

Tulip Star Hotels Ltd. Vs. Additional Cit, Spl. Range 1

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jun-01-2007

Judge : R Gupta, R Singh

Appellant : Tulip Star Hotels Ltd.

Respondent : Additional Cit, Spl. Range 1

Judgement :

1. These are three appeals by the assessee against the orders of the Commissioner (Appeals) relating to the assessment years 1998-99, 1999-2000 and 2003-04. Common issues are involved in these appeals, therefore, they are disposed of by this single order.
2. In appeal for the assessment years 1998-99 and 1999-2000, the main ground of the assessee is against disallowing the claim of bad debt/business loss due from M/s. Fairmark Apparels (India) Ltd. (Fairmark) amounting to Rs. 122 lakhs and an amount of Rs. 85 lakhs due from Makan Investment & Trading Co. Ltd. (Makan) aggregating to Rs. 207.47 lakhs for the assessment year 1998-99 and Rs. 340 lakhs for the assessment year 1999-2000.
3. The assessee has also raised legal ground for the assessment year 1999-2000 against reopening of the assessment under Section 147 was not pressed during the course of hearing of this appeal by the learned Counsel of the assessee, therefore, the same is dismissed as not pressed.

4. The main ground that is confirming the disallowance of bad debts and business loss is disposed of together for both the years since the facts are identical.

4.1 Briefly stated, the facts are that the assessee company filed its return of income for the assessment year 1998-99 on 30-11-1998 declaring a loss of Rs. 4,80,020. The assessment was completed on 28-2-2001 under Section 143(3) determining an income of Rs. 2,32,09,767. The assessee's main business as set out in the object clause was to provide lease finance, to provide hire-purchase finance, to provide finance for assisting in sale of goods/articles etc., to provide finance to promote, establish, support, setting up of or establishment of industrial/trading activity, to provide loans and other form of financial assistance to acquire/buy securities for trade purposes, to provide financial consultancy services and to conduct money charging business. The assessee is a non-banking finance company since its incorporation in 1987 and mainly engaged in providing funds and non-fund based financial services. The assessee also conducts money-changing business as full-fledged moneychanger. The fund based business activities of the assessee includes giving of loans providing funds for leasing and hire purchase activities, providing fund for bill discounting facilities, providing funds to entities where the assessee is a promoter. Acquisition of securities for funding/trading purpose and also lending of funds in different manner is a financial contract.

These facts are enumerated in the statement of facts/sheets enclosed with the memo of appeal filed before the Tribunal.

4.2 During the assessment proceedings, the assessee-company has in its profit and loss account claimed deduction of Rs. 2,35,36,427 as advance written off and in-order to explain these advances, the assessee company has in its note filed along with the computation of income, mentioned as under: Pursuant to the provisions of Sections 28, 36 and 37 other applicable provisions of the Income Tax Act and further following the ratio of the decision of the Supreme Court as enunciated in the case of Badridas Daga v. CIT and in number of other decisions in the computation of its taxable business income the company has claimed deduction of Rs. 235.36 lakhs under the head "Advance Written Off" on the

principle that business gains cannot be computed without deducting business losses. The break-up of Rs. 235.36 lakhs is as follows: (a) Rs. 100 lakhs was placed by the company with Citibank as fixed deposit in the year 1994-95. The company agreed with Citibank for a lien on the said deposit in consideration of the said bank disbursing a credit line to Fairmark a company in respect of which the assessee company was a co-promoter. The company earned interest income on the said deposit from Citibank and also earned interest income on the said deposit from Fairmark. On Fairmark's defaulting in payment of the dues to Citibank, the amount of fixed deposit of Rs. 109.06 lakhs (including interest accrued on the fixed deposit) was appropriated by the said bank against the dues of Fairmark in August 1997, the business operation of Fairmark were controlled by 3 non-resident Indian directors who have since abandoned the business affairs of Fairmark. The company had entered into an agreement with the said non-resident directors on 11-12-1996 whereby the said directors had undertaken to cause Fairmark to repay the dues of Citibank, and pay to the company:(a) by way of refund of share application money of Rs. 12.50 lakhs (b) arrears of interest on the deposit of Rs. 100 lakhs and (c) share of profit from Fairmark. The company has initiated legal proceedings in India against the Dass Brothers for their failure/misconduct in the discharge of their fiduciary responsibilities, as Directors are responsible for the operations of Fairmark and also in U.K. for break of agreement dated 11-12-1996. Notwithstanding a partly favourable judicial ruling by the courts in UK, the company is not hopeful of recoveries and hence the amount of fixed deposit of Rs. 100 lakhs with Citibank, the interest accrued thereon which was appropriated by Citibank and the share application money of Rs. 12.50 lakhs, all aggregating to Rs. 122.47 lakhs has been written off as business loss.

(b) An amount of Rs. 85 lakhs written off in the books of account as explained in note 4(ii) of Schedule 9 to the accounts for the financial year 1997-98 has been written off as business loss.

(c) Rs. 22.65 lakhs was paid in the year 1994-95 as advance to various vendors (villagers) for purchase of land at Bangalore for business of development activities. The company subsequently realized that the vendors had misrepresented to the company and entered into agreement(s) of sale by suppressing material facts

concerning the transaction. Since money advanced is not recoverable, the entire amount so paid including incidental expenses aggregating to Rs. 27.89 lakhs has been written off in the books as business loss.

