IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " I ", MUMBAI

BEFORE SHRI P. M. JAGTAP, ACCOUNTANT MEMBER &
SHRI N.V. VASUDEVAN, JUDICIAL MEMBER

ITA No. : 7143/Mum/2008
Assessment Years : 2004-05

Dy. C.I.T-3(3), Room No.609, 6th floor, Aayakar Bhavan, M.K. Marg, Mumbai-400 020	Vs.	M/s. Small Industries Development Bank of India 227, Vinay K. Shah Marg, Nariman Point, Mumbai-400 021 **PAN NO: AAACS 5687 E**
(Appellant)		(Respondent)

&

ITA No. : 6771/Mum/2008
Assessment Years : 2004-05

M/s. Small Industries Development Bank of India 227, Vinay K. Shah Marg, Nariman Point, Mumbai-400 021 **PAN NO: AAACS 5687 E**	Vs.	Dy. C.I.T-3(3), Room No.609, 6th floor, Aayakar Bhavan, M.K. Marg, Mumbai-400 020
(Appellant)		(Respondent)

Department by : Shri Sanjiv Dutt
Assessee by : Shri A. V. Sonde &
Shri Pankaj Jain

Date of hearing : 02.02.2012
Date of Pronouncement : 15.02.2012

ORDER

Per N. V. Vasudevan (JM) :

ITA No. 7143/Mum/2008 is an appeal by the Revenue, while ITA No.6771/Mum/2008 is an appeal by the assessee. Both these appeals are

directed against the order dated 30.08.2008 of CIT-32, Mumbai relating to the Assessment Year 2004-05.

2. The appeal by the Revenue was filed on 17.12.2008 and the appeal by the assessee was filed on 27.11.2008. The assessee is a public sector undertaking and, therefore, as per the decision of Hon'ble Supreme Court in the case of ONGC Vs CCE [1995] Suppl(4) SCC 541 permission of the committee of disputes was necessary for filing the appeal before the Tribunal. The committee on disputes did not permit the Revenue to raise Ground No. 1 in its appeal and similarly the COD did not give permission on Ground Nos. 2 and 3 raised by the assessee in its appeal. The COD has granted permission to raise additional ground in assessee's appeal. However, the Hon'ble Supreme Court in Civil Appeal No. 1883 of 2011 in the case of Electronic Corporation of India vs. Union of India vide order dated 17.02.2011 has held that the direction of the Hon'ble Supreme Court of India that earlier directions of the Hon'ble Supreme Court for permission of Committee on disputes for filing appeals by public sector undertakings has failed and therefore had to be recalled and accordingly recalled the aforesaid directions. As a result, all the grounds raised by the assessee as well as by the Revenue are required to be considered. We proceed accordingly.

3. ITA No.6771/Mum/2008 is an appeal by the Assessee. Ground no. 1 raised by the assessee in its appeal is with regard to disallowance of Rs.56,99,160 being proportionate amortised amount of lease premium paid to Mumbai Metropolitan Regional Development Authority (MMRDA) in respect of leasehold land treating them as capital expenditure. The Assessee was incorporated on 2nd April 1990 by a special statute viz., "The Small Industries Development Bank of India Act, 1989" ("SIDBI Act"). According to section 50 of the SIDBI Act, SIDBI was exempt from income tax till the amendment under section 142 of the Finance Act, 2001 which deleted the section 50 of the SDBI

Act with effect from 1 April 2002 i.e. A. Y. 2002-03. Due to this amendment by way of deletion of section 50 of SIDBI Act, SIDBI became liable to income tax with effect from A. Y. 2002-03. The Assessee was operating from Nariman Point in Mumbai. However, to facilitate the assessee's business operations and to enable management and conduct of its business to be carried on more efficiently and more profitab1y, it entered into an agreement to lease dated 03.12.1999 for obtaining plot of land on lease with Mumbai Metropolitan Regional Development Authority (MMRDA). As per the clause 6 of the said agreement, the assessee paid Lease premium of Rs.45,59,32,224/- for grant of lease for the term of 80 years from the date of grant of possession of land. The assessee has to pay nominal amount of annual ground rent which is as follows: (Clause 7 of the agreement).

-From Commencement of the term of lease upto the end of 3 years	Nil
-From 4th year upto the 20th year of the tem of lease	1% of the premium amount
-From the 21st year upto the 50th year of the term of lease	2% of the premium amount
-From the 51st year of term of lease upto the end of the term of lease	3% of the premium amount

For the first three years the assessee had the authority to enter upon the said plot of land for the purpose of erecting office building. The lease deed proper was to be executed after the said period of three years. As the lease period was of 80 years, the aforesaid premium was amortised over the said period, which according to the Assessee was as per the generally accepted accounting policy followed by the assessee and proportionate amount of Rs.56,99,160/- i.e. for the period 01.04.2003 to 31.03.2004 had been debited to accounts and claimed as deduction. According to the Assessee, the Lease premium of

Rs.45,59,32,224/- paid to MMRDA though stated as premium, is nothing but rent paid in advance. Hence, this expenditure was for the sole purpose of assessee's business and, as such, eligible for deduction. The Assessee thus claimed that the sum of Rs.45,59,32,224/- representing lease premium is rent paid in advance and hence is business expenditure allowable u/s 37(1) of the Income Tax Act, 1961.

