ground No.1 is decided against the assessee.

9. Ground Nos. 2 &3 are about addition made on account of depreciation on investment for different years. During the assessment proceedings, AO found that in the computation of income, assessee had added an amount of Rs. 35.13 Crores as transfer to investment depreciation reserve and simultaneously debited an amount of Rs. 27.42 Crores resulting into a net addition of Rs. 7.71 Crores. From the scrutiny of the P&L A/c, he found that assessee had debited Rs. 12.59 Crores to the P&L A/c. He further found that while computing the total income, assessee had added back Rs. 7.71 Crores as expenditure in his P&L A/c. AO found that there was difference of Rs. 4.87 Crores and assessee had not added back while the assessee had computed the income for the year under consideration. AO directed the assessee to file explanation as to why difference of Rs. 4.87 Crores was not added back to the total income? After considering the submission of the assessee, he held that assessee should have added back Rs. 4.87 Crores also to the income computed for the year under consideration. The addition of Rs. 4.87 Crores made by the AO was challenged before the FAA (Ground No.2). Assessee had claimed Amortization of Depreciation of Rs. 4.2 Crores for March 2005 and Rs. 1.60 Crores for March 2006. AO and the FAA rejected his claim.

10. Before us, AR submitted that as per the Circular issued by the RBI in 2005 & 2006 with regard to transfer of securities from one head to the other head i.e. AFS to HTM. Amortization of Depreciation was claimed for Rs. 4.2 Crores and Rs. 1.60 Crores respectively. Amortization of Depreciation amounting to Rs. 4.87 Crores claimed for the year under consideration as per the Master Guidelines issued by the RBI in the year 1988. Whereas, the earlier two amounts were accounted for as per the circulars of 28-03-2005 and 29-03-2006. He referred to the Guidelines issued by the RBI from time to time. DR relied upon the orders of the FAA.

11. We have heard the rival submissions and perused the material put before us. From the material available on record, it is clear that RBI had issued Guidelines in the year 1998 and thereafter in the year 2005 & 2006, considering the peculiar situations of the relevant years, it further issued circulars in this regard. Urban Co-operative Banks were allowed to change the categories of securities and loss arising out of the said transaction was allowed to be amortized for a period of 10 and 05 years respectively. In the year under consideration, depreciation on investment was claimed in pursuance of RBI's Guidelines 1988. We have decided the issue against the assessee while dealing with Ground No. 4 for the last AY i.e., 2006-07. As stated earlier, in para No. 6, the Hon'ble Supreme Court has decided the issue against the assessee. Following the orders of the last year, we decide Ground Nos. 2 & 3 for the AY 2007-08 against the assessee.

As a result, appeal filed by the assessee stands dismissed for the AY 2007-08.

Order pronounced in the open court on 9th January, 2013.
आदेश की घोषणा खुले न्यायालय में दिनांकः 9th January, 2013 को की गई ।

Sd/-	Sd/-
(आय.पी. बंसल / **I.P. BANSAL**)	(राजेन्द्र / **RAJENDRA**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	लेखा सदस्य / **ACCOUNTANT MEMBER**

मुंबई Mumbai, दिनांक Date: 9th January, 2013

TNMM

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. Appellant
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR "B" Bench, ITAT, Mumbai
6. Guard File

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai