IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.11.2018

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case (Appeal) No.166 of 2009

M/s.Chettinad Cement Corpn., Ltd.,
603, Anna Salai, Chennai-600 006. ... Appellant

-vs-

The Deputy Commissioner of Income Tax,
Company Circle I (3), Chennai. ... Respondent

Tax Case (Appeal) filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income-tax Appellate Tribunal Chennai A Bench, dated 12.06.2006 in I.T.A.No.1619/Mds/2002 for the assessment year 1998-99, against the order of the Commissioner of Income-Tax(Appeals)-III, dated 21.06.2002 and made in ITA.NO.Tr.347/2001-02/A-III for the Assessment year 1998-99.

against the order of the Joint Commissioner of Income tax, Special Range I, Chennai-34 dated 20/03/2001 and made in P.A.NO./G.I.NO.AAACC3130A/8-C for the Assessment year 1998-99.

For Appellant : Mr.A.S.Sriraman

For Respondent : Mr.T.R.Senthil Kumar,
Senior Standing Counsel

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal, by the appellant/assessee, is directed against the order of the Income-tax Appellate Tribunal Bench "A" Chennai, dated 12.06.2006, in I.T.A.No.1619/Mds/2002 for the assessment year 1998-99.

2.The above appeal has been admitted on 16.03.2009, on the following substantial question of law:-

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is correct in confirming the action of the

Assessing Officer in adding back the provision for bad debts in the computation 'book profits' in terms of Section 115 JA of the Act for the purpose of taxation?"

3.It is not disputed by the counsel on either side that identical question was answered by this Court in L.R.N.Finance Ltd. vs. Assistant Commissioner of Income-tax, Company Circle, Salem reported in [2018] 93 taxmann.com 106 (Madras). The operative portions of the judgment read as follows:-

4. It is not in dispute that the questions of law, which arise for consideration have been decided in favour of the assessee and against the Revenue in two decisions of the Hon'ble Supreme Court, first of which being in the case of State Bank of Patiala vs. Commissioner of Income Tax reported in (1996) 219 ITR 0706. The question, which arose for consideration in the said case was, whether the Tribunal was right in law in holding that the amounts provided by the assessee for bad and doubtful debts in the balance sheet of the relevant previous year qualified as reserves. The Hon'ble Supreme Court pointed out that, if the sums set apart in the balance sheet are only "provisions", the assessee will not be entitled to the relief claimed by it. If, on the other hand, the sums set apart are "reserves" within the meaning of the Act, the assessee will be entitled to appropriate relief. The Hon'ble Supreme Court pointed out the finding rendered by the Tribunal to the said fact and while answering the correctness of the decision, held as follows:

"14. The High Court has taken the view that the "fund created or a sum of money set apart to meet any liability which the assessee "can reasonably and legitimately anticipate" on the date of preparation of the balance-sheet, is the same, as in a case "where the liability has actually arisen", (a present known liability) and the fund to meet such liability cannot be treated as reserve". In the view of the High Court, since the assessee is a banking company, it would be "reasonable and legitimate to assume" that in the course of its business, "it is bound to have" bad and doubtful debts for which "it may" in anticipation, make a provision in the balance-sheet by having a separate fund or an account to meet such anticipated liability. We are afraid that the aforesaid assumption is totally unjustified and proceeds on mere surmises and conjectures. This is not a case, when at the time fund is earmarked, there is a known liability - one which has either arisen or anticipated legitimately, by the assessee - and the fund to meet such eventuality cannot be treated as "reserves". The observations of this Court that the liability should be one "which has actually arisen or is anticipated legitimately by the assessee", cannot be extended to hold, that in the case of an assessee carrying on banking business, it is "bound" or "can reasonably anticipate" on the date of the preparation of balance sheet "bad and doubtful debts", for which "it ought", in anticipation, make a provision and such provision for anticipated liability should be equated with known and existing liability and should be construed as a provision. The question in such cases, is whether the liability was "known" or "anticipated" on the date when the balance-sheet was prepared. The question is not whether the assessee "can anticipate" or "reasonably anticipate" on the date when the balance-sheet was prepared about "the bad and doubtful debts". The High Court was in error in surmising that the assessee being a banking company is bound to have bad and doubtful debts. It need not necessarily be so. It is not bound to anticipate on the date of preparation of balance-sheet that all or any of its debts "are bound to be bad and doubtful". It all depends upon facts and circumstances. We are of the view that the High Court misunderstood the scope of the observations in Saran Engineering Co.'s case (supra) and surmised that the observations quoted at page 748 will even cover cases, where the liability was not factually anticipated on the date of the preparation of the balance-sheet, but also will apply to cases, where the company "ought and can" anticipate on the date of preparation of the balance-sheet."