5. The details in regard to the amount of Rs. 85 lakhs written off in the books of account are explained in Schedule 9 of the audited balance sheet enclosed along with the return of income which are as under: (i) Payment of Rs. 500 lakhs by way of application money for redeemable preference shares of another company (Issuer Company) against which the shares were neither allotted nor monies refunded.

Pursuant to negotiations, it was mutually agreed that a third party indebted to the issuer company would repay the said amount to the company along with interest. The third party issued post-dated cheques towards repayment of the principal amount of the debt. An amount of Rs. 75 lakhs was repaid by the third party and the balance amount of Rs. 425 lakhs has not been repaid and the third party disclaims its obligation to pay the amount. The above dues represent a legally enforceable debt and necessary efforts are under process for recovery thereof. However, in view of the uncertainties involved, as a matter of prudence and in accordance with the accepted principles of accounting. Company has not taken credit for interest on the principal amount. Without prejudice to its right of recovery of the entire disputed amount, based on prudent accounting practices, the company has written off an amount of Rs, 85 lakhs out of unrealized principal amount. The company has further been legally advised that it has also recourse to the issuer company to enforce repayment of the debt and the interest thereof in the event of the failure of the third party to repay the balance principal amount and the interest thereof.

5.1 After examining these details the assessing officer noticed that the claim of the assessee based on three items which are basically advances given for share application money, interest-free advances and also for purchase of capital assets. The assessee was required to furnish the justification for claim of the bad debt/business loss claimed in its return. A detailed reply dated 27-2-2001 was filed by the assessee by which it was claimed that the deduction under Section

36(1)(vii), read with Section 36(2) is truly in the nature of an allowance for a business loss and hence has to be deducted as general principle in order to arrive at the true profits of the business. It was further explained that the conditions for claiming bad debt under Section 36(2) is satisfied in the present case as the assessee indulged in the activity of money lending. The object clauses of the company's business were also cited before the assessing officer. Reliance was also placed on various case laws. However, after considering the details and case laws, the assessing officer found that the claim of the assessee is not allowable, as the assessee does not deal with the money lending business. It was also found by the assessing officer that the assessee company had entered into a deal with M/s. Fairmark as a co-promoter and pledged their Fixed Deposit Receipts with the Citibank as a security for loan to be given by Citibank to Fairmark. It was further seen by the assessing officer that moreover in order to promote business certain advances were also given. After the borrower failed to offer the money in the Citibank and security of FDR given by the assessee company was adjusted by the Citibank against the dues to Fairmark. On perusal of the documents, it was seen by the assessing officer that Shri Paul Dass who was anon-resident has confirmed the valuation and settlement in UK and in India and, therefore, it does not appear to be clear cut case where the money advanced by the assessee company could be said to be a money advance in the normal course of business of money lending. The Assessing Officer further observed that the assessee company had advanced this money to Fairmark as a co-promoter and definitely advancing money to promote company is not a part of the business of the company. Once the money was advanced to a company the recovery proceedings from the company are to be carried out with under the provisions of the Companies Act and no such details regarding the steps being taken for recovery of money are moved for liquidation of that company have been furnished. Therefore, the assessing officer opined that the necessary conditions that the debt should have been incurred in the normal course of business and that it should have become bad in not furnishing and therefore, cannot be claimed as deduction by the assessee.

5.2 Regarding the advance given to Makan, it was seen by the assessing officer that the assessee company had advanced application money of Piem Hotels (Piem) and once shares were not allotted they entered in assigning conduct of

M/s. Makan. A perusal of the correspondence furnished indicates that Makan has not yet refused to honour the cheques but had only referred to certain correspondence between the assessee company and Tax Group of Hotels for which necessary correspondence had taken place. It was seen by the assessing officer that despite this assignment of the share application money, the assessee company also had another advance given to Piem amounting to Rs. 4,95,00,000 as on 31-3-1998. This amount, however, has still been shown recoverable. As far as ICE) (Inter Corporate Deposit) with Makan which had been assigned under agreement by Piem to Rs. 5 crores out of which only Rs. 85 lakhs has been written off in this year. Since the principal debtor of the assessee company is still Piem, the assessee company should have furnished the F details and steps taken for the recovery of the application money from Piem, which is still carrying on its business. No details of the correspondence undertaken either with the registrar of the companies or with Piem had been furnished and, therefore, the assessing officer was of the view that it is clear that the sum shown to be recoverable from Makan is still recoverable from Piem and therefore, cannot be considered as a bad debt and accordingly cannot be allowed as deduction.

6. The third issue, which was regarding the advance given for purchase of land for business of the assessee company. As the assessee company has gone into liquidation and dealing in land, thus it was seen that the advances were made for purchase of land to acquire the capital asset, therefore, the assessing officer opined that the same cannot be claimed as bad debt deduction.

6.1 Accordingly, total claim of the bad debt amounting to Rs. 2,35,36,427 was disallowed by the assessing officer.

6.2 Detailed submissions were filed before the Commissioner (Appeals).

Reliance was also placed on various case laws. However, the learned Commissioner (Appeals) was of the view that the assessing officer was justified in disallowing the claim of the assessee. The Commissioner (Appeals) has taken into consideration various case laws in support of his contention. These decisions are in the case of CIT v. Birla Bros.

