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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On: 30.03.2026	Delivered On: 09.04.2026

CORAM

THE HONOURABLE DR JUSTICE G. JAYACHANDRAN
AND
THE HONOURABLE MR.JUSTICE SHAMIM AHMED

Tax Case (Appeal).Nos.53 & 54 of 2010

Commissioner of Income Tax I,
Chennai. … Appellant in both appeals

vs.

M/s.The India Cements Ltd.,
827, Anna Salai,
Chennai … Respondent in both appeals

Prayer in T.C.A.No.53 of 2010: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'D' Bench, dated 15.07.2009 ITA No.778/Mds/2008 Assessment Year 2003-2004.

Prayer in T.C.A.No.54 of 2010: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'D' Bench, dated 15.07.2009 ITA No.779/Mds/2008 Assessment Year 2004-2005.

For Appellant in both appeals : Mr.T.Ravi Kumar, Senior Standing Counsel.

For Respondent in both appeals : Mr.R.Vijayaraghavan, for M/s.Subbaraya Aiyar Padmanabhan Ramamani

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COMMON JUDGMENT

The respondent herein is a company primarily involved in the manufacturing of cements. The assessment of tax for the Assessment Years 2003-04 and 2004-05 were challenged by the respondent and the same was partly allowed by the Appellate authority. The appeal by the Revenue before the Tribunal was dismissed through a common order. These two Tax Case Appeals filed under Section 260 A of the Income Tax Act by the Revenue against the common order dated 15.07.2009 passed by the ITAT in ITA No:778/Mds/08 and ITA No:779/Mds/08, confirming the order of the Appellate Authority.

2. Brief facts leading to the appeals:

M/s.India Cements Ltd, filed return of income for the Assessment Year 2003-2004, admitting a loss of Rs.174,21,40,971/-. The return was processed under Section 143(1) of the Act. Later, it was taken up for scrutiny after causing notice under Section 143(2). On hearing the assessee, the Assessing Officer passed order on 31.03.2006 computing the income as below:-

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Computation of Income

Income returned		(-) Rs.174,21,40,971/-	
Add: Disallowances (as discussed above)			
1.	Deduction under Section 35D	Rs.2,63,54,045/-	
2.	Interest not recognised:		
	(a) M/s.Industrial Chemicals Monomers Ltd	Rs.1,62,01,890/-	
	(b) ICL International Ltd	Rs.1,50,68,835/-	
	(c) ICL Sugars Ltd	Rs.5,56,91,955/-	
	(d) ICL Shipping Ltd	Rs.4,69,19,385/-	
	Total	Rs.13,38,82,065/-	
3.	Bad Debt	Rs.8,18,65,744/-	
4.	Entertainment	Rs.5,52,306/-	
5.	Guest House	Rs.12,44,760/-	
6.	Provident Fund	Rs.3,44,49,930/-	
7.	ESI	Rs.46,332/-	Rs.27,83,95,182/-
	Assessed Loss	(-)	Rs.146,37,45,789/-

3. Against the above Assessment, the assessee went on appeal before the Commissioner of Income Tax (Appeals), challenging:

(a) The addition of interest accrued on the advances to the subsidiary/associates and charging it to the Profit and Loss Account to an extent of Rs.25,854.20 Lakhs.

(b) The disallowance of the assessee's claim towards bad debts to an extent of Rs.8,18,65,744/- and;

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(c) The disallowance of deduction under Section 35D of a sum of Rs.2,63,54,045/- as debt incurred in respect of debt restructuring exercise.

4. Upon considering the grounds of appeal and hearing the assessee, the Appellate Authority, *vide* order in ITA No:194/06-07/A-III dated 31.01.2008, partly allowed the assessee's appeal on the following terms:-

a) Directed the Assessing Officer to delete the additions made on account of interest on the advances to subsidiary/associates, holding that these advances or debit balances are basically the result of commercially expedient action on the part of the assessee and hence, the interest disallowance made by the Assessing Officer are not justified.

b) Directed the Assessing Officer to delete the addition Rs.8,18,65,744/- claimed by the assessee as bad debt. The Appellate Authority held that what is required under the Act is that the assessee, should write off as the bad debt in its books of accounts. In this case, the assessee has done so in consolidated manner during the year under consideration. The write-off is given effect in the account of each individual debtor in subsequent year. When the assessee has debited the amount to the Profit and Loss Account and the contra entry is passed crediting the sundry debtors account in a consolidated manner in the books of accounts of the assessee, the conditions of Section 36(1) (vii) is fulfilled.

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c) The claim of deduction of Rs.2,63,54,045/- as expenditure incurred in respect of debt restructuring exercise under Section 35 D disallowed by the Assessing Officer upheld.

5. The Department, being aggrieved by the above order of the Appellate Authority, preferred an Appeal before the ITAT in ITA No:778/Mds/2008 on the ground that, the Appellate Authority had factually erred in holding that the assessee had not made any fresh advances and not charged interest for the reasons of commercial expediency. In fact, the assessee had actually made fresh advances and the subsidiaries were also performing well, as their goodwill had increased substantially. The assessee, in the earlier years, following the Mercantile System of Accounting and Charging Interest on advances to its subsidiaries/associates. Therefore, the addition made on the interest on advances is correct.