4. The AO however, did not allow the claim for deduction made by the assessee holding that the price paid by the assessee was for acquisition of rights to a capital asset and, therefore, cannot be allowed as revenue expenditure.

5. On appeal by the assessee, the Ld. CIT(A) confirmed the order of the AO and in doing so follow the order of the Ld. CIT(A) in assessee's own case for the A.Y. 2002-03 and 2003-04 in Appeal No.209B/04-05 and 278/04-05 dated 17.03.2006. Before us, it is not in dispute that the Special Bench of the Tribunal in the case of Mukand Ltd. 106 ITD 231 (Mum) (SB) has already taken a view that similar expenditure was capital in nature. Though the dispute in the aforesaid case related to lease of land from MIDC, the same principle will apply to the lease in the case of the assessee as well. The Mumbai Bench of the ITAT in the case of National Stock Exchange of India Ltd. vs. ACIT in ITA No. 3799/Mum/2004 vide order dated 27.04.2011 was also pleased to hold that expenditure in respect of lease from MMRDA in the nature of premium paid was capital in nature. In view of the aforesaid decisions, we are of the view that ground no. 1 raised by the assessee in its appeal is without any merit, consequently the same is dismissed.

6. Ground No.2 raised by the assessee reads as follows :-

> *"2. On the facts and in the circumstances of the case and in law the learned CIT(A) Commissioner of Income Tax (Appeals) [CIT(A)]*

> *erred in confirming the disallowances of Rs.50,00,000/- being 5% of dividend income u/s.14 A and reducing exemption u/s.10 of the Income Tax Act, 1961, assuming that an expenditure of Rs.50,00,000/- must have been incurred for earning dividend income and the reasons assigned by him for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of the Income Tax Act, 1961 and the Rules made thereunder."*

6.1 This ground of appeal can be conveniently decided together with the Ground No. 1 raised by the Revenue in its appeal, which reads as follows :-

> *"2.1 The appellant has claimed in the Computation of Total Income an amount / of Rs. 9,72,58,640/- (after disallowing Rs.86,86,554/- on assumption basis by prorating exempt income upon total income into expenses other than interest expense) as dividend income exempt u/s.10 of the Income Tax Act, 1961. However, the learned Assessing Officer has disallowed a further sum of Rs. 5,60,82,366/- out of the interest and finance charges and administrative and other expenses (Rs. 704.01 crores) by assuming the same as expenditure incurred in relation to earning of the tax free income, by invoking the provisions of Section 14A of the Income Tax Act, 1961. The learned A.O. has disallowed these proportionate expenses in the ratio of exempt income to total receipts.*

6.2. During the previous year 2003-04 relevant to assessment year 2004-0 5 the assessee earned tax free dividend income of Rs. 10.59 Crores. It was submitted by the assessee that the entire dividend income is from investments which were funded out of its own resources and own resources far exceeded the amount of investments made. Hence, no interest expense was incurred for earning the exempt income. Further, it was also submitted that the assessee's staff was not required to make any efforts or follow up for collecting the said income and as these investments are long term and no specific efforts are required for buying and selling frequently. Thus, there is no specific utilisation of staff or other infrastructure in earning the said income. The Assessee therefore submitted that no expenses were incurred for earning the Tax-free dividend income. The Assessee also submitted that if at all indirect expenses,

other than interest by pro-rating exempt income upon total income x expenses, other than interest would work out to Rs.86,86,554. This was disallowed by the Assessee on its own in the computation of income. The A.O. however held that the Assessee company failed to bring any material on record to prove that no expenses were incurred to earn income which did not form part of the total income under the Act. He disallowed proportionate business expenses in the ratio of dividend and interest income to total receipts. Total receipts during the previous year was Rs.1151.39 Crores out of which income claimed exempt was Rs.10.59 Crores. The proportion of total receipts to income exempt was thus 0.92%. The AO therefore worked out proportionate disallowance of Rs.6,47,68,920 The administrative, interest and finance charges and other expenses during the previous year was Rs.704.01 Crores. Since the Assessee had worked out disallowance on its own at Rs.86,86,554 the difference amount of Rs.5,60,82,366 was added by the AO to the total income by way of disallowance u/s.14A of the Act.

