आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'डी ' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

सर्वश्री विजयपाल राव, न्या.स एवं श्री एन. के. बिलैय्या, लेखा सदस्य ।

BEFORE SHRI VIJAY PAL RAO, JM & SHRI N K BILLAIYA, AM

आयकर अपील सं./I.T.A. No. 5470/Mum/2002

(**निर्धारण वर्ष** / Assessment Year:1996-97)

State Bank of India Accounts & Compliance Dept., Corporate Centre, Madam Cama Road Mumbai-400021	**बनाम**/ Vs.	The Deputy Commissioner of Income Tax, Range 2(2) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAACS8577K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / Appellant by :	Shri Girish Dave & Shri K. K. Ved
प्रत्यर्थी की ओर से/Respondent by :	Shri Girija Dayal
सुनवाई की तारीख / Dt. of Hearing :	5th July 2013
घोषणा कीतारीख/Dt.OfPronouncement:	26th July 2013

आदेश / O R D E R

PER: विजयपाल राव, न्या.स. / VIJAY PAL RAO, JM

This appeal by the assessee is directed against the order dated 22.7.2002 of Commissioner of Income Tax(Appeals) for the assessment year 1996-97.

2. The assessee has raised the following grounds in this appeal:

"The appellant objects to the order of the Commissioner of Income-tax (Appeals) II, Mumbai ("CIT(A)") dated 22 July 2002 for the aforesaid assessment year on the following among other grounds:

1. The learned CIT(A) erred in confirming the disallowance of a sum of Rs. 26,28,573 in respect of broken period interest.

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The learned CIT(A) erred in not directing the Assessing Officer to allow the appellant bank further loss on valuation of securities in respect of addition made to the closing stock of securities on account of the addition of broken period interest.

2. The learned CIT(A) erred in confirming the addition of Rs. 2,61,53,579 under the head "Deferred Payment Guarantee Commission". He erred in holding that the income from guarantee commission becomes final and irrevocable as soon as guarantee is given and does not depend on the liability that may eventually arise under the guarantee contract.

3. The learned CIT(A) erred in confirming the disallowance of Rs. 2,76,68,512 under section 37(4) of the Income-tax Act, 1961 ("the Act"), being expenditure incurred on repairs & maintenance, rates and taxes relating to the guest house and depreciation on the assets of the guest house, as under:

Rates & taxes	*Rs. 2,06,689*
Repairs & maintenance	*Rs. 40,70,360*
Depreciation	*Rs. 5,93,759*
Rent	*Rs. 93,93,094*
	Rs. 1,42,63,902

4. The learned CIT(A) erred in upholding the action of the Assessing Officer in treating 50% of entertainment expenses attributable to employees as entertainment expenses for the purpose of disallowance under section 37(2) of the Act.

5. The learned CIT(A) erred in confirming the disallowance of a sum of Rs. 1,00,55,676 paid to various schools towards reservation of seats for the children of the officers of the Bank. He erred in observing that the appellant has committed irregularity by not including those payments in the perquisite of the employees. He further erred in observing that this is a case of misuse of bank's fund.

It is submitted that such amounts paid towards reservation of seats for the children of the officers of the Bank is in the nature of staff welfare expenses to mitigate the hardship faced by the officers of the Bank for children's education during transfer/re-location.

6. The learned CIT(A) erred in upholding the order of the Assessing Officer in respect of denial of claim of deduction

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of interest charged under sections 234B, 220(2) and 215 aggregating to Rs. 425,42,37,785 and also denying the alternative claim of set-off of the interest of Rs. 425,42,37,785 charged by the Department against interest granted by the Department of Rs. 318,71,20,548.

7. The learned CIT(A) erred in directing the Assessing Officer to delete the double disallowance to the extent of Rs. 5,14,686 only as against the actual double disallowance of Rs. 1,40,78,488 in respect of profit tax of Frankfurt office.

8. The learned CIT(A) erred in upholding the action of the Assessing Officer in disallowing the appellant's claim in respect of depreciation of Rs. 3,12,50,000 on assets leased to Konkan Railway Corporation Ltd.

The learned CIT(A) erred in holding that there was no real sale to the lessor as there was no physical delivery of the equipments only paper work was created by issuing an invoice. The invoice was just like a "sale — letter" issued by the customer to the Bank.

The learned CIT further erred in observing that the relevant clauses of the lease agreement render it as an agreement of finance lease. It is a transaction where the assets are not intended to change hands and only a lien of the lessor is created as a security for the finance provided by him just as in case of a loan on hypothecation or mortgage of goods.

He further erred in observing that by different clauses of the lease agreement only the repayment of the finance provided by the 'lessor' with interest return in monthly instalments is ensured and the rights and liabilities of ownership remain vested with the 'lessee'.

The CIT(A) erred in observing that despite entering into the so-called lease agreement which only secured finance, the lessee retained the asset in its own dominion at the exclusion of others including the so-called lessor. In order to get finance, it made an arrangement to issue a sale invoice but retained the asset for itself.

The above conclusions are without any basis and contrary to the facts of the case. The appellant objects to these observations/conclusions.

9. The learned CIT(A) erred in not directing the Assessing Officer to exclude a sum of Rs. 7,02,21,455 being the

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interest recovered during the year out of interest credited to "Interest Suspense A/c" in earlier years.

He further erred in holding that as the matter relating to interest credited to "Interest Suspense A/c" is still sub judice, the question of exclusion of recovered will arise only when the disallowance made by the A.O. in the relevant years is finally confirmed. Hence, at this stage, no definite relief can be allowed to the appellant.

10. The learned CIT(A) erred in holding that the interest on securities is taxable on accrual basis instead of due basis.

11. The learned CIT(A) erred in upholding the action of the Assessing Officer of granting deduction for only Rs. 5,36,21,32,507 under section 36(1)(viia) of the Act instead of the entire provision of Rs. 5,63,32,54,326."

3. Ground No. 1 is regarding broken period interest. We have heard The Ld. AR as well as Ld. DR and considered the relevant material on record. At the outset we note that an identical issue has been consider and decided by this Tribunal in assessee's own case for the assessment year 1991-92 vide order dated 19.5.2008 in para 8 as under:

"8. We find that a similar issue arose before the Hon'ble Bombay High Court in the case of American Express International Bank (supra) wherein the Hon'ble Bombay High Court after considering the decision of Hon'ble Supreme Court in the case of Vijaya Bank has held as under:

".....In that case (Vijaya Bank's case) the facts were as follows.During the assessment year under consideration. Vijaya Bank entered into cm agreement with Jayalakshmi Bank Limited, whereby Vijaya Bank took over the liabilities of Jayalakhmi Bank. They also took aver assets belonging to Jayalakhmi Bank. These assets consisted of two items viz. Rs 58,568 and Rs. 11,430. The said amount of Rs. 58,568 represented interest, which accrued on securities taken over by Vijaya Bank from Jayalakshmi Bank and Rs. 11,630 was the interest which accrued upto the date of purchase of securities by the assessee-Bank from the open market. These two amounts

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were brought to tax by the AO under section 18 of the Income Tax Act. The assessee-Bank claimed that these amounts were deductible under sections 19 and 20. This was on the footing that the department had bought to tax, the aforesaid two amounts as interest on securities under section l8. It is in the light of these facts that one has to read the judgement in Vijaya Bank's case. In the light of the above facts, it was held that outlay on purchase of income bearing asset was in the nature of capital outlay and no part of the capital outlay can be set-off as expenditure against income accruing from the asset in question. In our case the amount which the assessee received has been brought to tax under the head "Business" under section 28. The amount is us not brought to tax under section 18 of the Income Tax Act. After bringing the amount to tax under Ike head "Business", the department taxed the Broken Period Interest Received on sale, but at the same time, disallowed Broken Period Interest Payment at the time of purchase and this led to the dispute. Having assessed the amount received by the assessee under section 28, the only limited dispute was — whether the impugned adjustments in the method of accounting adopted by the assessee-Bank should be discarded. Therefore, the judgement in Vijaya Bank's case has no application to the facts of the present case. If the department had brought to tax, the amounts received by the assessee-Bank under section 18, then Vijaya Bank's case was applicable. But, in the present case, the department brought to tax such amounts under section 28 right from inception. Therefore, the Tribunal was right in coming to the conclusion that the judgement in Vijaya Bank's case did not apply to the facts of the present case."

The Hon'ble Court finally held as under:

"That the judgement in the case of Vijaya Bank had no application to the facts of the case. That, having assessed the income under section 28, the department ought to have taxed interest for Broken Period Interest Received and the department ought to have allowed deduction for Broken Period Interest Paid."

The facts, being identical and there being no change in law, hence, respectfully following the same, we decide this ground in favour of the assessee."

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Following the earlier order of this Tribunal we decide this issue in favour of the assessee and against the revenue.

4. Ground No. 2 is regarding Deferred Payment Guarantee Commission. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. We note that an identical issue has been decided by this Tribunal in assessee's own case for the assessment year 1984-85 vide order dated 22.8.2006 in para 5.2 as under:

> *"After hearing both the parties and going through the material on record and also the decisions relied upon by the assessee, we find that undisputedly the assessee is a banking company. The assessee is following the mercantile system of accounting and there from, income is eligible to tax upon accrual. The system of accounting followed by the assessee is bona fide. The assessee receives the commission for the entire period of the debt repayment that it guarantees at the time when the guarantee agreement is entered into. The assessee had consistently shown in his books of account deferred guarantee commission receivable in respect of future periods, should not be taxed in the year. In other words where the commission related to a period beyond the previous year, the proportionate commission was deferred and shown as income in the year to which it related. The guarantee related to more than 12 months and/or the guarantee period extended beyond the period covered by the previous year relevant to the Assessment Year. Refund of upto 50% of guarantee commissioner for the unexpired period to valued clients may be permitted by the assessee's officials on receiving back the discharged guarantee bond in those cases also where the purpose for which the guarantee was issued has been fulfilled in a shorter period. Thus, the right to receive commission for the un-expired period of the guarantee became perfected and crystallized only with the expiry of the unexpired period. Accordingly, the right to receive commission for the unexpired period of the guarantee became perfected and crystallized only with the expiry of the unexpired period and income from deferred guarantee commission did not accrue or rose in the relevant Assessment year 1984-85. However, this issue has been decided by the Tribunal against assessee in case of assessee itself. Now it is*

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stated that in case of Bank of Tokyo (supra) the Hon'ble Calcutta High Court has decided this issue in favour of the assessee. The counsel of assessee has stated that decision of the Hon'ble Supreme Court in the case of Madras Industrial Corpn. (supra) also support the case of the assessee. These decisions were not available, when Tribunal decided the issue against assessee. To meet the ends of justice we restore this issue to the file of the AO and that the Assessing Officer ₹to decide the issue a fresh after taking into consideration the decision in case of Bank of Tokyo and in case of Madras Industrial Corpn. (supra) and if it is found that facts are identical then the decision of the Hon'ble High Court in case of Bank of Tokyo (supra) has to be followed. We order accordingly."

5. As it is clear from the above order of the Tribunal for the assessment year 1984-85 that in the earlier years upto the assessment year 1983-84 this issue was decided by the Tribunal against the assessee. However, in view of the subsequent decisions of Hon'ble Calcutta High Court in case of Bank of Tokyo 71 Taxman 85 as well decision of Hon'ble Supreme Court in case of Madras Industrial Investment Corporation Ltd. 225 ITR 802, the Tribunal has set aside this issue to the record of the Assessing Officer for deciding the same afresh after taking into consideration, the decisions in case of Bank of Tokyo (supra) as well as in case of Madras Industrial Corporation (supra). The Ld. AR of the assessee has pointed out that in the consequential order the Assessing Officer has allowed the claim of the assessee. We note that in the consequential order dated 19.12.2007. The AO has followed the decision of Hon'ble Calcutta High Court in case of Bank of Tokyo (supra) and decided the issue by accepting the claim of the assessee in para 3 as under:

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"3. Ground No. 4 relates to deferred bank guarantee commission of Rs. 3,97,99,363/- treated as income. The Hon'ble Tribunal has restored this issue to the file of the AO and directed the AO to decide the issue afresh after taking into consideration the decision in the case of Bank of Tokyo and in the case of Madras Industrial Corporation, and if it is found that facts are identical, then the decision of the Hon'ble High Court in the case of Bank of Tokyo has to be followed. Accordingly, the above decision has been gone through.

The decision of the Calcutta High Court in the case of Bank of Tokyo is squarely applicable in this case, wherein it is held that the income deferred guarantee commission did not accrue or arise in the year in which the guarantee agreements were entered and that the same should be spread over the period to which the guarantee commission related and should be assessed proportionately. Accordingly, excess addition made in the original order is reduced."

6. The AO has accepted the claim of the assessee as evident from the consequential order. Accordingly we decide this issue in favour of the assessee and against the revenue.

7. Ground No. 3 is regarding guest house expenses. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. We find that an identical issue has been considered and decided by this Tribunal in assessee's own case for the assessment year 1991-92 vide order dated 19.5.2008 in para 21 as under:

"21. The next issue is regarding guest house expenses and depreciation thereon. At the time of hearing, the learned Authorised Representative of the assessee has submitted that the issue was decided against the assessee by the judgment of Hon'ble Supreme Court in the case of Britannia Industries Ltd. Vs CIT, reported in 278 ITR 546 (SC). Accordingly, we are not inclined to interfere with the findings of the CIT(A). The same is upheld."

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Following the earlier order of this Tribunal we decide this issue against the assessee and in favour of the revenue. Accordingly the order of CIT(A) qua this issue is upheld.

8. Ground No. 4 is regarding disallowance of 50% of entertainment expenses. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. We note that an identical issue has been considered and decided by this Tribunal in assessee's own case for the assessment year 1984-85 vide order dated 22.8.2006 in para 3 as under:

> *"3. Ground 2 relates to disallowance of entertainment expenses on adhoc basis ₹ 25,00,000/-. The learned Counsel of the assessee submitted before us that in the earlier years i.e., 1977-78 to 1983-84, 25% of such expenses attributable to employees were held by the Income Tax Appellate Tribunal as not in the nature of entertainment expenditure. In view of the decision of the Income Tax Appellate Tribunal relating to earlier years on this issue, we hold that 25% of such expenses attributable to employees are not in the nature of entertainment expenditure. The assessee succeeds to this extent. The Assessing Officer is directed to recalculate the disallowances accordingly."*

As it is evident from the above order that the Tribunal has held that 25% of such expenses attributable to employees are not in the nature of entertainment expenses and accordingly the AO was directed to recalculate the disallowances. Following the earlier order of this Tribunal we direct the AO to recalculate the disallowance in the terms of earlier order of this Tribunal.

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9. Ground No. 5 is regarding staff welfare expenses. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The AO disallow a sum of ₹ 1,00,55,676/- being the payment made to certain schools for reservation of seats for the children of senior officers. The CIT(A) confirm the disallowance on the ground that these payments are gratitude without any contractual obligation. The Ld. AR of the assessee has filed the policy of assessee-Bank whereby the bank under the scheme has made the arrangements with certain schools to reserve seats for the children of officers to ensure proper education of the children of the officers who are transferred periodically. We further note that an identical issue has been considered and decided by this Tribunal in assessee's own case for the assessment year 1992-93 vide order dated 19.5.2008 in para 30-34 as under:

> *"30. The next issue is regarding deduction amounting to ₹ 32,27,534/- being staff welfare expenses on account of payments made to educational institutions for reservation of seat to the children of the employees. The learned Authorised Representative of the assessee has pointed out that the amount paid to schools for reservation of seats for children of employees.*
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> *31. The facts, in brief, are that the A.O. disallowed these expenses as these were not staff welfare expenses in the true sense of the word because of this, these were contrary to the Constitutional provisions of law and opposed to the public policy also. The ld. CIT(A), following his appellate order for A.Y. 1987-88, also confirmed the same. Aggrieved by this, the assessee is in appeal before us.*
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> *32. The ld. Counsel submitted that the officers of the assessee bank were subject to frequent transfers, hence, to avoid difficulty to .....in getting admission for their children in god educational institutions, the assessee had made a policy to*

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contribute to few institutions for some seats in various cities and, therefore, the expenditure incurred on this account was allowable as staff welfare expenses. The ld. Counsel contended that it was available to all officers of the bank and not merely to few officers of the bank as held by the A.O. The ld. Counsel contended that in A.Y. 1987-88 this issue arose before the Tribunal and was decided against the assessee for the reason that the assessee did not furnish details of expenditure before the Revenue authorities, however, in the present year, the details of payments were available and referred to the relevant pages of compilation. Accordingly, he contended that the aforesaid decision of the Tribunal was not applicable for the year under consideration. The ld. Counsel, thereafter, placed strong reliance on the decision of the Hon'ble jurisdictional High Court in the case of Mahindra & Mahindra as reported in 261 ITR 501 where the assessee provided donation to an education society which ran a school in which children of the employees of the company were studying and the Hon'ble Court held the same allowable as expenditure incurred for business purposes. The ld. Counsel also contended that Mumbai Tribunal in the following two cases also held so.

Indian Oil Corporation Ltd. (ITA Nos. 4923 & 6063/Mum/1989(Mum) pages 23 to 28 of the compilation.

Nuclear Power Corporation of India Ltd. (ITA No. 336/Mum/1999 pages 29 to 32 of the compilation

The ld. Counsel also placed reliance on the following judicial decisions in this regard.