6. The Tribunal, after considering the material available got satisfied that the assessee had commercial angle in its favour behind such advances. Relying on the dictum laid in ***S.A.Builders Ltd vs. Commissioner of Income-Tax (Appeals), Chandigarh*** *reported in* ***[2007] 288 ITR 1 (SC)***, it decided in favour of the assessee saying, financial health of a company is not proportionate to its goodwill. Therefore, the decision not to collect interest for the advance made, when the recovery of principle itself doubtful, no notional interest can be added.

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7. Regarding the issue of bad debts, the Tribunal opined that the finding of the Appellate Authority cannot be faulted. The bad debt has been written off in the books of account of the assessee for claiming benefit under Section 36(1)(vii). The Assessing Officer had no doubt about the bad debt. He disputes the manner in which the debt been written off. Mere written off is sufficient for the claim of bad debt if it is an honest judgement. As a result, the Tribunal dismissed the appeal I.T.A.No: 778/Mds/08: AY 2003-04.

8. Against the concurrent finding, the Revenue is in appeal. The appeal T.C.(A).No:53/2010 admitted to decide the following substantial question of law:-

> *1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee company was justified in not offering for tax the interest receivable on advances to the subsidiary companies to the tune of Rs.13,38,82.065/- departing suddenly from the practice followed hitherto without any change in the circumstances?*
>
> *2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was justified in not showing the interest accrued on advances to subsidiary companies on the basis of wrong assumptions such as no fresh advances having been made during the year.?*

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3. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the decision of the Supreme Court in 288 ITR 1 was applicable to the assessee's case without appreciating that in each case the assessee had to establish commercial expediency especially when the assessee was paying huge amounts of interest on its borrowing?

4. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee's claim of bad debts to the tune of Rs.8,18,65,744/- was allowable even though the assessee had not furnished party-wise details of the amount and the claim was based only on the decision of the Head Office of the company to write off in a consolidated manner, which did not amount to fulfillment of the conditions of Section 36 (1) (vii) of the Income Tax Act?

9. Insofar as the Assessment Year 2004-05, the assessee filed return admitting loss of Rs.21,95,22,382/-. The case was processed u/s 143(1). Later selected for scrutiny. The Assessing Officer *vide* order dated 26/12/2006, passed the assessment order computing the tax payable as below:-

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(A) Business:			
	Net business loss as per computation statement		Rs.15,14,29,384/-
ADD:-	**Additions/Disallowances:-**		
1.	Share issue expenses disallowed as discussed @ Para No.1	Rs.2,04,81,875/-	
2.	Interest debited to share premium account, disallowed, as discussed @ Para No.2	Rs.17,72,00,000/-	
3.	Depreciation on electrical items, restricted to 15% as discussed @ Para No.3	Rs.53,52,147/-	
4.	Interest not recognised by the assessee, now assessed on accrual as discussed @ Para No.4	Rs.16,73,13,00/-	Rs.37,03,47,022
			Rs.21,89,17,638/-
		Rounded to	Rs.21,89,17,640/-

(B) Capital Gains: Long-Term Capital Loss, as returned		(-)	Rs.6,80,92,998/-
		Assessed Income	Rs.21,89,17,640/-
	Income-Tax thereon	Rs.7,66,21,174/-	
	Add: Surcharge	Rs.19,15,529/-	
		Rs.7,85,36,703/-	
	Less: TDS	Rs.5,92,566/-	
		Rs.7,79,44,137/-	
	Add: Interest u/s 234B	Rs.2,57,21,553/-	
	Demand Payable	Rs.10,36,65,690/-	

10. The assessee went on appeal before the Commissioner of Income Tax (Appeals) in T.A.No.838/06-07/A-III challenging the above assessment order.

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The Appellate Authority, dismissed the assessee appeal in respect of deduction of Rs.2,04,81,875/- However, allowed the assessee appeal in respect of its challenge regarding:

(a) The disallowance of Rs.1673.13 lakhs towards non charging of Interest on advances given by the assessee to its subsidiaries and associates.

(b) The disallowance of interest towards share premium on redemption of deep discount bond by the company (Rs.17.72crores) and

(c) The disallowed Depreciation on electrical items extend of Rs.53,52,147/-.

11. Unsatisfied with the reasoning for substantially allowing the assessee appeal, the Revenue preferred appeal before the Tribunal in ITA No:779//Mds/08 and contended that:-

(a) The assessee following the mercantile system of accounting and claimed the income of interest accrued in all its previous years, suddenly omitted to offer the interest accrued on advances to its subsidiaries claiming that only the real income to be brought on account.

(b) For want of details under Section 43B, the Assessing Officer disallowed the deduction of Rs.17.72 crores in the income computation. When Deep Discount Bonds and Debentures are converted into premium loans, the interest remains unpaid. Therefore charging of interest as expenditure against redemption premium again

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claiming it as deduction in the computation statement defeat the very purpose of Section 43 B.

(c) Depreciation on electrical machinery is allowable only at 15%. Higher rate of depreciation at the rate of 25% allowed in the previous year on electrical items ipso facto cannot be extended for the subsequent years also without details. The assessee having failed to provide details of electrical machinery for claiming depreciation, the disallowance under this head by the Assessing Officer is to be upheld.

12. The Tribunal confirmed the order of the Appellate Authority and dismissed the revenue appeal.

13. The appeal against the Tribunal admitted by this Court to answer the following substantial questions of law:-

> *1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee company was justified not offering for tax the interest receivable on advances to the subsidiary companies to the tune of Rs.16,73,13,000/- departing suddenly from the practice followed hitherto without any change in the circumstances?*

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2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was justified in not showing the interest accrued on advances to subsidiary companies on the basis of wrong assumptions such as no fresh advances having been made during the year?

3. Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was right in holding that the decision of the Supreme Court in 288 ITR 1 was applicable to the assessee's case without appreciating that in each case the assessee had to establish commercial expediency especially when the assessee was paying huge amounts of interest on its borrowings?

4. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the disallowance of Rs. 17.72 Crores being interest debited to share premium account amounted to double disallowance on the grounds that the assessee had not claimed it in the profit & loss account and had claimed it only in the statement of computation of income where it had disallowed the same under section 43B, when the Commissioner of Income Tax (Appeals) had not given opportunity to the Assessing Officer to examine the claim that the assessee had actually made the disallowance?

5. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in accepting that the assessee's claim without noticing that in the

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Annexure V in the audit report the amount of Rs. 17.72 Crores was not included in the disallowance under section 43B.?

6.Without prejudice the preceding question, whether the Income Tax Appellate Tribunal was right in not holding that the amount of Rs. 17.72 Crores should not be claimed as deduction in the computation statement unless the amount transferred from share premium account had been added back in the computation?

14. The Learned Senior Standing Counsel representing the Income Tax Department/the Appellant and the Learned Counsel for the assessee submitted written notes for consideration of this Court in addition to their oral submissions.

15. The two issues in common for both the appeals taken up for consideration first, before adverting to the other issues which are unique to the respective appeals.

(a) Deviating the practice of following mercantile system of accounting, not offering for tax the interest receivable on advances made to subsidiary company, whether is justifiable on the ground of commercial expediency and on assumption no fresh advance made to those subsidiary company during the year. Whether the tribunal erred in following *S.A.Builders case cited supra*, which is not similar to the facts of the case in hand.

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(b) Without actual writing off the bad debt in the books of accounts, merely based on the decision of the assessee to write off at Head Office level in a consolidated manner without actual write off in the branch account is allowable u/s 36(1)(vii).

16. According to the Learned Counsel for the Revenue, the Appellate Authority as well as the Tribunal gravely erred by assuming that no fresh advances made by the assessee to its subsidiaries. It had omitted to take into consideration the fresh advance amounting to Rs.43,25,166/- to Industrial Chemicals and Monomers Limited and Rs.344,000,000/- to ICL Securities Ltd. The assessee having restructured its debts and agreed to infuse fresh funds of Rs.800 crores and Rs.40 crores to sale of non-core assets, the decision not to charge interest cannot be for any commercial expediency. Without charging interest on accrual basis, by change of accounting practise from mercantile system of income accrued to actual receipt to evade tax not been considered by the Tribunal. The conclusion of the tribunal that the subsidiaries /associate company of the assessee were not doing well is contrary to the annual accounts which discloses the goodwill on net capital reserve arising on account of investment in associate company at Rs.2325.73 lakhs. (Rs.2626.73 lakhs as against Rs.611.40 lakhs as on 31.03.2002).

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17. The Learned Counsel for the appellant/revenue submitted that the facts in S.A Builder's case and the facts of the case in hand are different. Therefore, the observations in S.A. Builders case have no relevance to the case in hand. Even otherwise, the Hon'ble Supreme Court consisting three Judges Bench in ***Addl. Commissioner of Income Tax -vs- Tulip Star Hotels Ltd***., had opined the view expressed in S.A.Builders by two judges bench needs reconsideration. Therefore, the S.A.Builder's case cannot be binding, though later Tulip Star Hotel's case was dismissed as withdraw in view of Low Tax Liability.

18. The assessee had not furnished party-wise details of the bad debts on the ground that the list is voluminous. As per the Schedule-VII, the amount written off is shown as Rs.775.47 lakhs. Whereas as per the Profit and Loss Accounts, the assessee had written off Rs.41.19 lakhs only. The remaining Rs.7.7 crores actually not written off but only a provision is made. The assessee had only adjusted it against the debtors balance and had claimed the same in the income tax adjustment statement which is not valid. The assessee without debiting the bad debts in the profit and loss account or in the provision for doubtful debts claimed reduction which is not allowable being not in accordance with the proviso of Section 36(1)(vii).

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19. In contra, regarding not charging interest on loans to subsidiaries/associates, the Learned Counsel for the assessee contended that, notional interest on interest free loans to subsidiaries and associates cannot be brought to tax when the advances were made for commercial reasons and when the interest not charged due to the weak financial condition of the subsidiaries. The uncertainty of recovery from subsidiaries is not an interest actually accrued. The advances to subsidiaries were made purely on grounds of commercial expediency. Both CIT (A) as well as the Tribunal deleted the addition on the basis of fact and applying the ratio laid by the Hon'ble Supreme Court in S.A.Builders wherein the Apex Court has observed that where a holding company has a deep interest in its subsidiary, advances made for business purposes of the subsidiary should qualify as being for commercial expediency.

20. The assessee had not charged interest accrued on loans to its subsidiaries taking into consideration its financial position. In view of no certainty of recovery of interest from subsidiaries only the real income brought in the profit and loss account as per the established principle of accounting standard. For the advances made to its subsidiaries, the assessee had its own funds in the form of capital and reserves in its earlier years, therefore it is to be presumed that the loans have been made from the own funds. Hence, no disallowance on borrowings can arise.

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21. Regarding bad debts, the learned counsel for the assessee states that write off first effected on a consolidated basis at the Head Office and reflected in the printed financial statements. Thereafter, corresponding entries are passed in the individual debtor accounts at various regional offices. During the particular year of assessment at the year end i.e., 31st March, the assessee write off the receivables as bed debts and claimed the same as deduction under Section 36(1)(vii). The corresponding entries are passed in the individual accounts at regional office the following year. The entries in the individual account relates back to the 31st March of the previous year. The reasoning of the Assessing Officer to disallow the claim solely on his misunderstanding of the accounting procedure. Whereas, the CIT(A) and the ITAT had accepted the assessee claim. For the first time in the appeal the department had raised the ground that the details of debtor not furnished despite the fact that the Books of Account maintained and produced in support of the write-off to the satisfaction of the ITAT.

22. In ***T.R.F Ltd vs. Commissioner of Income Tax*** *reported in* ***[2010] 323 ITR 397(SC)*** read with C.B.D.T Circular No.12/2016 dated 30.05.2016, it is clarified that once a bad debt is written off in the books of account, same to be allowed as a deduction. In ***Vijaya Bank Ltd*** vs. C***ommissioner of Income-Tax*** *reported in* ***[2010] 323 ITR 166 (SC)*****,** the Hon'ble Supreme Court has held that even in cases involving provision for bad and doubtful debts, where such provision is adjusted against the

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debtor accounts and only the net debtor balance is reflected in the balance sheet, it would amount to an actual write-off of the debt and would be entitled to deduction under Section 36(1)(vii).

23. Heard the Learned Counsel for the appellant and the respondent and records perused.

24. The essence of the substantial questions of law framed in both the appeals are primarily centers on two points:

First, Whether the assessee following mercantile system of accounting legally justified in not charging the interest receivable on advances to subsidiary companies on the ground the loans were extended for commercial expediency, but the recovery of the debt become uncertain due to the financial condition of the subsidiaries, hence interest did not actually accrued. Whether this justification is in tune with Section 43B of the Act and is the dictum of the Hon'ble Supreme Court rendered in ***S.A.Builders Ltd vs. Commissioner of Income-Tax (Appeals), Chandigarh*** *reported in* ***[2007] 288 ITR 1 (SC)*** still holds the field and applicable to the facts of the assessee case.

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Secondly, whether the Tribunal view that the bad debts written off at Head office level on consolidated manner without actual write off in the branch account could be claimed as deduction under Section 36(1)(vii), if it is the honest judgment of the assessee, is sustainable when same is contrary to the Accounting Standard and the judicial pronouncements.

25. To begin, it may be necessary to understand how for taxing purpose total income is computed and what are all the income excluded from total income.

Section 5 of Income Tax Act, 1961.

Scope of total income.

(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year:

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which-

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(a) is received or is deemed to be received in India in such year by or on behalf of such person; or
(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

26. In the case in hand, the assessee, being a Company incorporated in India, it has to follow the mercantile system of accounting, which means the income accrued, even if not actually received, is deemed to be received and to be brought under the head 'Total Income.' However, while computing the total income, certain income such as income from agricultural do not form part of total income. The list of exempted sources of income are mentioned in Chapter-III of the Income Tax Act, which commences from Section 10 and end with Section 13B.

27. For the purpose of computing the profits and gains of business, certain deductions are permissible. The Sections which are relevant for the purpose of this case are: Section 43B of Income Tax Act, (certain deductions to be only on actual payment) and Section 36(1)(vii) of Income Tax Act, 1961 (other deduction - Bad debt).

Section 43B:

Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -
a)...
b)...

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c)...

d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State Industrial Investment Corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing or

....

..

*Explanation 3 C: **(inserted by the Finance Act, 2006 w.e.f 1/04/1989) For the removal of doubts, it is hereby declared that a deduction of any sum, being interest payable under clause (d) of this section, shall be allowed if such interest has been actually paid and any interest referred to in that clause which has been converted into a loan or borrowing shall not be deemed to have actually paid.*

28. In so far as bad debts, while computation income referred to in section 28, the bad debts which is written off as irrevocable in the accounts of the assessee in the previous year is deductible, subject to the restrictions mentioned in sub-section (2) of Section 36.

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—

…….

(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

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year."

...

...

(2) In making any deduction for 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

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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;

(iv) 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."

29. On reading the above provisions regarding deduction of bad debt, we can safely conclude that from 1st April 1989, a deduction for a bad debt can be claimed in the year it is written off as irrecoverable in the books of account, and cannot include any provision for bad or doubtful debts made in the accounts. Merely stating that a bad and doubtful debt is an irrecoverable is not sufficient to claim deduction. Appropriate treatment in the accounts, together with compliance of the conditions in sections 36(1)(vii), 36(2), and the explanation to section 36(1)(vii), are mandatory. Write off without following the mandate would not entitle the taxpayer to claim a deduction.

(i) S.A.Builders Ltd vs. Commissioner of Income-Tax (Appeals), Chandigarh *reported in* ***[2007] 288 ITR 1 (SC)****, held as below:*

"30. In the present case, neither the High Court nor the Tribunal nor other authorities have examined whether the

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amount advanced to the sister concern was by way of commercial expediency.

32. The High Court and the other authorities should have examined the purpose for which the assessee advanced the money to its sister concern, and what the sister concern did with this money, in order to decide whether it was for commercial expediency, but that has not been done.

36. We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement (B) Ltd. [(2002) 254 ITR 377 (Del)] that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximise its profit. The Income Tax Authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

37. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance,

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if the Directors of the sister concern utilise the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."

