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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.12.2019

CORAM:

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Tax Case (Appeal) No.8 of 2013

Commissioner of Income Tax
Chennai

...Appellant /Respondent

Vs.

M/s.Saint Gobain Glass India Ltd.,
Plot NO.A1,SIPCOT Industrial Park,
Sriperumbudur 601 106.

...Respondent/Appellant

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 18.05.2012 in ITA No.276/Mds/2012, against the Order passed by the Commissioner of Income Tax (Appellate), Chennai, made in ITA Tr.No.3/10-11/LTU (A) dated 18/11/2011 and against the the order passed by the Assistant commissioner of Income Tax Company circle VI (1) Chennai-34 made in GIR No./PAN AABCS4338M dated 29/12/2009.

For Appellant : Mr.T.Ravikumar

For Respondent : Mr.Vikram Vijayaragavan
for Mr.Subbaraya Aiyar Padmanabhan

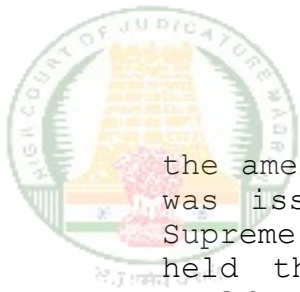
J U D G M E N T

(Delivered by DR.VINEET KOTHARI, J.)

The Revenue has filed this Appeal under Section 260A of the Income Tax Act calling in question the correctness of the order passed by the Income Tax Appellate Tribunal, Chennai "C" Bench, Chennai, dated 18 May 2012, in I.T.A.No.276/MDS/2012, for the Assessment Year 2003-04.

2. The present appeal was admitted by a Coordinate Bench of this Court on 6 February 2013 by framing the following substantial Questions of Law for consideration :-

1.Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that



the amended reassessment notice under section 147/148 of the Act was issued by the Assessing Authority on 31 March 2008, the Supreme Court's decision in HCL Comnet Systems & Services Ltd. held the field and therefore, the learned Assessing Officer could not take a contrary view for disallowing the bad and doubtful debt and therefore, the learned Income Tax Appellate Tribunal was justified in setting aside the said impugned assessment order.

5. The learned counsel further submitted that even on the allowability on the merits of the "Provision for Bad and Doubtful Debt", the Hon'ble Supreme court in Vijaya Bank vs. Commissioner of Income Tax & Anr, (2010) 323 ITR 166 has held that if the provision for bad and doubtful debt is created by way of debit to the Profit and Loss Account, then such deduction is a lawful deduction for the purpose of Section 36(1) (vii) of the Act. Similarly, the same would be a lawful deduction for tax provided under Section 115JA of the Act.

6. The learned Counsel further relied upon a judgment of the Bombay High court in Rallis India Ltd. vs. Assistant Commissioner of Income Tax and Anr. (2010) 323 ITR 54, which has also been referred to and relied upon by the learned Income Tax Appellate Tribunal in its order, and submitted that merely because amendment to Explanation-1 to Section 115JB of the Act was brought in later on in 2009, with retrospective effect from 1 April 2001, it would not ipso facto be justified for issuance of reassessment notice under Section 147/148 of the Act on 31 March 2008. He further submitted that the learned Income Tax Appellate Tribunal was justified in holding that the reassessment in the present case was not justified.

7. Having heard the learned counsel for the parties, we are satisfied that there is no merit in the present appeal filed by the Revenue for the following reasons :-

(a) The Hon'ble Supreme Court in HCL Comnet Systems & Services Ltd., supra had held as under:-

Company - book profit under
Section 115JA - Provision for
doubtful debts - provision for bad
and doubtful debts can be added
back to the net profit only if
item (c) of the Explanation to
Section 115JA stands attractted -
Item (c) deals with amount set
aside as provision made for
meeting liabilities other than
ascertained liabilities -
Provision for bad and doubtful



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debts is made to cover up the probable diminution in the value of asset i.e. Debt receivable by the assessee - such a provision cannot be said to be a provision for liability - therefore, item (c) of the explanation is not attracted and the provision for doubtful debts cannot be added back under clause (c) of the Explanation.

Held :-

For the purposes of Section 115JA, the AO can increase the net profit determined as per the P&L a/c prepared as per Parts II and III of Sch.VI to the Companies Act only to the extent permissible under the Explanation thereto. The said Explanation has provided six items, i.e. Item nos.(a) to (f) which if debited to the P&L A/c can be added back to the net profit for computing the book profit. 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 s.115JA. Item (c) is however not attracted in this case. The provision for bad and doubtful debt is made to cover up the probable diminution in the value of asset, i.e. Debt which is an amount receivable by the



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assessee. Therefore, such a provision cannot be said to be a provision for liability, because even if a debt is not recoverable, not liability could be fastened upon the assessee. In the present case, the debt is the amount receivable by the assessee 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, 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 under cl.(c) of the explanation to s.115JA - CIT Vs HCL Comnet Systems & Services Ltd. (2008) 2019 CTR (Del) 226 Affirmed.

Conclusion:-

Provision for bad and doubtful debts being a provision made to cover up the probable diminution in the value of asset i.e. Debt receivable by the assessee, it cannot be said to be a provision for liability and, therefore, item (c) of the Explanation to S.115JA is not attracted and the provision for doubtful debts cannot be added back under Cl.(c).

8. The aforesaid position of law declared by the Hon'ble Supreme Court made it clear that the "Provision for Bad and Doubtful Debt" was clearly a deductible amount for the purpose of Section 115JA of the Act. This position of law was undone only by the Finance Amendment Act, 2009 with retrospective effect from 1 April 2001. But the fact remains that the said amendment in law was effected in the year 2009 and it was not available on the date when the reassessment notice was issued in the present case on 31 March 2008.

9. Similar issue was dealt with by the Division Bench of the Bombay High Court in the case of Rallis India Ltd. and the Division Bench held that subsequent to the decision of the



Hon'ble Supreme Court in HCL Comnet Systems & Services Ltd., the Parliament stepped in to amend Explanation (1) to Section 115JB by the Finance Act, 2009. But that amendment would not be available for the Assessing Authority to exercise the power to reopen the assessment. The Bombay High Court decided Rallis India Ltd. case on 16 April 2008. The relevant paragraphs 17 and 18 of the said judgment are also quoted below for ready reference.

17. Subsequent to the decision of the Supreme Court in HCL (supra), Parliament stepped in to amend Explanation (1) to Section 115JB by the Finance Act of 2009. As a result of the amendment, clause (i) came to be inserted in Explanation (1) so as to provide for the amount or amounts set aside as provision for diminution in the value of an asset. Though the amendment was made with retrospective effect from 1st April 2001, it was enacted into law after the Assessing Officer had exercised the power to re open the assessment in the present case by his notice dated 16th July 2008. Consequently, on the date on which the Assessing Officer exercised his jurisdiction under Section 148, the amendment which was brought in subsequently by the Finance Act of 2009 was not in existence.

18. A legislative amendment, though made with retrospective effect has been held not to justify a recourse to the revisional power of the Commissioner under Section 26 of the Income Tax Act in Commissioner of Income Tax V/s. Max India Limited. Counsel for the Revenue sought to distinguish the judgment in Max India (supra) on the ground that it dealt with Section 80HHC and one of the grounds which weighed with the Supreme Court was that the Section had been amended several times. The judgment of the Supreme Court cannot be



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distinguished for the reasons as suggested by the Counsel for the Revenue. The principle which has been laid down in the judgment of the Supreme Court cannot be confined to Section 80HHC. In that case, the revisional authority had sought to exercise its revisional jurisdiction under Section 263. The exercise of power was challenged firstly on the ground that two views on the interpretation of the provision were possible and hence, recourse to Section 263 was not permissible. Moreover, the second ground which appears to have been urged was that the retrospective amendment to the statutory provision in question would not have a bearing on the correctness of the recourse to Section 263 since on the date on which the power was exercised by the Commissioner, the legislative amendment had not been brought into force. The judgment of the Supreme Court notes firstly that on the date on which the Commissioner passed his order, two views on the word "profit" under Section 80HHC were possible and the provision itself had been amended on several occasions. The second ground which weighed with the Supreme Court was that the subsequent amendment in 2005 of the provisions of Section 80HHC, even though retrospective, would not attract the provisions of Section 263, particularly when the Court would have to take into account the position of law as it stood on the date when the Commissioner passed his order in purported exercise of his powers under Section 263.

(d) The allowability of the "Provision for Bad and Doubtful Debt" for the purpose of Section 36(1)(vii) of the Act was dealt



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with by the Hon'ble Supreme Court in the case of Vijaya Bank vs. CID (2010) 323 ITR 166, in the following manner.