Shri Venkatastayanarayana Rice Mills Vs CIT (223 ITR 101) (SC)

CIT Vs India Radiators Ltd. (236 ITR 719) (Mad)

CIT Vs Emtici Engineering Ltd. (242 ITR 86)

33. The ld. D.R., on the other hand, contended that this facility was restricted to only officers and not employees, hence, its was arbitrary and un-reasonable, hence, assessee being as government owned bank falling within definition as per Article 12 of Constitution of India could not do so and, therefore, expenditure was correctly disallowed by the Revenue Authorities.

34. We have considered the submissions made by both sides, material on record and orders of authorities below. We find that the Tribunal in the earlier A.Y. 1987-88 rejected the claim of the assessee for want of details whereas in the present case the

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assessee has submitted these details, hence, the decision of the Tribunal in that year is not applicable. We find that both the Revenue Authorities have treated this expenditure as opposed to the public policy, however, in our view the same cannot be a valid reason for disallowing the expenditure because this aspect does not come within the provisions of I.T. Act, 1961. We are further of the opinion that it is a mater of corporate policy where policies of this type are framed after due consultation with employees/officers association, hence, it cannot be treated as arbitrary. Further, the officers of the bank do not get any bonus whereas the employees get bonus which can also be treated as arbitrary in the similar manner, if the contentions of the Revenue are accepted. As far as incurrence of this expenditure for business purpose is concerned, that is not doubted. In this back ground, we hold that the expenditure incurred by the assessee is allowable as revenue expenditure. Thus, this ground of the assessee stands accepted."

10. As it is clear from the above order of the Tribunal that for the assessment year 1992-93 this issue was decided in favour of the assessee. The ground of disallowance for the year under consideration is treating the same as gratitudes payment. We note that as per the policy of the bank the arrangements are made for the reservation of seats in the schools for the children of the officer who are frequently transferred. Thus there is no discrimination in the policy as far as the officers subjected to transfer. A similar view has been taken by the Tribunal for the assessment year 1995-96 vide order dated 17.9.2009. Accordingly, following the order of this Tribunal for the assessment year 1992-93, we allow this claim of the assessee.

11. Ground No. 6 is regarding denial of deduction for interest paid u/s 234B, 220(2) and 215 of Income Tax Act. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The Ld.

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AR of the assessee has relied upon the decision of Hon'ble Jurisdiction High Court in case of Arthur Anderson Vs ACIT 190 Taxman 279 as well as in case of CIT Vs Manoj Kumar Bernival 217 CTR 407.

12. Interest payment u/s 234B, 220(2) and 215 of the Income Tax Act is not an admissible claim u/s 36 or 37 of the Income Tax Act. The payment of interest due to delay in payment of tax does not relate to earning of business income. Therefore the same cannot be allowed as deduction. The decisions relied upon the by the Ld. Counsel for the assessee are not on the point of allowability of deduction being business expenditure but on a different point. The decision in case of Arter Anderson Company Vs ACIT is only on the point of reopening of assessment u/s 148 and not on the point whether the interest paid u/s 220 to be allowable deduction. Similarly, the decision in case of Manoj Kumar Bernival (supra) is on the point of definition of tax and whether interest would be part of tax for the purpose of section 249, therefore the said decisions are not relevant on the issue before us. As far as the alternative plea of the assessee is concerned, it is setter proposition is the interest receipt on refund of tax is assessable as income from other source whereas the interest paid u/s 234B, 220(2) and 115 is not an expenditure incurred for earning the interest on refund of tax. Even otherwise the interest on refund of tax is not an activity for earning the income and therefore no adjustment can be given against the interest receipt from the department. In view of the above discussion we do not find any merit in this ground of the assessee and the same is dismissed.

13. Ground No. 7 is regarding double disallowance of profit tax of Frankfurt office. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The Ld. AR of the assessee has submitted that the assessee made provision for profit tax at Frankfurt of ₹ 1,45,93,174/- out of which the assessee paid ₹ 1,40,78,488/-. The balance of ₹ 51,46,686/- was offered by the assessee being addition u/s 43D. The AO disallow a sum of ₹ 1,40,78,488/- and accordingly the total disallowance on this account is ₹ 1,45,93,174/-. The Ld. AR has further submitted that the CIT(A) as directed the AO to delete ₹ 51,46,686/- in stead of the addition made by the AO u/s 40(a)(ii) of ₹ 1.40,78,488/- because the provisions for foreign tax for all branches amounting to ₹ 32,38,34,950/- was also disallowed by the AO which includes the provision for profit tax at Frankfurt of ₹ 1,45,93,174/-. Hence, the Ld. AR has submitted that there is a double disallowance to the extent of ₹ 1,40,78,488/-.

14. Having considered the rival submissions we are of the view that a proper verification is required regarding fact pointed out by the assessee that the provision for profit tax at Frankfurt branch was also part of the provision for foreign tax for all foreign branches of ₹ 32,38,34,950/- and thus there is double disallowance of ₹ 1,40,78,488/- being the profit tax paid by the assessee in respect of Frankfurt Branch. According the AO is directed to verify the point whether there is a double disallowance in this regard and decide the same as per law.

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15. Ground No. 8 is regarding depreciation on lease assets given to Konkan Railway Corporation Ltd. The assessee has entered into an agreement dated 30.3.1996 with Konkan Railway Corporation Ltd. for leasing transaction with respect to the asset of ₹ 25,00,00,000/-. The assets have been categorised as plant and machinery in the shape of Railway Tracks comprising of rails, sleepers and associated fitting. The assessee claimed depreciation on these assets at the rate of 12.5% as used for less than 180 days. The assets in question were originally acquired by Konkan Railway Corporation Ltd. and thereafter to arrange the funds the same were sold to the assessee Bank and taken back on lease for a period of 84 months against the lease rental payable at monthly instalment. The Assessing Officer held that the transaction is in the nature of loan or financial assistance provided to the Konkan Railway Corporation Ltd. (KRCL) by the assessee Bank. The transaction has been given the shape of lease transaction only in order to enable the bank to claim depreciation and reduce its taxable income. Accordingly, the AO held that the sale and lease back transaction is in the nature of financial transaction, therefore, the claim of depreciation was disallowed. On appeal, the CIT(A) confirm the action of the AO and held that the so-called lease agreement is only a finance lease on which the depreciation can be allowed to a person who vests the dominion over the property/asset, who is entitled to use it in his own right and using the same for the purpose of his business or profession. The CIT(A) has observed that in the present case the lessee retained the asset in

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its own dominion at the exclusion of others including the assessee because the lessee has constructed the equipments and uses it as integral part of railway system. In order to get finance KRCL made an arrangement to issue a sale invoice but retained the asset for itself. However, the CIT(A) while confirming the disallowance of depreciation directed the AO to exclude the capital recovery component from the lease rentals assessed to tax.

16. Before us Mr. Girish Dave the Ld. Counsel for the assessee submitted that the assessee Bank acquired the asset in question by invoice dated 20.3.1996 for a consideration of ₹ 25,00,00,000/- and the said asset was given on lease to Konkan Railway Corporation Ltd. vide agreement dated 30.3.1996. He has further submitted that the transaction of sale by the Konkan Railway Corporation Ltd. to the assessee and again taken on lease has been approved by the Railway Board as well as Government of India vide letter dated 30.1.1995, therefore there is no question of any doubt about the genuineness of the transaction when the transaction has been sanctioned by the Government of India and between the two public sector undertaking. He has referred various clauses of the agreement and submitted that the interest and the title in respect of the lease asset are specifically mentioned under clause 8 of the agreement. According to the terms and conditions of clause 8 of the agreement the lessee is not permitted to sell, assign, sub-let, pledge, mortgage or create charge or otherwise part with possession of the asset in question and therefore the assessee

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Bank has pre-dominance over the assets. In case of any breach of terms and conditions of the agreement the assessee is entitled to recover to asset from the lessee, therefore the assessee holds the lien over the asset. He has submitted that the terms and conditions of the agreement clearly demonstrate the real attributes of the ownership of asset with the assessee. He has referred clause 8.1 of the agreement and submitted that the lease asset shall continue in the ownership of the assessee, notwithstanding that the same may have affixed to any land or building. He has referred clause 12 of the agreement and submitted that if the lessee without the consent of the assessee, sells, transfers or attempts to sell or pledge, parts with possession or sub-lets or creates any charge lien or encumbers equipment/asset in question or otherwise the asset is endanger in the opinion of the assessee the same shall be treated as default. The Ld. Counsel for the assessee has then referred clause 13.2 of the agreement and submitted that on termination of the agreement the assessee shall without any notice be entitle to remove and reposes the equipments. He has also referred clause 14.1 of the agreement and submitted that on expiry of agreement if the lessee does not propose to renew the lease for further period, the lessee shall delivery the equipment to the lessor or hold the equipment in trust for lessor. The Ld. AR has pointed out that as per the clause 15 of the agreement on termination of the agreement unless the lessee propose to renew the lease, the assessee shall as the absolute owner of the equipment be at liberty to sell any or all of the equipment at a public or

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private sale or otherwise dispose of, hold, use, operate or lease to others etc. The Ld. AR then referred clause 16.1 of the agreement and submitted that as per the terms of the agreement the assessee may hypothecate the equipment owned by it and leased out hereunder in favour of any bank, Financial Institution, or any other institution by way of security for Financial Assistance arranged therefor. Thus, the Ld. Counsel has submitted that as per the terms and conditions of the agreement the assessee is the absolute owner of the lease asset and therefore the lease in question is operating lease and not a financial lease. He has relied upon the decision of Hon'ble Supreme Court in case of M/s ICDS Vs CIT 350 ITR 527 and submitted that the assessee is entitled for the depreciation on the lease asset as held by the Hon'ble Supreme Court. The Ld. Counsel has submitted that in the case of ICDS Ltd. the Hon'ble Supreme Court has noted that as per the terms of lease agreement the lessor has the right to retain legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. He has further submitted that the Tribunal in case of Development Credit Bank Ltd. Vs CIT has allowed the claim of depreciation on the leased asset by following the decision of Hon'ble Supreme Court in case of ICDS Ltd. (supra). Therefore the issue of depreciation is covered in favour of the assessee by the decision of Hon'ble Supreme Court as well as the Co-ordinate Bench of this Tribunal.

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17. On the other hand, the Ld. DR has referred the findings of the CIT(A) as well as Assessing Officer wherein the nature of arrangement has been discussed in detail and submitted that the issue is covered against the assessee by the decision of Special Bench of this Tribunal in case of IndusInd Bank Ltd. Vs ACIT 135 ITD 165. He has submitted that the Special Bench has decided the issue in case of bank by following the decision of Hon'ble Supreme Court in case of Asian Brown Boveries Ltd. Vs Incorporation India as well as in case of Association of leasing and Financial Services Vs Union of India wherein their lordships have laid down the distinguishing features of financial lease from operating lease.

18. In rebuttal the Ld. Counsel for the assessee has submitted that the decision of Special Bench in case of IndusInd Bank is not applicable in the case of the assessee because of various reasons including the lease period in case of the assessee is fix to 84 months with a liberty of renewal therefore the period of lease was not fixed so that it recovers the cost of asset as in case of IndusInd Bank but in case of the assessee the lease was having a possibility of renewal. The Ld. AR has further pointed out that in case of IndusInd Bank the lease agreement provides sale of asset to lessee at the end of lease period at a pre-determined price whereas in case of the assessee the asset is to be restored to the assessee in absence of renewal and the assessee be at liberty to sell the asset in a private or public sale or otherwise dispose of. He has further submitted that in the case of the assessee it may hypothecate

the equipment or lease out in favour of the any bank or Financial Institution for arranging Financial Assistance therefore, there is no such terms and conditions discussed by the Special Bench. In case of IndusInd Bank the lease was not revocable whereas in the case of assessee on the event of default the assessee shall terminate the agreement and shall demand return of asset.

19. On query from the bench about the permissible business as per the RBI regulation Act and treatment of lease rentals in the books of account the Ld. Counsel for the assessee has submitted that as per the circular dated 19.2.1994 the RBI has permitted the bank the activity of equipment leasing and factoring service therefore the bank is empowered to do the business of leasing out of asset. As regards the treatment of the lease rentals the Ld. AR has filed the profit and loss account and balance sheet and submitted that as per the prudent accounting standard only finance charge are recognise as income and the components representing the replacement of cost of asset has been carried to the balance sheet as a capital item.

20. We have considered the rival submissions as well as relevant material on record. The assessee has claimed that as per the lease agreement the assessee has entered into an operating lease of the asset in question. In order to determine the real nature of transaction and arrangement between the parties, the substance of the document intention of the parties and surroundings circumstances under which the parties have entered into the transaction are material and relevant

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to be considered. Therefore, mere nomenclature words used in the agreement cannot be looked into in isolation of the substance of the document, the real intentions of the parties and the surroundings circumstances under which the transaction took place. Undisputedly in the case in hand the asset in question is the railway track which is already owned by the lessee Konkan Railway Corporation Ltd. (KRCL) but because of the requirement of funds the KRCL decided to raise the funds by making the arrangement of sale and lease back of the asset. Thus, the real object as far as KRCL is concerned for entering into the transaction of sale and lease back is to raise/arrange the funds. The two transaction of sale of the asset in question to the assessee bank and lease back cannot be separated as there was no choice with either of the party to restrict the transaction of sale alone independently because it was neither possible nor permissible to sell out the asset in question by the Konkan Railway Corporation being the integral part of their railway system which is the very basis of the existence of the KRCL. Thus, we have not doubt that the sale transaction in question is merely on paper and to facilitate the financial arrangement by the assessee to the KRCL without involving any real intention of transfer of the asset in question. Even otherwise the transfer of asset in question is impossible in the facts and circumstances of the case and therefore it was not the real intention of the parties even reflected from the lease agreement. Some of the relevant clauses of the agreement are as under:

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"1.5 The Acquisition Cost of the equipment shall be the Invoice Value of the Equipment inclusive of levies on important of the Equipment, Customs Duty, Central Excise Duty, Sales Tax, Additional Tax, Surcharge on Sales Tax, Interest Tax, where applicable, Turnover Tax, where payable and all other costs and expenses, as the case may be such as Freight, Octroi, Entry Tax, Erection and Installation \Charges, Commissioning Charges, Testing Charges paid or payable in respect of the Equipment or value assessed by the valuers as per clause 2.2. Below whichever is lower. In case the Lessee proposes to avail MODVAT on the specified Excise Duty paid in terms of the Central Excise Rules, 1944, of which due intimation will be given by the Lessee to the Lessor, the acquisition cost will not include Excise duty payable on the equipment.

1.6 The Lessee hereby takes on lease the Equipment for the Fixed period from the Commencement Date as hereinafter referred to subject to the terms, conditions, covenants and stipulations contained herein and in the Schedules hereto. The Fixed period or the primary period of the Lease as defined in Part II of the First Schedule hereto is non-cancellable by the Lessee and/or the Lessor except as provided in Clause 13 hereof. The fixed period of the lease may be renewed for a further fixed term referred to as "the secondary period" at the option of the Lessee on the same terms and conditions as are contained in this agreement subject to payment by the Lessee of lease rentals in advance as stipulated in Part II of the First Schedule hereto.

5. Insurance

It is agreed by and between the Parties hereto that the Lessee shall, for and on behalf of the lessor.

5.1 Take out insurance on the Equipment against loss in transit, erection and installation risks, maritime risks, where necessary prior to the despatch of the Equipment, or alternatively to ensure that the insurance on the Equipment in respect of the said risks is effected by the Manufacturer/Supplier before delivery of the Equipment.

5.2 immediately after the delivery of the Equipment, insure the Equipment and keep the same insured throughout the term of this Agreement against loss or damage by accident, lighting, fire, flood, storm, earthquake, tempest, falling aircraft, malicious damage, riot, strike, civil commotion, explosion, implosion and where necessary against third party claims in respect of Equipment used in hazardous industries and those requiring environmental protection as also for other risks usually covered

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by insurance in the type of business for which the Equipment is for the time being used to the satisfaction of the Lessor upto the full replacement value thereof under a Comprehensive Policy of Insurance, in the joint names of the Lessor and the Lessee with an endorsement showing the Lessor as the owner and Loss payee.

8. Lessor's Interest and Title:

The Lessee agrees and undertakes that it will-

8.1 ensure that in so far as the Equipment is installed in or affixed to any land or building, such Equipment shall be capable of being removed without material injury to the said land or building and that all such steps shall be taken as are necessary to prevent title to the Equipment from passion to the Owner/Lessor/Occupier of the said land or building:

8.2 Keep the Equipment at all times in the possession and control of the Lessee at the Lessee's Factory or Premises as indicated in the Proposal and at the address as specified in Part II of the First Schedule hereto and not remove the same from the place so specified where it is installed without the consent in writing of the Lessor:

8.3 notify the Lessor of any change in the Lessee's address and upon request by the Lessor promptly inform the Lessor of the whereabouts of the Equipment:

8.4 not do or omit to do any act which may result in seizure and/or confiscation of the Equipment by the Central or State Government or Local Authority or any Public Officer or Authority under any law for the time being in force:

8.5 not sell, assign, sub-let, pledge, mortgage, charge, encumber, or part with possession of or otherwise deal with the Equipment or any interest therein nor create or allow to be created any lien on the Equipment whether for repairs or otherwise and in the event of any breach of this sub-clause by the Lessee, the Lessor shall be entitled to call upon the Lessee to have the lien or charge or other encumbrance lifted at its cost and in the event of the Lessee failing to do so within a reasonable time, the Lessor shall be entitled (but shall not be bound) to pay to any third party such sum as is necessary to procure the release of the Equipment from any lien charge or encumbrance and shall be entitled to recover from the Lessee forthwith all such expenses as might have been incurred for such release:

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8.6 not sell, mortgage, charge, demise, sub-let or otherwise dispose of any land or building on or in which the Equipment are kept or enter into any contract to do any of the aforesaid things without giving to the Lessor at least six weeks prior notice in writing and the Lessee shall in any event ensure that any such sale, mortgage, charge, demise, sub-lease, or other disposition as the case my be is made subject to the right of the Lessor to repossess the Equipment at any time(whether or not the same or any part thereof shall have become affixed to the said land or building) and for that purpose to enter upon such land or building and sever any Equipment affixed thereto:

8.7 punctually pay all registration charges, licence fees, rent, rates, taxes including in particular Sales Tax and other outgoings payable in respect of the Equipment under this Agreement or for storage, installation, or use thereof, or in respect of any premises in which the Equipment form time to time may be placed or kept and produce to the Lessor, on demand, the latest receipts for all such payments and in the event of the Lessee making default under this sub-clause the Lessor shall be at liberty to make all or any of such payments and to recover the amount thereof from the Lessee forthwith.

8.8 not claim any relief by way of any deduction, allowance or grant available to the Lessor as the owner of the Equipment, under the Income Tax Act, 1961 or under any other Statute, rule, regulation or guideline issued or that may be issued by the Government of India or any Statutory Authority and not do or omit to do or be done any act, deed or thing whereby the Lessor is deprived, whether wholly or partly of such relief by way of deduction, allowance or grant. The Lessee shall at the end of each financial year of the Lessor provide to the Lessor such information as it may require to claim relief by way of any deduction allowance or grant as the owner of the Equipment under the Income Tax Act, 1961 and the Lessee undertakes to comply with and observe at all times all the terms and conditions to be complied with or observed in respect of the use and operation of the Equipment so as to entitle the Lessor to obtain such relief.

8.9 The Lessee irrevocably agrees that if due to incremental taxes whether on account of the impact of the sales tax legislation in the various States as applicable or on account of customs duty or excise duties or any other related and consequential taxes or charges levied or leviable on this transaction now or hereafter as also due to any increase in the purchase price of the Equipment covered by this Agreement on account of purchase tax and/or any other tax or imposition or due to tax on the right to use goods as may be applicable to the

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Equipment the Acquisition Cost of the Equipment stands increased, then the Lessor reserves the right to increase the Lease rentals proportionate thereto and on such notification by the Lessor to the Lessee, the Lease Rentals shall correspondingly stand increased from the date specified by the Lessor in such notification.

12. Events of Default:

An event of default shall occur hereunder, if the Lessee-

12.4 without the Lessor's consent, sells, transfers, or attempts to sell or pledge, parts with possession or sub-lets or charges or encumbers or creates any lien on the Equipment or any item of the Equipment is endangered in the opinion of the Lessor or the interest of the Lessor is jeopardised:

13. Termination in the even of default:

13.2 On the termination of this Agreement the Lessor shall without any notice be entitled to remove and repossess the Equipment and for that purpose by itself its servants or agents enter upon any land buildings or premises where the Equipment is situated or is reasonably believed by the Lessor to be situated for the time being and detach and dismantle the same and the Lessor shall not be responsible for any damage which may be caused by any such detachment or removal of the Equipment.

13.3 Without prejudice to and in addition to the Lessor's rights provided in Clause 13.2 hereinabove the Lessor shall also be entitled to recover from the Lessee and the Lessee shall be bound to pay to the Lessor the following amounts viz:

13.3.1 The entire amount of the lease rentals for the fixed period of the lease computed in the manner set out in Part II of the First Schedule hereto on the footing and as if the Agreement had not been terminated to the end and intent that the Lessee shall pay to the Lessor not only arrears of instalments of lease rentals upto the date of termination of this Agreement but also such further instalments for the then unexpired residue of the term which the Lessee would have been bound to pay to the Lessor had this Agreement continued.

14. Redelivery/Repossession of Equipment:

14.1 Upon the expiration of this Agreement if the Lessee does not propose to renew the lease for further fixed period or secondary period the Lessee shall if required by the Lessor deliver the Equipment to the Lessor at the address of the Lessor stated in this Agreement or at such other addresses as the Lessor may specify or if not so required shall hold the

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Equipment in trust for the lessor so as to make it available to the Lessor for collection by itself or by its employees or agents; the Lessor or its employees or agents shall be entitled to retake possession of the Equipment and may for that purpose enter upon any land or building Lessor or its employees or agents to be situated and if the Equipment or any part thereof is affixed to such land or buildings, the Lessor or its employees or agents shall be entitled to server the same therefrom and to remove the Equipment or part thereof so severed and the Lessee hereby agrees that it shall not hold the lessor for any damage done responsible for and to make good at its expense all damage caused to the land or buildings by such removal.

15. Sale of Equipment on termination of the Agreement:

Upon the termination of this Agreement unless the Lessee has elected to renew the lease for a further fixed period or secondary period the Lessor shall as the absolute owner of the Equipment be at liberty to sell any or all of the Equipment at a public or private sale or otherwise dispose of, hold, use, operates, lease to others or keep idle such Equipment, all free and clear of any rights of the lessee and without any duty to account to the Lessee for such action or inaction or with respect to any proceeds thereto and if such Equipment is sold the price obtained upon such sale shall not be questioned or challenged by the Lessee more shall the Lessee question or dispute the exercise or non-exercise by the Lessor of any one or more of the rights and remedies as set out in Clause 13 hereinabove.

16. Assignment:

16.1 The Lessor may hypothecate the Equipment owned by it and leased out hereunder in favour of any bank, Financial Institution or any other Institution whatsoever as and by way of security for the financial assistance arranged therefore by the Lessor for the acquisition of such Equipment. The Lessor may assign to any person any of its rights under this Agreement and in particular may assign such rights by way of a charge and any person to whom such rights are assigned shall be entitled to the full benefit of all such rights of the lessor.

21. It is manifest from the terms and conditions of the lease agreement that the lease is for a fixed period of 84 months and as per clause 1.6 it is non-concealable by the lessee and/or by the lessor except on the default on the part of the lessee. Even in case of default

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and consequential termination of lease its is provided that the lessee shall pay the entire arrears of the lease as well the future instalment for the unexpired period of the lease term, therefore the lease agreement has been framed and constructed in such a way that the assessee recovers its entire cost along with the interest in equated monthly instalments. Even in the schedule to the lease agreement the period of 84 months is a fixed non-concealable period. As per clause 5 of the agreement the lessee is required to take out the insurance on the asset in question and also bear all the damages, loss and risk attached to the leased asset, therefore, it is agreement between the parties that all the risk and reward attach to the lease asset shall be born and enjoyed by the lessee. The so-called restrictions on the sale, creating charge, lien by the lessee are necessary being a security against the funds provided by the assessee to the lessee. Even otherwise in case of simple finance, the asset which is being financed is always kept as a security/mortgage with the bank to protect the interest of the bank till the repayment of the finance. Therefore, the restrictions provided in the lease agreement are only to secure the interest of the bank till the recovery of the full amount along with the interest. Some of the terms of the agreement appear to be only for sake of the conditions as to protect to the interest of the bank but the same could not be given effect in practical. For instance, in case of default if the assessee terminates the lease agreement in question then it is not possible for the assessee either to take the possession of the asset in question because of the nature of

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asset which could not be separated from the railway network or remove the asset from the place of its existence being part of the railway network. Further apart from the lessee the asset cannot be transferred or assigned to anybody else as it is not possible to use only a particular stretch of railway track without connecting or being a part of the entire network. Thus, the terms and conditions as heavily relied upon Ld. AR would not help the case of the assessee to establish that the asset in question could actually be taken in possession by the assessee. Therefore, the assessee cannot exercise the real and actual ownership over the asset keeping in view the facts and circumstances and nature of the asset in question. The Special Bench of this Tribunal in case of IndusInd Bank Ltd. (supra) by following the decision of Hon'ble Supreme Court in case of Asea Brown Boveri Ltd. Vs Industrial Finance Corporation of India (IFCI) 154 Taxman 512 as well decision in case of Association of Lease and Financing Service Company Vs Union of India (supra) has enumerated various features which make distinction between operating lease and finance lease in para 5.20 as under:

> *"5.20 In view of the fact that the Id. AR has lodged a strong claim to consider the present agreement as that of operating and not a finance lease, it is imperative to understand the distinction between the two as under :-*
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> *a. In the case of an operating lease, the lessor provides the asset for use for a certain period of time to the lessee for rent. On the expiry of such lease period, the lessor has to inevitably repossess the asset. On the other hand, a case of finance lease is in essence an arrangement for borrowing. The role of lessor is limited to that of financier only.*

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b. In operating lease, it is the lessor who bears the loss and obsolescence of the asset leased, whereas in &se of finance lease it is the lessee who always bears such loss.

c. In the case of an operating lease, the lessor remains the owner of the asset throughout the lease period and thereafter also, whereas in a finance lease it is the lessee who becomes the real owner. The lessor's title over the asset is only symbolic to serve as security for the rentals, which are nothing but the return of his investment with interest.

d. Operating lease is cancellable, whereas tinance lease is always non- cancellable. In a case of finance lease, the lessor is interested in lease rentals and not the asset.

e. In the case of an operating lease, substantial risks and rewards of ownership of the asset remain with the lessor, whereas in the case of finance lease these ab initio vest with the lessee.

f. In the case of an operating lease, the fixation of lease rental bear no symmetry with the economic life of the asset and the possibility of the asset reverting back to the lessor can never be ruled out. However in the case of a finance lease, the lease period is ordinarily equal to the economic life of the asset and lease rentals are fixed in such a way so as to recover the investment with interest during the lease peiod itself. The possibility of the asset reverting back to the lessor is never there.

g. In the case of an operating lease, the asset is ordinarily common use utility whereas in case of finance lease the asset is normally selected by the lessee himself so as to suit his particular requirements

h. Normally an operating lease is non payout whereas a finance lease is full payout. Full payout lease means that the lessor recovers the full value of the leased asset plus the finance cost over the period of first lease. Full payout lease is peculiar to finance lease. On the other hand, a non payout lease is one where the lessor is not interested in recovering his principal investment plus interest from one lessee only because he may lease out the same asset over and over again. Though no single lease recovers the principal amount plus interest component of the lessor but all the leases taken together make it a full payout. That is why the non payout lease is peculiar to operating lease."

22. The Special Bench then analysed the various factors of distinction between operating lease and finance lease in para 5.21-5.23 as under:

> *"5.21 From the above points of distinction between operating lease and finance lease, the salient features of operating lease have become glaring. Now let us ascertain as to whether the above clauses, claimed by the id. AR as amply proving it to be a case of operating lease agreement, do in fact prove it so. IA an earlier para we have observed that this lease agreement fully satisfies all the characteristics of finance lease. The position which, therefore, emerges is that some clauses of the agreement tend to give impression of this being an operating lease whereas the others largely indicate it to be a finance lease. How to resolve the conflict? In order to decide as to whether the instant lease agreement be characterized as operating or finance lease, we need to take shelter of the doctrine of pith and substance. This rule stipulates that if there is some overlapping in the contents of the clauses of an agreement, then it becomes necessary to examine the pith and substance of the agreement. It can be done by seeing as to whether it predominantly satisfies the conditions of operating lease or finance lease. The crux is that we should find out the substance of the agreement.*
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> *5.22 We have highlighted the broad features of operating lease such as, the lease is cancellable; the lessor provides services, maintenance and insurance; total of all the lease payments by the lessee does not provide for the recovery of the investment with interest. Further the operating lease generally covers the asset which can be needed by different users so that the lessor may make available to one lessee after another.*
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> *5.23 Now let us try to find out the substance of the extant lease agreement as to whether it predominantly satisfies the conditions of an operating lease. On reading the lease agreement as a whole, we find that except for naming the lessor as owner at some places in the agreement and inserting certain cosmetic clauses to give the colour of operating lease, there is nothing in substance which satisfies the inherent requisites of operating lease. It can be observed that the lease is not cancellable prior to the expiry period of seven years. The cost of repairs and insurance is to be borne by the lessee. Sum total of the lease rentals by the lessee recoups the amount invested by the lessor plus interest. There is a clause that after the expiry of seven years period, the boiler will be sold to the lessee at predetermined value. It is the lessee who has to bear the loss*

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due to obsolescence. All the risks and rewards vest with the lessee. When we consider the cumulative effect of all the factors for and against the operating lease, it can be easily found out that if one has to choose between the finance lease and operating lease, there can be no difficulty in reaching the irresistible conclusion that it is a case of finance lease agreement. In pith and substance this agreement is nothing but a finance lease."

23. In the case in hand the lease is for fix period of 84 months during which the assessee would recover the full value of lease asset with finance cost being interest as agreed between the parties. All the costs regarding loss and obsolences, repairs, maintenance, insurance etc. are to be born by the lessee. Thus the risk and reward of ownership of the asset vested with the lessee and therefore for all practical purposes the ownership of the asset was vested with the lessee and not with the assessee. The terms of the agreement are designed in a manner so that in any eventuality the assessee would recover the investment (cost of asset) with interest and not the asset in question. As discussed in the foregoing paras the title over the asset as per the lease agreement is only for securing the financial interest of the assessee and not intended to really take the asset in its possession on the expiry of lease term or on the termination of the lease agreement. Therefore all the features and attributes of finance lease as discussed by the Special Bench in case of IndusInd Bank do exist in the case of the assessee.

24. Apart from the terms and conditions as stipulated in the lease agreement one more important aspect which is very relevant in

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deciding the issue is that as per the Banking Regulation Act, 1949, a Banking company is not permitted to engage in the activity of leasing of asset. Section 6 of the Banking Regulation Act specifies various business in which a banking company may engage as under:

> *"6. Forms of business in which banking companies may engage. — (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:—*
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> *(a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;*
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> *(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a 1[managing agent or secretary and treasurer] of a company;*
>
> *(c) contracting for public and private loans and negotiating and issuing the same;*
>
> *(d) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or*

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association and the lending of money for the purpose of any such issue;

(e) carrying on and transacting every kind of guarantee and indemnity business;

(f) managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(h) undertaking and executing trusts;

(i) undertaking the administration of estates as executor, trustee or otherwise;

(j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;

(k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(m) acquiring and undertaking the whole or an part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which

it is lawful for a banking company to engage.

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(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).”

25. As it is clear from the sub-section 2 that no banking company shall engaged in any form of business other than those referred in sub-section 1 of section 6. However, as per circular dated 19.2.1994 the Reserve Bank of India has allowed the banking companies to undertake the activities of equipment leasing but the same should be treated on par with the loan and advances. Therefore, the activity of equipment leasing permitted by the RBI vide said circular is only in the nature of finance lease. The said circular has also been considered and discussed by the Special Bench in para 5.24-5.27 as under:

“5.24 Our view is fortified by the RBI Circular No. FSCBC 18/24-01-001/93-94 dated 14.02.1994 which inter alia deals with equipment leasing. It is needless to say that this circular is binding on the assessee bank. Para 1(i) of it provides that the activities like equipment leasing, hire purchase and factoring services should be undertaken only by certain selected branches of the Bank. Para 1 (ii) which is relevant for our purpose reads as under:

“(ii) These activities should be treated on par with loans and advances and should accordingly be given risk weight of 100 per cent for calculation of capital to risk asset ratio. Further, the extant guidelines on income recognition, asset classification, asset classification and provisioning would also be applicable to them.”

Paras 1(v) and (vi) which are also relevant read as under:-

“(v) Banks undertaking equipment leasing departmentally should follow prudential accounting standards. The entire lease rental should not be taken to the bank’s income account. it would be recognized that lease rentals comprise two elements a finance charge (i.e. interest charge) and a charge towards recovery of the cost of the asset. The interest component alone should be taken to the income account. The component representing the

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replacement cost of the asset should be carried to the balance sheet in the form of a provision for depreciation.

(vi) As a prudent measure, full depreciation should be provided for during the primary lease period of the asset. The period of lease should not normally exceed five years. In exceptional cases, lease period not exceeding 7 years may be fixed in respect of lease transactions covering assets of Rs. 1 crore and above, as the recovery of cost may not be possible in a period of 5 years."

5.25 On perusal of the above paras of the above circular it becomes patent that the equipment leasing activity should be treated by banks "on par with loans and advances". The further contents of para 1 (ii) which provides that the guidelines on income recognition, asset classification and provisioning would also be applicable to them, make it clear that the activity of equipment leasing should be considered as an act of advancing loans and advances. It is so for the reason that the guidelines on income recognition and asset classification etc. as referred to herein, are applicable to loans and advances. Further para 1 (v) provides that the entire lease rental should not be taken to the bank's income account. Only the interest component being the finance charge should be taken to the income account and the second component being charge towards recovery of the cost representing the replacement cost of the asset should be carried to the balance sheet in the form of a provision for depreciation. Para 1 (vi) states that as a prudent measure full depreciation should be provided for during the preliminary lease period of the asset. It is .impermissible to read para 1 (vi) of the Circular in isolation to support the contention that the RBI permits claiming depreciation on the leased assets. It is in fact not so because the Circular as a whole treats the activity of equipment leasing as that of loans and advances and the reference to full depreciation in para 1 (vi) should be read in juxtaposition to para 1(v) which talks of the second component of the lease rental being the replacement cost of the asset. When we read this Circular in entirety, there remains no doubt that the activity of equipment leasing has to be considered by a bank on par with the loans and advances.