30. Later, in ***Commissioner of Income Tax vs. Tulip Star Hotels Ltd.,*** the Delhi High Court, following the ruling in *S.A.Builder's case,* dismissed the appeal by the Revenue by observing that for the effective control of new hotel acquired by the assessee under its management, it had invested in a wholly owned subsidiary. Therefore, the assessee is entitled to claim deduction of interest on the borrowed funds.

31. Being aggrieved, the Revenue filed an SLP before the Supreme Court. Though a Bench of Three Hon'ble Judges expressed the dictum in S.A.Builders requires reconsideration. No order on merits was passed, but later dismissed as withdrawn in view of circular issued by CBDT, being a case of Low Tax Liability.

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32. In Vijaya Bank Ltd vs. C***ommissioner of Income-Tax*** *reported in* ***[2010] 323 ITR 166 (SC),*** the following two questions arose for consideration:-

1) The manner in which actual write off takes place under the Accounting principles.

2) Whether it is imperative for the assessee-bank to close the individual account of each debtor in its books or a mere reduction in the "Loan and Advances Account" or debtors to the extent of the provision for bad and doubtful debt is sufficient.

33. The Hon'ble Supreme Court, answered those two questions as under:-

> "***6.*** *The first question is no more res integra. Recently, a Division Bench of this Court in Southern Technologies Ltd. v.CIT [(2010) 2 SCC 548: (2010) 320 ITR 577] [in which one of us (S.H. Kapadia, J.) was a party] had an occasion to deal with the first question and it has been answered, accordingly, in favour of the assessee vide ITR para 25, which reads as under:*
>
> *"Prior to 1-4-1989, the law, as it then stood, took the view that even in cases in which the assessee(s) makes only a provision in its accounts for bad debts and interest thereon and even though the amount is not actually written off by debiting the P&L account of the assessee and crediting the amount to the account of the debtor, the assessee was still entitled to deduction under Section 36(1)(vii). (See CIT v.Jwala Prasad Tiwari [(1953) 24 ITR 537*

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(Bom)] and Vithaldas H. Dhanjibhai Bardanwala v.CIT [(1981) 130 ITR 95 (Guj)]) Such state of law prevailed up to and including Assessment Year 1988-1989. However, by insertion (w.e.f. 1-4-1989) of a new Explanation to Section 36(1)(vii), it has been clarified that any bad debt written off as irrecoverable in the account of the assessee will not include any provision for bad and doubtful debt made in the accounts of the assessee. The said amendment indicates that before 1-4-1989, even a provision could be treated as a write-off. However, after 1-4-1989, a distinct dichotomy is brought in by way of the said Explanation to Section 36(1)(vii). Consequently, after 1-4-1989, a mere provision for bad debt would not be entitled to deduction under Section 36(1)(vii). To understand the above dichotomy, one must understand 'how to write-off'. If an assessee debits an amount of doubtful debt to the P&L account and credits the asset account like sundry debtor's account, it would constitute a write-off of an actual debt. However, if an assessee debits 'provision for doubtful debt' to the P&L account and makes a corresponding credit to the 'current liabilities and provisions' on the liabilities side of the balance sheet, then it would constitute a provision for doubtful debt. In the latter case, the assessee would not be entitled to deduction after 1-4-1989."

.....

8. Coming to the second question, we may reiterate that it is not in dispute that Section 36(1)(vii) of the 1961 Act applies both to banking and non-banking businesses. The manner in which the write-off is to be carried out has been explained hereinabove. It is important to note that the assessee Bank has not only been debiting the profit and loss account to the extent of the impugned bad debt, it is simultaneously reducing the amount of loans and advances or the debtors at the year end, as stated hereinabove. In other words, the amount of loans and advances or the debtors at the year end in the balance sheet is shown as net of the provisions for impugned debt.

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However, what is being insisted upon by the assessing officer is that mere reduction of the amount of loans and advances or the debtors at the year end would not suffice and, in the interest of transparency, it would be desirable for the assessee Bank to close each and every individual account of loans and advances or debtors as a precondition for claiming deduction under Section 36(1)(vii) of the 1961 Act. This view has been taken by the assessing officer because the assessing officer apprehended that the assessee Bank might be taking the benefit of deduction under Section 36(1)(vii) of the 1961 Act, twice over. [See the order of CIT(A) at pp. 66, 67 and 72 of the paper book, which refers to the apprehensions of the assessing officer.] In this context, it may be noted that there is no finding of the assessing officer that the assessee had unauthorisedly claimed the benefit of deduction under Section 36(1)(vii), twice over. The order of the assessing officer is based on an apprehension that, if the assessee fails to close each and every individual account of its debtor, it may result in the assessee claiming deduction twice over. In this case, we are concerned with the interpretation of Section 36(1)(vii) of the 1961 Act. We cannot decide the matter on the basis of apprehensions/desirability. It is always open to the assessing officer to call for details of individual debtor's account if the assessing officer has reasonable grounds to believe that the assessee has claimed deduction, twice over. In fact, that exercise has been undertaken in subsequent years. There is also a flip side to the argument of the Department. The assessee has instituted recovery suits in courts against its debtors. If individual accounts are to be closed, then the debtor/defendant in each of those suits would rely upon the bank statement and contend that no amount is due and payable in which event the suit would be dismissed.

9. Before concluding, we may refer to an argument advanced on behalf of the Department. According to the Department,

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it is necessary to square off each individual account failing which there is likelihood of escapement of income from assessment. According to the Department, in cases where a borrower's account is written off by debiting profit and loss account and by crediting loans and advances or debtors accounts on the asset side of the balance sheet, then, as and when in the subsequent years if the borrower repays the loan, the assessee will credit the repaid amount to the loans and advances account and not to the profit and loss account which would result in escapement of income from assessment. On the other hand, if bad debt is written off by closing the borrower's account individually, then the repaid amount in subsequent years will be credited to the profit and loss account on which the assessee Bank has to pay tax. Although, prima facie, this argument of the Department appears to be valid, on a deeper consideration, it is not so for three reasons. Firstly, the head office accounts clearly indicate, in the present case, that, on repayment in subsequent years, the amounts are duly offered for tax. Secondly, one has to keep in mind that, under the accounting practice, the accounts of the rural branches have to tally with the accounts of the head office. If the repaid amount in subsequent years is not credited to the profit and loss account of the head office, which is ultimately what matters, then, there would be a mismatch between the rural branch accounts and the head office accounts. Lastly, in any event, Section 41(4) of the 1961 Act, inter alia, lays down that, where a deduction has been allowed in respect of a bad debt or a part thereof under Section 36(1)(vii) of the 1961 Act, then, if the amount subsequently recovered on any such debt is greater than the difference between the debt and the amount so allowed, the excess shall be deemed to be profits and gains of business and, accordingly, chargeable to income tax as the income of the previous year in which it is recovered. In the circumstances, we are of the view that the assessing officer is sufficiently empowered to tax such subsequent repayments under Section 41(4) of the 1961 Act

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and, consequently, there is no merit in the contention that, if the assessee succeeds, then it would result in escapement of income from assessment.

34. In ***T.R.F Ltd vs. Commissioner of Income Tax*** *reported in* ***[2010] 323 ITR 397(SC),*** Hon'ble Supreme Court held as below:

> "*4. This position in law is well settled. After 1-4-1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. However, in the present case, the assessing officer has not examined whether the debt has, in fact, been written off in the 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. As stated above, the assessing officer has not examined whether, in fact, the bad debt or part thereof is written off in the accounts of the assessee. This exercise has not been undertaken by the assessing officer. Hence, the matter is remitted to the assessing officer for de novo consideration of the abovementioned aspect only and that too only to the extent of the write-off."*

35. The ***Commissioner of Income Tax, Ahmedabad vs. M/s.Gujarat Cyprоment Ltd, (2019) 308 CTR 309 (SC) order dated 21.02.2019*** is in respect of interest liability which accrued during the relevant assessment year but not actually paid back by the assessee rather was sought to be adjusted in the future loan of Rs 8.crores. In this contest, the Hon'ble Supreme Court referring Section 43 B and the

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earlier judgment of the Apex Court in ***Eicher Motors Ltd vs. Commissioner of Income Tax [(2009) 315 ITR 312],*** held as below:-

> *"14. In so concluding, this Court is supported by the decision of the Madhya Pradesh High Court in Eicher Motors Ltd. v. CIT [Eicher Motors Ltd. v. CIT, 2006 SCC OnLine MP 731: (2009) 315 ITR 312] and subsequently, the judgment of the High Court of Telangana and Andhra Pradesh in CIT v. Pennar Profiles Ltd. [CIT v. Pennar Profiles Ltd., 2015 SCC OnLine Hyd 51] In Eicher Motors [Eicher Motors Ltd. v. CIT, 2006 SCC OnLine MP 731 : (2009) 315 ITR 312], the Court noted:*
>
> *"8. As observed supra, Explanation 3-C has now in clear terms provided that such conversion of interest amount into loan shall not be deemed to be regarded as "actually paid" amount within the meaning of Section 43-B. In view of clear legislative mandate removing this doubt and making the intention of legislature clear in relation to such transaction, it is not now necessary for this Court to interpret the unamended Section 43-B in detail, nor it is necessary for this Court to take note of facts in detail as also the submissions urged in support of various contentions except to place reliance on Explanation 3-C to Section 43-B and answer the questions against the assessee and in favour of Revenue."*
>
> *15. The Court in Pennar Profiles Ltd. [CIT v. Pennar Profiles Ltd., 2015 SCC OnLine Hyd 51] considered the decisions in Mahindra Nissan [CIT v. Mahindra Nissan Allywin Ltd., 1998 SCC OnLine AP 202 : (1998) 4 ALD 11], Vinir Engineering [Vinir Engg. (P) Ltd. v. CIT, 2008 SCC OnLine Kar 653] and Eicher Motors [Eicher Motors Ltd. v. CIT, 2006 SCC OnLine MP 731 : (2009) 315 ITR 312] and held as follows:*

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"8. In this backdrop, we have perused the provisions contained in Section 43-B of the Act, in particular, Explanation 3-C thereof, which was inserted by the Finance Act, 2006 with retrospective effect from 1-4-1989. This provision was inserted in 2006 and hence, this Court in Mahindra Nissan case [CIT v. Mahindra Nissan Allywin Ltd., 1998 SCC OnLine AP 202 : (1998) 4 ALD 11], had no occasion to deal with the case in the light of this provision. Insofar as the Karnataka High Court is concerned, though this provision was existing on the date of judgment, it appears that it was not brought to the notice of learned Judges and hence, the Division Bench proceeded to consider and decide the appeal of the assessee without referring to Explanation 3-C appended to Section 43-B of the Act.

