IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 25 OF 2000

Bajaj Auto Finance Ltd. .. Applicant
v/s.
Commissioner of Income Tax, Pune .. Respondent

Ms. Vasanti Patel for the applicant
Mr. Charanjeet Chanderpal a/w Ms. Namita Shirke for the respondent

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA J.J.

Judgment Reserved on : 12th February, 2018.
Judgment Pronounced on : 23rd February, 2018.

ORAL JUDGMENT : (Per M.S. Sanklecha, J.)

1. This Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the applicant assessee seeks our opinion on the following question of law:-

> *(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that the Assessing Officer was justified in making an adjustment u/s 143(1)(a) relating to disallowance of the claim for bad debts under Section 36(1)(viii) in respect of a sum of Rs.1,69,37,818/- representing "provision for doubtful overdue installments under hire purchase finance agreements"?*

2. This Reference relates to Assessment Year 1993-94. The facts

leading tot he present Reference as set out in the Statement of Case are as under :-

> *"2. The assessee company had debited in its profit and loss account a sum of Rs.1,69,37,818/- representing "provision for doubtful overdue installments under Hire Purchase Finance Agreements". In its return of income, the assessee claimed the said provision as bad debts u/s 36(1)(vii) of the Income Tax Act. In the Notes on computation of total income submitted with the return, it was clarified that the said amount was claimed as a deduction, relying on the decision of the Gujarat High Court in the case of Vithaldas H.Dhanjibhai Bardanwala (130 ITR 95). The Assessing Officer disallowed the claim u/s 141(1)(a) on the ground that the amount represented mere provision for doubtful debts and, as such, could not be treated as bad debts. The assessee filed an application u/s 154 for deletion of the adjustment. It was contended before the Assessing Officer that the adjustment could not be made in respect of a provision for doubtful installments, as its allowability was a debatable issue. The Assessing Officer rejected the application u/s 154.*
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> *3. It was contended before the learned C.I.T.(A) that since the "provision for doubtful overdue installments under Hire Purchase Agreement" had been debited to the profit and loss account, the assessee should be treated to have satisfied the conditions laid down u/s 36(1)(vii) read with Sec.36(2). In this regard, reliance was placed on the decision in the case of Vithaldas H. Dhanjibhai Bardanwala V. Commissioner of*

Income Tax, (130 ITR 95 – Guj.) and Industrial Credit & Investment Corporation of India Ltd. V. IAG (32 ITD 315 – Bom.Trib). It was further contended that since the courts have held that once the condition for 'writing off' is satisfied and the concerned amount has been debited to the profit and loss account and credited to Bad Debt Reserve account, it was not necessary to actually write off the concerned bad debt in the ledger account of the concerned parties. In view of this, the question whether "provision for overdue installments" was an allowable deduction or not was a debatable issue and accordingly could not be made the subject matter of adjustment u/s 143(1)(a) of the Act. According to the assessee, since the Assessing Officer was not competent to examine the claim of deduction of 'provision' without conducting further enquiries in the matter, which was permissible only after issuing a notice u/s 143(2), he was not competent to issue intimation of adjustment and reject the assessee's prayer made for rectification u/s 154.

4. Before the Tribunal, the same pleas were reiterated as had been made in the first appeal. Further reliance was placed upon the decision of the Bombay High Court in the case of Khatau Junkar Ltd. V. K.S. Pathania (196 ITR 55), decision of the Delhi High Court in S.R.F. Charitable Trust Vs. Union of India (193 ITR 95) and the decision of the Bombay High Court in Bank of America N.T. & S.A. Vs. Dy.CIT (200 ITR 739)

