Reserved

Review Petition No. 296 of 2009

M/s Kohli Brothers Colour Lab (P) Ltd. …..... Applicant

Versus

The Commissioner, Income Tax, Ayakar Bhawan, Lucknow …..Opposite-party

in re:

Income Tax Appeal No. 2 of 2007

The Commissioner, Income Tax, Ayakar Bhawan, Lucknow …..... Appellant

Versus

M/s Kohli Brothers Color Lab (P) Ltd., Lucknow …..... Respondent

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Hon'ble Rajiv Sharma, J.,
Hon'ble Dr. Satish Chandra, J.

(Delivered by Hon'ble Dr. Satish Chandra, J.)

By this review petition, the petitioner has assailed the order passed by this Court in ITA No. 02 of 2007 dated 5.11.2009 whereby the impugned order passed by the Tribunal dated 4.8.2006 was set aside. The Assessing Officer was directed to take a fresh decision pertaining to bad debt after affording opportunity to the respondent-assessee on the record produced.

Sri Prashant Chandra, Senior Advocate, assisted by Sri Ashish Chandra, Advocate submits a preliminary argument that the said appeal was filed by the department before this Hon'ble Court. The tax effect in the appeal was less than Rs. 4,00,000/-. As per the instruction of CBDT dated 15.5.2008, the appeal should not have been filed by the department as the tax effect was less than prescribed monetary limit.

On the other hand, learned counsel for the department Sri D.D.Chopra submits that the CBDT has also issued Circulars from time to time where exceptions were provided. It was clearly mentioned in the Circular No. F.279 Misc. 64/5-IT that-

> "*3. The Board has also decided that in cases involving substantial question of law of importance as well as in cases where the same question of law will repeatedly arise; either in the case concerned or in similar cases, should be separately considered on merits without being hindered by the monetary limits."*

After hearing learned counsel for both the parties, it appears that CBDT Circular dated 15.5.2008 specifically mentions that the Income Tax Department shall not be precluded from filing the appeal against the disputed issue even in the case of same assessee for any other assessment year. These instructions were issued under Section 268A(1) of the Income Tax Act. The said Section also provides the exception for filing the appeal where some disputed question is involved.

Moreover, in the instant case, the department has filed an appeal before Hon'ble High Court and the objection pertaining to the monetary limits was never taken by the assessee. It is belated to take such a plea in review and the same be dismissed being not maintainable. Moreover, as per the ratio laid down in the case of **Satish Grain Co. v. CIT (2005) 27 NTN 354 Allahabad**, no new point can be raised in review petition.

On merit, learned Senior Advocate Sri Prashant Chandra submits that in the instant case, the assessee has written off the bad debt as per the proviso to Section 36(1) (vii) of the Income Tax Act. After the amendment w.e.f. 1.4.1989, the entire amount of bad debt which has been written off as not recoverable in the accounts of the assessee for the previous year will be deducted. Any inquiry into the bad debt becomes redundant as the bad debts are now being straightaway allowed in the year of written off. For this purpose, he relied on the ratio laid down in the following cases-

Income Tax v. General Insurance Corporation of India, (2002) 254 ITR 204 (Bom.), page 209 where it was observed that-

> *"However, so far as the exact requirement of the writing off is concerned, the language used in the Indian Income Tax Act, 1922 and the 1961 Act is identical. If the debit entries posted by the assessee indicate that bad debt has been written off as irrecoverable in the accounts of the assessee, then the statutory condition stands fully complied with. That, if the assessee has posted entries in the profit and loss account and the corresponding entries are posted in the bad debt reserve account, it would be sufficient compliance with the provisions of the statutory requirement for writing off as irrecoverable the concerned debt in the books of the assessee. These judgments squarely apply to the facts of our case. In the present matter, the assessee has posted entries in the profit and loss account and has made corresponding entries in the bad debt reserve account. Therefore, there is compliance with section 36(1) (vii). It may be noted that prior to April 1, 1989, this statutory requirement existed under section 36(2)(i). That entry has been shifted and brought to section 36(1)(vii). Therefore, to the extent of the exact requirement of writing off of the concerned debt as irrecoverable, the law remains the same even after April 1, 1989. Hence, there is compliance with section 36(1)(vii) Rule 5(a) of the First Schedule, inter alia, lays down that where any expenditure or allowance is debited to the profit and loss account by way of reserve which is not admissible under the provisions of section 36(1), then the amount shall be added back in computing the profits of the business."*
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> Similarly, in the case of **CIT v. Girish Bhagwat Prasad *(2002) 256 ITR 772 (Guj.), page 774***, it was observed that "*under the provisions of section 36(1)(vii) of the Act, deduction was to be allowed in computing the income*

referred to in section 28 of the Act of the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year subject to the provisions of sub-section (2). Prior to the amendment from April 1, 1989, the allowance under this clause was confined to the debts and loans which had become irrecoverable in the accounting year. Thus, under the provisions of section 36(1)(vii) as in force from April 1, 1989, all that the assessee had to show was that the bad debt was written off as irrecoverable. The genuineness of such a claim made by the assessee was not in doubt. Therefore, all that the Tribunal has done is to uphold the first appellate authority's decision, applying the provisions of the amended section 36(1)(vii) of the Act, and no question of law arises in the matter from such application of the provision to the facts of the case.

In the case of ***CIT v. Nai Dunia, (2006) CTR 70, page 73 (MP)***, it has been observed that-*We do not find any error of law much less substantial error of law as contemplated in s. 260A ibid for answering the question in favour of revenue. When the assessee has actually written off the debt in their books of account as being bad debt then unless the AO had rejected the entire books of account to be totally unreliable and finding extreme perversity in declaration of debt to be bad debt, there arose no occasion for AO for not accepting the stand of assessee on this issue, It is essentially for the assessee to decide as to whether they are able to recover the debt or that whether there are any viable chances to ensure its recovery or that all hopes have come to an end for recovery. This being in the nature of what is called commercial expediency depending upon the nature of transaction, capacity of debtor, etc., the stand of assessee cannot be ignored by Revenue unless there are very cogent reasons to reject."*

In case of **Travancore Tea Estates Co. Ltd. v. Commissioner of Income Tax, (1999) 151 CTR (SC) 231, page 232***, it was* observed that-

"This case is about writing off of bad debts.

It is well settled that whether a debt has become bad or the point of time when it became bad are pure questions of fact.

There is no question of law involved in this appeal. We, therefore, decline to go into the controversy raised. The

appeal is dismissed. There will be no order as to costs."

In addition, learned counsel for the petitioner relied on the following cases:-

1. *Commissioner of Income Tax, Meerut v. Sri Ram Gupta, (2005) 149 Taxman 237, page 241*
2. *Kamla Cotton Co. v. Commissioner of Income Tax, (1997) 226 ITR 605 (Guj.), page 611*
3. Commissioner of Income Tax v. Morgan Securities and Credits (P) Ltd., (2007) 292 ITR 339 (Delhi), page 344/para 7

Lastly, Sri Prashant Chandra, Senior Advocate, learned counsel for the applicant, made a request to recall the order passed by this Hon'ble Court on 5.11.2009.

On the other hand, learned counsel for the department, Sri D.D.Chopra submits that bad debt can be written off by the assessee provided if it is a trade debt which has become bad. In the instant case, the A.O. has observed that as per the proviso to Section 36(1) (vii) of the Income Tax Act, 1961, the amount of any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year, is to be allowed for the purpose of deduction. He further submits that the term 'Bad Debt' has been used in this section and not 'Debt'. As such it implies that it is the onus upon the assessee to prove that it was a trade debt and has become bad debt. The claim of the assessee is not acceptable by stating that the amount has been written off being bad debt. So blankly but in order to allow the claim the assessee has led evidence for the same. He also relied on the ratio laid down in the case of **CIT v. Girish Bhagwat Prasad, (2002) 256 ITR 772 (Gujarat)** where it was held that

> *"under the provisions of section 36(1) (vii) of the Act, deduction had to be allowed in computing the income referred to in section 28 of the Act of the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year subject to the provisions of sub-section (2). Prior to the amendment from April 1, 1989, the allowance under this clause was confined to the debts and loans which had become irrecoverable in the accounting year. Thus, under the provisions of section 36(1)(vii) as in force from April 1, 1989, all that the assessee had to show was that the bad debt was written off as irrecoverable. The genuineness of such a claim made by the assessee was not in doubt. Therefore, no question of law arose for reference."*

Sri D.D.Chopra also read out the order passed by the CIT (A) dated 3.3.2006. The same is as under:-

> *"In the written submission, the applicant has placed reliance on the case of CIT v. Girish Bhagwat Prasad, 256 ITR 772 and simply stated that the disallowance of the amount, which was old*

and irrecoverable, has wrongly been made. A perusal of the assessment order reveals that the AO has given proper opportunity to the appellant to prove the genuineness of the claim. If the appellant's version that the amount was not recoverable, is considered, details regarding efforts made or legal steps taken by the appellant to recover the bad debts, have not been filed either before the AO or in appeal. It is obvious that the appellant failed to substantiate its claim. On the other hand, the AO has rightly observed that it was not a bad debt. The addition is, therefore, upheld."

Lastly, learned counsel for the opposite-party justifies the orders passed by the assessing authority as well as CIT appeal by submitting that it is the duty of the assessee to prove the debts being bad debt and a finding of fact has been recorded by the assessing authority and CIT appeal that the assessee fails to prove debts which have been claimed in profit and loss account are a trading debt and as such they have rightly disallowed the claim of the assessee.

We have heard learned counsel for both the parties and gone through the material available on record.

It may be mentioned that a distinction has to be kept in mind between a bad debt falling within the scope of its provision and a trading loss. It may be noted that while all bad debts may be said to be losses, not all losses are bad debts as per the ratio laid down in the case of **CIT v. City Motor Services Ltd. (1966) 61 ITR 418 (Madras)** and **CIT v. Gillanders Arbuthnot & Co Ltd. (1982) 138 ITR 763 (Calcutta)**. In the present case, the A.O. asked the information from the assessee to prove that the debt was a **"trade debt"** and its details but the assessee has refused to do so. In these circumstances, CIT(A) upheld the order of the A.O. However, the Tribunal has deleted the addition merely by relying its earlier order and without explaining reasons. Therefore, this Hon'ble Court has set aside the order of the Tribunal and restored the matter to the A.O. for fresh adjudication. When it is so, then on merit the review petition is not maintainable.

Needless to mention that there are three elements in the concept of a bad or doubtful debt which qualifies for deduction under clause (*vii)* of sub-section (1) of section 36 read with sub-section (2) of the Income Tax Act thereof.

The **first** is that there should be a debt, which would have come into balance sheet as a trading debt to swell the profits of the business,

The **second** is that the debt should be established to have become bad in previous year. The expression earlier used in the statute and also in accountancy parlance was that the debts in question are "bad and doubtful" but the adjective "doubtful" does not qualify, add to or detract from the true meaning of the expression, viz, that there are no chances of recovery of the whole or concerned part of the debt as

at the end of the previous year; it had become bad, inasmuch as it is doubtful of recovery. After the amendment w.e.f. 1.4.1989, it is the assessee to decide that debt has become bad debt.

The **third** element of the debt is that it should have been written off by the assessee in the relevant previous year in respect of which the claim for deduction is made by the assessee.

As far as the Review Petitions are concerned, under Order 47, Rule 1 CPC a judgment may be open to review *inter alia* if there is a mistake or an error apparent on the face of the record. An error, which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record.

In ***Meera Bhanja (Smt.) v. Nirmala Kumari Choudhary (Smt.)*** [(1995) 1 SCC 170] the Hon'ble Supreme Court has held that the review petition has to be entertained only on the ground of error apparent on the face of record and not on any other ground.

The Hon. Supreme Court while reiterating the above view in ***Parsion Devi Vs. Sumitra Devi*** 1997(8) SCC 715 observed that under Order 47 Rule 1 CPC a judgment may be open to review if there is a mistake or error apparent on record. An error which is not self evident and has to be detected by process of reasoning can hardly be said to be an error apparent on face of record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. Order 47 Rule 1 CPC is a rider on the power of the Court, which passed the order. In exercise of jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be re-heard and corrected. On the aforesaid acid test, it is settled position that a review petition has a limited purpose and cannot be allowed to be “an appeal in disguise”.

Counsel for the applicant has failed to point out any error apparent on the face of record and it appears that he wants re-hearing of the case under the garb of the application, which is not permissible.

Further, in the case of **Commissioner of Income Tax v. West Coast Paper Mills Ltd. [2009] 319 ITR 390 (Bombay)**, it was observed that the power of the High Court for **substantive review** has not been conferred under the Income Tax Act. The review, as filed, is not maintainable. The High Court has no power for substantive review of its judgment. The Hon’ble Bombay High Court has observed-

> *“The settled law is that the power of review must be specifically conferred. The Supreme Court in Gindlays Bank Ltd. v. Central Government Industrial Tribunal [1980] SCC (Suppl.) 420 had made a clear distinction between substantive review and procedural review is inherent in every court or Tribunal. This is what the court observed (page 425):*
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> *“The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on the merits when the error sought to be corrected is one of law and is*

apparent on the face of the record. It is in the latter sense that the court in Patel Narshi Thakership v. Pradyumansinghji, AIR 1970 SC 1273; [1971] 3 SCC 844, held that no review lies on the merits unless a statute specifically provides for it. Obviously, when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal."

Thereafter, that view has been reiterated in J.K.Synthetics v. Collector of Central Excise [1996] 86 ELT 472 (SC). This view has been reiterated by this Court in Chandrakant Butalal Shah v. Union of India in Writ Petition No. 1505 of 2007 decided on August 6, 2007.

Once, the substantive review is not maintainable, the question for considering fresh cause does not arise.

In the light of above, the review petition filed by the assessee is dismissed.

Dated: 20th May, 2010
VB/