9. As a matter of fact, from reading of Explanation 3-C, in our opinion, the question as raised in the present appeals stands answered without further discussion. This provision was inserted for removal of doubts and it was declared that deduction of any sum, being interest payable under clause (d) of Section 43-B of the Act, shall be allowed if such interest has been actually paid and any interest referred to in that clause, which has been converted into a loan or borrowing, shall not be deemed to have been actually paid. Thus, the doubt stands removed in view of Explanation 3-C. This provision was considered by the Madhya Pradesh High Court in Eicher Motors Ltd. v. CIT [Eicher Motors Ltd. v. CIT, 2006 SCC OnLine MP 731: (2009) 315 ITR 312] to hold that in view of Explanation 3-C appended to Section 43-B with retrospective effect from 01-04-1989, conversion of interest amount into loan would not be deemed to be regarded as actually paid amount within the meaning of Section 43-B of the Act.

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> *12. In light of the introduction of Explanation 3-C, this Court does not consider it necessary to discuss the precedents relied upon by the assessee delivered prior to the enactment of the Finance Act, 2006. As regards the decision in Shakti Spring Industries [CIT v. Shakti Spring Industries (P) Ltd., 2013 SCC OnLine Jhar 18] , the interest due in that case was offset against a subsidy which the assessee was entitled to, and it did not involve an instance where it was "converted into a loan or borrowing" within the meaning of Explanation 3-C. It is perhaps for this reason that Explanation 3-C was not discussed."*

36. Conclusion:

The clear and specific case of the Department against the assessee Company is that in the earlier years the assessee company had been charging interest on advances to its subsidiaries/associates. It was following the mercantile system of accounting. While so, for the Assessment Years 2003-04 and 2004-05, to reduce the incidence of tax, the assessee against the accounting standard, had not charged interest on advances to its subsidiaries.

37. The Appellate Authority as well as the Tribunal has held that the interest on advances were not charged to auger the commercial expediency and not charging interest was a prudent business measure in view of the fact that the subsidiaries were not financially doing well. For each of these four subsidiaries, different reasons were recorded to arrive at the conclusion as to why they were not

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financially doing well and how the decision not to charge interest fall within the meaning of 'commercial expediency'.

38. We are of the view that the law and the decisions of the Court cited does not endorse the manner in which the assessee deviated from the previous years and omit to charge interest on the ground that the recovery of the principal amount is in doubt without write off the debt as required under the law. Also, the claim of the assessee company that the advance made to the subsidiaries from the reserve funds available with the assessee company at that point of time was accepted by the Appellate Authority without any verification. No data referred in the order of the Appellate Authority to justify the said conclusion. The order of the Appellate Authority also silent about the details of the statement submitted by the assessee to satisfy that the assessee company had surplus reserve to advance loans to its subsidiaries. In this regard, the Tribunal had failed to properly consider the grounds of appeal raised by the Department. Contrarily, it had invented a new reasons to interfere the order of the Assessing Officer. For example, while the assessee accepting the advances made to its subsidiaries and collecting interest for the earlier years, had given commercial expediency as a reason for not charging for the subsequent Assessment Years under consideration. Whereas, the Tribunal had erred by treating the advance to the Industrial Chemicals & Monomers Ltd (ICMR) as not an advance but an undeniable capital subscription. In respect of another subsidiary

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Company, namely ICL International Ltd, the Tribunal has held that the advances to this subsidiary, which provided logistic support services to the cement transport of the assessee company and advances were only running accounts in the ordinary course of business. Hence, no notional interest can be added, even if the assessee follow the mercantile system of accounting.

39. In our considered view, the Appellate Authority as well as the Tribunal badly erred in misapplying the judgment of S.A.Builders, which is not similar to the facts of the case in hand. Further invented new reasons for deciding in favour of the assessee, which is neither pleaded nor supported by records.

40. The unique dispute in respect to the assessment for the Assessment Year 2004-05, is with regard to the disallowance of interest amount Rs.17.72 crores debited to the share premium account, we find that the assessee company had redeemed Deep Discount Bonds issued by the assessee company to Deutsche Bank and later transferred to UTI. Rs.17.72 crores represents the discount accrued on conversion of few of the debentures and bonds into term loans. When the said term loan with UTI got settled later, the assessee had claimed this as an expense. Whereas, the Assessing Officer has opined that when Deep Discount Bonds and Debentures are converted into premium loans, the interest remains unpaid. Therefore, charging of the interest as expenditure against redemption premium as

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well as claiming deduction in the computation statement goes against the purpose of Section 43B. The Tribunal, after examining the paper book produced by the assessee has held that Rs.17.72 crores disallowed by the Assessing Officer is part of Rs.88.91 crores added back under Section 43B wrongly.

41. It is an admitted fact that UTI is not the original allottee of the Deep Discount Bonds and also it was not a party to the CDR. Therefore, till the conversion of UTI Bonds into term loan, the interest payable (as redemption premium) and the subsequent interest debited to the Profit and Loss Account remained unpaid. The amount was eventually waived by UTI consequent to one-time settlement and this fact is also not in dispute.

42. In such facts and circumstances, the Appellate Authority has held that the disallowance under Section 43B starts when the expenditure is debited and not when paid. Further, it had observed that, when the assessee had not claimed the expenditure in the Profit and Loss Account and has claimed it in the computation of income, it was disallowed under Section 43B. Therefore, there was no justification of disallowance of the said amount again. As a result, the Authority directed the Assessing Officer to delete the addition of Rs.17.72 crores.

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43. The Tribunal, after being satisfied by the details found in the paper book relied by the assessee had held that those materials were produced before the Assessing Officer and available with him. However, had disallowed the claim holding that the details to claim deduction had not made available by the assessee.

44. It is strange to note that the Tribunal, while holding as above, had not mentioned what are the materials produced by the assessee and considered by it. A vague and general observation that the paper book contains the required details and that those details had satisfied them to hold the addition of Rs.17.72 crores by Assessing Officer is erroneous and is not a justifiable finding on fact, since the Appellate Authority CIT(A) as well as the Tribunal had consciously omitted to take into consideration that the assessee, in its Audit Report Annexure-V, had not included Rs.17.72 crores in the disallowance under Section 43B.

45. If at all there is any necessity to reappreciate the facts is view of new plea or document raised in the appeal, in all fairness, the matter should have been remitted back to Assessing Officer for fresh consideration of the deduction claimed. Instead, without indicating which document provided satisfaction for them to reverse the finding of the Assessing Officer and without any plausible explanation from the assessee for not disclosing this amount in Annexure-V of the Audit Report, the appeal of the assessee was allowed by CIT (A) and the same was confirmed by the

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46. To sum up, the above discussion leads to the following irresistible conclusion:-

(a) The assessee's claim before the Assessing Officer regarding non-charging of interest on advances to subsidiaries, deviating from the prevailing accounting practice of earlier years, was based on the financial condition of the subsidiary companies. If the financial condition of the subsidiary company was so bad, the debt should have been write off before foregoing the interest accrued. Without such change, the non-charging of interest is impermissible. When the disallowance by the Assessing Officer was challenged before the Appellate Authority, the assessee realising that the said reason will not sustain, hence it has put forth different defence and succeeded by citing the ruling in S.A.Builders was applicable to its case.

(b) In fact, S.A.Builder case is in respect of interest on borrowed capital advanced to third party as loan. The assessee which borrowed loan from a bank and advanced part of it to its sister concern (a subsidiary) as interest-free loan. Whereas, the assessee in this case, the advance to subsidy was not made interest-free. For the previous years, the interest accrued was included in the Profit and Loss Account.

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There was no change of character of the said advance from loan on interest to a loan without interest. Whereas, the Tribunal while deciding the appeal by the Revenue, substituted its own view on the character of the advance and had termed the advance to one of its subsidiary – ICMR, as capital subscription to a company and for the other subsidiary - ICL International Ltd., as advances under running account. These observations, which the Tribunal to confirm the order of the CIT(A) is neither based on the information disclosed by the assessee in its books of account nor in the pleadings before the Assessing Officer or the Commissioner of Income Tax (Appeals).

(c) No proper reason assigned by the CIT (A) as well as ITAT to accept the case of the assessee to write off the bad debts based on the consolidated statement, without production of details of the individual debtors. In this case, the advances made by the assessee company is to its own subsidiary companies. Unlike a Banking company, as in the case of ***Vijaya Bank vs. Commissioner of Income Tax*** *reported in* ***(2010) 190 Taxman 257 (SC),*** which has several branches in various places and several customers in each branch whose account declared as bad debt and reconciliation, the same will take reasonable time, for the assessee Company, the same logic does not apply. Atleast to establish that no escape of income due to the delay in write off the bad debts at the branch level, the assessee ought to have produced party-wise details maintained in the branches.

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(d) From the discussion of the Commissioner of Income Tax (Appeals) and Income Tax Appellate Tribunal, we do not find any records of branch offices produced to rule out escaped income. Prior to 01.04.1989, even a provision for bad and doubtful debts made in the accounts of assessee could be treated as written off. However, after the new explanation to Section 36(1)(vii) w.e.f 01.04.1989, the dichotomy is taken care. In ***Southern Technologies Ltd vs. Jr.Commissioner of Income Tax*** reported in ***(2010) 320 ITR 577***, the Hon'ble Supreme Court has explained how to understand 'write off' in the following words:-

> *'if an assessee debits an amount of doubtful debt to the profit and loss account and credits the asset account like sundry debtor's account, it would constitute write off of an actual debt. However, if an assessee debits provision for 'doubtful debt' to the profit and loss account and makes a corresponding credit to the 'current liabilities and provisions on the liabilities side of the balance sheet, then it would constitute a provision for doubtful debt. In the latter case, the assessee would not be entitled to deduction after 01/04/1989'*

47. This judgment has been followed and reiterated in Vijaya Bank's case cited supra. The guidelines laid down by the Hon'ble Supreme Court in *Southern Technologies case cited supra*, later followed in *Vijaya Bank's case* were not available for the Commissioner of Income Tax (Appeals) and the Income Tax

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Appellate Tribunal when they decided the case in hand. We therefore hold that the order impugned requires a test afresh based on the above guidelines.

48. As a result, the findings of the Commissioner of Income Tax (Appeals) and Income Tax Appellate Tribunal are set-aside. Both matters are remitted back to the Commissioner of Income Tax (Appeals) for fresh consideration of all the grounds of appeal challenging the assessment orders and pass orders after affording opportunity of hearing the parties.

49. In fine, Tax Case Appeals are disposed of on the above terms. There shall be no order as to costs.

(**Dr. G.JAYACHANDRAN, J.**) & (**SHAMIM AHMED, J.**)
09-04-2026

Index :Yes/No.
Neutral Citation :Yes/No.

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Dr. G.JAYACHANDRAN, J.
&
SHAMIM AHMED, J.
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Pre-Delivery common judgment made in
Tax Case (Appeal).Nos.53 & 54 of 2010

09-04-2026

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