7. On appeal by the assessee, the Ld. CIT(A) held that no part of the interest expenses can be disallowed u/s.14A of the Act, as the assessee had own funds which were sufficient to cover the investment and that there was no material brought on record to show that borrowed funds has been used for making investments necessitating disallowance of interest expenses u/s.14A of the Act. The assessee on his own has disallowed a sum towards administrative and other expenses incurred to earn the income that does not form the total income under the Act in view of the provision of section 14A of the Act. Before the Ld. CIT(A), the assessee submitted that the said disallowance have to be deleted because administrative and other expenses do not vary with dividend income and that no specific expenditure has actually been incurred for earning exempt income. On this submission, the Ld. CIT(A) held as follows:-

"5.6 I have considered the submissions made by the appellant and also, perused orders of the Assessing Officer and the paper book filed on behalf of the appellant. I have also gone through the decisions relied on by the AR for the assessee. According to the decision of the Tribunal in the case of WIMCO SEEDLINGS Ltd. (supra) only expenditure, which has been proved to have been incurred in relation to the earning of tax free income, can be disallowed, and the section cannot be extended to disallow even expenditure which is assumed to have been incurred for the purpose of earning the tax free income. According to the said decision, the word 'incurred' refers to the factual spending of the expenditure in relation to the exempt income and does not refer to a deemed spending or assumed spending for the purpose.

5.7 In the instant case, however, I find that the appellant has on his own accepted the disallowance of business expenses on proportionate basis presuming that expenditure was incurred towards earning tax free interest and dividend income. In the case of Gherzi Eastern Ltd, ITA No.6562/Bom/94 vide order dated 23.9.2002, Hon'ble Mumbai Tribunal held that some administrative expenditure was definitely attributable towards earning of the dividend as rightly cited by the AO in the assessment order in addition to other judgements. It cannot be the case of the appellant that not even a single penny of administrative expenditure incurred as per P & L account can be said to be attributable to the earning of dividend income. If a tax payer intentionally maintains his accounts in such an amalgamated manner and does not deliberately maintain separate accounts of expenses incurred for earning of exempt dividend income, the only recourse for revenue authorities (and even for the tax payer) would be estimation of such expenditure in a logical and rational manner looking to the facts and circumstances of the case. The AR has argued that the activity of earning of dividend income involves negligible expenses. I agree that the only activities which can be attributed to it are management's decision making process regarding investment and thereafter collection and deposit of dividend warrants. Towards these activities, in my view, the ends of justice would be served if the administrative expenditure the dividend income which would be around Rs. 50 lacs. ***I therefore uphold disallowance to the extent of Rs. 50,00,000/- and the balance amount is deleted."***

8. Aggrieved by the relief granted by the Ld. CIT(A), the Revenue was preferred Ground No. 1 before the Tribunal. Aggrieved by the action of the Ld. CIT(A) in sustaining addition to the extent of Rs.50,00,000/- the assessee has raised Ground No. 2 in its appeal.

9. We have heard the rival submissions. As far as the disallowance of direct expenses in the form of interest is concerned, the finding by the Ld. CIT(A) is that borrowed funds on which interest was paid had not been used for making investments which yielded tax free income. Therefore, disallowance of direct expenses was rightly deleted by the Ld. CIT(A). As far as the administrative and other expenses are concerned we find that it is a case where estimation was required to be made. We are of the view that considering the circumstances of the case, estimation at 5% of the dividend income made by the Ld. CIT(A) is reasonable. Accordingly, we uphold the order of the Ld. CIT(A). Consequently, Ground No. 1 of the Revenue and Ground No. 2 raised by the assessee are dismissed.

10. Ground No. 3 raised by the assessee reads as follows :

> *"3. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [CIT(A)] erred in confirming the excess interest charged under section 234C of the Income Tax Act, 1961 amounts to Rs.51,07,946/- and the reasons assigned for doing so are wrong and contrary to the provisions of the Income Tax Act, 1961, and the Rules made thereunder."*

11. On the issue raised by the assessee in Ground No. 3, the plea of the assessee was that due to circumstances beyond its control and because of the events that happened after the date of payment of third installment of advance tax, there was a short fall in payment of advance tax leading to levy of interest u/s.234C of the Act and in the light of the circumstances set out in para 6.1 of the Commissioners order, the assessee prayed that interest u/s.234C should

not be charged. The Ld. CIT(A) on an examination of the plea of the assessee was of the view that the circumstances mentioned by the assessee have to be examined by the Commissioner of Income Tax in exercise of his administrative powers. As far as the AO and the First Appellate Authorities are concerned they cannot take into consideration these circumstances to delete interest u/s.234 of the Act. Ground No. 3 is by the assessee is directed against the aforesaid order of the Ld. CIT(A).

