आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एच' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL " H " BENCH, MUMBAI

सर्वश्री आई.पी.बंसल,, न्यायिक सदस्य एवं नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI I.P. BANSAL, JM AND SHRI N.K. BILLAIYA, AM

आयकर अपील सं./I.T.A. No. 545/Mum/2011

(**निर्धारण वर्ष /** Assessment Year :2007-08

M/s. Saurashtra Capital Services Pvt. Ltd., 39, Great Western Building, Make House Lane, Fort, Mumbai-400 023	बनाम/ Vs.	The ACIT 4(2), Aayakar Bhavan, Mumbai-400 020

आयकर अपील सं./I.T.A. No. 462/Mum/2011

(**निर्धारण वर्ष /** Assessment Year :2007-08

The ACIT 4(2), Aayakar Bhavan, Mumbai-400 020	बनाम/ Vs.	M/s. Saurashtra Capital Services Pvt. Ltd., 39, Great Western Building, Make House Lane, Fort, Mumbai-400 023
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AABCS 7785A		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by:**	Shri Manish Chavan
प्रत्यर्थी की ओर से/**Respondent by :**	Smt. Parminder

सुनवाई की तारीख **/ Date of Hearing : 02/05/2013**

घोषणा की तारीख /**Date of Pronouncement: 02/05/2013**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

These cross appeals by the assessee and the Revenue are directed against the very same order of the Ld. CIT(A)-8, Mumbai dt.10.11.2010 pertaining to A.Y. 2007-08. As both these appeals were heard together, they are disposed of by this common order for the sake of convenience and brevity.

ITA No. 545/M/2011 – Assessee's appeal

2. The sum and substance of the grievance of the assessee is that the Ld. CIT(A) erred in directing the AO to determine the quantum of disallowance u/s. 14A of the Act based on the formula given by the Ld. CIT(A).

3. During the course of the scrutiny assessment proceedings, the Assessing Officer observed that the assessee has earned tax free dividend income of Rs. 75,663/- and the same has been claimed as exempt. However, the AO noticed that the assessee has not allocated any expense incurred for earning of such tax free income. Explanation was called from the assessee. It was explained that the assessee has not incurred any expenditure to earn this exempt income. The AO was not convinced and was of the opinion that a certain percentage of the expenses claimed by the assessee would definitely be attributable to the tax free income. The AO further noticed that the assessee has earned dividend mostly from vandha transactions and the assessee has claimed vandha loss of Rs. 98,209/-. The AO was of the firm belief that the dividend income to this extent deserves to be disallowed and accordingly disallowed a sum of Rs. 75,663/-.

4. The assessee agitated this addition before the Ld. CIT(A) but without any success. The Ld. CIT(A) relying upon the decision of the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co.

Ltd. , was of the firm belief that no addition of the amount determined as per Rule 8D can be made for the year under consideration. The Ld. CIT(A) further observed that the addition of Rs. 75,663/- is neither as per Rule 8D nor on any reasonable basis and accordingly deleted the addition. However, at the same time, the Ld. CIT(A) went on to prescribe his own formula to determine the amount to be disallowed as per the provisions of Sec. 14A.

5. Aggrieved by this finding of the Ld. CIT(A), assessee is before us. The Ld. Counsel for the assessee submitted that the Ld. CIT(A) on the one hand has correctly held that Rule 8D is not applicable for the year under consideration but at the same time erred in prescribing his own formula for making the disallowance.

6. The Ld. Departmental Representative relied upon the findings of the Ld. CIT(A).

7. We do not find any logic in the findings of the Ld. CIT(A). We accordingly set aside the order of the Ld. CIT(A) and restore that of the AO wherein the AO has atleast given some basis for quantifying the disallowance at Rs. 75,663/-. The appeal of the assessee is accordingly allowed.

<u>ITA No. 462/Mum/2011 – Revenue's appeal</u>

8. The first grievance of the Revenue is that the Ld. CIT(A) erred in deleting the disallowance of Rs. 9,85,078/- made in respect of VSAT, Leaseline and transaction charges u/s. 40a(ia) of the Act.