(P) Ltd. where the assessee guaranteeing loan to selling agents and selling agents compelling to pay the same and no circumstances showing that the assessee was under obligation to provide such guarantee, the amount was held not to be deductible as bad debt.

6.3 In the case of S.A.V. Thomas & Co. Ltd. v. CIT , where the Hon'ble Supreme Court has held that an advance paid by the assessee company to purchase shares cannot be said to be incidental to the trading activity of the assessee-company. It was mere in the nature of a price paid in advance of shares which the southern agencies had a right to be allowable in RTM Ltd. Therefore, it cannot be described as debt and indeed the change in the books of account of the assessee-company clearly shows that the assessee-company itself was altering the entities to convert the advance into debt so as to able to write off and claim the benefit of Section 10(2)(xv). The Commissioner (Appeals) further placed reliance on the decision in the case of CIT v. Sembi Traders and Hasimara Industries Ltd. v. CIT , wherein it was held that where the money was 7. The contentions raised before the lower authorities were reiterated by the learned Authorised Representative before the Tribunal. It was submitted that the assessee is a non-banking finance company, therefore, any recoverable amount advanced during the course of business is allowable as bad debt under Section 36(1)(vii), read with Section 36(2) or as business loss. Attention of the Bench was drawn on various documents placed on record from pages 13 to 51 and thereafter up to 80. At pages 30 to 51, the copies of accounts and evidences showing prospects of the business, interest income on advances given during the course of business, the details of advances, the task of accountancy, the prospectus, approvals and the main objects of the assessee company. It was further explained that the assessee company was incorporated some time in the year 1987 and since then the assessee was advancing loans to various subsidiaries for earning of interest. It was further submitted that the interest income earned by the assessee has also offered for taxation and the same has taxed also. Attention of the Bench was drawn on computation sheet of income placed in the records. The circumstances of the amounts recoverable from Fairmark, Piem or Makan and on account of land purchased for its business purposes were explained by the counsel of the assessee. Reliance was also placed on various decisions in CIT v. Crescent Films

(P) Ltd. (2001) 248 ITR 6701 (Mad.), Essen (P) Ltd. v. CIT , C.T. Narayanan Chettiar v. CIT and CIT v. S.P.Balasubramaniam (2001) 250 ITR 1272 (Mad.). The ratio of these decisions were read and explained also and it was submitted that the facts of the assessee's case are fitting in the facts of these cases and therefore, the claim of the assessee is allowable. Reliance was placed on the decision of Hon'ble Supreme Court in the case of Badri Das Daga v. CIT and in Jhalani & Co. v. Asstt. CIT (2001) 77 ITD 44 (Delhi) and CIT v. Amalgamation (P) Ltd. (1997) 226 ITR 1883 (SC). The decisions relied upon by the learned Commissioner (Appeals) were also discussed and it was explained that the ratio of these decisions are not applicable at all as the facts of the present case are different.

7.1 Regarding the claim of bad debt on account of advance given for purchase of land, the assessee simply placed reliance on the decision in CIT v. Anjani Kumar Co. Ltd 8 to 10. The learned departmental Representative on the other hand, strongly placed reliance on the orders of the learned Assessing Officer and the learned Commissioner (Appeals). It was further explained that not a single debt which has been claimed as a bad debt, forms part of profit and loss account, therefore, they are not allowable. It was further explained that the assessee has not proved that it does the business of money lending. Attention of the Bench was drawn on page 31 of the paper book, where note on different deposit is given. It was explained that the assessee has applied for licence of money lending in the accounting year under consideration and no registration has been done even after the close of the accounting year, therefore, it cannot be said that the assessee is doing money-lending business. It was further explained that it has only stated that the assessee is a co-promoter of Fairmark, but nothing has been brought on record that how the assessee's interest is involved in Fairmark business. As a promoter of Fairmark does not prove that how it is business of assessee and how it prove that the assessee is doing money-lending business. It was further submitted that guarantee given for its own cannot be treated a guarantee for business purpose or money lending business. The onus lay upon the assessee has not been discharged for proving that the assessee's activities are of business for which guarantee was given by the assessee.

10.1 It was further stated that the amount shown in the name of Piem was given for allotting preferential shares and the amount given for preferential shares cannot be transferred to a loan account. It was further explained that nothing is on record to prove that Piem agreed to accept the amount taken for allotment of preferential shares, transferred to another as corporate deposit. A third party has given consent that it will refund the amount to the assessee and has issued cheques also, but it cannot be said that the amount given by the assessee has taken the character of advances given at the end of the assessee.

10.2 The learned departmental Representative further stated that the investments in shares and investment on account of loan advanced cannot be treated on equal footings. The assessee had given money for allotment of preferential shares and not for the purposes of advancing of loans. The assessee on recovery stage only treated the amounts given for allotment as inter-corporate deposits (ICD). Kailash Investments (P.) Ltd. v. CIT (2006) 153 Taxman 430 (Guj.) and further reliance was also placed on the decisions considered by the learned Commissioner (Appeals). Regarding the various case laws relied upon by the learned Authorised Representative, it was submitted that all these case laws are distinguishable on facts.

11. In reply, the learned Counsel of the assessee firstly placed reliance on the decision of Dy. CIT v. SREI International Finance Ltd. (2006) 10 SOT 722 (Delhi). It was further stated that the assessee is having 50 per cent interest in Fairmark and Dass Brothers were having 50 per cent interest in that company. It was further submitted that the Hon'ble Supreme Court in the case of SA. Builders Ltd. v. CIT ' has held that the amount advanced to its subsidiary company has to be taken as an advance given for business purposes for earning interest. Attention of the Bench was drawn on copy of balance sheet placed at page 38 of the paper book, where the assessee has shown the amount recoverable on account of ICD. It was further pointed out that for the assessment year 1997-98, which is the immediately preceding year, the amount has been shown as share application money.

Once Fairmark refused to allot the shares, the assessee immediately asked to refund the amount with interest. When they failed to refund the amount then the

same was shown recoverable on account of ICD. It was further stated that a huge interest has been shown receivable on account of these ICD and the same has been offered for taxation and has taxed also. Attention of the Bench was drawn on computation sheet placed on record. It was further explained that the assessing officer himself has treated the amount recoverable on account A of ICD, attention of the Bench was drawn on page 7 of the assessment order.

Regarding; the decision in Kailash Investments (P.) Ltd's case (supra), relied upon by the learned departmental Representative, it was explained that the facts are totally different as in that case there was a reverse situation.

We have heard arrival submissions and considered them carefully. We have also perused the relevant material on which our attentions were drawn. We have also taken into consideration the various case laws relied upon by the Commissioner (Appeals), the learned departmental Representative and by the learned Counsel of the assessee.

12. The claim in regard to bad debts of Rs. 122 lakhs due from Fairmark, the brief facts which we would like to discuss once again.

The firm Fairmark was promoted by the assessee jointly with Taj Trade & Transport Company Ltd., and Dass Brothers NRI's settled in UK. The assessee had advanced Rs. 12.50 lakhs to Fairmark as equity share application money against which the shares were never allotted by Fairmark. The assessee had also placed Rs. 100 lakhs with Citibank, Mumbai during the financial year 1994-95 as interest bearing deposit.

In consideration of Citibank giving financial facility to Fairmark, the assessee agreed to lien on the above deposit and the interest thereon was earned by the assessee. In consideration of the lien on the said deposit, Fairmark agreed to pay the assessee consideration computed at 9.125 per cent on the above deposit. d Thus, the assessee was entitled to receive interest income on the said deposit of Rs. 100 lakhs from Citibank and also from Fairmark.

13.1 Fairmark was incorporated to export designer garments to European countries. The Dass Brothers were in the garment business in UK for number of years and the business of Fairmark was managed and controlled by Dass Brothers. The assessee and Taj Trade & Transport Co. Ltd. decided to part ways with Dass Brothers and Dass Brothers were to continue with their involvement in Fairmark. In December 1996 the assessee and Taj Trade & Transport Co. Ltd. signed a settlement agreement with Dass Brothers pursuant to which the Dass Brothers agreed to the following conditions: (i) To refund Rs. 12.50 lakhs to the assessee, which was paid by the assessee to Fairmark as share application money during the financial year 1994-95.

(ii) To pay consideration computed at 9.125 per cent on the deposit of Rs. 100 lakhs placed with Citibank in consideration of the lien on the deposit by the assessee until the vacation of the lien by Citibank.

(iii) To pay Citibank the amount owing by Fairmark to Citibank so that the bank vacates the lien on the deposit.

(iv) To pay the assessee Rs. 6.25 lakhs as their share of profit from Fairmark.

13.2 The Dass Brothers failed to perform their commitments as mentioned above consequent to which Citibank in August 1997 appropriated the deposit of Rs. 100 lakhs and interest thereon amounting to Rs. 109.06 lakhs against the amount owing by Fairmark to Citibank. The Dass Brothers abandoned the management of Fairmark in India as a consequence of which the assessee and others filed a suit in July 1997 against the Dass Brothers in the Delhi High Court with a petition that the Dass Brothers should discharge their fiduciary responsibility towards Fairmark. The assessee and Taj Trade & Transport Co. Ltd., also filed a case in the court in London for their failure to honour their obligations towards the assessee and Taj Trade & Transport Co. Ltd., under the settlement agreement. It was seen that there was no honour in London because the Dass Brothers has declared solvent, therefore, the recoverability of the damages was extremely uncertain in view of the facts and circumstances, the amount due from Fairmark at Rs. 122.47 lakhs was claimed as bad debts.

14. As discussed somewhere above, that the assessing officer disallowed the claim by observing that the transaction is not entered in the normal course of business and the assessee is a promoter of Fairmark and therefore, lending of funds to promoted company is not in the normal course of business. The assessee should have initiated measures for winding up of Fairmark under the Companies Act and the assessee has not furnished evidence of the debt having become bad. As stated above, the Commissioner (Appeals) was also confirmed the action of the assessing officer.

15. We have seen the correspondences and the factual aspects of the case and found that the assessee has discharged its onus to prove that the money had become bad in fact. The objections of the lower authorities that the assessee is not indulging any money lending activities is not correct because the assessee was incorporated in 1987 and money lending activities have been done by doing non-banking financial business. Huge amounts earned on account of interest was offered for taxation and the same has taxed in earlier year as well as in the year under consideration also. We have seen the objects clauses of the assessee-company and found that there are clauses of objects to run the business of non-banking finance business and to advance money as inter-corporate deposits and also business of leasing business.