12. We have heard the submissions of the learned counsel of the assessee. We are of the view that the order of the Ld. CIT(A) on this issue does not call for any interference. As rightly held by him the circumstances set out by the assessee have to be considered only in an petition for waiver of interest made to the administrative authorities and cannot be made in the appellate proceedings in which only liability to tax can be subject matter of the proceedings. Consequently, Ground No. 3 raised by the assessee is dismissed.

13. The assessee has filed an application for admission of the following additional grounds of appeal :

ADDITIONAL GROUNDS OF APPEAL

4(a) On the facts and in the circumstances of the case the lower authorities ought to have considered and allowed the deduction of ₹.51,83,50,000/- paid as contribution to the Credit Guarantee Fund Trust for Micro and Small Enterprises (CGTMSE) being expenditure incurred wholly and exclusively for the purpose of business, and not doing so is wrong and contrary to the facts of the case, the provisions of the Income Tax Act and the Rules and regulations made thereunder.

b) The leanred Assessing Officer ought to have granted the said deduction irrespective of the fact that the Appellant had not made any such claim of deduction for contribution to CGTMSE of ₹.51,83,50,000/- in the Return of Income.

c) The Appellant prays that deduction be allowed in light of the following :

That the contribution is deductible being expenditure incurred for meeting the objects of the business of the appellant;
The proposition laid down in National Thermal Power Corporation vs. CIT (229 ITR 383) (SC);
The principle laid down in Circular No.14(XL-35) dated 11-4-1995 of the Central Board of Direct Taxes and
The principle laid down in Commissioner of Income-tax v. Chandulal Keshavalal & Co. [1960] 38 ITR 601 (SC).

13.1 The assessee has also filed an application for admitting additional evidence in support of the additional grounds of appeal. The additional evidences sought to be filed before us as additional evidence are (i) copy of the Trust Deed of Credit Guarantee Fund Trust for Micro and Small Enterprises (CGTMSE) (ii) copy of deed of modification of CGTMSE and (iii) document evidencing the contribution made by the assessee to CGTMSE. The admission of the aforesaid additional grounds was opposed by the Ld. DR for the reason, that claim cannot be made by the assessee for the first time before the Tribunal. It was also argued that the additional evidence cannot be admitted at this stage and no grounds have made out for admission of the additional grounds. It was also argued that admission of the additional grounds would require examination of facts and even the Hon'ble Supreme Court in the case of NTPC (supra) have laid down that additional evidences can be admitted provided facts are already available on record.

14. We have considered the submissions of the learned counsel for the assessee and the Ld. DR. The limited request of the assessee is to send back the matter to the lower authorities. The deduction is claimed by the assessee under the provisions of section 36(1)(xii) of the Act which lays down that any expenditure incurred by a corporation if its is constituted by a Central, State or a Provisional Act and if such expenditure is incurred for the objects and

purposes authorized by the Act under which it is constituted or established, should be allowed as a deduction. We are of the view that the existences of the aforesaid conditions have to be seen by perusal of the objection purpose mentioned in the Act, under which the assessee was constituted. It has to be further seen that whether the Trust Deed by which CGTMSE was constituted and the contribution made by the assessee to CGTMSE fall within the objection purpose authorized by the Act by which the assessee was constituted or established. We are of the view that this may not require adjudication of any disputed fact. Consequently, we reject the objection of the Revenue. We admit the additional ground, as the purpose of the proceedings under the Act is to determine the correct taxable income of assessee. Since the matter requires examination by the AO, we direct the AO to examine this claim after giving opportunity to the assessee and in the light of the additional evidence, which we admit because it is necessary for decision on the claim made by the Assessee. Ground No. 4 is accordingly, considered as allowed.

15. In the result, the appeal by the assessee is partly allowed.

16. ITA No. 7143/Mum/2008 is an appeal by the Revenue. Ground No. 1 has already been decided while deciding Ground No. 2 raised by the assessee for the reason stated therein. Thus ground no. 1 of the Revenue is accordingly, dismissed.

17. Ground No. 2 raised by the Revenue reads as follows :-

> *"2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing to grant deduction on account of bad debts written off at Rs.25,25,55,044/- u/s.36(1)(vii) of the I.T. Act, 1961 which was not claimed by the assessee in the return of income."*

18. It was the claim of the Assessee before CIT(A) that during the captioned assessment year, the assessee had written off bad debts to the tune of Rs.25,25,55,044/- as irrecoverable in the accounts but failed to claim the deduction u/s.36(1)(vii) in the Return of Income. The claim was made by the Assessee for the first time before CIT(A). In the Assessment order the learned A.O. did not have any occasion to consider the claim of the Assessee. Before CIT(A), the Assessee submitted that the learned A.O. should have allowed the deduction u/s.36(1)(vii) irrespective of the fact that the assessee had not made any such claim of deduction for bad debts of Rs.25,25,55,044/- in the return of income.