5. As against the above, it was submitted by the learned departmental representative that the assessee's claim of deduction in respect of "provision for doubtful overdue

installments under Hire Purchase Finance Agreements" was prima facie inadmissible on the basis of the information available in the return, accounts and documents within the meaning of clause (iii) of first proviso to claim (a) of sub-sec. (1) of sec. 143 and, therefore, the Assessing Officer was fully justified in issuing an intimation of adjustment. The assessee in fact had made a separate claim of deduction for an amount of Rs.47,42,762/- in respect of 'bad debts'. This claim of bad debts appeared separately immediately after the claim of 'provision for doubtful overdue installments under Hire Purchase Finance Agreements" in Schedule 10 of the assessee's accounts for the year. Thus, according to its own showing of the assessee, the claim of deduction of Rs.1,69,37,818/- on account of "provision for doubtful overdue installments under Hire Purchase Finance Agreements" was a distinct and separate item of deduction and was not treated as equivalent to a claim for bad debts. Elaborating his discussion, the learned departmental representative submitted that, firstly, the "provision for doubtful overdue installments" could not validly be held to be write off of irrevocable debts so as to be treated as bad debt. Secondly, this claim was not made with reference to any specific debts which were perceived to be bad debt. Rather, it was a provision of an ad-hoc nature and was part of the annual exercise which the assessee made in all the preceding years and the subsequent years. With a view to buttress his argument, the learned departmental representative referred to the annual reports and accounts of the assessee for the immediately preceding and subsequent years. In the

accounts for all these years, the claim of deduction on account of "provision for doubtful overdue installments under Hire Purchase Finance Agreements" had been reversed in the immediately succeeding year to the last rupee. In all these years, a separate claim of deduction had always been made in respect of the debts which were perceived as 'bad debts'. According to the learned departmental representative, debiting the profit and loss account with the total amount of overdue installments under Hire Purchase Agreements and treating them collectively as doubtful debts and making provision for them could not be held to be equivalent to write off irrevocable debts as bad debts. In this connection, the learned departmental representative referred to the following decisions:-

(1) Kantilal Chimanlal Shah V. CIT(26 ITR 303 Bom).
(2) Sidhramappa Andannappa Manvi V.CIT(21 ITR 333 Bom.)
(3) Jethabhai Hirji & Jethabhai Ramdas V.CIT(120 ITR 792.Bom.)
(4) Jadhavji Narsidas & Co. V. CIT(47 ITR 411-Bom.)
(5) CIT V. Pranlal Kesurdas (49 ITR 931 – Bom.)

6. The Tribunal, after consideration of all the relevant facts and circumstances and the relevant provisions of law and the case law cited before it, came to be conclusion that on the basis of the return of income itself and the accounts and documents accompanying it, the claim of "provision for doubtful overdue installments under Hire Purchase Finance Agreements" was clearly distinct and separate from one of claim of bad debt and

was prima facie inadmissible on its own tenor. The Assessing Officer was, therefore, justified in issuing an intimation of adjustment and rejecting the assessee's application u/s 154. For the same reason, the learned CIT(A) was justified in dismissing the assessee's appeal. The assessee's appeal before the Tribunal was accordingly dismissed."

6. Ms. Patel, learned Counsel appearing in support of the application submits as under :-

(a) relief / deduction of provision of bad debt claimed in the return of income cannot be disallowed by way of intimation under Section 143(1)(a) of the Act when the issue *prima facie* gives rise to a debatable issue;

(b) the claim for deduction of provision for bad debts under Section 36(1)(vii) of the Act was made on basis of the decision of Gujarat High Court in the case of *Vithaldas H.Dhanjibhai Bardanwala* Vs. *Commissioner of Income Tax, 130 ITR 95* as is evident from note in the return. Therefore, disallowance of a claim which has been allowed by High Court, would at the very least be a debatable issue;

(c) the words "prima facie inadmissible" found in clause (iii) of Section 143(1)(a) of the Act, has been construed by this Court in Khatau Junkar Ltd. Vs. K.S. Pathania, 196 ITR 157 to mean not available on the face of it i.e. where no further inquiry is necessary to

hold so. However, when there is a different interpretation accepted by Court, then, adjustment under Section 143(1)(a) of the Act is not permissible. It would at the very least require giving an opportunity to the assessee to support his claim before disallowing the same.

(d) Instruction No.1814 dated 4th April, 2009 issued by the Central Board of Direct Taxes (CBDT) explains the scope of the word "prima facie disallowance" under Section 143(1)(a) of the Act as being different from a debatable issue. It clarifies that a debatable issue is one where a claim made by an assessee on the basis of a decision of a Court / Tribunal. A debatable claim cannot be disallowed by an intimation under Section 143(1)(a) of the Act; and

(e) the decision of the Apex Court in Vijaya Bank Vs. Commissioner of Income Tax, 323 ITR 166, also supports the view that at the relevant time, the issue of allowing provision for bad debts as a deduction under Section 36(1)(vii) of the Act is an debatable issue. Therefore, could not be dis-allowed by way of intimation under Section 143(1)(a) of the Act.

7. On the other hand, Mr. Chanderpal, learned Counsel appearing for the Revenue tendered written submissions on behalf of the Revenue making the following submissions :-

(a) That out of 8 issues raised by the Tribunal, only 3 major issues can be inferred from the said 8 questions which are as under :-

> *"(a) Allowance of a provision for bad and doubtful debts.*
>
> *(b) With regard to the above, the provisioning for doubtful debts on account of irrecoverably of outstanding interest income on loans being doubtful of recovery.*
>
> *(c) The writing back of amounts recovered later"; and*

(b) There is no place for equity in fiscal laws. Therefore, mere provision would not make it bad debt as a provision lacks certainty. For the purposes of write off under Section 36(1)(vii) of the Act, there must be certainty of debt becoming irrecoverable. Thus, it is submitted that the view of the Tribunal is correct and the question as proposed should be answered in favour of the Revenue.

8. Before dealing with the rival contentions, it would be necessary to reproduce Section 143(1)(a) of the Act, at the relevant time which read as under :-

> *"143(1)(a) Where a return has been made under Section 139, or in response to a notice under sub-section (1) of section 142, –*
>
> *(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be*

deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly ; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee:

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :
(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;
(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed:
(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed ; ….

Provided further that where adjustments are made under the first proviso, an intimation shall be sent to the assessee, notwithstanding that no tax or interest is found due from him after making the said adjustment.

Provided ……"

9. The written submission as filed by the Revenue ignores the fact that only one question has been referred to us for consideration. The issue referred to us is in respect of applicability of Section 143(1)(a) of the Act to disallow a claim for provision for bad debt by intimation i.e. without calling upon the assessee to explain its claim. On this issue, the written submission proceeds on the basis that a plain reading of Section 36(1)(vii) of the Act would only mean an assured and / or certain irrecoverability of debt. Therefore, it is submitted that the

intimation under Section 143(1)(a) of the Act cannot in the present facts be faulted. In fact, the written submissions states,

> *"Litera Leges, certainty concept and on the concept that there is no equity on fiscal law irrespective of any judgment of any Hon'ble Court or Tribunal a go-by cannot be given to the aforesaid interpretations given in this written submission".*

The above submission that decision of the Court and / or Tribunal interpreting a provision is to be ignored by the Assessing Officer, if accepted will ring the death knell of Rule of law in the country. The Assessing Officer is bound by the views of the Court. The above submission ignores the hierarchal system of jurisprudence in our country.

10. The issue that arises for our consideration is whether an adjustment by intimation under Section 143(1)(a) of the Act can be made where the issue which arises for consideration is a debatable issue. In the present facts, the computation of total income submitted along with return indicates that claim for bad debts has been made by relying upon the decision of Gujarat High Court in the case of *Vithaldas H.Dhanjibhai Bardanwala* (supra)

11. However, the Assessing Officer completely ignored the note made

by the applicant in its computation of return, indicating that the basis of claim for bad debts is the decision in Gujarat High Court in *Vithaldas H.Dhanjibhai Bardanwala* (surpa). In the above case, even a provision debited to the profit and loss account was allowed as bad debts, where corresponding credit entires are posted in the bad debts reserve account. It held that is was not necessary to post credit entries in the ledger account of the concerned parties. It was on the basis of the aforesaid decision of the Gujarat High Court that the claim in respect of the provision for bad debts was made by the applicant assessee. Once, reliance is placed upon a decision of a Court and / or Tribunal to make a claim, then even if the Assessing Officer has a different view and does not accept the view, yet the claim itself becomes debatable. This is so laid down in Instruction No.1814 dated 4th April, 1989 issued by the CBDT in respect of the scope of prima facie disallowance under Section 143(1)(a) of the Act. In fact, paragraph no.9 thereof provides that where a claim for deduction has been made on the basis of a decision of a High Court / Tribunal, then, even if there is contrary view expressed by another High Court and / or Tribunal or an appellate Authority, the issue itself becomes debatable. In such cases, no adjustment under Section 143(1)(a) of the Act is permissible. Thus, disallowance of a claim can be made only after hearing the assessee who has made the

claim.

12. Further, our Court in *Khatau Junkar Ltd. (supra)* had while dealing with the word "prima facie inadmissible" in clause (iii) of Section 143(1)(a) of the Act has held that the word "prima facie" means on the face of it the claim is not admissible. It means the claim does not require any further inquiry before disallowing the claim. The Court observed that where a claim has been made which requires further inquiry, it cannot be disallowed without hearing the parties and / or giving the party an opportunity to submit proof in support of its claim. In the absence of Section 143(1)(a) of the Act being read in the above manner i.e. debatable issues cannot be adjusted by way of intimation under Section 143(1)(a) of the Act, would lead to arbitrary and unreasonable intimations being issued leading to chaos.

13. In the present facts, it is undisputed that the decision of Gujarat High Court was referred to in the computation of income. Thus, the Assessing Officer could not have disallowed the claim on a *prima facie* view that the same is inadmissible. In fact, there can be no dispute that even according to the Assessing Officer, the issue was debatable. This is evident from the fact when the applicant assessee had filed an

application under section 154 of the Act for deletion of the adjustment made of provision of bad debts by intimation under Section 143(1)(a) of the Act, it was disallowed on the ground that it is a debatable issue. This itself would indicate that whether the claim of a provision for bad debts is deductible under Section 36(1)(vii) of the Act or not is debatable. Further, the above claim for deductions as made by the applicant was by following the decision of the Gujarat High Court in *Vithaldas H.Dhanjibhai Bardanwala* (Supra). Thus, a debatable issue. Therefore, the same could not have been disallowed by way of an intimation under section 143(1)(a) of the Act.

14. We are conscious of the fact that Section 36(1)(vii) of the Act was amended by the Finance act, 2001 by insertion of Explanation to Section 36(1)(vii) of the Act w.e.f. 1st April, 1989. We are also conscious of the fact that while disposing of a Reference under Section 256(1) of the Act, the question proposed for our opinion shall be answered taking into account the subsequent amendment to the law with retrospective effect, as they are clarificatory in nature.

15. In the aforesaid background, we find that the insertion done by Explanation to Section 36(1)(vii) of the Act (w.e.f. 1989) would arise

for consideration while answering the proposed question in respect of Assessment Year 1993-94. The above amendment by addition of Explanation to Section 36(1)(vii) of the Act was a subject matter of consideration by the Supreme Court in Vijaya Bank (supra). In the above decision, the Court while applying the amended law, held that mere debit of a provision to the profit and loss account will not by itself be sufficient to constitute bad debts (write off). This must be accompanied by simultaneously also reducing the loans and advances from the asset side of the Balance Sheet. This would ensure that the amount shown as loans and advances (debtors) is net of the provisions made for bad debts.

16. Therefore, in the present facts, while mere making of provision for bad debts will not by itself (on application of amended law) entitle the party to deduction, yet it would be a matter where the assessee should be given an opportunity to establish its claim. This by producing its evidence of the manner in which it treated the provision of bad debts written off in accounts as well as in its Balance Sheet. Therefore, the disallowance cannot be made by intimation under section 143(1)(a) of the Act, as it requires that a party be given an opportunity to establish its claim before disallowing it. It would have

been a completely different matter if the Apex Court had ruled that in no case can provision for bad debts be allowed as a bad debt under section 36(1)(vii) of the Act. The allowance of the claim of provision for bad debt is entirely dependent upon how it is reflected in the Balance Sheet and its accounts. Therefore, for the above purpose it is necessary that the party to be given an opportunity to establish its claim. Therefore, in the present facts, adjustment by way of disallowing deduction by intimation under section 143(1)(a) of the Act is not proper.

17. In the above view, the question as raised for our opinion is answered in the negative i.e. in favour of the applicant assessee and against the respondent Revenue.

18. The Reference is disposed of in the above terms. No order as to costs.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**