15.1 A Bench of the Delhi Tribunal in the case of SREI International Finance Ltd. (supra) has held that: there was no qualification in Section 36(2) that the business of money lending should be understood only in a traditional sense. The business of a NBFC apart from leasing definitely involves lending of money. This activity of money lending and deriving income therefrom in the form of interest in the business of money lending. Hence, the assessee was entitled to deduction as claimed.

16. The assessee, as stated above, has promoted a joint venture with Dass Brothers in the name of M/s. Fairmark. As per the information given to the Bench by the learned Authorised Representative that the assessee was having 50 per cent interest in Fairmark as a promoter. The business of the Fairmark was of doing garments business. Therefore, it cannot be said that there was no business

interest of the assessee in Fairmark. Since Dass Brothers belong to U.K. and they need funds to run Fairmark and acquiring funds from the Bank, bank guarantee was needed.

The assessee had deposited Rs. 100 lakhs to Citibank and stood as guarantor for the money given to Fairmark by Citibank. This act of the assessee in giving guarantee is a conduct of money lending business, because on the guarantee money of Rs. 100 lakhs the assessee earned interest from bank as well as from Fairmark @ 9.125 per cent. The interest earned from Fairmark and from bank was offered for taxation by the assessee and the same has already taxed also.

17. As discussed above, that in the case of SREI International Finance Ltd. (supra), has held there was no qualification in Section 36(2) that the business of money lending should be understood only in a traditional sense. The business of a NBFC apart from leasing definitely involves lending of money. Similarly, the guarantee stood by the assessee has to be taken as activities of money lending. On the amount of guarantee, the assessee earned interest from bank as well as from Fairmark. The business of Fairmark was abandoned in the year 1996 and whatever the amount due from Fairmark either on account of advances given by Citibank guaranteed by the assessee or some other amount recoverable from Fairmark was treated as the amount recoverable from Fairmark in the year ending on 31-1-1997 and when it is noticed that the same was not recoverable, were claimed as bad debts in the year ending on 31-3-1998. All the conditions provided under Section 36(l)(vii) read with Section 36(2) are satisfied in the present case because the interest earned on account of guarantee stood by the assessee was offered for taxation in earlier years as well as in the year under consideration and the same has been taxed also. Therefore, the claim of the assessee is allowable as bad debts.

18. Regarding Rs. 85 lakhs recoverable from Piem, the assessee had placed Rs. 500 lakhs on 31 -3-1997 with Piem as application money for preference shares of Piem. Until allotment of preference shares by Piem the above advance was to earn income by way of interest. Piem decided against issue of preference capital and the assessee vide letter dated 26-7-1997 to Piem p asked for refund of the

above advance with interest.

19. Piem expressed inability to make immediate repayment in view of liquidity constraints and offered to instruct Makan which company during the relevant time owned inter-corporate deposits to Piem. As per the instructions of Piem to Makan vide their letter dated 29-7-1997 Makan issued post dated cheques aggregating to Rs. 500 lakhs to the assessee vide letter dated 29-7-1997. Makan instructed the assessee to deposit the cheques on their given instructions to the assessee. The assessee therefore agreed with Piem to discharge Piem against their obligation to repay the advance of Rs. 500 lakhs. Two cheques for Rs. 50 lakhs and Rs. 25 lakhs issued by Makan were encashed on 19-9-1997 and 31-10-1997 respectively. Thereafter the assessee was requested orally by Makan not to present the cheques for clearing. Subsequently, Makan under their letter dated 2-4-1998 and 15-4-1998 on wholly frivolous and imaginary grounds refused their indebtedness to the assessee. Thereafter by mutual discussion the assessee agreed with Makan to reduce a sum of Rs. 85 lakhs of the principal amount with the hope the assessee will receive the balance principal amount and interest thereon. Accordingly the sum of Rs. 85 lakhs was claimed as bad debts during the year under consideration and the remaining amount of Rs. 340 lakhs (500 lakhs - 75 lakhs received already - 85 lakhs) was claimed as bad debt in the subsequent year i.e. Assessment Year 1999-2000. As no amount was received thereafter, therefore, the assessee claimed the remaining amount as bad debts in the subsequent year.

20. It was explained by the learned Counsel of the assessee during the course of hearing of this appeal, that M/s. Makan belong to a reputed Global Tele System Ltd. group and the assessee in good faith discharged Piem on receipt of payment through cheque from Makan. While disallowing the claim of the assessee, the assessing officer observed that 'Makan has refused to honour post dated cheques but has merely referred to the correspondences between the assessee and Piem. Piem also owned Rs. 495 lakhs towards inter-corporate deposit to the assessee, which has not been treated as bad debts by the assessee. The principal debtor was Piem and the assessee has not taken any legal action against Piem. Piem still carries on business implying that Piem is solvent. Even, if the debt had not

become bad, it would have yielded a dividend income that is exempt from Income-tax and therefore the underlying asset cannot be allowed as a deduction'.

The action of the assessing officer was confirmed by the Commissioner (Appeals) as discussed above.