18.1 It was submitted that the entire bad debts written-off in the accounts as irrecoverable by the appellant is allowable u/s. 36(1)(vii) in view of the following:

i) deduction u/s.36(1)(vii) is independent of deduction granted in earlier years, u/s.36(1)(viia) (c).

ii) Further as required by the proviso to section 36(1)(vii), opening balance at the commencement of the financial year, namely opening balance in provision account as on 01.04.2004 alone is to be considered in arriving at the credit balance in provision for bad and doubtful debts u/s.36(1)(viia). In the present case there will only be a debit balance of Rs.181.40 crore as detailed below and there will not be any credit balance. Hence, the entire bad debts writeen off of Rs.25,25,55,044/- should have been allowed as deduction u/s.36(1)(vii).

Rs. Crores

Assessment Year	**Bad Debts Written Off**	**Provision for Bad Debts allowed u/s.36(1)(viia)**	**Net Debit Balance**
2002-03	84.70	2.23	82.47
2003-04	178.24	79.31	181.40

18.2 Further, it was submitted that the Assessee has fulfilled all the conditions prescribed under section 36(1)(vii) read with section 36(2) of the Income Tax Act, 1961 for claiming deduction of bad debts written off viz.

(a) There was a debt on account of irrecoverable amount and the said debt is written off in the books of account.

(b) It is incidental to business of the assessee as the assessee is engaged in the business of money lending. The assessee had written off the bad debts in the normal course of its business.

18.3 It was also submitted that there is no requirement, after the amendment of Section 36(1) (vii) w.e.f 1.4.89, to establish that the debt has become bad. The judgment of the management for this purpose and the actual write off of the amount in books of account is sufficient.

18.4 It was also submitted that the issue is now settled by special Bench of Mumhai Tribunal in the case of DIT v. Oman International Bank SAOG, 102 TTJ 207 wherein it was held that claim of had debt is to he allowed in the year in which such debt has been written off us irrecoverable in the accounts of the assessee. The assessee is not required to prove that the debt has become bad.

19. The Ld. CIT(A) held as follows :-

> *"8.2 I have carefully considered the above submissions as well as facts of the case. I have also gone through the material brought on record and order of the assessing officer. The facts of this issue have been discussed in detail in the case of the appellant in Assessment Years 2002-2003 and 2003-2004 in Appeal Nos. CIT(A)XXXII/IT 209B/04-05 and CIT(A)XXXII/IT 278/04-05 dated 17.03.2006 respectively. In those years this ground was not allowed.*

8.3 However, I do not agree with my predecessor(s) on this issue. Further, it seems they failed to appreciate that the appellant is in the business of money lending. In terms of Section 3 6(2) where the debts w/off represent money lent in the ordinary course of the business of banking or money lending which is carried on by the assessee, the same is allowable u/ 6[)(vii)./ The second limb of the provisions of Section 3 6(2) is applicable to the appellant. The decision of the Hon'ble Mumbai Tribunal Special Bench in the case of Oman International Bank supports this view. In view of the above decision, it is no more the requirement under the law for the appellant to establish that the debts which had been written-off had become bad. At the same time, it is also seen that the appellant had given the details of bad debts which have been written-off. The details of the major bad debts w/off have been placed on record by the appellant during the appellate proceedings. In A.Y 2002-2003, my ld. Predecessor considered this issue and averred as under:

"I have considered the submissions of the appellant and found the same not fully acceptable. The deduction under section 3 6(1) (vii) of the Income-tax Act is applicable to bad debts which has been written off in the previous year. The allowance of bad debts is subject to the provision of sub section 2 of section 36 of the Income tax Act. As per this the deduction is allowable only if debts or part thereof which has been written off has been taken into consideration in computing the income of the appellant of the previous year or the money is lent in the course of business of money lending. The income of the appellant was not liable to tax up to Assessment Year 2001-2002. The money has been lent by the appellant in the earlier year. Sine the income of the appellant was not liable to tax upto Assessment Year 2001-2002 there was no question of taxing the income of the appellant in the earlier years. The appellant will be entitled to deduction under section 36(1) (vii) of the Income tax Act only in respect of loans advanced in the year in which the income of the appellant is taxable and also interest income on the amount advanced in the earlier year, which has been liable to tax in the current year. In view of this, though the Assessing Officer was not justified in holding that the amount written off is expenditure of the appellant for the earlier years but the claim cannot be allowed as deduction as it does not fulfill the condition of section 3 6(2) of the Income tax Act. This ground of appeal is not allowed." It is thus seen that my predecessor failed to consider the provisions of Section 36(2) and 36(I)(vii).

