* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.1931 of 2010**

Reserved on: 21st July, 2011
% Pronounced on: 30th September, 2011

IFCI LTD. . . . APPELLANT

Through: Mr. Ajay Vohra with Ms. Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Ms. P.L. Bansal, Sr. Advocate with Mr. Deepak Anand, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This appeal was listed along with seven other appeals, all of which were field by the Income Tax Department. Lead appeal of the Revenue was ITA No.1572 of 2006 and the issue raised in this

appeal is linked with that. It pertains to the Assessment Year 1 97. To put it in nutshell, during the year, the assessee created special reserve under Section 36(1)(viii) of the Act amounting to ₹12,906.18 lacs. The assessee had an opening balance of ₹26,963 lacs as on 01.04.1995. Out of these amounts, the assessee transferred a sum of ₹50 Crores to provision for bad and doubtful loans and thus, the assessee carried forward a sum of ₹34,869.18 lacs by way of special reserve under Section 36 (1) (viii) of the Act. This balance appears in the annual accounts of the assessee in Schedule II under the head "Reserve and Surplus". Thus the position of the special reserve account in the books of the assessee stood as under:

	₹ in lakhs
Balance as on 01.04.1995	26,963.00
Reserve created during the year	12,906.18
Transferred to bad & doubtful debts	5,000.00
Balance as on 31.3.1996	34,869.18

2. The sum of ₹12,906.18 lacs added by the assessee to special reserve has been debited by the assessee by way of appropriation of profit as per Profit & Loss Account. In the computation of income

chargeable to tax, this amount was claimed as deduction u Section 36(1)(viii) of the Act.

3. As to the "provision for bad and doubtful loans" account to which the sum of ₹50 Crores has been transferred by the assessee from special reserve account, the assessee had an opening balance of ₹25,012.14 lacs. The assessee credited thereto not only the sum of ₹50 Crores transferred from special reserve account, but also the sum of ₹570 lacs provided for under the provisions of Section 36(1)(viia)(c) by way of an expenditure debited to Profit & Loss Account. The aggregate sum of ₹30,582.14 lacs as at the end of the year on 31.03.1996 has been reduced by the assessee from outstanding loans amounting to ₹11,15,921.06 lacs and only the net amount of ₹10,85,338.92 lacs has been shown as loans outstanding as per Schedule V of the balance-sheet. In addition to the sum of ₹30,582.14 lacs adjusted to loans recoverable under the caption "provision for bad and doubtful loans", the assessee has further written off outstanding loans by the sum of ₹18,624.61 lacs being the aggregate amount of bad debts written off in the books of accounts of the assessee. This sum of ₹18,624.61 lacs had been

claimed as deduction by the assessee over and above the su ₹570 lacs provided under Section 36(1)(viia)(c) of the Act and the special reserve of ₹12,906.18 lacs created under the provisions of section 36(1)(viii) of the Act. The sum effect is that the assessee had reduced the amount of loans by a sum of ₹18,624.61 lacs by way of write off and by the sum of ₹30,582.14 lacs by way of "provision for bad and doubtful loans".

4. The AO vide order dated 26.02.1999 disallowed deduction for bad debts written off amounting to ₹18,624.61 lacs, *inter alia*, on the following grounds:

   (a) The assessee could not claim deduction for both the amount of provision of bad and doubtful debts created during the relevant previous year under Section 36(1)(viia)(c) of the Act as also the amount of bad debts actually written off.

   (b) The amount of claim of deduction of bad debts written off was to be reduced by the cumulative amount of provision for bad and doubtful debts allowed deduction under Section 36(1)(viia)(c) of the Act for Assessment

Years 1992-93 to 1996-97 to the extent ₹34,31,90,547.

(c) Alternatively, the amount of deduction claimed for bad debts written off had to be reduced by the amount withdrawn from special reserve created under Section 36(1)(viii) of the Act and credited to the profit and loss account in Assessment Years 1995-96 and 1996-97, aggregating to ₹22,500 lacs.

(d) Further without prejudice, the amount of deduction claimed for bad debts written off needed to be reduced by the amount standing to the credit of provision for bad and doubtful debts in the books of account of the assessee upto 31.3.1996, aggregating to ₹30,582.14 lacs.

5. Being aggrieved by the aforesaid order dated 26.02.1999, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The CIT(A) held that the deduction on account of bad debts written off had to be reduced to the extent of –

(a) The amount of ₹5000 lacs withdrawn from sp reserve and credited to the profit and loss account.

(b) Amount of ₹570 lacs being provision for bad and doubtful debts claimed deduction under Section 36(1)(viia)(c) of the Act.

6. According to the CIT(A), if the deduction for bad debts was not to be reduced to the extent of the aforesaid amounts, the assessee would have enjoyed double deduction which, according to the CIT(A) is contrary to the provisions of law. The CIT(A), however, held that "in absence of specific provisions enabling the AO in this regard, the benefits claimed or granted, even if erroneously as per the interpretation of Section 36(1)(vii) pertaining to the earlier years could not have been withdrawn during the current assessment year. Therefore, insofar as denying the benefit of writing off of the bad debts to the extent of reserves withdrawn in the earlier years and the deductions claimed under Section 36(1)(viia)(c), is not as per law and cannot be supported. Nothing, however, prevents the AO from considering such action as deemed fit in the earlier assessment years. The order of the CIT(A) was

accepted by the Revenue and no appeal filed thereagainst. assessee, however, challenged the order of the CIT(A) on the following grounds:

(a) Reducing deduction of amount of bad debt written off by the amount of ₹5,000 lacs transferred from special reserve to provision for bad and doubtful loans;

(b) Upholding adjustment of ₹570 lacs being provision for bad and doubtful debts allowable under Section 36(1)(vii) of the Act against bad debts written off.

7. The Tribunal reversed the order of the CIT(A) qua the first issue, viz., reducing the amount of bad written off by sum of ₹5,000 lacs transferred from special reserve to provisions for bad and doubtful loans. With regard to the second issue, the Tribunal upheld the order of the CIT(A) for which the assessee has filed in the instant separate appeal.

8. Insofar as the first issue is concerned, the Revenue had filed the appeals including ITA No.1572/2006, which appeals have been dismissed vide judgment dated 11.7.2011. In this appeal preferred by the assessee, we are concerned with the order of the Tribunal

upholding the orders of CIT (A) qua adjustment of ₹570 lacs b the bad and doubtful debts. We may point out that though number of questions were framed, it was accepted by the learned counsel for the appellant that this is the only issue which survives in this appeal after rendering the judgment dt 11.7.2011 in ITA No.1572/2006.

9. As already pointed out above, the Tribunal did not accept the submission of the assessee that the provision relating to the claim of deduction of bad debts actually written off from the provisions of the aforesaid Section. The Tribunal dealt with this issue in the following manner:

> "16. At the same we see considerable force in the contention of the revenue that the assessee could not separately claim deduction of bad debt actually written off in accordance with the provisions of Section 36(1)(vii) and at the same time claim further deduction under the provisions of Section 36(1)(viia) of the Act. This position clearly emerges from the proviso to Section 36 (1)(vii) as well as from the provisions of Section 36 (2)(v). According to the proviso to Section 36(1)(vii) in the case of an assessee to which Clause (viia) applies, the amount of deduction under Section 36(1)(vii) shall be limited to the amount by which bad debt or any part thereof exceeds the credit balance in the provision made under Section 36(1)(viia). Similarly the provisions of Section 36(2)(v) provide that in the case of an assessee to which provisions of Section 36(1)(viia) apply, no deduction shall be allowed on account of bad debt or part thereof unless the assessee has debited the amount of such debt or part of debt

in that previous year to the provision for bad and doubtful loan account made under Clause (viia) of Sub-section (1) of Section 46. We further find that the learned CIT(A) has erred in restricting the addition made by the Assessing Officer on this count to the amount of Rs. 570 lakhs only. During the course of assessment proceedings the learned Assessing Officer found that the assessee had created provision under Section 36(1)(viia)(c) in different assessment years in the following manner:-

Assessment year 1992-93	4,94,63,176
Assessment year 1993-94	4,97,58,313
Assessment year 1994-95	6,35,18,063
Assessment year 1995-96	12,34,54,934
Assessment year 1996-97	5,70,00,000
Total	34,31,90,547

We find that the provisions of Section 36(2)(v) are some what ambivalent in this regard, but the proviso to Section 36(1)(vii) is clear and unambiguous that the amount of deduction claimed under Section 36(1)(vii) has to be limited to the amount by which bad debt actually written off during the year exceeds the credit balance in the provision for bad and doubtful loan account made under Section 36(1)(viia). The proviso speaks of credit balance and not merely the amount of provision created during a particular assessment year. For this reason we do not see much assistance to the case of the assessee from the judgment of Hon'ble Rajasthan High Court in the case of Bank of Rajasthan {supra) relied upon by the learned AR of the assessee. The matter considered in that judgment is on altogether different basis. We, therefore, hold that the learned CIT (Appeals) was not justified in restricting the disallowance to the sum of Rs. 570 lakhs. According to the Assessing Officer the aggregate amounts of provision under Section 36(1)(vii) availed of by the assessee amounted to Rs. 34,31,90,547. It is not immediately known to us as to what are the amounts of bad debt claimed by the assessee in those assessment years under the provisions of Section 36(1)(vii). However, it is quite possible that there may be an opening balance in this account. After such adjustment it should be added to the sum

> of Rs. 570 lakhs so as to work out the amount of disallowance to be made in the case of the assessee in accordance with the proviso to Section 36(1)(vii). We, therefore, restore this issue to the file of the learned Assessing Officer for computation of disallowance accordingly after allowing the assessee an opportunity to place relevant facts."

10. Mr. Ajay Vohra, learned counsel appearing for the assessee/appellant submitted before us that the AO had discussed the issue of disallowance of ₹50 Crores under Section 36(1)(viii) of the Act and computation made by him clearly reveal that insofar as the deduction of ₹570 lacs is concerned, that was allowed by the AO. The CIT (A) had upheld the same observing as under:

> "9.6 The only issue, therefore, to be considered is whether the bad debts actually written off should first exhaust the provision of ₹5.70 Crores created this year u/s 36(1)(viiia)(c). There is no ambiguity in this regard in the provision of section 36(1)(vii)(c), therefore, the bad debts written off will be reduced by the amount of ₹5.70 crores if not already done. To this extent the AO's action is upheld."

11. CIT (A) thereafter took up the issue of transferring of an amount of ₹129 Cores to be special reserve and then withdrawing an amount of ₹50 Crores and while affirming the disallowance of ₹50 Crores, the CIT (A) restricted the bad debts claim to ₹50 Crores to ₹5.70 Crores in the following manner:

> "9.9 In view of the above discussion a disallowance of Rs.50.00 crores out of the withdrawal made from the reserve is upheld. In the final result the disallowance out of the bad debt and the claimed u/s 36(1)(viii) will be restricted to Rs.5.7 crores plus Rs.50.00 crores. The remaining disallowance would stand deleted."

12. On the aforesaid facts, plea of Mr. Vohra is that the Revenue had accepted the order without challenging the appeal and it is the assessee which had filed the appeal. In these circumstances, the Revenue could not have tinkered with the order of the CIT (A), which was in favour of the assessee and which was accepted by the Revenue as well. He, thus, argued that the discussion contained in Para 16 extracted above is beyond the jurisdiction vested in the Tribunal under Section 253 of the Act and this was never an issue before the Tribunal. Though he conceded that as per proviso to Section 36(1)(viii) of the Act, this was not to be allowed, at the same time this amount was offered to tax in the assessment year 1998-99. Therefore, it was taxed neutral which fact was ignored and for this reason he referred to the judgment of the Bombay High Court in the case of ***Commissioner of Income Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat Vs. Nagri Mills Co. Ltd.***, 33 ITR 681. Otherwise, contended the counsel, it amounts to double taxation, which is impermissible having regard to the

judgments of the Supreme Court in the case of ***Income Officer, 'A' Ward, Lucknow Vs. Bachu Lal Kapoor***, 60 ITR 74, ***Laxmipat Singhania Vs. Commissioner of Income Vs. CIT, U.P.***, 72 ITR 291 and the judgment of this Court in ***CIT, Delhi (Central) Vs. R. Dalmia***, 135 ITR 346.

13. We are not convinced with the plea of the learned counsel for the assessee that the Tribunal exceeded his power in discussing this issue. Not only it was inextricably mixed with the provision for doubtful debts out of which ₹50 Crores was disallowed and, therefore, there had to be accumulative discussion, the issue was specifically raised by the assessee itself before the Tribunal. (See ***Hukumchand Mills Ltd. Vs. CIT, Central, Bombay***, 63 ITR 232, ***Auto and Metal Engineers and Others Vs. Union of India and Others***, 229 ITR 383 and ***The Assam Tribune Vs. CIT &*** Another, 285 ITR 452]. Furthermore, it would be relevant to point out that the legal position stated in Para 16 by the Tribunal is correct in law and even the assessee is not in a position to dislodge the same. It is for this reason the assessee has taken the plea of double taxation as the amount is surrendered in the Assessment Year 1998-99.

However, legal position cannot be disputed that proviso to Se 36(1)(viii) of the Act is retrospective in operation and therefore, this had to be dealt with in the assessment in question. If the assessee had surrendered the amount in the Assessment Year 1998-99, it would be permissible to take credit thereof in that year.

14. Permitting the assessee to take such a course of action for the Assessment Year 1998-99, insofar as this appeal is concerned, we answer the question in favour of the Revenue and against the assessee. As a result thereof, this appeal is dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

SEPTEMBER 30, 2011
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