"7. One point needs to be clarified. According to Shri Bishwajit Bhattacharya, learned Additional Solicitor General appearing for the Department, the view expressed by the Gujarat High Court in the case of Vithaldas H. Dhanjibhai Bardanwala [supra] was prior to the insertion of the Explanation vide Finance Act, 2001, with effect from 1st April, 1989, hence, that law is no more a good law. According to the learned counsel, in view of the insertion of the said Explanation in Section 36(1)(vii) with effect from 1st April, 1989, a mere debit of the impugned amount of bad debt to the Profit and Loss Account would not amount to actual write off. According to him, the Explanation makes it very clear that there is a dichotomy between actual write off on the one hand and a provision for bad and doubtful debt on the other. He submitted that a mere debit to the Profit and Loss Account would constitute a provision for bad and doubtful debt, it would not constitute actual write off and that was the very reason why the Explanation stood inserted. According to him, prior to Finance Act, 2001, many assessees used to take the benefit of deduction under Section 36(1)(vii) of 1961 Act by merely debiting the impugned bad debt to the Profit and Loss Account and, therefore, the Parliament stepped in by way of Explanation to say that mere reduction of profits by debiting the amount to the Profit and Loss Account per se would not constitute actual write off. To this extent, we agree with the contentions of Shri Bhattacharya. However, as stated by the



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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 judgement 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 assessee(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 judgement. In the circumstances, we hold, on the first question, that the assessee was entitled to the benefit of deduction under Section 36(1) (vii) of 1961 Act as there was an actual write off by the assessee in it's Books, as indicated above.

8. Coming to the second question, we may reiterate that it is not in dispute that Section 36 (1) (vii) of 1961 Act applies both to Banking and Non-Banking businesses. The manner in which



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the write off is to be carried out has been explained hereinabove. It is important to note that the assessee-Bank has not only been debiting the Profit and Loss Account to the extent of the impugned bad debt, it is simultaneously reducing the amount of loans and advances or the debtors at the year-end, as stated hereinabove. In other words, the amount of loans and advances or the debtors at the year-end in the balance-sheet is shown as net of the provisions for impugned debt. However, what is being insisted upon by the Assessing Officer is that mere reduction of the amount of loans and advances or the debtors at the year-end would not suffice and, in the interest of transparency, it would be desirable for the assessee-Bank to close each and every individual account of loans and advances or debtors as a pre-condition for claiming deduction under Section 36(1)(vii) of 1961 Act. This view has been taken by the Assessing Officer because the Assessing Officer apprehended that the assessee-Bank might be taking the benefit of deduction under Section 36(1)(vii) of 1961 Act, twice over. [See Order of CIT (A) at Pages 66, 67 and 72 of the Paper Book, which refers to the apprehensions of the Assessing Officer]. In this context, it may be noted that there is no finding of the Assessing Officer that the assessee had unauthorisedly claimed the benefit of deduction under Section 36(1)(vii), twice over. The Order of the Assessing Officer is based on an apprehension that, if the assessee fails to close each and every individual account of its debtor, it may result in assessee claiming



year 2003-04 were very much available at the time of original assesment order passed by the Assessing Authority on 10 March 2006. Therefore, on 31 March 2008, the learned Assessing Authority could not have issued the impugned reassessment notice. Therefore, in our opinion, the learned Income Tax Appellate Tribunal was justified in holding that the reassessment in the present case was without any reason and therefore, it is liable to be quashed and set aside.

12. It is not the case of the Revenue that reassessment proceedings were initiated after the amendment of law. They were admittedly initiated on 31 March 2008, and as on that date, the judgment of the Supreme Court in the case of HCL Comnet Systems & Services Ltd., which was delivered on 23 September 2008, was holding the field.

13. Therefore, in our opinion, the Questions of Law framed above deserve to be answered against the Revenue and in favour of the Assessee and we hereby do so.

14. In the result, the appeal filed by the Revenue deserves to be dismissed and the same is accordingly dismissed. No costs.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

To

1. The Income Tax Appellate Tribunal, 'C' Bench, Chennai
2. The Commissioner of Income Tax (Appeals), Chennai.
3. The Assistant Commissioner of Income Tax Company Circle VI (1), Chennai-34.

+1cc to Mr.T.Ravikumar, Advocate Sr.101055

+1cc to M/s.Subbaraya Aiyar, Advocate Sr.100692

T.C.(A) No.8 of 2013

bs[co]
srg 22/01/2020