> *8.4 It was however also pointed out by the A.R. of the appellant that the decision in the case of State Bank of Travancore v/s Addi. CIT (ITA Nos. 465 & 466/COCH/1998) A.Y 1994-95 & 1995-96 is also applicable to the present case. In this case, the Tribunal accepted the contention of the assessee bank and held that the entire bad debts written off by the assessee bank are allowable u/s.36(1)(vii) as the opening balance in the provision account was only a debit balance. The appellant's case is also on similar lines. In the instant case the appellant has recast the account of the provision for bad & doubtful debts. It is clear from the said provision account that the opening balance in the provision account as on 1.4.2003 is showing net debit balance of Rs.181.40 crores. Accordingly, the appellant was eligible to claim the entire deduction of bad debts written off of Rs.25,25,55,044/-."*

20. The Ld. CIT(A) also held that the admission of the additional grounds for the first time before the Ld. CIT(A) can be admitted because it is a legal claim and that it was necessary to determine the correct tax liability of an assessee. The Ld. CIT(A) also considered the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs CIT, 284 ITR 323 (SC). It is not in dispute before us that similar issue came up for consideration before the Tribunal in assessee's own case for the A.Y. 2002-03 and 2003-04 in ITA No. 3407 & 3408/Mum/2006 and thus Tribunal held that the assessee was entitled to claim the deduction. The following were the relevant findings of the Tribunal:

> *18. We have considered the issue. After considering the facts and analysis of the legal principles involved, we are in agreement with the propositions laid down by the learned counsel. First of all, in our view the A.O. has not considered assessee's business in its proper perspective. Assessee is a bank established by the Small Industries Development Bank Act, 1969 for the purpose of promoting banking activity for small industries. As rightly contended, only the income, profits and gains of the assessee's business are exempt from taxation by virtue of section 50 of the SIDBI Act and not the entire business and in our view the principles established by the Hon'ble Supreme Court in the case of Karamchand Premchand Ltd. (supra) will apply. The decision relied upon by the learned AO that business of lending up to A.Y. 2001-02 was exempt from income tax cannot be accepted as business is one*

and the same and the incomes are to be assessed under the same head. The only point to be considered is that before A.Y. 2001-02 the provisions of levy of income tax on incomes, profits and gains of the business as provided in the Income Tax Act are not applicable but all other provisions of the Income Tax Act are applicable to the assessee bank. As submitted the assessee was collecting tax as per the provisions of the I.T. Act and also paying various other amounts except that its profits and gains are not covered by taxation under the Act. It cannot be stated that the assessee's business itself is exempt. Following the principles established by the Hon'ble Supreme Court, we are of the opinion that the assessee's business per se is not exempt and the decision will equally apply. The above said decision is also followed by the Hon'ble Calcutta High Court in the case of Royal Calcutta Turf Club Vs CIT 144 ITR 709 in which the decision of the Hon'ble Madras High Court and also the Hon'ble Supreme Court relied upon by the Revenue were analysed and distinguished. Similarly, here also we are of the opinion that the proposition laid down by the Hon'ble Madras High Court in the case of S.S. Thiagarajan (supra) and by the Hon'ble Supreme Court in the case of Hariprasad & Co. Pvt. Ltd. (supra) cannot be applied to the facts of the case. Coming to the second proposition that the assessee is a banking institution so second part of provisions of section 36(2) will apply is also correct. The assessee is a bank and amounts lent, which have become bad, represent the money lent in the ordinary course of business of banking and the condition that the 'bad debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such bad debt or part thereof is written off or of any earlier previous year' does not apply, as the assessee is in banking or money lending business. Since the assessee's banking business is continuing from earlier years the amount of bad debt identified during the year is allowable as deduction under section 36(1)(vii) as it represents money lent in the ordinary course of business. We are of the opinion that both the A.O. and the CIT(A) have wrongly considered the provisions of section 36(2) which are not applicable to the banking business and disallowed the claim of the assessee. Accordingly we hold that the assessee's claim of bad debt is allowable.

19. Related to the above, is the issue of additional ground which is to be considered. The assessee contends that the A.O. has deducted the amount wrongly and further amount of Rs.17.72 crores has to be considered as further allowance. The issue of additional ground cannot be considered as the A.O. has disallowed

only an amount of Rs.84.71 crores and not 102.43 crores. Consequently there is no question of further allowance of Rs.17.71 crores which stands allowed in the computation by the A.O. Consequently there is no need to consider the additional ground on the facts of the case. The assessee is also a public sector undertaking so, permission of the COD is also required for raising the additional ground. There is no such permission made available to us on this. We, accordingly reject the additional ground raised.