5.26 In view of the above circular we do not find any scope for argument that the instant lease agreement be treated as that of operating lease. Since the loans and advances encompass finance lease, naturally such type of equipment leasing cannot be given any name other than the finance lease. Here it is relevant to note that the assessee claimed depreciation on leased asset and also showed full amount of lease rental as income in contravention of para 1(v) of the afore noted RBI

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Circular. When the Assessing Officer concluded that the instant lease cannot be characterized as finance lease, the assessee requested the A.O. that in case the depreciation on the leased asset to assessee is not to be granted by treating it as a loan transaction, then the capital recovery embedded in the lease rental should not be charged to tax. This issue has been discussed in para 2.30 of the assessment order. Acceding to the assessee's request, the Assessing Officer excluded the portion of capital recoveries from the rental income. Thus it can be observed that the action of the A.O. is fully in consonance with the RBI Circular which states that in case of equipment leasing the entire lease rental should not be treated as bank's income but only that component of such lease rental which represents finance charges i.e. interest should be recognized as income alone.

5.27 We, therefore, approve the view taken by the authorities below in coming to the conclusion that the lease agreement under consideration is that of finance lease and not operating lease."

26. As it is clear from the circular that the banks undertaking equipment leasing departmentally should follow prudential accounting system and only the interest charge component should be recognised as income and the recovery of cost of asset should be carried to balance sheet on the form of provision of depreciation. Therefore under the circular the transaction of equipment lease is treated at par with the loan transaction and accordingly only the interest component of the receipt is recognised as income. Since it is not permitted to recognise the entire receipt being lease rentals as income the assessee has also recognised only interest component of the receipt of the lease rental as income in the profit and loss account and the balance which represents the capital component is taken to the balance sheet. Thus, in the books of account, the assessee has treated the transaction in question as finance lease and not as an operating lease because the banks are

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permitted only to carry out the transaction of finance lease of equipments.

27. It is pertinent to note that in case of ICDS Ltd. (supra) it was not a lease by a bank but the assessee in the said case is a non-banking financial institution and one of the business of the assessee was leasing out the vehicles as the facts recorded by the Hon'ble Supreme Court in para 2 of the said decision as under:

> *"2. The assessee is a public limited company, classified by the Reserve Bank of India (RBI) as a non-banking finance company. It is engaged in the business of hire purchase, leasing and real estate etc. The vehicles, on which depreciation was claimed, are stated to have been purchased by the assessee against direct payment to the manufacturers. The assessee, as a part of its business, leased out these vehicles to its customers and thereafter, had no physical affiliation with the vehicles. In fact, lessees were registered as the owners of the vehicles, in the certificate of registration issued under the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act")."*

28. Therefore the Hon'ble Supreme Court has decided the issue in the case of non-banking financial company which is engage in the business of leasing whereas in the case of bank it is not permitted under the Banking Regulation Act to engage in the business of leasing of equipments. Following the decision of Special Bench of this Tribunal in case of IndusInd Bank Ltd., we hold that the transaction in question is finance lease and not operating lease. Accordingly, we uphold the orders of the authorities below qua this issue.

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29. Ground No. 9 is regarding interest credited to “Interest Suspense Account” taxed in earlier years now written of. During the year the assessee has recovered a sum of ₹ 7,02,21,455/- out of the interest credited to Interest Suspense Account in the earlier year. The Assessing Officer taxed the interest credited to the suspense account rejecting the claim of the assessee in the earlier years. Since the issue was subjudice therefore, the authorities below assessed the interest recovered to keep the issue alive.

30. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. At the outset we note that in the earlier years the issue of taxing the amount credited to Interest Suspense Account has been decided by this Tribunal by holding that such interest is not assessable to tax. Therefore, the amount recovered during the year out of the interests credited to the suspense account in the earlier year would be taxable. Accordingly, we reject this ground of the assessee being become infructuous in view of the fact that the claim of the assessee in respect of interest credited to the Interest Suspense Account in the earlier year was allowed by this Tribunal.

31. Ground No. 10 is regarding interest on securities due to difference between accrual and due method. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. We note that an identical issue has been considered and decided by this Tribunal in assessee’s own case for the assessment year 1991-92. Further for the

assessment year 1995-96 again the Tribunal has considered and decided this issue in para 16 & 17 as under:

"16. As regards ground No. 8 relating to the addition of ₹ 2,45,42,24,967/- made by the A.O. and confirmed by the ld. CIT(A) on account of interest on securities holding the same to be taxable on accrual basis instead of due basis, it is observed that this issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for earlier years vide its order dated 19.05.2008 (supra) wherein a similar addition was deleted by the Tribunal for the following reasons given in Para 20:

"We have considered the submissions made by both sides, material on record and orders of authorities below. We find that the Tribunal in the case of Union Bank of India (supra) after going through various facts and various judicial decisions held as under:

"In the course of the arguments, the ld. Counsel for the assessee had made a submission that though in the profit & loss account the Interest on Govt. securities are credited on day to day basis, for purposes of computation of total income under the Income Tax Act, the credit entries are deleted from the net profit and are substituted by the interest that has become due during the year on specified dates and offered to tax. It was pointed out that the interest that is offered to tax in the return of income has also been assessed to tax by the A.O. In order to verify the submission, we directed the assessee to furnish the relevant statements to us. These were filed along with a covering letter which was taken on record. We find that in the profit & loss account the year ended 31.12.1987, interest on Govt. securities amounting to ₹ 138,06,30,075/-has been included in the credit side. However, in the computation of total income for income tax purposes, the interest has been reduced from the net profit and interest of ₹ 138,06,30,075/- has been included in the coupon date basis. In the assessment order for the A.Y. 1988-89, a copy of which was also filed before us. The Assessing Officer has accepted the above computation made by the assessee.

With regard to the contention that the assessee cannot set up a claim in the return of income which is altogether different from the manner in which entries are made in its accounts, we may notice the judgment of the

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Supreme Court in the case of United Commercial Bank in 240 ITR 355(SC). While reversing the judgment of the Calcutta High Court reported in 200 ITR 68 (Cal), wherein it was held that the assessee cannot prepare the computation of its income fro income tax purposes in a manner different form the method under which it keeps accounts. It was held by the Supreme court that preparation of the balance sheet in accordance with the statutory provisions of the banking Regulation Act would not disentitle the assessee in submitting the income tax return on the real taxable income in accordance with a method of accounting adopted by the assessee consistently and regularly. For the purpose on income tax, what is to be taxed is the real income and in assessing the real income, the assessee cannot be bound by the manner in which its balance sheet is prepared under a particular statute. Thus, merely because in the balance sheet or the profit & loss account, the assessee bank before us has taken credit for the interest on Govt. securities on day today basis, it cannot be prevented form urging in the return that such interest accrues not on day to day basis but only on the specified coupon dates and that this is the correct legal position on the basis of which its income should be computed. Therefore, we reject the contention of the ld. (D.R.).

For the above reasons, we accept the assessee's claim and hold that the interest on Govt. securities cannot be assessed "de die in diem". We direct the A.O. to assess the interest on the basis of the coupon dates. Ground No. 2 is allowed."

Similarly, the Tribunal in the case of Housing Development and Finance Corporation (supra), following the aforesaid decision of the Tribunal, has also held that Section 145 of the Act could not override the provisions of Section 5 and, therefore, no person could be assessed unless the income accrued to him and in the cases of Securities, interest accrued to the assessee on specified dates and not on day today basis as the assessee has no right to receive the income before fixed date, hence, interest was taxable on the due basis only. In this view of the matter, we accept this ground of the assessee."

17. Moreover, as rightly submitted by the learned counsel for the assessee, the decision of Mumbai bench of Income Tax Appellate Tribunal in the case of Dy. CIT Vs Housing Development & Finance Corporation Ltd. 98 ITD 319 and that of the Hon'ble Kerala High Court in the case of C.I.T Vs Federal bank Ltd., 301 ITR 188 also support the assessee's case on this

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issue. Respectfully following these judicial pronouncements, we delete the addition made by the A.O. and confirmed by the ld. CIT(A) on this issue and allow ground No. 8 of assessee's appeal."

Following the earlier order of this Tribunal, we decide this issue in favour of the assessee and against the revenue.

32. Ground No. 11 is regarding provision for doubtful debts. The assessee has claimed deduction for provision for bad and doubtful debts u/s 36(1)(viia) amounting to ₹ 5,63,32,54,326/-. The said provision was stated to be made on the basis of RBI guidelines. The AO allowed a sum of ₹ 5,36,21,32,507/- u/s 36(1)(viia) of the Income Tax Act. On appeal, the CIT(A) has confirmed the action of the AO and held that the entire amount cannot be allowed as deduction merely on the basis of RBI guidelines. Before us the Ld. AR of the assessee has relied upon the decision of Chennai Bench of this Tribunal in case of Overseas Sanmar Financial Ltd. Vs JCIT 86 ITD 602. On the other hand, the Ld. DR has relied upon the order of the authorities below and submitted that the provisions of statute will prevail over the RBI guidelines for the purpose of deduction u/s 36(1)(viia).

