IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'A': BANGALORE

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
and
SHRI JASON P.BOAZ, ACCOUNTANT MEMBER

ITA No.733/Bang/2011
(Assessment year: 2001-02)

Asst. Commissioner of Income-tax,
Circle 11(4),
Bangalore. … Appellant

Vs.

The Vysya Bank Ltd.,
(Now ING Vysya Bank Ltd.)
'ING Vysya House', No.25, M.G. Road,
Bangalore-560001. … Respondent
PAN: AABCT0529M

AND

ITA No.748/Bang/2011
(Assessment year: 2001-02)

M/s.ING Vysya Bank Ltd.
'ING Vysya House', No.25, M.G. Road,
Bangalore. … Appellant

Vs.

Deputy Commissioner of Income-tax,
Circle 12(3),
Bangalore. … Respondent

Revenue by: Shri C.H.Sundar Rao, CIT (DR).
Assessee by: Shri S.Ananthan, CA.

Date of hearing : 02-06-2014.
Date of pronouncement: 28-08-2014.

O R D E R

Per Smt. P.MADHAVI DEVI, JM:

These are cross appeals filed both by the Revenue and the assessee against the order of the CIT(A)-I, Bangalore, dated 19-5-2011 for the assessment year 2001-02.

2. Brief facts of the case are that the assessee, who is engaged in the business of banking, had filed its return of income for the relevant assessment year. During the assessment proceedings u/s 143(3) of the Income-tax Act, 1961[hereinafter referred to as 'the Act'], the Assessing Officer (AO) observed that the assessee had claimed an amount of Rs.28,73,88,373/- to be 'income' exempt u/s 10 of the Act. He observed that the assessee has not made any disallowance u/s 14A stating that there is no cost incurred for earning such income. The AO held that the contention of the assessee is not correct, as the CBDT in the circular No.780 dated 4-10-1999 has clarified that it is the 'net income' after taking into account all expenses incurred to earn the dividend, interest and long term capital gains, that is exempt u/s 10(23C) of the Act. He observed that the assessee has made these investments out of borrowed funds i.e. public deposits only and that the assessee's own funds are only 14% of the total funds available for the year. He, therefore, estimated that all the investments have not been made out of own funds and since there will be administrative expenses for realizing the income on investment, he held that 15% has to be treated as expenses incurred for earning of the exempt income. He, accordingly, worked out the expenses at Rs.28,73,88,373/- and made disallowance of Rs.1,43,69,418/- u/s 14A of the Act.

3. Aggrieved, assessee preferred an appeal before the CIT(A) who allowed the same. The Revenue is in appeal before us against the relief given by the CIT(A).

4. The learned Departmental Representative relied upon the order of the AO while the learned counsel for the assessee relied upon the order of the CIT(A) and also the decision of the ITAT in assessee's own case for the assessment year 2000-01 wherein the Tribunal has restricted the disallowance to 5% of the expenses. We find that the CIT(A) has only followed the decision of the Tribunal in the assessee's own case wherein the Tribunal has held as under:

> *"17. Now coming to the assessee's appeal and on the firs tissue agitated regarding claim of estimated expenses to earn the income, the assessee has relied on the Tribunal order in assessee's own case for the assessment year 1993-94 and before us it has been submitted in view of the assigning and apportioning on a particular expenditure to earn the said income was a mere impossibility. Only remission could be possible which can be considered as prayed before the Settlement Commission on the very issue of rendering additional income being exempt income for taxation. The Hon'ble Settlement Commission has settled the expenditure to be considered for earning the said income at 5% thereof which we are inclined to uphold to be considered as against estimated by the Assessing Officer and confirmed by the learned CIT(A) at 15%. The disallowance of expenses therefore is directed to be at 5% instead of 15% for earning the said income be considered."*

We find that the CIT(A) has only followed the decision of the Tribunal in the assessee's own case for an earlier assessment year in similar set of facts. Therefore, we do not find any reason

to interfere with the order of the CIT(A). The Revenue's appeal is accordingly dismissed.