20. The A.O. has only considered disallowing the amount of bad debts by invoking the provisions of section 36(2) holding that the bad debt claim cannot be allowed. However, as seen from the record the A.O. has allowed the deduction under section 36(1)(viia) applicable to banks and financial institutions. However, he has not examined the proviso to section 36(1)(vii) since he has disallowed the entire claim as such. Provisions of section 36(1)(vii) are as under: -

"36 .....
(1) .....
.....
(vii) subject to the provisions of sub-section (2), the amount of [any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year]:

[Provided that in the case of [an assessee] to which clause (viia) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause.] "

21. The proviso to the above section applies to a case where deduction under clause (viia) was also allowable. In this case the assessee also claimed deduction under section 36(1)(viia), therefore, while holding that the claim of bad debt or part thereof, which is written off is allowable to the assessee under section 36(1)(vii) r.w.s. 36(2) the A.O. is directed to examine the claim vis-à-vis the proviso, as deduction under section 36(1)(viia) was also allowed. The AO is directed to compute the deduction/claims keeping in view the provisions of the Section 36(1)(vii) and 36(1)(viia). With these directions, assessee's grounds are considered allowed in both the assessment years.

21. Aggrieved by the order of the Ld. CIT(A) the Revenue has raised Ground No. 2 before the Tribunal.

22. Before us, the learned DR submitted that the Assessee did not raise this ground before the AO and the issue was raised for the first time before CIT(A). It was his submission that the CIT(A) has powers u/s.250(5) of the Act to consider any ground provided the omission to raise the ground in the original grounds of appeal was not wilful or unreasonable. It was pointed out by the learned DR that there is no finding in the order of the CIT(A) that omission to raise the ground regarding deduction u/s.36(1)(vii) of the Act was not wilful or unreasonable. Therefore the issue has to go back to CIT(A) for fresh consideration. In this regard reliance was placed by the learned DR on the decision in the case of CIT Vs. Plastic Dela foot Wear 203 ITR 759 (Raj) wherein it was held that CIT(A) in exercise of powers to admit additional grounds of appeal u/s.250(5) of the Act has to give a finding that the additional ground sought to be raised was not wilful or unreasonable and without doing so if the CIT(A) entertains additional ground then the matter has to be remanded to CIT(A) to give such finding.

23. It was next submitted that additional ground can be entertained only if facts necessary for adjudication of additional grounds are already on record. In this regard the learned D.R. submitted that even the Hon'ble Supreme Court in the case of NTPC 229 ITR 383 (SC) had laid down that facts for deciding the additional ground should be available on record. It was submitted by him that the facts available on record before the AO was that in the return of income to the profit as per profit and loss account a sum of Rs.195,13,93,375 was added back and a deduction u/s.36(1)(viia) of the Act had been claimed while computing income from business. The quantum of deduction claimed u/s.36(1)(viia) of the Act has been explained in Note No.5 to

the return of income. In the other notes to the return of income in Note No.6 , it has been mentioned as follows:

> *"6. Bad Debts: The Assessee bank in its return has written off the amount of Rs.25,25,55,044/- against the gross interest. It is the actual write off which has taken place as the borrowers accounts are credited and debit is to the profit and loss account under the head "gross inomce". The Assessee company submits that the above treatment satisfies the requirement of Sec.36(1)(vii) regarding the write off to profit and loss account and crediting to the borrowers account. Against the bad debts written off the benefit claimed u/s.36(1)(viia) in ITAY 2003-04 amounting to Rs.25,25,55,044/- is adjusted."*

He drew our attention to the annual accounts of the Assessee from page-39 onwards and contended that the annual accounts do not show as to how the above sum was not actually claimed as deduction in the profit and loss account. It is also not clear as to how the CIT(A) concluded that the deduction of Rs.25,25,55,044/- was not claimed by the Assessee and the reasoning in this regard is not discernible from his order. In any event the AO should have been afforded an opportunity of looking into such reconciliation. It was submitted that additional evidence without factual verification should not be admitted by appellate authorities and in this regard relied on the decision of Hon'ble H.P. High Court and Bombay High Court in the case of CIT Vs. Shree Kangra Stell (P) Ltd. And Shriram DAgdulal (HUF) Vs. CIT, 320 ITR 691 (HP) and 161 ITR 42 (Bom) respectively.

24. Lastly it was submitted that the AO after giving effect to the impugned order of the Tribunal reopened the assessment of the Assessee and gave a finding that the Assessee has availed of double deduction u/s.36(1)(vii) of the Act and has sought to revoke the same.

25. In his reply the learned counsel for the Assessee submitted that the learned CIT(A) in his order has considered as to why he is admitting the

additional ground raised before him for the first time and it is not correct to say that he has not given a finding in this regard. Our attention was drawn to the order of the CIT(A) from para 8.5 and 8.6 of CIT(A)'s order. The CIT(A) has even considered the case of NTPC(supra) and Goetz India Ltd. 284 ITR 323 (SC) and several other decisions. The material on which the CIT(A) gave his conclusions were already on record and it was only on that basis that the CIT(A) gave his conclusions while allowing claim of deduction on account of bad debts written off. In this regard our attention was drawn to the letter of the Assessee to the AO dt.23.8.2006 whereby in reply to the details called for by the AO, the Assessee furnished details of bad debts written off and also the provision for bad debts availed u/s.36(1)(viia) of the Act in an annexure to the said letter.

