

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 7 OF 2013

The Commissioner of Income Tax
Aaykar Bhavan, Patto Panaji Goa
PAN AACCS87556Q

...Appellant

Versus

M/s. Desouza Hotels Ltd.
G-5, Monalisa Apts, Naikawado,
Calangute-Goa
PAN AABCD3541K

...Respondent

....

Ms. Amira Abdul Razaq, Advocate for the Appellant.

Mr. P. Pardiwala, Senior Advocate a/w Mr. Sukhsagar Syal and Mr. Parikshit Sawant for Respondent.

....

CORAM : PRAKASH D. NAIK, &
BHARAT P. DESHPANDE, JJ.

Date of Reserving the Judgment : 27th OCTOBER, 2023.

Date of Pronouncing the Judgment : 14th MARCH, 2024.

JUDGMENT (Per : Prakash D. Naik, J.):-

1. This appeal is preferred under Section 260(A) of the Income Tax Act, 1961 challenging order dated 11.01.2013 passed by Income Tax Appellate Tribunal, Panaji Goa.

2. Brief facts which are necessary to adjudicate this appeal are as under:

- i) The assessee/respondent filed return of income on 25.09.2009 declaring income of Rs. Nil. Notice under Section

143(2) dated 31.08.2010 was issued and served upon the assessee. Subsequently notice under Section 142(1) along with detailed questionnaire dated 03.05.2011 was issued, calling for details in connection with return filed.

ii) The assessment order under Section 143(3) was finalized. The assessee undertook an assignment work of 2000 acres of land for M/s. Unitech Ltd. The assessee appointed Dantras Estate Pvt. Ltd. at Sawantwadi to procure the land for M/s. Unitech Ltd. for which Memorandum of Understanding (MOU) was entered into between assessee and Unitech Ltd.

iii) The MOU was also entered into between assessee and Dantras Estate Pvt. Ltd.

iv) The assessee arranged for sale of 2,500 acres of land for M/s. Unitech Ltd. on which the assessee earned the profit of Rs.16,52,38,928/- and paid the tax on 31.03.2008.

v) The income from the said transaction was shown under the head "Income from Business". The return income for the assessment year 2008-09 was duly accepted. During the year under consideration the assessee sold 68 acres of land for a sum of Rs.9,52,00,000/-. All the transactions took place

up to 30.06.2008. As on 30.06.2008, the assessee was to receive a sum of Rs.7,99,37,826/- from M/s. Unitech Ltd.

vi) The said amount was not received even after various reminders and the assessee has to write off the amount in their books of account by passing the board resolution. The assessee filed the return showing nil income.

vii) The assessing officer vide order dated 19.12.2011 disallowed a sum of Rs.7,99,37,826/- as bad debts and added back to income.

3. The assessing officer while passing the assessment order dated 19.12.2011 has observed that in the instant case of the assessee, the debtor very much exists. Just because the shares of debtors has gone down in the market cannot be a reason to consider a debt to be a bad debt which the assessee has done. The assessee has not filed any arbitration nor any legal action taken. The assessee produced e-mail forwarded to M/s. Unitech Ltd. The first correspondence between the assessee and the debtor was on 25.03.2009. Only one mail was sent during the whole financial year and the debt has been declared “Bad Debt”. The assessee has not taken enough measures to collect the debt. The letter under Section 133(6) dated 28.11.2011 was sent to M/s. Unitech Ltd.

calling for information about the treatment given by the debtor for the amount of Rs.7,99,37,826/- in their books of accounts. The debtor, M/s. Unitedech Ltd. vide their letter dated 06.12.2011 has shown the balance amount as outstanding demand in its books for the year ending 31.03.2009, 31.03.2010 and 31.03.2011. The debtor has not made credit entry in his books. The assessee cannot claim it as bad debts. Hence, considering all the facts, the assessee's claim of bad debt is being disallowed and added back to income.

4. The assessee/respondent challenged the order dated 19.12.2011 before the Commissioner of Income Tax (Appeals) Panaji by preferring Appeal No.455/PNJ/11-12/ACIT under Section 250 of the Income Tax Act, 1961.

5. The appellate authority vide order dated 31.10.2012 dismissed the appeal preferred by Respondent and upheld the assessment order dated 19.12.2011.

6. While dismissing the appeal, the appellate authority observed that there was no business relations, no creditors and debtors relations, no credit entry were made in the books of accounts and the isolated transactions cannot be considered as a business.

7. The respondent challenged the order dated 19.12.2011 and 31.10.2012 before the Income Tax Appellate Tribunal vide ITA No.108/PNJ/2012. Vide order dated 11.01.2013, the appeal filed by respondent was allowed and the order passed by the Commissioner of Income Tax was set aside and deleted the disallowance made on account of bad debt of Rs.7,99,37,826/-.

8. While allowing the said appeal it was observed that in view of Section 36(2) of the Income Tax Act, it cannot be said that the assessee did not comply with the conditions laid under Section 36(2). The assessee has taken into account the debt so written off in computing the income of the assessee in the previous year in which the amount of such debt is written off. It was further observed that even if the income has been taken into account in the earlier previous year, it cannot be said that the assessee has not complied with the provisions of Section 36(2). It is the case where ultimately no recovery was made by the assessee from M/s. Unitech Ltd. Once the assessee has sold the land to M/s. Unitech Ltd., the debtor and creditor relationship has come into existence and that relationship has come into existence due to the business transaction entered into between the assessee and M/s. Unitech Ltd.

9. The appellant is aggrieved by order dated 11.01.2013 and thus preferred this appeal by invoking Section 260(A) of the Income Tax Act, 1961.

10. This Appeal was admitted vide order dated 01.07.2013 on the following substantial question of law :

“Whether the I.T.A.T. was right in deleting disallowance of bad debts under Section 36(1)(vii) claimed by assessee to the tune of Rs.7,99,37,286/-.”

11. Learned Advocate for the Appellant has submitted as under:

- i) The Income Tax Appellate Tribunal has committed an error in allowing the appeal preferred by respondent and setting aside the concurrent orders of assessing officer and appellate authority.
- ii) The bad debt in order to be eligible for deduction should be written off in the books of the assessee.
- iii) Where the assessee was dealing in units of mutual funds in the course of money lending business with interest earned were offered for income from business, the amount claimed as bad debt could not be allowed as a deduction.
- iv) Write off should be bonafide. The assessee has not fulfilled the conditions stipulated under Section 36 of the

Income Tax Act to declare the aforesaid amount as bad debt.

v) The amount of Rs.7,99,37,826/- has been shown as income in the financial year 2008-09 and was written off as bad debts in the same financial year 2008-09.

vi) A debt can be considered bad on occurrence of the events such as death of the debtor without leaving any assets, the debtor is bankrupt or in liquidation, the debt is statute barred, the debtor is not traceable despite various attempts and attempts at negotiation or arbitration of a dispute debt have failed. In the instant case, the debtor very much exists. Just because the shares of the debtors company depleted in the market, cannot be a reason to consider a debt to be a bad debt. The assessee has not produced any documents with regards to correspondence made with M/s. Unitech Ltd. or arbitration filed or legal action taken against them.

vii) The debtor has not made a credit entry in his books and hence the assessee cannot claim it as bad debts. M/s. Unitech Ltd. had shown the amount as outstanding whereas the assessee had declared it to be bad debt on the ground that they have bed debt. The order passed by the Income Tax Appellate Tribunal is bad in law. It is contrary to Section

36(1)(vii) of the Income Tax Act.

viii) The bad debt presupposes the existence of a debt and relationship of a creditor and debtor. The mere fact that the assessee has lost some money on which he has been taxed will not be sufficient to justify the deduction under this Section.

ix) There were no business relationship. No creditors and debtors relationship. No credit entries were made in the books of account and the isolated transactions cannot be considered as a business.

x) Income Tax Tribunal has erred in allowing the claim of the assessee towards bad debt and Rs.7,99,37,826/-.

12. Learned Advocate for the Appellant has relied upon the recent decision of the Hon'ble Supreme Court in the case of **Pr. Commissioner of Income Tax 6 Vs. Khyati Realtors Ltd¹**. It is submitted that the decision of this Court in the case of **Pr. Commissioner of Income Tax Vs. Khyati Realtors Ltd.** dated 30.04.2019 was challenged before the Apex Court and the said decision was set aside on 25.08.2022. The apex Court had considered the law relating to Section 36 of the Income Tax Act. It was observed that merely stating the bad debt and doubtful debt as an irrecoverable write off without the appropriate treatment in the

¹ AIR 2022 SC 4030.

accounts as well as non-compliance with conditions in Section 36(1)(vii), 36(2) and explanation to Section 36(1)(vii) would not entitle the assessee to claim a deduction.

13. Learned Senior Advocate Mr. Pardiwala appearing for the respondent submitted as under:

- i) The order passed by the assessment officer and the Appellate Authority were erroneous and the said orders were rightly set aside by the Income Tax Appellate Tribunal.
- ii) The assessee has entered into an agreement with Dantras Estate Pvt. Ltd. Sawantwadi, Sindhudurg for the purchase of 2500 acres of land at Sindhudurg on 10.07.2005, 26.06.2006 and 13.09.2006. Out of the said land, the assessee agreed to sell 2000 acres of land to M/s. Unitech Ltd. The assessee sold 205.234 acres of land for Rs.28,73,27,600/- to M/s. Unitech Ltd. on which profit of Rs.16,52,38,928/- was earned and returned as business income. As on 31.03.2008 amount payable to M/s. Unitech Ltd. against the advance was Rs.2,20,81,480/-. Subsequently, from April to June 2008, the assessee sold 67.998 acres of land for Rs.9,51,97,200/-. Rs. 68,22,106/- were incurred on their behalf. Thus, there was balance of Rs.7,99,37,826/- recoverable from M/s.

Unitech Ltd. Thereafter, inspite of several reminders and attempts by the assessee, no amount was received by the assessee from M/s. Unitech Ltd.

iii) After the sale of land to M/s. Unitech Ltd. there was crash in the share price of M/s. Unitech Ltd. from Rs.546/- to Rs.18/-. The properties of M/s. Unitech Ltd. were put on sale. M/s. Unitech Ltd. was not in a position to honour the commitment. The assessee forwarded the reminders but there was no response. The matter was discussed in board meeting and resolution was passed thereby deciding to write off Rs.7,99,37,826/- as bad debts and passed the entries in its books of accounts.

iv) The assessee has shown the income from business from the sale and purchase of land and the income as such been accepted by the assessing officer. The assessing officer has believed that the assessee has to prove that the debt has become bad during the year. The assessee is entitled for the deduction under Section 36(1)(vii) in the year in which he has recovered the same.

v) The assessee has written off the bad debts. The schedule of profit and loss account was produced before the

authorities along with account of M/s. Unitech Ltd. in the ledger of the assessee.

vi) The bad debts claimed by the assessee relate to the assessee's business as the income from sale of the land to M/s. Unitech Ltd. and it has been duly shown as business income. The amount was never recovered by assessee. The write off, of the amount was genuine. The amount was duly written off as such the amount has been treated due to the assessee in his books due to the business transaction entered into by the assessee with M/s. Unitech Ltd. There was clear relationship of debtor and creditor.

vii) The assessing officer and the Appellate Authority has ignored the fact that Section 36(1)(vii) as it stood before and after its amendment would show that prior to the amendment, the assessee was required to establish that the debt in question had become bad in the previous year. Subsequent to the amendment to the language of the Section, it sufficient if the bad debt or part thereof is written off as irrecoverable in the accounts of the assessee.

14. Mr. Pardiwala has relied upon the decision of the Supreme Court in the case of **T.R.F Ltd. Vs. Commissioner of Income-tax²** and

² [2010] 190 Taxman 391 (SC)

the decision of this Court in the case of **Director of Income Tax (International Taxation) Vs. Oman International Bank SAOG³**.

15. The factual matrix of this case indicate that the assessee filed the return of income on 25.09.2009 declaring income of Rs.Nil. The assessee undertook an assignment of land for M/s. Unitech Ltd. and appointed Dantras Estate Pvt. Ltd. to procure the land for M/s. Unitech Ltd. for which MOU was executed between the parties. The assessee arranged for sale of 2500 acres of land for M/s. Unitech Ltd. on which the assessee earned profit of Rs.16,52,38,928/- . The tax was paid on 31.03.2008. The income from said transaction was shown under the head “Income from Business”. The return income for the assessment year 2008-09 was accepted. The assessee sold 68 acres of land for sum of Rs.9,52,00,000/-. As on 30.06.2008, the assessee was to receive a sum of Rs.7,99,37,826/- from M/s. Unitech Ltd. The said amount was not received. The assessee decided to write off the amount in his books of accounts. The resolution was passed. Return was filed.

16. The resolution dated 25th June 2009 passed by the assessee in its board meeting reads as follows:

³ [2009] 184 Taxman 314 (Bombay)

" The issue of recovery of amount from M/s. Unitech Ltd was discussed in detailed including the financial position of M/s. Unitech Ltd., extent of the deliveries of plots given vis-a-vis a total contracted deliveries and the issue arising in the title for those plots as well as tenancies, which are claimed in respect of number of these plots. Based upon this discussion it was resolved that the amount of Rs.7,99,37,826/- receivable from M/s. Unitech Ltd. be written off in the financial year 2008-09."

17. Section 36 of the Act post amendment dated 01.04.1989 occurs under the heading 'other deductions', and its relevant extract, for the purpose of this case, is as follows:

"36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 -

(vii) subject to the provisions of sub-section (2), 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:

Provided that in the case of an assessee to which clause (viia) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause:

Provided further that where the amount of such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof becomes irrecoverable or of an earlier previous year on the basis of income computation and disclosure standards notified under sub-section (2) of Section 145 without recording the same in the accounts, then, such debt or part thereof shall be allowed in the previous year in which such debt or part thereof becomes irrecoverable and it shall be deemed that such debt or part thereof has been written off as irrecoverable in the accounts for the purposes of this clause.

Explanation 1.—For the purposes of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the assessee shall not include any provision for bad and doubtful debts made in

the accounts of the assessee. Explanation 2.—For the removal of doubts, it is hereby clarified that for the purposes of the proviso to clause (vii) of this sub-section and clause(v) of sub- section (2), the account referred to therein shall be only one account in respect of provision for bad and doubtful debts under clause (viia) and such account shall relate to all types of advances, including advances made by rural branches;....

(2) In making any deduction for a bad debt or part thereof, the following provisions shall apply—

- (i) no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;
- (ii) if the amount ultimately recovered on any such debt or part of debt is less than the difference between the debt or part and the amount so deducted, the deficiency shall be deductible in the previous year in which the ultimate recovery is made;
- (iii) any such debt or part of debt may be deducted if it has already been written off as irrecoverable in the accounts of an earlier previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year), but the Assessing Officer had not allowed it to be deducted on the ground that it had not been established to have become a bad debt in that year;
- (iv) where any such debt or part of debt is written off as irrecoverable in the accounts of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year) and the Assessing Officer is satisfied that such debt or part became a bad debt in any earlier previous year not falling beyond a period of four previous years immediately preceding the previous year in which such debt or part is written off, the provisions of sub-section (6) of Section 155 shall apply;
- (v) where such debt or part of debt relates to advances made by an assessee to which clause (viia) of sub-section (1) applies, no such deduction shall be allowed 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 debts account made under that clause.”

18. Prior to the amendment dated 1.4.1989, Section 36(1)(vii) was as follows:

" 36. Other deductions – (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 –

(i) to (vi) **

(vii) subject to the provisions of sub-section (2), the amount of any debt, or part thereof, which is established to have become a bad debt in the previous year. "

19. Subsequent to the amendment dated 01.04.1989, the board had issued circular No.551 dated 23.01.1990. The issue pertaining to the bad debt was set out in Paragraph 6.6 of the said circular which reads as follows:

" In order to eliminate the disputes in the matter of determining the year in which a bad debt can be allowed and also to rationalise the provisions, the Amending Act, 1987 has amended clause (vii) of sub-section (1) and clause (i) of sub-section (2) of the section to provide that the claim for bad debt will be allowed in the year in which such a bad debt has been written off as irrecoverable in the accounts of the assessee. "

20. Another Circular was issued on 30.05.2016 by the Government of India, Ministry of Finance, Department of Revenue Central Board of Direct Taxes Viz. Circular No.12 of 2016. The said Circular reads as follows:

Circular No. 12/2016

F.No.279/Misc./140/2015-(T.)

Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

* * *

New Delhi, Dated 30th May, 2016

Subject: - Admissibility of claim of deduction of Bad Debt under section 36(1) (vii) read with section 36(2) of the Income Tax Act, 1961— reg.

Proposals have been received by the Central Board of Direct Taxes regarding filing of appeals/pursuing litigation on the issue of allowability of bad debt that are written off as irrecoverable in the accounts of the assessee. The dispute relates to cases involving failure on the part of assessees to establish that the debt is irrecoverable.

2. Direct Tax Laws (Amendment) Act, 1987 amended the provisions of sections 36(1)(vii) and 36(2) of the Income Tax Act 1961, (hereafter referred to as the Act) to rationalize the provisions regarding allowability of bad debt with effect from the 1st April, 1989.

3. The legislative intention behind the amendment was to eliminate litigation on the issue of the allowability of the bad debt by doing away with the requirement for the assessee to establish that the debt, has in fact, become irrecoverable. However, despite the amendment, disputes on the issue of allowability continue, mostly for the reason that the debt has not been established to be irrecoverable. The Hon'ble Supreme Court in the case of TRF Ltd. In CA Nos. 5292 to 5294 of 2003 vide judgment dated 9.2.2010¹, has stated that the position of law is well settled. "After 1.4.1989, for allowing deduction for the amount of any bad debt or part thereof under section 36(1)(vii) of the Act, it is not necessary for assessee to establish that the debt, in fact has become irrecoverable; it is enough if bad debt is written off as irrecoverable in the books of accounts of assessee."²

4. In view of the above, claim for any debt or part thereof in any previous year, shall be admissible under section 36(1)(vii) of the Act, if it is written off as irrecoverable in the books of accounts of the assessee for that previous year and it fulfills the conditions stipulated in sub-section (2) of sub-section 36(2) of the Act.

¹available in NIRS 2010-LI-0209-8

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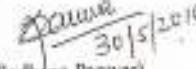
5. Accordingly, no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/not pursued upon.

6. This may be brought to the notice of all concerned.


(Sadhna Panwar)
DCIT (OSD) (IT),
CBDT, New Delhi.

Copy to:

1. The Chairman, Members and officers of the CBDT of the rank of Under Secretary and above.
2. OSD to Revenue Secretary.
3. All Pr. Chief Commissioners of Income-Tax & All Directors General of Income-Tax with a request to bring to the attention of all officers.
4. The Pr. Director General of Income-Tax, NADT, Nagpur.
5. The Pr. DGIT (Systems), ARA Centre, Jhandewalan Extension, New Delhi.
6. The Pr. DGIT (Vigilance), New Delhi.
7. The ADG (PR, PP & OL), Mayur Bhawan, New Delhi for printing in the quarterly ITK bulletin and for circulation as per usual mailing list.
8. The Comptroller and Auditor General of India.
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21. The comparison between the pre amendment and post amendment of Section 36(1)(vii) shows that prior to the amendment the assessee was required to establish that the debt in question had become bad in the previous year. Post amendment it is sufficient if the bad debt or part thereof is written off as

irrecoverable in the accounts of the assessee based on commercial expediency.

22. In the case of **Director of Income Tax (International Taxation), V/s. Oman International Bank SAOG** (Supra) the Division Bench of this Court considered the question of law whether as per the existing provisions even after the amendment w.e.f. 01.04.1989 is it obligatory on the part of the assessee to prove that the debt written off by him is indeed bad debt for the purpose of allowing it under Section 36(1)(vii). The assessee therein had claimed writing of bad debt in the sum of Rs.4,59,60,393/- . The contention of the assessee was that the write off done by following RBI guidelines was bonafide and as such contention should be allowed. The Appellate Authority was pleased to hold that as per the amended provisions under Section 36(1)(vii), the assessee is not required to establish that the debt had actually become bad and what was required was whether the amount is written off during the year or not. The order of appellate authority was challenged before the tribunal and it was urged on behalf of the revenue that two conditions had to be satisfied before the deduction under Section 36(1)(vii) could be allowed viz.

i) The debt in respect of which the deduction is claimed, is a bad debt.

ii) Such debt is written off in the account of assessee for the previous year.

However, the assessee contended that one has to look into the intention of the legislature. If the provisions are amended in order to remove hardship or mischief of the pre-amended provision, then the Hyden's Mischief Rule of interpretation should be applied. As per the pre-amended provision, the assessee was required to establish that the debt which was claimed as deduction had become bad during the previous year and Assessing Officer was empowered in terms of Section 36(2) to allow the deduction in another year, if he was of the view that the debt had become in an earlier or later year. The tribunal held that considering the expression "bad debt" in Section 36(1)(vii) strict proof is not required to be established and/or it is uneasy to prove that the debt too has become bad. It would be within the personal knowledge of the businessman whether the debt has become bad or not as long as it is bona fide and no demonstrative proof can be demanded from the assessee to establish that the debt had actually become bad. Writing off a bad debt, is an evidence on the part of the assessee with whom the information rests and is a sufficient

requirement of the amended provision.

23. This Court in Paragraph-6 of above decision has observed as follows:

6. A comparison, therefore, between the provisions as it stood and after its amendment with effect from 1st April, 1989 would show that prior to the amendment the assessee was required to establish that the debt in question had become bad in the previous year. Subsequent to the amendment from the language of the section it is sufficient if the bad debt or part thereof is written off as irrecoverable in the accounts of the assessee based on commercial expediency. If we apply the Rule of interpretation as spelt out in Hyden's case, it would lead to an irresistible conclusion, that the Legislature by the amendment has sought to exclude the burden on the assessee to prove that the debt is bad debt and leaves it to the commercial wisdom of the assessee to treat the debt as bad, once it is written off as irrecoverable in the accounts of the assessee."

24. The Court also referred to the Circular No.551 dated 23.01.1990 and More particularly Paragraph 6.6 of the said Circular and it was observed that the Circular of the Board clearly spells out that it is to eliminate the dispute in the matter of determining the year in which the bad debt is written off as irrecoverable. If in spite of this provision the assessee is again called upon to establish that the debt has become bad debt, the object behind the amendment will not be achieved. The legislative intent appears to be to avoid litigation and to do away with disputes regarding the allowability of bad debts as a deduction in computing the income of an assessee. The dispute regarding the

year in which the debt has to be allowed as a deduction has been resolved by the clear statement of the amended law that the deduction shall be allowed in the year in which the debt has been written off as irrecoverable. Considering these aspects, it would be clear that there is no burden now on the assessee to establish that in fact the debt has become bad. If this interpretation is read with the Board's circular it would be clear that the Board's circular reflects this very object which the Legislature had in its mind while amending the provision. The amendment clearly was brought to cure a defect and/or in other words to avoid the mischief. This Court then referred to the dictionary meaning of the word "bad debt". In Chambers 20th Century Dictionary "bad debt" is referred to as "a debt that cannot be recovered". The dictionary meaning of 'bad debt' reflected in Mitra's Legal and Commercial Dictionary was also quoted wherein the 'bad debt' is referred to as a debt become bad when the creditor has no reasonable chance of recovering it from the debtor. This Court also noted the meaning of 'bad debt' reflected on the Law Laxicon wherein it is explained that debt which cannot be reasonably be collected. A debt about which there is no reasonable expectation recovery; a debt believed to be unrecoverable.

25. Analyzing the definition of 'bad debt' and Section 36(1)(vii) in Paragraph it was observed as follows:

"11. All this would indicate that when the assessee treats the debt as a bad debt in his books the decision which has to be a business or commercial decision and not whimsical or fanciful. The decision must be based on material that the debt is not recoverable. The decision must be bona fide. The difference between the position, pre-amendment and post amendment would be that the burden is no longer on the assessee and can be claimed in the year it is written off in the books of account as irrecoverable. The A.O if he is to disallow the debt as a bad debt must arrive at a conclusion that the decision was not bona fide. The A.O only in those circumstances and to that extent may interfere. All that the assessee must do is to be *prima facie* satisfied based on the information available that the debt is bad and that would be sufficient requirement of the amended provisions."

26. The apex Court in the case of **T.R.F Ltd. Vs. Commissioner of Income-tax** (supra) considered the scope of Section 36(1)(vii) prior to 01.04.1989 and post 01.04.1989 on account of amendment to the said Section. After analyzing the said provisions prior to amendment and post amendment it was observed that after 01.04.1989, it is not necessary for assessee to establish that the debt, in fact, has become irrecoverable; it is enough if bad debt is written off as irrecoverable in the accounts of assessee. The assessing officer has not examined whether the debt has in fact, been written off in accounts of the assessee. When bad debt

occurs, the bad debt account is debited and the customer's account is credited, thus, closing the account of the customer. In the case of companies, the provision is deducted from sundry debtors.

27. Learned counsel for the Appellant has heavily relied upon the decision of the apex Court in the case of **Pr. Commissioner of Income Tax 6 Vs. Khyati Realtors Ltd.** (supra) wherein the decision of this Court was challenged by the revenue. This Court had dismissed the Appeal preferred by the revenue challenging the Judgment of Income Tax Tribunal. The tribunal had come to the conclusion that the transaction undertaken by the assessee was part of business activities. The amount had become irrecoverable and in view of the matter the loss was to assessee's business and was required to be allowed under Section 37(1) of the Act.

28. The Hon'ble Supreme Court analysed Section 36(1)(vii) and Section 37 of the Income Tax Act. It was observed that merely stating a bad and doubtful debt as irrecoverable write off without appropriate treatment in the accounts, as well as non compliance with the conditions in Section 36(1)(vii), 36(2) and explanation to Section 36(1)(vii) would not entitle the assessee to claim the deduction. The Apex Court referred to the decision in the case is also referred to the decision in **T.R.F. Ltd. Vs. Commissioner of**

Income-tax (supra). The apex Court also referred to the decision of in the case of **Catholic Syrian Bank Ltd Vs. Commissioner Of Income Tax, Thrissur⁴** and **M/s. Southern Technologies Ltd Vs. Joint Commissioner of Income Tax⁵** and by referring to the said decisions it was observed in Paragraph 18 as follows:

" 18. It is evident from the above rulings of this court, that:

(i) The amount of any bad debt or part thereof has to be written-off as irrecoverable in the accounts of the assessee for the previous year;

(ii) Such bad debt or part of it written-off as irrecoverable in the accounts of the assessee cannot include any provision for bad and doubtful debts made in the accounts of the assessee;

(iii) No deduction is allowable unless the debt or part of it "has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year", or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee;

(iv) The assessee is obliged to prove to the AO that the case satisfies the ingredients of Section 36(1)(vii) as well as Section 36(2) of the Act."

29. It is pertinent to note that in the case of **Pr. Commissioner of Income Tax 6 Vs. Khyati Realtors Ltd. (supra)** the assessee was carrying out real estate development business, trading in transferable development rights (TDR) and finance. The assessee contended that an amount of Rs.10 crores was deposited with M/s. C. Bhansali Developers Pvt. Ltd. towards acquisition of

4 AIR 2012 SC 1538

5 320 ITR 577 (SC)

commercial premises two years prior to assessment year in question. The project did not appear to make any progress and assessee sought return of the amounts from the builder. However, the latter did not respond. The assessee's board resolved to write off the amount as a bad debt in 2009. It was contended that amount could also be construed as a loan, since the assessee had 'financing' as one of its objects. The assessee further contended that his case would fall within the provisions of Section 36(2) hence, the write off of advance is liable under Section 36(1)(vii). The assessment officer disallowed sum of Rs.10 Crores as a bad debt in determining the income under the profits and Gains of Business or profession. The Court observed that merely stating a bad and doubtful debt as an irrecoverable write off without the appropriate treatment in the accounts, as well as non-compliance with the conditions in Section 36(1)(vii), 36(2), and Explanation to Section 36(1)(vii) would not entitle the assessee to claim a deduction. It is relevant to note that the accounts of the assessee nowhere showed that the advance was made by it to M/s. C. Bhansali Developers Pvt. Ltd in the ordinary course of business. Its primary argument was that amount of Rs.10 Crores was given for the purpose of purchase of constructed premises. However, the amount was written off on 28.03.2009. There was no material to

substantiate this submission, in respect of payment of the amount, the time by which the constructed unit was to be given to it, the area agreed to be purchased, etc. In support of the argument that the amount was given as a loan, the assessee nowhere established the duration of the advance, the terms and conditions applicable to it, interest payable, etc. The assessee conceded that it had received interest income for the relevant assessment year. However, it could not establish that any interest was paid (or shown to be payable in its accounts) for the sum of Rs.10 Crores. There was nothing on record to suggest that the requirement of the law that the bad debt was written off as irrecoverable in the assessee's accounts for the previous year had been satisfied. The assessee's claim was that it was given to M/s. Bhansali Developers Pvt. Ltd. for acquiring immovable property. It was in the nature of a capital expenditure. It could not have been treated as a business expenditure. The assessee's claim for deduction of Rs.10 crores as a bad and doubtful debt cannot be allowed. The facts of the said case differs from present proceedings.

30. In the present case, the assessee have entered into an agreement with Dantras Estate Pvt. Ltd, for purchase of 2,500 acres of land at Sindhudurg on 10.07.2005, 29.06.2006 & 13.09.2006. Copies of the agreements were produced on record. Out of the said

land the assessee agreed to sell 2,000 acres of land to M/s. Unitech Ltd. The MOU was executed between the parties. The assessee sold 205.234 acres of land to M/s. Unitech Ltd. Profit of Rs.16,52,38,928/- was earned and returned as business income. As on 31.03.2008 amount payable to M/s. Unitech Ltd. was Rs.2,20,81,480/-. From April to June 2008, 67.998 acres of land was sold for Rs.9,51,97,200/- excluding the amount incurred. The balance amount was Rs.7,99,37,826/- was recoverable from M/s. Unitech Ltd. as on 30.06.2008. Inspite of several reminders and attempts by the assessee no amount was received by assessee from M/s. Unitech Ltd. There was crash in the share price of M/s. Unitech Ltd from Rs.546/- to Rs.18/-. The properties of M/s. Unitech Ltd were put on sale. M/s. Unitech Ltd. was not in a position to honour the commitment. There was no response to the reminders made by the assessee. Resolution was passed in the board meeting to write off the said amount as bad debt and entries were passed in books of account. The assessee had shown the income from business from the sale and purchase of land and the income as such has been accepted by the assessing officer. The assessee had proved that the debt had become bad during the year. In view of the amendment to Section 36(1)(vii) necessity of establishing beyond what was brought on record by the assessee

was not warranted. The assessee has written off the bad debt. The assessee had placed before the tribunal the schedule of the profit and loss account as well as the copy of the account of M/s. Unitech Ltd. in the ledger of the assessee. It was pointed that the bad debt claimed by the assessee relate to the assessee's business as the income from sale of the land to M/s. Unitech Ltd. has duly been shown as business income and accepted as such. Thus, there is sufficient evidence to show that the income was related to assessee's business. The amount was never recovered by the assessee. There is nothing to infer that the write off was not genuine. The amount was duly written off and the amount has been treated as income due to the assessee in his books due to the business transactions entered into by the assessee with M/s. Unitech Ltd. There was relationship of debtor and creditor. It is pertinent to note that the income from the sale of the land has been accepted by the revenue in the preceding year as such income from business. The assessee has also shown the income as business income. We find that the claim of the assessee is in consonance with Section 36(1)(vii) and Section 36(2) of the Act. It cannot be said that assessee has not complied with the conditions under Section 36(2) of the said Act. The assessee has taken into account the debt so written off in computing the income of assessee in the

previous year in which the amount of such debt is written off. The tribunal has taken into consideration these aspects. It was observed that even if the income has not been taken into account in the earlier previous years it cannot be said that the assessee has not complied with provisions of Section 36(2). It is the case where ultimately no recovery has been made by the assessee from M/s. Unitech Ltd. Once the assessee sold the land to M/s. Unitech Ltd, the debtor and creditor relationship has come into existence due to the business transaction between the assessee and M/s. Unitech Ltd.

31. The legislature by amendment has sought to exclude the burden on the assessee to prove that the debt is bad debt. The subsequent circulars reflects the object of amendment. The object of provision is to avoid litigation and to do away with disputes regarding allowing bad debts as deduction in computing income of assessee as observed by this Court in the decision referred above.

32. Considering the aforesaid circumstances we do not find any reason to interfere in the order dated 11.01.2013 passed by the Income Tax Appellate Tribunal. The appeal would not sustain and is required to be dismissed.

ORDER

- i) Tax Appeal No.7 of 2013 is dismissed and disposed off.

(BHARAT P. DESHPANDE, J.)

(PRAKASH D. NAIK, J.)

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