5. As regards grounds of appeal raised by the assessee in its appeal, we find that ground No.1 is general in nature and needs no adjudication.

6. Ground Nos.2 to 6 are against the confirmation of the disallowance made by the AO of the assessee's claim of Rs.7,48,41,688/- being 'write off of non-convertible debentures' on the ground that there is no actual write off.

6.1 We find that the AO, during the assessment proceedings, asked the assessee to confirm whether the non-convertible debentures were actually written off from the investment portfolio and the assessee, vide letter dated 4-3-2002, stated that depreciation provision of Rs.7.48 crores is covered by RBI prudential norms and that it has been written off. Further, vide letter dated 6-3-2002 the assessee stated that the bank holds non-convertible debentures worth Rs.245.01 crores as on 31-3-2001 out of which the non-convertible debentures worth Rs.22.71 crores became the non-performing assets. The AO observed that non-performing assets in NCD worth Rs.22.7 crores shown in the balance-sheet under investment for the assessment year 2000-01 are still a part of the investments at

the end of year ending on March 2001 also. Thus, he came to the conclusion that there was no actual write off and hence the same cannot be allowed u/s 36(1)(vii) of the Act and the assessee had only made provision for non-performing assets in non-convertible debentures as per RBI guidelines.

6.2 Aggrieved, the assessee preferred an appeal before the CIT(A) who, after considering the decision of the Tribunal in the assessee's own case for the assessment year 2000-01, has held that the issue is still open for decision and hence the decision of the AO is found to be justified. Aggrieved, the assessee is in second appeal before us.

6.3 The learned counsel for the assessee, while reiterating the submissions made by the assessee before the authorities below, placed reliance upon the decision of the co-ordinate Bench of the Tribunal in the assessee's own case for the assessment years 2000-01 and 2002-03 and submitted that the issue may be remitted back to the file of the AO for consideration afresh in the light of the factual matrix that has been brought on record and considered by the Hon'ble Supreme Court in the case of *UCO Bank* reported in 240 ITR 355.

6.4 The learned Departmental Representative, however, supported the orders of the authorities below.

6.5 Having heard both the parties and having considered the rival contentions, we find that the issue is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of *UCO Bank* (cited supra) and also by the decision of the co-ordinate Bench of the Tribunal in the assessee's own case. In view of the same, we remand this issue to the file of the AO for re-consideration in the light of the decision of the Tribunal in the earlier year as well as of the Hon'ble Supreme Court in the case of *UCO Bank* (cited supra). These grounds are, therefore, allowed for statistical purposes.

7. As regards grounds No.7 to 11, we find that they are against the confirmation of the disallowance made by the AO of the expenditure on Vysyamulya Project (computerization of branches), amounting to Rs.23,05,49,466/-, on the ground that the same is capital expenditure.

7.1 The learned counsel for the assessee submitted that the very same issue had arisen in the cases of IBM Ltd., and Bank of Punjab Ltd, wherein the expenditure incurred on computerization of branch has been held to be revenue in nature. The learned counsel for the assessee has filed copies of the judgments of the Hon'ble Karnataka High Court in the case of *CIT vs. IBM India Ltd* confirming the decision of the Bangalore Tribunal and also the decision of the Tribunal at Chandigarh in the case of *Bank of*

Punjab Ltd. and also the decision of the Hon'ble Delhi High Court in the case of *CIT vs. M/s.Asahi India Safety Glass Ltd.*.