33. We have considered the rival submissions as well as relevant material on record. There is no dispute regarding the claim allowed by the AO is proper as per the provisions of section 36(1)(viia). When the allowable claim has been accepted by the AO under the provision of section 36(1)(viia) then merely the provision made on the basis of RBI

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guidelines does not become allowable for deduction in contravention of the provision of section 36(1)(viia). It is pertinent to note that when the claim of deduction specifically provided u/s 36(1)(viia) then the same cannot be allowed by applying any other provision. Accordingly, we do not find any merit or substance in the claim of the assessee. Hence dismissed.

34. The assessee has also raised various additional grounds vide letter dated 3.9.2012 as under:

> *"The appellant objects to the order of the Commissioner of Income-tax (Appeals) II, Mumbai [C1T(A)] dated 22 July 2002 for the aforesaid assessment year on the following among other grounds:*
>
> *1. The appellant submits that it is entitled to a deduction for write off of bad debts under section 36(1)(vii) as per the judgment of the Supreme Court in the case of Vijaya Bank Limited (323 ITR 166).*
>
> *It is submitted that necessary directions may be given to the Assessing Officer to allow the claim of write-off bad debts.*
>
> *2. The appellant submits that the recovery of bad debts written off should not be liable to tax under section 41(4) as the appellant had not claimed a deduction under section 36(1)(vii), as held by the Bangalore Tribunal in the case of State Bank of Mysore (ITA No. 647/Bang 2008).*
>
> *It is submitted that necessary directions may be given to the Assessing Officer to not tax the recovery of bad debts where deduction under section 36(1)(vii) has not been claimed.*
>
> *3. The appellant submits that the income earned by the foreign branches of the appellant should not be liable to tax in India in terms of the relevant tax treaties in light of various judicial pronouncements.*
>
> *It is submitted that necessary directions may be given to the Assessing Officer to not tax income of foreign branches based in countries with which India has a tax treaty.*

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4. The learned CIT(A) erred in upholding the action of the Assessing Officer in disallowing a sum of Rs. 2,23,86,418 towards depreciation on matured securities.

5. The learned CIT(A) erred in upholding the action of the Assessing Officer in not allowing a deduction of Rs. 32,64,283 claimed by the appellant on account of loss on revaluation of permanent category investments."

35. We have heard the Ld. AR as well as Ld. DR on the admissibility of the additional ground raised by the assessee. The Ld. DR has objected on the ground that the assessee has not obtained the approval of CoD for filing the appeal in respect of the additional ground. On the other hand, the Ld. AR has submitted that in view of the decision of Hon'ble Supreme Court in case of Electronics Corporation of India Ltd. Vs Union of India, the direction for permission of CoD given in the earlier decisions has been recalled by the Hon'ble Supreme Court and consequently there is no requirement of obtaining permission of the CoD for filing appeal.

36. Having considered the rival submissions we find that in view of the decision of Hon'ble Supreme Court in case of Electronics Corporation of India Ltd. Vs Union of India (supra) dated 17.2.2011, the requirement of permission of Committee on Disputes (CoD) has been recalled by the Hon'ble Supreme Court and accordingly there is no bar for filing an appeal by the Government Department or the public sector undertakings before this Tribunal. Since the additional ground No. 1-3 involved pure legal issue and additional ground No. 4-5 are not fresh ground but already raised before the CIT(A), therefore in the interest of

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justice we admit the additional grounds raised by the assessee for adjudication.

37. Additional Ground No. 1-3 are raised first time by the assessee and involves legal issue, therefore as prayer by the assessee the same are remitted to the record of the Assessing Officer for examination and adjudication as per law after giving a opportunity of hearing to the assessee.

38. Additional Ground No. 4 is regarding depreciation on matured securities. The assessee has claimed a sum of ₹ 2,23,86,418/- towards depreciation of investments. The AO disallowed the claim of the assessee and the CIT(A) has confirmed the action of the AO. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The CIT(A) has decided the issue in para 9 as under:

> *"9. The ninth effective ground of appeal is against the disallowance of Rs.2,23,86,418/- being the provision for diminution in the value of securities which had matured and become due for redemption during the year but were not redeemed. It was contended before the A.O. that in some cases, the companies or the State Governments who had issued the relevant securities were not able to pay the amount due on redemption. The appellant treats these securities as non-performing assets and a provision is made at a certain percentage for diminution in their value as in the case of other non-performing assets. There may be some delay on the part of the companies or the State Governments in paying the redemption amount. But, whenever the payment would be made it cannot be expected to be less than the face value. On the date of maturity, the whole of the amount of redemption money becomes due under the mercantile system of accounting followed by the appellant unless a portion of this amount is written off as bad debt. It is a real income and hence has to be*

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taxed as such under the mercantile system followed by the appellant. Reliance in this regard is placed on ***State Bank of Travancore vs. CIT 158 ITR 102, 155 (SC)*** *which was followed in* ***Western India Oil Distributing Co. Ltd. Vs. CIT 206 ITR 359 (Bom).*** *It was held in this decision that the concept of real income should not be so read as to defeat the provisions of the Act. Extension of the concept of real income to a field so as to negate accrual after the amount had become receivable is contrary to the postulates of the Act, the Supreme Court held (p. 146 of 158 ITR). Moreover, as held in the case of* ***Navin R. Karnani vs. CIT 185 ITR 408 (Bom)****, it was not possible to waive any amount of income which had accrued under the mercantile system of accounting on the ground of diminished hope of recovery. Furthermore, any liability de futuro is not an ascertained liability in praesenti and cannot be allowed as deduction under the Income-tax Act as held in the case of* ***Indian Molasses Co. Pvt. Ltd. vs. CIT 37 ITR 66 (SC)*** *and* ***Standard Mills Co. Ltd. Vs.CIT 229 ITR 366(Bom)****. Hence, no such ad hoc deduction could be allowed against the amount receivable on redemption of securities which had matured and become due for payment before the close of the accounting year. This ground therefore fails."*

39. The findings of the CIT(A) is based the on the various decisions of the Hon'ble Supreme Court as well Jurisdiction High Court. No contrary decisions has been brought before us accordingly we do not find any error or illegality in the impugned order of CIT(A) qua this issue. The same is upheld.

40. Additional Ground No. 5 is regarding loss of revaluation of permanent category investment. We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. At the outset we note that an identical issue has been considered and decided by this Tribunal is assessee's own case for the assessment year 1995-96 in para 10 as under:

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"10. After considering the rival submissions and perusing the relevant records, we find it difficult to agree with the stand of the Revenue Authorities that the loss claimed by the assessee on revaluation of the concerned investment cannot be allowed while computing the income of the assessee from banking business. As held by the Hon'ble Kerala High Court in the case of Malabar Co-operative Central Bank Ltd. (supra), the banking institution as a part of business activity will have to have ready resources to meet its liability the extent of which could never be foreseen. It was held that even though the legislature has made it obligatory for the banking institutions to maintain certain percentage of its assets in the form of securities at any given day taking the interest of the public into consideration, this does not detract from the proposition that by so holding the securities, the bank is carrying on its business and securities so held are stock in trade. In the case of Bihar State Co-operative Bank Ltd. (supra), it was held by the Hon'ble Supreme Court that it is a normal mode of carrying on banking business to invest moneys in a manner that they are readily available. It was held that howsoever a security capital is employed, it is a part of normal course of business of a bank and the money which was not lend to the borrower but was invested in the form of deposits in another bank cannot be said to have become ceased to be part of stock in trade of bank. Keeping in view the ratio of these judicial pronouncements, we hold that the investment in question very much represented stock in trade of the baking business of the assessee and the loss on the revaluation thereof is allowable as deduction. Accordingly, the impugned order of the ld. CIT(A) on this issue is set aside and the A.O. is directed to allow the deduction claimed by the assessee on account of loss on revaluation of investment. Ground No. 3 of assessee's appeal is accordingly allowed."

Following the earlier order of this Tribunal, we decide this issue in favour of the assessee against the revenue.

41. In the result, the appeal of the assessee is partly allowed.

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Order pronounced in the open Court on 26th day of July 2013

आदेश की घोषणा खुले न्यायालय में दिनांकः 26th जुलाई को की गई ।

Sd/-	Sd/-
(एन. के. बिलैय्या)	(विजयपाल राव)
लेखा सदस्य	न्यायिक सदस्य
(N K BILLAIYA)	**(VIJAY PAL RAO)**
Accountant Member	Judicial Member

Place: Mumbai : Dated: 26th July 2013
Subodh

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai