

**B.N. Khandelwal Vs. Ito**

**B.N. Khandelwal Vs. Ito**

**SooperKanoon Citation :** [sooperkanoon.com/75656](http://sooperkanoon.com/75656)

**Court :** Income Tax Appellate Tribunal ITAT Mumbai

**Decided On :** May-30-2007

**Judge :** K Thangal, Vice, V Gupta

**Appellant :** B.N. Khandelwal

**Respondent :** ito

**Judgement :**

1. This appeal is filed by the legal heir of the assessee against the order of the Commissioner (Appeals)-XIV, Mumbai, dated 10-11-2003 for assessment year 1999-2000.

1. The learned Commissioner (Appeals) erred in confirming the disallowance of Bad Debts of Rs. 34,10,000.

2. The learned Commissioner (Appeals) further erred in holding that in respect of Bad Debts of K.M. Nemani of Rs. 29,10,000, the debt cannot be said to have become bad in view of the pendency of the recovery proceedings.

3. The Commissioner (Appeals) further erred in holding that the appellant has not carried out any business activity and income earned out of interest is assessable under the head 'Income from other sources' and, therefore, bad debt in respect of K.M. Nemani is not allowable under Section 36(1)(vii).

4. The facts in brief, are that the assessee was a member of the Bombay Stock Exchange and sold its membership card (sic) on the assessment year 1995-96 for

a consideration of Rs. 1.5 crores. The said amount utilised by the assessee in carrying out share dealings and on granting of loans and advances to earn interest. The assessee showed interest income as its business income. The assessee also showed profit from share dealings as business profit. The assessing officer scrutiny of P & L account, noted that assessee had claimed Rs. 34,10,000 as bad debts. The assessing officer prima facie formed an opinion that the assessee, in the absence of any valid money lending licence could not be said to be engaged in the business of money lending and hence such debts did not represent the money lent in the normal course of business of money lending and accordingly conditions laid down under Section 36(2) of the Act were not satisfied. The assessing officer in respect of loan of Rs. 29,10,000 given to Shri K.M. Nemani held that it was a case of premature write off because recovery proceedings were pending in the Bombay High Court. With regard to loan of Rs. 5 lakhs given to M/s. Videocon Holdings (P.) Ltd., no documentary evidences were given, hence, assessing officer held that genuineness of bad debts in respect of this loan was not proved. The assessing officer also drew support from the decision of the Hon'ble Bombay High Court in the case of Chinai & Co. (P.) Ltd. v. CIT . Aggrieved by this, the assessee carried the matter before the learned Commissioner (Appeals) wherein the assessee pointed out that the assessing officer did not consider the appellate order for 1997-98 wherein the learned Commissioner (Appeals) had allowed the claim of the assessee. The assessee also reiterated the submissions made before the assessing officer. The learned Commissioner (Appeals) however upheld the action of assessing officer and recorded his findings as under: 10. After going through the facts of the case for the assessment order and after hearing the arguments of the learned AR, I find that, the assessing officer was justified in holding that, the debts were not representing money lent in normal course of business of money lending, since, the money lending business requires valid license from the concerned authority, and since, in money lending business only, the loans were debts. As held by the Hon'ble Bombay High Court in the case of Chinai & Co. (P.) Ltd, 206 ITR 616 that, the income of interest and dividend earned by the assessee through the shares of managed company, which were continued to be held by the assessee-company would not be sufficient to say that, there was a business in the said year, and the

expenditure will not be allowable under Section 3(1) and the income of interest and dividend will be assessed under the head 'Income from other sources'. In the appellant's case, the appellant was a share broker till assessment year 1995-96 when the BSE membership card was sold and subsequent to that assessment year, the appellant had only earned income from dividend and interest, out of investment made, out of funds received on sale of BSE membership card. Accordingly, the same was not a business activity and hence, the income earned out of interest would be: assessable as "Income from other sources". Thus, the question of allowing bad debts under Section 36(1)(vii) does not arise. Further, regarding the loan of Rs. 29,10,000 to M/s. K.M. Nemani, it was evident from the documents that, the appellant had initiated the process of recovery of the dues from M/s K.M. Nemani by filing the suit in Bombay High Court, which was not yet finalized, and hence, debt cannot be said to have become bad, in view of the pendency of the recovery proceedings.

11. Regarding the debt in respect of M/s. Videocon Holdings (P.) Ltd., the appellant did not give any details thereof. It was clearly submitted in the letter dated 21-3-2002 by the appellant before the assessing officer that, the legal heirs were unable to trace out any document pertaining to the recovery of the loan amount from the said party. Thus, the assessing officer was correct in holding that the "so-called" loan given to M/s. Videocon Holding (P.) Ltd., was not proved as bad debts. Accordingly, following judgments of Hon'ble Bombay High Court in the case of Chinai & Co. (P.) Ltd., 206 ITR 616, as quoted supra, I find that, the assessing officer was justified in not allowing the bad debts of Rs. 34,10,000, which were correctly disallowed, rejecting the claim of the appellant.

5. The learned Counsel for the assessee pointed out that the claim of bad debts was accepted by learned Commissioner (Appeals), in 1997-98 and which came before the Tribunal. The Tribunal vide its order dated 19-1-2005 reversed the order of the learned Commissioner (Appeals), however, the same was not required to be followed in this year for the reason that the Tribunal, in deciding the issue against the assessee, placed reliance on the decision of Jurisdictional High Court in the case of Phalton Sugar Works Ltd. v. CWT which was overruled by Hon'ble Supreme Court in the case of S.A. Builders Ltd. v. CIT . The learned

Counsel also contended that the decision of Hon'ble Calcutta High Court in the case of *Turner Morrison & Co. Ltd. v. CIT*, being the direct decision on the issue, was not followed by the Tribunal being binding. However, in view of these subsequent developments, this decision was not required to be followed. The Id. Counsel thereafter, contended that the assessee had given these loans on interest in earlier years and declared interest thereon as business income which was assessed so as well. Hence, all the preliminary conditions for claiming the bad debt were satisfied.

The learned Counsel also contended that, for the purpose of Income Tax Act, the requirement of money lending licence to hold a person engaged in money lending business was not specified, hence, the engagement of a person in the money lending business had to be consideration on the basis of nature and frequency of transactions entered into by the assessee and on that basis the assessee met all norms to hold it as engaged in the business of money lending. The learned Counsel also contended that the assessee was also engaged in the share dealing business and money lending licence was required by the person who was solely carrying on business of money lending. The learned Counsel also drew our attention to the P & L account wherein the assessee had declared share trading profit at Rs. 20,54,348 and contended that it was having business profits in addition to interest earned and shown the same as business income.

6. The learned Counsel also contended that the decision of Hon'ble Bombay High Court in the case of *Chinai & Co. (P.) Ltd. (supra)*, had been wrongly applied as in that case, the business had ceased to continue and assessee had only income from interest and dividends, whereas in the present case, the assessee was having interest (sic) income. The learned Counsel for the assessee also narrated the (sic) details relating to transaction with Mr. K.M. Nemani which resulted into default by him in the repayment of loan, efforts made by the assessee and no possibility of recovery of any sum because this part was not having any assets. It was also contended that even the sum was not deposited in the court as directed by Hon'ble Bombay High Court.

With regard to the other loan transaction M/s. Videocon Holdings (P.) Ltd., the learned Counsel for the assessee contended that the assessee had died and the legal heirs wrote it off as the same was (sic) not recoverable. The learned Counsel also relied on various judicial decisions in support of its claim however, he particularly placed reliance on the decisions of Hon'ble Gujarat High Court in the case of Kamla Cotton Co. v. CIT and on the decision of Special Bench of the Tribunal in the case of Dy. CIT v. Oman International Bank SOG (2006) 100 ITD 285 (Bom.).

7. The learned DR, on the other hand, placed strong reliance on the order of the learned Commissioner (Appeals). He also contended that in case of advances given to M/s. Videocon Holdings (P.) Ltd. conditions of Section 36(2) were not satisfied.

8. We have considered the submissions made by both the sides, material on record and orders of authorities below. Admittedly the assessee received substantial sum on sale of BSE membership card in assessment year 1995-96 which has been deployed by the assessee in granting loans and advances on interest. It is also in dispute that the assessee has also carried on share dealing business subsequently in the capacity of sub-broker or a trader for assessment year 1997-98 (sic) the Tribunal rejected the claim of the assessee regarding write off of bad debts for the reason that, in the absence of money lending licence, no other evidence or material was produced to establish that the assessee was carrying on money lending business. The Tribunal also relied on the decision of Hon'ble Jurisdictional High Court in the case of Phalton Sugar Works Ltd. (supra) and followed the same in preference to the order of Hon'ble Calcutta High Court in the case of Turner Morrison & Co. Ltd. (supra). Now, the position has changed a little bit in view of the decision of the Hon'ble Supreme Court in the case of S.A. Builders Ltd (supra), wherein advances to subsidiary company has been held as given for the purpose of business of the assessee-company. It is also noted that in the assessment year 1997-98 the assessing officer had assessed the income from interest under the head 'Income from other sources' whereas in the present year the assessing officer has assessed the same under the head 'Profit and gains of business or profession'.

Although, the learned Commissioner (Appeals), after rejecting the claim of bad debts, has observed that the income from interest should be assessed under the head 'Income from sources', however, the same is nothing more than a justification to reject the claim of assessee.

Practically, the approach of the revenue authorities is blow hot blow cold at the same time which cannot be allowed. We also find that before the learned Commissioner (Appeals), the assessee had placed reliance on the decision of the Tribunal in the case of Smt. Gulab Sundri Bapna v. Dy. CIT (2001) 79 ITD 455 (Delhi) where it was held that where the assessee was regularly engaged in money lending business and had been earning interest income therefrom interest income of the assessee was taxable under the head 'business income' regardless of the fact that the assessee had not obtained any money lending licence. We further find that the Tribunal in the case of Smt. Gulab Sundri Bapna (supra), relying on the decision of Hon'ble Supreme Court in the case of Sole Trustee, Loka Shaikhs hana Trust v. CIT regular course of dealings in money lending could not be brushed aside merely for the reason that the assessee was not having any money lending licence. However, the learned Commissioner (Appeals) has not dealt with this judgment. We also find that this decision was also not considered by the Tribunal in the earlier assessment year 1997-98. The facts of the present case are almost similar to facts of that case. In the present case also the assessee has entered into number of transactions over the years whereby it has earned interest on loans and advances given in the ordinary course of its activities. Assessment year 1997-98 was only the second year, however this is the 5th year of the engagement of the assessee in the same kind of transactions, hence, having regard to the nature of transactions undertaken by the assessee, it can be held that the assessee is engaged in the business of money lending. We are also of the view that absence of money lending licence is not so crucial for the purpose of Income Tax Act, 1961, if the nature of activity undertaken by the assessee can be decided on the basis of other facts. As stated earlier, the assessee is engaged in granting of loans on regular basis and interest income has also been shown as business income which also reflects the intention of the assessee. We are also of the view that pendency of recovery proceedings cannot come into the way of allowing of bad debts, if other facts clearly establish that there are no chances of

any recovery of the money even if a decree in favour of the assessee is pronounced by the Court. In the present case the bad debt of Mr. K.M. Nemani stand on the same footing. However, in the absence of details regarding loan transactions with M/s. Videocon Holding (P.) Ltd. the same cannot be allowed. We are further of the view that the decision of Hon'ble Jurisdictional High Court in the case of Chinai & Co. (supra) is in other context, hence, the same is not applicable to the facts of the case. In this view of the matter and taking into consideration facts of the year under appeal, subsequent legal developments, we are of the view that the decision of the Tribunal in the earlier assessment year is not applicable and assessee's claim in respect of bad debts of Mr.

K.M. Nemani is justified. Accordingly, order of the learned Commissioner (Appeals) stands modified and we direct the assessing officer to allow the claim of bad debt in respect of this account. Thus ground No. 1 stands partly allowed and ground Nos. 2 and 3 stand accepted.

9. In the result, the appeal filed by the assessee stands partly allowed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**