21. We have seen the observations of the assessing officer and other material on record and found that it is not in dispute that the amount of Rs. 500 lakhs was transferred to inter-corporate deposit in the year under consideration. In the immediately preceding year, the assessee advanced Rs. 500 lakhs for allotment of preference shares but Piem refused to allot the shares and then the assessee asked for refund of the same. At this stage Piem instructed Makan from whom some dues were recoverable by M/s. Piem. Makan has also accepted to repay Rs. 500 lakhs to assessee and it is evidenced from the facts that Makan had issued cheques of Rs. 500 lakhs. Two cheques of Rs. 50 lakhs and Rs. 25 lakhs given to assessee were encashed also. Thereafter, on account of some dispute and in hope of recovery of principal amount with interest assessee agreed to accept the amount less by Rs. 85 lakhs. In these circumstances the amount of Rs. 85 lakhs was claimed as bad debt during the year under consideration.

22. The learned departmental Representative stated that the money was allotted for shares and not for the purpose of advancing business purpose.

In our considered view the contentions of the learned departmental Representative are not correct. No doubt, the amount of Rs. 500 lakhs was given for allotment of preference shares in assessment year 1997-98. However, Piem refused to allot the same. Therefore, the assessee asked to refund the amount with interest. Piem accepted this request of the assessee and therefore, in these circumstances, Makan was instructed to pay on behalf of Piem to the assessee. The assessee had shown this amount as on 31-3-1998 as inter-corporate deposit with Makan and interest has also shown. The same has taxed also for the year under consideration. Therefore, it cannot be said that the amount of Rs. 500 lakhs has no character of inter-corporate deposit but the character of share application money. The share application money was shown by the assessee as on 31-3-1997 and in July 1997 when Piem refused to allot shares, the same was converted

into inter-corporate deposit. Inter-corporate deposit is nothing but the deposit on which the assessee was to receive interest. Therefore, in view of these facts and circumstances, we are of the considered view that since the assessee was doing non-banking finance business, therefore, inter-corporate deposits are also to be treated as deposits for the purpose of earning interest which is equal to money lending business.

Once it is seen that the inter-corporate deposits is for earning interest then the same has to be treated advancing under money lending activities. Accordingly, " the conditions of Section 36(2) are satisfied here also.

23. We have taken into consideration the various case laws relied upon by the learned Commissioner (Appeals) and the learned departmental Representative and found that these case laws are distinguishable on facts. The Commissioner (Appeals) has placed reliance in the case of CIT v. Birla Bros. (P.) Ltd. ,wherein it has been held that where the assessee guaranteeing loan to selling agent and selling agent compelling to pay the same and no circumstances showing that the assessee was under obligation to provide such guarantee, the amount was held not to be deductible as bad debts.

23.1 In the present case, the assessee has given guarantee of Rs. 100 lakhs to Citibank on behalf of the Piem on which the assessee earned interest. In the case of Birla Bros (P.) Ltd (supra), no interest was given and the Tribunal has given a finding that guarantee was for some selling agent. We have seen this order in detail and found that the Hon'ble Supreme Court at page 755 observed that: a businessman may have to stand surety for someone in order to get monies for his own business. There may be accustom of the business by which that may be the only method whereby he could get money for the purpose of his own business. If he is to discharge a surety debt and if any such custom is established it would be a business debt.

If the assessee has made a payment not voluntarily but to discharge a legal obligation which arises from his business he would be entitled to have the amount deducted as a bad debt under Section 10(2)(xi).

23.2 These observations of the Supreme Court, in our considered view are in support of the case of the assessee. In the present case, the guarantee was given to safeguard the business interest of the assessee because the business with Fairmark was joint venture and the assessee was interested in that joint venture. Therefore, the amount guaranteed by the assessee B has to be treated as business debt. On this amount, as discussed above, the assessee has earned interest also from bank as well as Fairmark. Therefore, it cannot be said that in any way the amount of outstanding against Fairmark was not business debt.

24. We have seen the decision considered by the Commissioner (Appeals) in the case of S.A.V. Thomas & Co. Ltd. v. CIT and found that the facts are different from the facts of the present case.

At page 76 the Hon'ble Supreme Court has observed that: Section 10(2)(xi) is in two parts. One part deals with an assessee who carries on the business of a banker or money-lender. Another part deals with business other than the aforesaid. Since this was not a loan by a banker or money-lender, the debt to be a debt proper had to be one which if good would have swelled the taxable profits.

24.1 Applying this test, the Hon'ble Supreme Court held that money given for acquiring shares was not allowable as bad debts. In the case in hand before the Supreme Court, the assessee's business was not money-lending. In the present case the assessee's one of the objects is of money-lending business and this is an undisputed fact that the assessee was doing non-banking finance business. Therefore, the ratio of the decision of the Supreme Court is not against assessee but supports the case of the assessee.

25. We have seen the decision relied upon by the learned departmental Representative in Kailash Investments (P.) Ltd. 's case (supra) and found that the facts are totally different.

26. We have taken into consideration the various decisions relied upon by the learned Counsel of the assessee and found that they are in support of the case of the assessee. The ratio of the decisions in the case of SREI International Finance Ltd. (supra) which we had discussed somewhere above. CIT v. Amalgamation (P.)

Ltd. , the Hon'ble Supreme Court has held that: the assessee-company had incurred loss in carrying on its own business which included furnishing guarantee to debts borrowed by its subsidiary companies. The assessee-company could have ascertained whether there was loss in the transaction of guarantee only at the stage of final payment by the liquidators, which was received in the relevant previous year for the assessment year 1962-63 and it was allowable in that year.