5. In the aforementioned decision, the Hon'ble Supreme Court pointed out that, the question is, whether the liability was "known" or "anticipated" on the date when the balance sheet was prepared and the question is not whether the assessee "can anticipate" or "reasonably anticipate" on the date when the balance sheet was prepared about "the bad and doubtful debts". Further, the Hon'ble Supreme Court pointed that the High Court was in error in surmising that the assessee being a banking company

is bound to get 'bad and doubtful debts'.

6. In a subsequent decision in the case of Commissioner of Income Tax vs. HCL Comnet Systems & Services Ltd., reported in (2008) 305 ITR 0409, the Hon'be Supreme Court held as follows:

> "10. As stated above, the said Explanation has provided six items, i.e., Item Nos.(a) to (f) which if debited to the profit and loss account can be added back to the net profit for computing the book profit. In this case, we are concerned with Item No. (c) which refers to the provision for bad and doubtful debt. The provision for bad and doubtful debt can be added back to the net profit only if Item (c) stands attracted. Item (c) deals with amount(s) set aside as provision made for meeting liabilities, other than ascertained liabilities. The assessee's case would, therefore, fall within the ambit of Item (c) only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than ascertained liability, i.e., it should be for an unascertained liability. In other words, all the ingredients should be satisfied to attract Item (c) of the Explanation to Section 115JA. In our view, Item (c) is not attracted. There are two types of "debt". A debt payable by the assessee is different from a debt receivable by the assessee. A debt is payable by the assessee where the assessee has to pay the amount to others whereas the debt receivable by the assessee is an amount which the assessee has to receive from others. In the present case "debt" under consideration is "debt receivable" by the assessee. The provision for bad and doubtful debt, therefore, is made to cover up the probable diminution in the value of asset, i.e., debt which is an amount receivable by the assessee. Therefore, such a provision cannot be said to be a provision for liability, because even if a debt is not recoverable no liability could be fastened upon the assessee. In the present case, the debt is the amount receivable by the assesee and not any liability payable by the assessee and, therefore, any provision made towards irrecoverability of the debt cannot be said to be a provision for liability. Therefore, in our view Item (c) of the Explanation is not attracted to the facts of the present case. In the circumstances, the AO was not justified in

adding back the provision for doubtful debts of Rs.92,15,187/- under clause (c) of the Explanation to Section 115JA of the 1961 Act."

7. It was pointed out in the aforementioned decision that, an assessee's case would fall within the ambit of Clause (c) of Section 115JA(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") only if the amount is set aside as provision; the provision is made for meeting a liability; and the provision should be for other than ascertained liabilities, that is, it should be for an unascertained liability. The aforementioned decision squarely covers the case on hand and the decision relied on by the ITAT in the case of Deputy Commissioner of Income Tax vs. Beardsell Ltd., reported in (2000) 244 ITR 0256, pertains to a case not arising in respect of a banking company.

8. Thus, the decisions of the Hon'ble Supreme Court in State Bank of Patiala (referred supra) and HCL Comnet Systems & Services Ltd., (referred supra) are clear answers to both the substantial questions of law, which have been framed for consideration. Thus, we are required to allow the appeal filed by the assessee and answer both the questions in favour of the assessee.

9. Further, it is a case of the assessee that by applying a decision of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd., vs. Commissioner of Income Tax reported in (2002) 255 ITR 0273, both Clause (c) and Clause (g) would be inapplicable to the assessee's case. However, we cannot make any observation in this regard, since the effect of the Clause (g) in Section 115JA(2) was never considered by the Tribunal, though on the date when the Tribunal took the decision, the said provision has already been inserted with retrospective effect. Therefore, to take a decision on the said fact, the matter has to be necessarily remanded to the assessing officer for fresh consideration. Further, the contention advanced by the learned counsel for the assessee is that even assuming that the proviso is applicable, then the proviso is not unconditional, as it lays down various parameters, which are required to be fulfilled.

10. In the result, the tax case appeal filed by the assessee is allowed and the substantial questions of law are answered in favour of the assessee and against the Revenue. The matter is remanded to the assessing officer to decide as to the applicability of amendment to Section 115JA vide

Finance (2) Act, 2000 with retrospective effect from 01.04.1998. No costs."

4.Thus, following the above referred decision, the substantial question of law is answered in favour of the assessee, the appeal is allowed accordingly, and the matter is remanded to the Assessing Officer to decide as to the applicability of amendment to Section 115JA vide Finance (2) Act, 2000 with retrospective effect from 1st April, 1998. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

abr

To

1.The Income-tax Appellate Tribunal "A" Bench Chennai.

2.The Commissioner of Income Tax(Appeal)III,
Chennai-34.

3.The Joint Commissioner of Income Tax
Special Range-I, Chennai-34.

+1cc to Mr.S.Sridhar, Advocate sr.no.77488
+1cc to Mr.T.R.Senthil Kumar, Advocate sr.no.77213

T.C.(A) No.166 of 2009

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