7.2 The learned Departmental Representative, however, supported the orders of the authorities below.

7.3 On consideration of the material on record, we find that similar issue had arisen in the case of *IBM India Ltd.,* and the jurisdictional High Court, vide judgment dated 10-4-2013 at para.9 has held as under:

> *"9. The second substantial question of law relates to application of the amount utilized for projects of Software in a sum of Rs.33,14,298/-.*
>
> *The Tribunal on consideration of the material on record and the rival contentions held, when the expenditure is made not only once and for all but also with a view to bringing into existence an asset or an advantage for the enduring benefit, the same can be properly classified as capital expenditure. At the same time, even though the expenses are once and for all and may give an advantage for enduring benefit but is not with a view to bringing into existence any asset, the same cannot be always classified as capital expenditure. The test to be applied is, is it a part of company's working expenses or is it expenditure laid out as a part of process of profit earning. Is it on the capital layout or is it an expenditure necessary for acquisition of property or of rights of a permanent character, possession of which is condition on carrying on trade at all. The assessee in the course of its business acquired certain application software. The amount is paid for application of software and not system software. The application software enables the assessee to carry out his business operation efficiently and smoothly. However, such software itself does not work on stand alone basis. The same has to be fitted to a computer system to work. Such software enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Thus, for payment of such application software, though there is an enduring benefit, it does not result into*

acquisition of any capital asset. The same merely enhances the productivity or efficiency and hence to be treated as revenue expenditure. In fact, this Court had an occasion to consider whether the software expenses is allowable as revenue expenses or not and held, when the life of a computer or software is less than two years and as such, the right to use it for a limited period, the fee paid for acquisition of the said right is allowable as revenue expenditure and these softwares if they are licensed for a particular period, for utilizing the same for the subsequent years fresh license fee is to be paid. Therefore, when the software is fitted to a computer system to work, it enhances the efficiency of the operation. It is an aid in manufacturing process rather than the tool itself. Though certain application is an enduring benefit, it does not result into acquisition of any capital asset. It merely enhances the productivity or efficiency and therefore, it has to be treated as revenue expenditure. In that view of the matter, the finding recorded by the Tribunal is in accordance with law and do not call for any interference. Accordingly, the second substantial question of law is answered in favour of the assessee and against the Revenue."

Respectfully following the decision of the jurisdictional High Court on similar set of facts, we hold that the expenditure incurred by the assessee for computerization of its branches is revenue in nature. These grounds are accordingly allowed.

8. Grounds No.11 to 13 are against the confirmation of the disallowance of the claim of Rs.1 lakh u/s 36(1)(viia) of the Act. As regards this issue, the learned counsel for the assessee submitted that the Tribunal, in the assessee's own case for the assessment years 2003-04 and 2004-05 (ITA Nos.53 & 54/Bang/2013 dt.25-10-2013) had considered this issue and at para.37 thereof has held as under:

37. Though under Stage-II and Stage-III of

the provisions of Sec.36(1)(viia) of the Act, PBDD has to be created by debiting the profit and loss account of the sum claimed as deduction, the condition that the provision should be in respect of rural advances is not necessary. At stage-II of the provisions of Sec.36(1)(viia) of the Act, this condition was done away with and it was only necessary to create PBDD in the books of accounts and debit to profit and loss account. The quantification of the maximum deduction permissible u/s.36(1)(viia) of the Act had to be done. Firstly it has to be ascertained as to what is 10% of the aggregate average advances made by rural branches, if the Bank has rural branches, otherwise that part of the deduction u/s.36(1)(viia) of the Act will not be available to the bank. The second part of the deduction u/s.36(1)(viia) has to be ascertained viz., 7.5% seven and one-half per cent of the total income (computed before making any deduction under this clause and Chapter VI-A). The above are the permissible upper limits of deductions u/s.36(1)(viia) of the Act. The actual provision made in the books by the Assessee on account of PBDD (irrespective of whether it is rural or non- rural) has to be seen. To the extent PBDD is so created, then subject to the permissible upper limits referred to above, the deduction has to be allowed to the Assessee. The question of bifurcating the PBDD as one relating to rural advances and other advances (Non-rural advances) does not arise for consideration.

Since the facts of the case are similar for the relevant assessment year also, we direct the AO to allow deduction subject to the permissible limits referred to u/s 36(1)(viia) of the Act . These grounds are accordingly allowed.