27.1 After going through the ratios of these decisions, it is seen that the amount of guarantee given on behalf of subsidiary the loss is allowable. In the present case, the assessee on behalf of its joint venture Fairmark stood the guarantee and when Fairmark failed to discharge its onus then only the assessee has claimed the guarantee money as loss. *Essen (P.) Ltd. v. CIT* Hon'ble Supreme Court, reversing the decision of the Hon'ble High Court, that the findings given by the Tribunal were correct findings and the amount on account of guarantee claimed as bad debt was held as allowable.

28.1 In this case, the concerned assessee stood guarantee along with a director of the managed company for a loan of Rs. 2 lakhs obtained from Bank. The managed company failed in its business and upon the pressing the bank for payment, the appellant, in accordance with its guarantee paid the bank Rs. 81,593 and out of the dues of the managed company released by bank had realized Rs. 44,905. Even thereafter the managed company did not improve and there was no prospect of realizing the money from it. The appellant written off a sum of Rs. 4,03,203 in its books of account and claimed allowance of the same as bad debts. The Tribunal found that the assessee advanced to the managed company and the agreement guaranteeing the loan to the managed company were in pursuance of its objects and were made in the course of its business and allowed the claim. On reference, the High Court reversed the order of the Tribunal. However, as stated above, the Hon'ble Supreme Court reversed the order of the High Court and confirmed the order of the Tribunal.

29. In the case of *CIT v. Williamson Magor & Co. Ltd* , the findings of the Tribunal, who found that the furnishing of guarantee for the debt of the managed company by the assessee was incidental to the carrying on the assessee's business were

confirmed by the Hon'ble Supreme Court.

30. In the case of T.J. Lalvani v. CIT , the Hon'ble High court has held that the financing by the assessee of the business of Lokmanji and of all its import of goods on Lokmanji's licenses was an activity of the assessee in the course of his business and the loss arising on the loan, therefore, was a loss, which had occurred in connection with the business of the assessee and incidental to it and was, therefore, claimable by the assessee as a deduction was justified.

In the present case also, the appellant stood guarantee to protect the assessee's business.

31. The ratios of these decisions as discussed above, in our considered view are in support of the case of the assessee. In the present case also the assessee stood guarantee by assigning the deposit of Rs. 100 lakhs in favour of Citibank to protect the business interest of its own as the guarantee was stood for Fairmark where the assessee was having 50 per cent business interest with Dass Brothers.

32. In the case of C.T. Narayanan Chettiar v. CIT the money was advanced to firm carrying on business and interest was charged on the same and the same was taxed also. The firm was dissolved and the liability was discharged by one of the partners and the same was claimed as bad debts and the Hon'ble' Supreme Court has held that the amount was allowable as bad debts under Section 10(2)(xi). Here, in the present case, the facts are similar. The assessee stood guarantee for its joint venture business and when the joint venture business failed, the bank adjusted the guarantee money and the same was claimed as bad debts by the assessee firm. In view of the above decision of the Supreme Court, the claim of the assessee allowable.

32.1 We have also taken into consideration the contentions of the learned departmental Representative that the assessee is not advancing money to Fairmark, which can be equated with the business of the assessee. In the case of S.A. Builders Ltd. (supra), the Hon'ble Supreme Court has held that the amount advanced to its subsidiary amounted to advance given to an independent party and any interest received from the subsidiary is an income of the assessee

because the subsidiary is an independent entity. In this case the Hon'ble' Supreme Court has reversed the decision of the Bombay High Court in the case of Phaltan Sugar Works Ltd. v. CWT . In the present case, the assessee has stood guarantee of Rs. 100 lakhs on which the interest is earned in accordance with the joint venture with Dass Brothers.

Therefore, it cannot be said that the amount as guaranteed by the assessee is not for its business purposes or for its business interest.

33. We have seen various other decisions relied upon by the learned Authorised Representative in Badridas Daga v. CIT ; Jhatani &Cos case (supra) and CIT v. S.P. Balasubramaniam (2001) 250 ITR 1272(Mad.) and found that the ratios of these decisions are in favour of the assessee's case. Therefore, in view of above facts and the circumstances and in view of various case laws discussed above, we hold that the assessee's claim of bad debt is allowable. However, we noted that in the case of Fairmark, the assessee claimed a sum of Rs. 6.25 lakhs as their share of Fairmark on 31-1-1997 included in the amount of total bad debts of Rs. 122 lakhs which is not clear that whether the amount of Rs. 6.25 lakhs have been offered for taxation as profit in assessment year 1997-98 or not. It has been shown in the profit of assessment year 1997-98 then the A assessee is entitled for deduction of this amount also. Otherwise, to this extent the amount cannot be allowed as bad debt because the conditions of Section 36(2) that the amount should be taken into profit & loss account is not satisfied. If it is found that this amount is not offered for taxation then to this extent the claim of the assessee cannot be allowed.

Therefore, to this extent, we restore the issue to the file of the assessing officer to examine the same and the remaining amount of Rs. 115.75 lakhs (Rs. 122 lakhs - 6.25 r lakhs) is allowed as bad debt. The amount of Rs. 85 lakhs on account of Piem/Makan is also allowed.

34. Since we have held that the same is allowable as bad debt, therefore, we are not inclined to consider the alternative contentions of the assessee that the claim is allowable as business loss.

35. Now, we will take up the remaining issue in regard to bad debts of Rs. 27.89 lakhs raised through ground No 2.
36. The assessing officer disallowed the claim of the assessee by holding that the advances were for acquiring capital assets. The Commissioner (Appeals) also confirmed the action of the assessing officer.
37. The learned Authorised Representative who appeared before the Tribunal could not controvert the findings of the learned Assessing Officer and learned Commissioner (Appeals) that the amount so advanced was for acquiring capital assets. The Commissioner (Appeals) has taken into consideration the decision of the Hon'ble Madras High Court in the case of Sembi Traders (supra) and in the case of Hasimara Industries Ltd (supra), wherein it has been held that the money advanced for acquiring capital assets cannot be allowed as business loss.
38. The learned Counsel of the assessee could not controvert this findings of the learned Commissioner (Appeals) as he simply placed reliance on the decision in CIT v. Anjani Kumar Co. Ltd. . The decision relied upon by the learned Authorised Representative is on some different facts, therefore, we are not inclined to interfere with the findings of the learned Commissioner (Appeals) to this extent. Accordingly, the disallowance of Rs. 27.89 lakhs is confirmed.
39. The assessee for assessment year 1999-2000 has raised a ground against upholding the disallowance of Rs. 340 lakhs on account of bad debts. This amount of Rs. 340 lakhs is on account of remaining amount recoverable from Piem and Makan as the same is out of total amount of Rs. 500 lakhs. We have discussed the issue in detail while disposing the ground for assessment year 1998-99.
40. After considering the issue in detail, we have allowed the ground of the assessee in regard to bad debt claim recoverable from Piem and Makan.
- On the same reasoning, we allow this ground for the year under consideration ie. Assessment Year 1999-2000 also.
41. Ground No. 3 in appeal for assessment year 1998-99 is against confirming the public issue expenses of Rs. 1,53,361 under Section 35D of the Act.

42. Briefly stated facts of the case are that in financial year 1995-96 the assessee-company issued 9,10,000 equity shares in public issue and incurred certain expenditure. The assessing officer did not allow the deduction under Section 35D of the Act. The disallowance was made on the ground that the provisions of Section 35D are applicable to the case of industrial undertaking and the assessee is not an industrial undertaking nor it is a case of extension of an industrial undertaking, accordingly the provisions of Section 35D were not applicable. The Commissioner (Appeals) also confirmed the action of the assessing officer.

43. The learned Counsel of the assessee, who appeared before the Tribunal stated that the matter should be sent back to the file of the Assessing Officer to decide the same in light of the decision of the H - Bench of the Mumbai Tribunal in the case of HSBC Securities India Holding Ltd decided in (1394/Mum./2000 for assessment year 1996-97 vide order dated 20-9-2004), as the facts in the case in hand and the facts in the case of HSBC Securities India Holding Ltd (supra) are similar.

On the other hand, the learned departmental Representative placed reliance on the orders of the authorities below.

44. After considering the submissions and perusing the material on record, we restore this issue to the file of the assessing officer to decide the same afresh in the light of the decision of the Tribunal in the case of HSBC Securities India Holding Ltd (supra) and in view of the provisions of law after affording reasonable opportunity of being heard to the assessee. We order accordingly.

45. Ground No. 4 in the appeal for assessment year 1998-99 is against in charging interest under Section 234B, which is consequential in nature, and the assessing officer is directed to allow consequential relief, if any to the assessee.

47. Now, we will take up the appeal in ITA No. 5024/Delhi/04 for assessment year 1999-2000.

48. Ground No. 1: We have already disposed of the issue by dismissing the same which was against reopening of the re-assessment under Section 147.

49. Ground Nos. 2 and 3 are against disallowance write off of Rs. 340 lakhs, which we have already disposed of.

50. Ground Nos. 4 and 5 are against confirming the disallowance of write A off of Rs. 93,986 being unrealized interest on advances.

51. We have already given our findings that the assessee is carrying on business of money lending, therefore, interest received on advance, which was not recoverable has to be allowed a bad debt. The issue is also covered by the decision of the Special Bench of the Tribunal in the case of Dy. CIT v. Oman International bank SaG(2006) 1(30 ITD 285 (Mum.) and in the case of Morgan Security & Credit Ltd. decided in (ITA 1442/Mum./06 vide order dated 7-12-2006) by the; Hon'ble Bench of the Delhi Tribunal, therefore, we direct the assessing officer to allow the claim of the assessee.

52. Ground No. 6 is against charging of interest under Section 234B, which is consequential in nature, and the assessing officer is directed to allow consequential relief, if any to the assessee.

53. Now, we will take up the appeal in ITA No. 3007/Delhi/06 for assessment year 2003-04.

54. The only ground in this appeal is against confirming the addition of Rs. 1,53,361 on account of public issue expenses under Section 35D.55. Similar issue was involved in the appeal for assessment year 1998-99 and we have restored the issue to the file of the assessing officer for that year. Accordingly, here also the issue is restored to the file of the assessing officer to decide the same afresh in light of our observations given above while deciding the appeal for assessment year 1998-99. We order accordingly.

56. In the result, the appeals filed by the assessee are allowed in part as above.

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