9. During the course of the assessment proceedings, the AO observed that the assessee has incurred expenses on VSAT Rs. 36,266/-, Lease Line charges Rs. 2,61,015/- and transaction charges Rs. 6,87,797/- which are paid/payable to stock exchange on account of services provided by it. The AO sought explanation from the assessee as to why no tax has been deducted at source on these payments. It was explained that the expenses under the head VSAT/Leaseline charges is really recovery of costs and the charges cannot be categorized as fees for technical services falling within the scope of 194J of the Act. The assessee relied upon the information given to it by NSE based on the decision of the Hon'ble Madras High Court in the case of Skycell Communications Ltd. 251 ITR 53. The AO did not agree with the opinion of the NSE and the decision of the Hon'ble Madras High Court (supra) and went on to disallow a total sum of Rs. 9,85,078/- comprising of VSAT/Leasline and transaction charges being in valuation of Sec. 40a(ia) of the Act.

10. The assessee strongly agitated this matter before the Ld. CIT(A). It was explained that the issue is now settled by the decision of the Hon'ble Jurisdictional High Court in the case of Kotak Securities Ltd. The ld. CIT(A) was convinced that the issue has been decided in favour of the assessee and accordingly deleted the additions made by the AO on this account.

11. Before us, the Ld. Departmental Representative supporting the findings of the AO submitted that the brokers have started deducting tax at source on account of transaction charges in subsequent years which fact has been over looked by Ld. CIT(A).

12. We have considered the rival submissions and perused the orders of the lower authorities. We find that the Hon'ble Jurisdictional High Court of Bombay in the case of CIT Vs Angel Capital & Debit Market Ltd. in Income Tax Appeal (L) No. 475 of 2011 has given a categorical finding that VSAT and Leasline charges paid by the assessee to Stock Exchange were merely reimbursement of the charges paid/payable by the Stock Exchange to the Department of Telecommunication. Since the VSAT and Lease Line charges paid by the assessee do not have any element of income, deducting tax while making such payments do not arise and accordingly decline to entertain the questions of law raised by the Revenue. Similar view has been taken by the Hon'ble Jurisdictional High Court in the case of CIT Vs Kotak Securities Ltd., in ITA No. 3111 of 2009, However, on the point of transaction charges, the Hon'ble Jurisdictional High Court at para-29 of its order have confirmed that the transaction charges were paid by the assessee to the stock exchange for rendering the managerial services which constitutes fees for technical services u/s. 194J read with Explanation 2 to Section 9(1)(vii) of the Act and hence the assessee is liable to deduct tax at source before crediting the transaction charges to the account of the stock exchange.

13. Considering the facts of the case in the light of the above judicial pronouncement of the Hon'ble Jurisdictional High Court, in our considerate view, no TDS liability arise in respect of payment of VSAT and Leaseline charges. However, as per the decision of the Hon'ble Bombay High Court in the case of CIT Vs Kotak Securities Ltd (supra), transaction charges are subject to TDS. Respectfully following the decision of the Hon'ble Jurisdictional High Court, we direct the AO to restrict the disallowance only in respect of transaction charges. To that

extent, findings of the Ld. CIT(A) are modified. Ground No. 1 is partly allowed.

14. Ground No. 2 relates to deletion of addition made on account of penalty of Rs. 3,92,394/- on violation of the bye-laws of the stock exchange.

15. This issue is now well settled in favour of the assessee by the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs.Alchemy Share & Stock Brokers Pvt. Ltd. in ITA (LOD) No. 1969 of 2010 wherein the Hon'ble High Court had the occasion to answer the following question:

> *"Q. 3. Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the disallowance made by the AO of claim of the assessee company for a deduction of payment of Rs. 3,04,005/- towards penalty paid to the stock exchange even though such penalty payment was clearly disallowable under Explanation to Sec. 37(1) of the Income Tax Act?*

to which the Hon'ble Bombay High Court answered as under:

> *As regards the third question is concerned, counsel for the parties state that the said question is answered in favour of the assessee by the decision of this Court in the case of The Commissioner of Income Tax-4 Vs M/s. The Stock and Bond Trading Co. (Income Tax Appeal No. 4117 of 2010) on 14th October, 2011. The third question is answered accordingly. The appeal is disposed of in the above terms with no order as to costs.*

Respectfully following the decision of the Hon'ble Jurisdictional High Court, we do not find any reason to interfere with the findings of the Ld. CIT(A). This ground of the assessee is dismissed.

16. Ground No. 3 is identical to ground No. 1 of assessee's appeal and is decided accordingly.

17. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is partly allowed.

Order pronounced in the open court on 2.5.2013 .

आदेश की धोषणा खुले न्यायालय में दिनांकः 2.5.2013 को की गई ।

Sd/-	Sd/-
(I.P. BANSAL)	(N.K. BILLAIYA)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 02 /05 /2013

व.नि.स./ *RJ* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**