9. Grounds No.14 to 18 are against the confirmation of the disallowance made by the AO of the assessee's claim of Rs.3,19,37457/- on account of amortization of cost over face value of investment held to maturity stating that the same is not revenue expenditure in terms of sec.37(1) of the Act.

9.1 The learned counsel for the assessee submitted that this issue is also covered in favour of the assessee by the decision of the Tribunal in the case of *Sir M.Visveswaraya Co-op. Bank Ltd.* in ITA No.1122/Bang/2010 dated 11-5-2012 while the learned Departmental Representative supported the orders of the authorities below.

9.2 We find that the AO observed that the RBI guidelines prescribe that investments need not be marked to maturity and the security acquired by the assessee with the intention to hold them to maturity will be classified under the head 'held to maturity'. He further observed that the investment classified under the head 'held to maturity' category may be carried at acquisition cost unless it is more than the face value in which case the premium should be amortized over the period remaining to maturity. He held that the assessee cannot treat 'held to maturity' security as stock-in-trade as they have material characteristics of capital asset rather than stock-in-trade. He, therefore, held that amortization of cost over face value of investment done as per RBI guidelines is not an allowable expenditure in terms of sec.37(1) of the Act and accordingly disallowed a sum of Rs.3,19,37,457/- and added it back to the income of the assessee.

9.3 Aggrieved, the assessee preferred an appeal before the CIT(A) who confirmed the order of the AO and the assessee is in second appeal before us.

9.4 We find that the Tribunal, in the case of *Sir M.Visveswaraya Co-op. Bank Ltd.* (cited supra) has considered this issue at length and after considering various decisions of the Tribunal in the cases of *Catholic Syrian Bank Ltd. vs. ACIT* (2010) 38 SOT 553)(Cochin) and *The Khanapur Co-op. Bank Ltd. vs. ITO* (ITA No.141/PNJ/2011 dated 8-9-2011 has held that the assessee therein is entitled to claim deduction of the amortization of the premium on Government securities. Since facts of the case before us are also similar, we are inclined to follow the decisions of the co-ordinate Benches of the Tribunal and we direct the AO to allow the deduction. These grounds are accordingly allowed.

10. Grounds No.19 to 22 are against the confirmation of addition of the write off of non-convertible debentures, depreciation on investment, depreciation on leased assets and provision for NPA while arriving at the book profits /s 115JB of the Act. In addition to the above, the assessee has also raised an additional ground that the provisions of sec.115JB are not applicable to the assessee, being a bank. In support of the additional ground of appeal, the learned counsel for the assessee

has placed reliance upon decisions of various Benches of the Tribunal in the cases of *Canara Bank* in ITA No.305/Bang/2011 dated 18-7-2012, *Dena Bank* in ITA No.2337/Mum/2011 dated 10-4-2013*, ICICI Lombard General Insurance Co. Ltd.,* reported in 2012-TIOL-690-ITAT-MUM wherein it has been held that the provisions of sec.115JB are not applicable to a banking company.

10.1 The learned Departmental Representative, however, opposed the contention of the learned counsel for the assessee.

10.2 Having regard to the material on record and the judicial precedents thereon, we are inclined to agree with the learned counsel for the assessee that the provisions of sec.115JB are not applicable to a banking company. The decisions relied on by the learned counsel for the assessee in the case of *Canara Bank, Dena Bank and ICICI Lombard General Insurance Co. Ltd.,* have taken this view and respectfully following the decisions of the co-ordinate benches, we hold that the provisions of sec.115JB are not applicable to a banking company i.e. the assessee herein also. Having held that the provisions of sec.115JB are not applicable to the assessee, we are of the opinion that grounds No.19 to 22 need no adjudication at this stage.

11. In the result, the assessee's appeal is allowed and the Revenue's appeal is dismissed.

Pronounced in the open court on 28th of August, 2014.

sd/-	sd/-
(Jason P Boaz)	**(Smt. P.Madhavi Devi)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

eksrinivasulu

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore