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

Reserved on: 9th May, 2017
Pronounced on: 3rd July, 2017

\+ **ITA Nos.440/2016, 442/2016, 444/2016, 445/2016 & 446/2016**

HOUSING AND URBAN DEVELOPMENT CORPORATION LIMITED ...Appellant
Through: Mr. Gagan Kumar, Advocate

versus

ADDITIONAL COMMISSIONER OF INCOME TAX RANGE 12 ...Respondent
Through: Mr. Rahul Chaudhary, Senior Standing Counsel

CORAM: JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR

JUDGMENT

% 03.07.2017

Dr. S. Muralidhar, J.:

1.These are five appeals under Section 260A of the Income Tax Act, 1961 ('Act') by the Housing and Urban Development Corporation Limited ('HUDCO') against the common judgment and order dated 9th February, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 1166/Del/2012; 1167/Del/2012; 1168/Del/2012; 3365/Del/2013 and 3366/Del/2013 for the Assessment Years ('AYs') 2005-06 to 2009-10 respectively.

2. By the order dated 6th February, 2017, the only question framed for

consideration in these appeals was:

> "Whether the ITAT erred in confirming the CIT (A)'s conclusion with respect to the appellant/assessee's claim of entitlement to deduction on account of de-recognition of interest accruing upon NPAs, by applying Rule 6EB of the Income Tax Rules, 1962 which the assessee claims is contrary to the directions issued by the National Housing Bank under Section 30A read with 36 of the National Housing Bank Act, 1987, in the given facts and circumstances of the case."

3. The background facts are that HUDCO is a public sector undertaking engaged primarily in providing long-term finance for construction of houses for residential purposes or undertaking housing and urban development programmes in the country. Each of the returns filed by HUDCO for the aforementioned AYs was selected for scrutiny and an assessment order under Section 143(3) was passed under Section 143(2) of the Act. The issue concerns treatment of the interest corresponding to bad and doubtful debts known as Non-Performing Assets ('NPAs') in banking terminology.

4. For AY 2005-06, the Assessee claimed deduction in respect of Rs. 54,13,48,468/- accrued on classified NPAs according to the guidelines of National Housing Bank ('NHB') issued with effect from 31st March, 2005. In the said guidelines, the debts or loan in respect of which interest had not been received beyond a period of more than 90 days were classified as NPA. Relying on the said guidelines, deduction was claimed by HUDCO.

5. The Assessing Officer ('AO'), however, went by Section 43D of the Act read with Section 6EB of the Income Tax Rules, 1962 ('the Rules') whereunder only if interest in respect of a debt or loan was due for more

than six months could such a loan be treated as NPA. The interest corresponding to such NPA was only to be considered for deduction for non-recognition of the interest income. In other words, the AO held that the NPA was to be classified as per Rule 6EB of the Rules and not by the amended guidelines of the National Housing Bank ('NHB') effective from 31st March, 2005.

6. In the absence of calculations furnished by HUDCO, the AO allowed 50% of the revenue de-recognition of Rs. 54,13,48,468/- thereby disallowing Rs. 27,06,74,234/-. This was added back to the income of HUDCO. The Commissioner of Income Tax (Appeals) concurred with the findings of the AO and sustained the addition.

7. Similar additions proposed by the AO for the AYs 2006-07, 2007-08, 2008-09 and 2009-10 were likewise confirmed by the CIT(A) with dismissal of HUDCO's appeals on that issue.

8. By the impugned common order for all the AYs, the ITAT rejected the contention of HUDCO and held that it was entitled to deduction as per Rule 6EB of the Rules only. However, since the AO had computed the disallowance only on an estimate basis, the matter was restored to the AO to compute the deduction strictly in terms of Rule 6EB of the Rules and allow the deduction accordingly.

9. Mr. Gagan Kumar, learned counsel appearing for HUDCO contended that its accounts had been maintained in terms of the directions issued by the NHB and audited by its Statutory Auditor and Comptroller and Auditor

General of India ('CAG') without any comments. In other words, the interest income had been correctly calculated for the AYs in question in terms of the prevalent revenue recognition norms. Mr. Kumar submitted that as per Section 36 of the National Housing Bank Act, 1987 ('NHB Act') the direction of NHB to HUDCO overrides any other law regarding recognition of income. HUDCO was mandated by law to abide by the instruction/directions given to it by the CAG in terms of hierarchical discipline. Therefore, HUDCO could not be penalized for abiding with those norms. These directions could be issued by the NHB under Section 30A of the Act and were binding on HUDCO. Specific reference is drawn to Section 36 of the NHB Act which states that the provisions of Chapter V relating to 'housing finance institutions receiving deposits' would "have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law".

10. Mr. Kumar submitted that the CIT(A) as well as the ITAT overlooked the real income theory and erred in holding that the de-recognition of interest corresponding to the NPAs would have to be in terms of Rules only. He pointed out that Section 43D(b) itself requires de-recognition of interest to be prescribed "having regard to" the guidelines issued by the NHB in relation to such debts. While Rule 6EB was amended to make it consistent with the guidelines, fresh guidelines issued with effected from 31st March, 2005 did not result in the corresponding amendment to the Rules. This was only done as a matter of course. He urged that a purposive construction had to be adopted and the Rules had to be interpreted in any manner beneficial to

the Assessee.

11. Mr Rahul Chaudhary, learned Senior Counsel for the Revenue, on the other hand, supported the concurrent findings of the AO, CIT(A) and the ITAT.

12. Section 43-D(b) of the Act reads thus:

> "Notwithstanding anything to the contrary contained in any other provision of this Act,-
>
> (a)...
>
> (b) in the case of a public company, the income by way of interest in relation to such categories of bad or doubtful debts as may be prescribed having regard to the guidelines issued by the National Housing Bank in relation to such debts, shall be chargeable to tax in the previous year in which it is credited by the public financial institution or the scheduled bank or the State financial corporation or the State industrial investment corporation or the pubic company to its profit and loss account for that year or, as the case may be, in which it is actually received by the institution or bank or corporation or company, whichever is earlier."

13. This has to be read along with Rule 6EB, which reads thus:

> "**Rule 6EB – Categories of bad or doubtful debts in the case of a public company under clause (b) of section 43D.**
>
> The provisions of clause (b) of Section 43D shall apply in the case of every public company where its income by way of interest pertains to the following categories of bad and doubtful debts, namely, -
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> (a)(i) doubtful asset, that is, a debt which has remained a non-performing asset of the nature specified in sub clause (ii) for a period exceeding two years;

(ii) non-performing asset referred to in sub clause (i) shall be the following: -

(1) term loan beyond one year, if the interest amount remain "past due" for six months or instalment is overdue for more than six months;

(2) lease rental or hire purchase instalment, if the rental or the instalment is "past due" for six months;

(3) bill purchased or discounted, if the bill remains overdue and unpaid for six months; or

(4) any other credit facility in the nature of short term loan or advance other than those referred to in (1), (2) and (3) above, if any amount to be received in respect of such a facility remains "past due" for a period of six months;

(b) loss asset, that is, a debt which has been identified as loss and considered as uncollectible but has not been written off in the accounts of the Assessee.

Explanation. – For the purpose of this rule, an amount shall be deemed to be "past due" when it remains unpaid for thirty days beyond the due date."

14. Further, the relevant provisions of the NHB Act which have a bearing on the present issue read thus:

"**30A. Power of the National Housing Bank to determine policy and issue directions.-**

(1) If the National Housing Bank is satisfied that, in the public interest or to regulate the housing finance system of the country to its advantage or to prevent the affairs of any housing finance institution being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the housing finance institutions, it is necessary or expedient so to do, it may subject to the provisions of sub-section (5) of section 5, determine the

policy and give directions to all or any of the housing finance institution relating to income recognition, accounting standards, making of proper provision for bad and doubtful debts, capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a housing finance institution or a group of housing finance institutions or housing finance institutions generally, as the case may be, and such housing finance institutions shall be bound to follow the policy so determined and the direction so issued.

(2) Without prejudice to the generality of the powers vested under sub-section (1), the National Housing Bank may give directions to housing finance institutions generally or to a group of housing finance institutions or to any housing finance institution in particular as to –

(a) the purpose for which advances or other fund-based or non-fund-based accommodation may not be made; and

(b) the maximum amount of advances or other financial accommodation or investment in shares and other securities which, having regard to the paid-up capital, reserves and deposits of the housing finance institution and other relevant considerations, may be made by that housing finance institution to any person or a company or to a group of companies.

36. Chapter V to override other laws. – The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

15. While it is true that the Assessee is governed by the instructions issued by the NHB as to what should be considered as an NPA, the fact remains that as far as the permissibility of deduction for the purposes of computing the taxable income is concerned, it is the Act that applies. In the first place, it requires to be noticed that in terms of clause (b) of Section 43D of the Act, HUDCO could recognize interest income either on cash basis or accrual

basis from "such categories of bad or doubtful debts as may be prescribed". The word 'prescribe' brings in the Rules. The relevant rule is Rule 6EB. The statute requires that while prescribing such a rule, regard must be had to the guidelines issued by the NHB to such debts.

16. Prior to 31st March, 2005 the criteria for terming a loan to be an NPA remained the same, both, in terms of the NHB guidelines as well as the Rules i.e., when the interest due thereon was not received for a period of more than 180 days. After 31st March, 2005, the NHB guidelines mandated that where the interest on the loan was not received for a period of more than 90 days, it was to be treated as an NPA. However, there was no corresponding change brought about in Rule 6EB.

17. The question is whether there is an automatic change to be read into Rule 6EB as and when the guidelines of the NHB are revised? In other words, is it an instance of incorporation of the NHB guidelines into Rule 6EB by reference? In this context, the expression "having regard to" is relevant.

18. In ***Rajesh Kumar v. DCIT (2006) 287 ITR 91***, the Supreme Court was considering the ambit of the expression "having regard to" under Section 142(2A) of the Act which empowers the AO to direct an audit of the accounts of an Assessee. The Supreme Court held that factors like the nature of accounts; complexity of accounts and interest of the revenue were an important criteria but "are not exhaustive" and that while carrying a special audit "regard must be had also to the factors enumerated therein together with all factors relevant for the exercise of that power."

19. Going by the above interpretation of the Supreme Court, it appears that the expression "having regard to" occurring in Section 43D(b) of the Act does not imply that the Rules thereunder have to be identical to the NHB guidelines. The expression is used as not "in accordance with" but "having regard to". It cannot be said that the NHB guidelines have to be treated as having been incorporated into Rule 6EB in the sense that every amendment or modification in the NHB guidelines has to *ipso facto* be read into Rule 6EB.

20. This conclusion also draws support from the decision of the Supreme Court in ***Southern Technologies Ltd. v. Asstt. CIT [2010] 320 ITR 577 (SC)*** which held that the RBI Act does not override the provisions of the Act. The Court reconciled the said judgment with the decision in ***TRO v. Custodian appointed under the Special Court (Trial of Offences relating to Transaction in Securities) Act, 1992 [2007] 293 ITR 369 (SC)*** which held that where an Act makes a provision with a non-obstante clause, that would override the provisions of all other Acts.

21.1 In ***CIT v. Vasisth Chay Vyapar Ltd. (2011) 330 ITR 440 (Del.)***, the Court was concerned with the concept of income recognition. In that case, the Assessee was a non-banking financial company which had advanced certain Inter-Corporate Deposits ('ICDs') to a company 'S'. No interest was received on such deposits for more than six months. In terms of directions given by RBI, the Assessee treated the said ICDs as NPAs. It did not disclose interest income thereon which, according to it, was not realizable. The AO, however, added the interest as income of the Assessee holding that

it had 'accrued' to the Assessee since the Assessee was following the mercantile system of accounting. The AO held that the provisions of the Reserve Bank of India Act ('RBI Act') read with NBFCs Prudential Norms (Reserve Bank) Directions, 1998 could not have overridden the provisions of the Act in terms of which the amount of interest was taxable under the accrual system of accounting. After the CIT(A) affirmed the order of the AO, the matter travelled to the ITAT which held that no such addition could be made.

21.2 The Revenue's appeal raised two questions, one of which is whether the RBI guidelines would override the provisions of the Act. It was held that the directions issued by the RBI under the RBI Act and the Act (i.e., the Income Tax Act) operated in different areas. It was held that the RBI directions had nothing to do with computation of taxable income and could not overrule the "permissible deductions" or "their exclusion" under the Act. It was held that the Accounting Policies adopted by an NBFC could not determine the taxable income. Given the wording of Section 45Q of the RBI Act, which states that the provisions of that Chapter "shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law", it was held that it was a case where the AO had to follow the 1998 RBI Directions since as far as income recognition was concerned, Section 145 of the Act had "no role to play".

22. In the present case, there is no doubt that Section 36 of the NHB Act states that the provisions of Chapter V of the NHB Act would have the

effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. However, Section 30A of the NHB Act under which directions are issued by NHB to housing financial institutions, etc. does not contain a non-obstante clause. It is not meant to override Section 43D(b) of the Act in the matter of computation of taxable income.

23. Section 43D of the Act read with Rule 6EB is a complete Code in itself. There is an element of discretion for the rule making authority to follow or not to follow the NHB guidelines as and when they are revised. The purpose of classification of debts as NPA by the NHB and the purpose for non-recognition of income for the purposes of the Act are different. Given the wording of the relevant provisions of the Act and the NHB Act, it is not possible to agree to HUDCO's proposition that with every change in the NHB guidelines there would be a corresponding automatic change in Rule 6EB.

24. Even otherwise, as pointed out by the ITAT, the real income principle would have no application as far as Section 43D of the Act. A distinction is required to be drawn between the concept of 'deductions' claimed under the Act which has to satisfy the conditions laid down therein to qualify as such and the prudential norms that the NHB Act may lay down for determining an NPA. The present case is similar to ***Southern Technologies Ltd. v. CIT*** (*supra*) where the Supreme Court had to deal with the claim for deduction on account of the method for determining an NPA and not ***CIT v. Vasisth Chay Vyapar Ltd.*** (*supra*) where this Court was dealing with 'income recognition' which had nothing to do with Section 43D of the Act.

25. Consequently, the question framed by the Court is answered in the negative i.e., in favour of the Revenue and against the Assessee.

26. The appeals are accordingly dismissed, but in the circumstances, no orders as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

JULY 03, 2017
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