

OD-4

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/70/2011
M/s. INDIAN BANK
VS.
COMMISSIONER OF INCOME TAX-II, KOLKATA

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 20th March, 2023

Appearance:
Mr. C. Bhaskaran, Adv.
Ms. Swapna Das, Adv.
...for the appellant.

Mr. Aryak Dutt, Adv.
...for the respondent..

The Court : - This appeal filed by the assessee under Section 260A of the Income Tax Act (the Act) is directed against the order dated September 30, 2009 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata in ITA NO.2486/Kol/2007 for the assessment year 2003-2004.

The appeal was admitted on 18.03.2011 on the following substantial questions of law:-

- "1. Whether the Tribunal below, while interpreting section 36(1)(viii)(a) of the Income-tax Act, 1961, committed substantial error of law in holding that deduction under the first proviso was alternative to that under sub-clause (a) and that no deduction under the first proviso was allowable if deduction had been allowed under sub-clause (a) thereby rejecting the appellant's*

claim for deduction of Rs.140,33,70,000/- under the first proviso ?

2. *Whether the Tribunal below committed substantial error of law in holding that the proviso of sub-sections (2) and (3) inserted in Section 14A of the Income Tax Act, 1961 with effect from April 1,2007 and Rule 8D inserted in the Income Tax Rules 1962 on March 24, 2008 was procedural and retrospective and were applicable for the assessment year 2003-2004?*
3. *Whether the Tribunal below committed substantial error of law in directing the Assessing Officer to decide disallowance under section 14A of the Income-tax Act as per Rules 8D of the Income-tax Rules 1962 without arriving at any finding that the claims of the appellant as regards expenditure incurred in relation to tax free interest income was not correct ?*
4. *Whether the Tribunal below committed substantial error of law in holding that only provision for ascertained liability/expense was not to be added back in computation of book profit under section 115JB and that the deduction in the appellant's case in respect of provisions for bad and doubtful debts, standard assets, depreciation of investment, fraud and forgery, stationery wastage and tangible assets could not be allowed unless the same were for ascertained liability/expense ?*

We have heard Mr. C. Bhaskaran, learned counsel assisted by Ms. Swapna Das, learned advocate for the appellant/assessee and Mr. Aryak Dutt, learned standing counsel for the respondent/revenue.

The first substantial question of law is whether the Tribunal was right in holding that the deduction under the first proviso to Section 36(1)(viia)(a) was alternative to that under sub-clause (a) and that no deduction under the first proviso was allowable if the deduction had been allowed under sub-clause (a). Identical issue was considered in the case of Commissioner of Income Tax, Chennai vs. Tamilnadu Industrial Investment Corporation Limited reported in (2019)112 Taxmann.com 386 (Mad.). The only distinction in the said case was that the respondent assessee in the said case was Public Financial Institution to which sub-clause (c) under the said provision would stand attracted. The question of applying sub-clause(3) in Section 36(1)(viia)(a) does not arise and the proviso cannot be read independently was rejected for the reason that the proviso to sub-clause (c) in Section 36(1)(viia)(a) uses the words “at its option”. The proviso provided that a Public Financial Institution or a State Financial Corporation or a State Industrial Investment Corporation referred to in sub-clause (c) of Section 36(1)(viia)(a) shall, at its option, be allowed to in any of the two consecutive assessment years commencing on or after 1st April, 2003 and ending before 1st April, 2005, deduction in respect of any provision made by it for any assets classified by the Reserve Bank of India as doubtful assets or loss assets in accordance with the guidelines issued by it in this behalf, of an amount exceeding 10% of such assets shows in the books of account of such institution or corporation, as the case may be, on the last day of the previous year. Thus, the Court held that the proviso carves out an exception from the stipulation in sub-clause(c), otherwise the use of the expression “at its option” would lose its significance. The said decision would squarely apply to the case on hand and the only distinction being sub-clause(a) of Section 36(1)(viia)(a) would stand attracted in the case on hand and the said provision was given effect to from the assessment year 2000-01. The decision in the case of Tamilnadu

Industrial Investment Corporation Limited was challenged by the revenue before the Hon'ble Supreme Court and the Special Leave Petition was dismissed as reported in (2019) 112 Taxmann.com 387 (SC).

Thus, following the above decision, the substantial question of law no.1 is answered in favour of the assessee.

So far as the substantial questions of law nos.2 and 3 are concerned, they could be clubbed together and those questions were considered by this Court in the case of PCIT vs. Dhansar Engineering Co. (P) Ltd. reported in (2022) 135 Taxmann.com 167(Cal.). In the light of the said decision, the procedure under Rule 8D of the Income Tax Rules, 1962 was held to be prospective in operation and not retrospective. Thus, the substantial questions of law nos.2 and 3 are answered in favour of the appellant/assessee and the Assessing Officer is directed to do the re-computation bearing in mind the above legal principle.

So far as the substantial question of law no.4 is concerned, we are of the view that it is entirely factual and moreover the matter is remanded back to the Assessing Officer for a fresh decision in the matter and, therefore, the substantial question of law no.4 need not be answered in this appeal.

In the result, the appeal (ITA/70/2011) is allowed to the extent indicated leaving the substantial question of law no.4 unanswered on the above reason.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)