26. Our attention was also drawn to the order of the CIT(A) dt. 25.1.2010, against the order of the AO in the reassessment proceedings u/s.147 of the Act, whereby the addition made by the AO of Rs.25,25,55,044/- holding that the said claim was a double deduction was deleted by CIT(A). Our attention was also drawn to the profit and loss account as on 31.3.2004 in which the Bad debts written off was neutralised by a corresponding credit to the provision for bad debts written off account thereby establishing the case of the Assessee that the deduction of Rs.25,25,55,044/- was not claimed while arriving at the income from business, though the same was written off in the books of accounts of the Assessee. Our attention was also drawn to the fact that in an annexure to the letter dt.25.5.2011 in the proceedings for giving effect to the order of the CIT(A) allowing deduction on account of bad debts written off, the Assessee has given copy of profit and loss account showing all the relevant entries. The stand of the Assessee was that during the previous year the Assesseee had written off bad debts amounting to Rs.25,25,55,044/- which amount was adjusted against gross interest income. Simultaneously, the Assessee has also written back (credited) an amount of Rs.25,25,55,044/-

out of the provision for bad and doubtful debts to the profit and loss account. Thus, there is a simultaneous debt and credit to the profit and loss account. In other words, the effect on profit and loss account is nil. Th bad debts write off of Rs.25,25,55,044/- was also inadvertently not claimed u/s.36(1)(vii) read with Sec.36(2) (v) in the return of income. Hence, in fact no claim was made by the assesse towards write off of bad debts in the return of income which the assesse was eligible to claim.

27. We have considered the rival submissions. The main grievance of the learned D.R. as projected in his argument is regarding opportunity to the AO. In this regard, we find that the grounds of appeal of the revenue project the grievance of the revenue only with regard to the fact that the claim was not made in the return of income and therefore cannot be entertained. In this regard, we find that the CIT(A) has relied on Circular No.14 of 11.4.1955 of CBDT which says that Officers of the Department must not take advantage of ignorance of an assessee as to his rights and guide the Assessee of any rights available to him in law. In our view it is also in consonance with the principle that there shall be no tax without the authority of law. If in law an Assessee is not liable to be taxed on a particular income, the same cannot be foisted on the Assessee because of procedural lapses. The assessment and other proceedings under the Act are for determination of correct tax liability of an Assessee in accordance with law. Keeping the above spirit in mind, in our view the CIT(A) has rightly allowed the claim of the Assessee and the reasons given by the CIT(A) for doing so, in our view are acceptable and we agree with the same.

28. Even on merits of the claim of the Assessee, we are of the view that the same deserves to be accepted. The relevant provisions under which the deduction has been claimed by the Assessee are as follows:

"36. Other deductions.--(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

(vii) subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year:

Provided that in the case of a bank to which clause (viia) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause ;

(viia) in respect of any provision for bad and doubtful debts made by--

(a) a scheduled bank not being a bank incorporated by or under the laws of a country outside India or a non-scheduled bank, an amount not exceeding five per cent. of the total income (computed before making any deduction under this clause and Chapter VIA) and an amount not exceeding ten per cent. of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner :

From a reading of the aforesaid provisions, it would be clear that the Assessee is thus entitled to claim deduction both under Sec.36(1)(vii) and Sec.36(1)(viia) of the Act. The only limitation is that the amount of deduction shall not exceed the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account. In the present case there is no dispute that provisions of Sec.36(1)(viia) applies to the Assessee and also the fact the amount of deduction relating to bad debts written off is limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account. In the case of the Assessee there is no dispute that there was no credit balance in the provision account and therefore whole of the bad debts written off would in effect be in excess of the credit balance (which is nil) in

the provisions account. Therefore the whole of the bad debts written off would be deductible u/s.36(1)(vii) of the Act. The fact that this sum has been omitted to be claimed in the return of income has been amply demonstrated by the Assessee. Even in the reassessment proceedings the AO has no answer to the claim of the Assessee in this regard and has merely observed in his order that there is no evidence produced by the Assessee. The book entries and the return of income before the AO are enough evidence to come to the conclusion that the amount in question was not claimed in the return of income though the Assessee could have claimed it legitimately. In the given circumstances, we are of the view that there is no merit in the ground raised by the Revenue. Consequently, the ground of appeal of the revenue is dismissed and the order of CIT(A) in this regard is upheld.

29. In the result, the appeal by the Revenue is dismissed.

30. In the result, the appeal by the Assessee is partly allowed for statistical purposes, while the appeal by the Revenue is dismissed.

Order pronounced on this 15th day of February, 2012.

Sd/-	Sd/-
(P. M. JAGTAP)	**(N.V. VASUDEVAN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, Dt : 15/02/2012

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, I- Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Roshani