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

Before Shri D.K. Agarwal, Judicial Member
& Shri P.M.Jagtap, Accountant Member.

I.T.A. Nos. 5543 & 5544/Mum/2011
Assessment Year : 2005-06 & 2008-09.

M/s Total Securities Ltd., 601, Durga Chambers, 40, Waterfield Road, Bandra (W), Mumbai – 400 050. PAN AABCT1302N Appellant.	**Vs.**	Asstt. Commissioner of Income-tax, Circle-4(2), Mumbai. Respondent.

I.T.A. No.5304/Mum/2011
Assessment Year : 2008-09.

Asstt. Commissioner of Income-tax, Circle-4(2), Mumbai. Appellant.	**Vs.**	Total Securities Ltd., Mumbai. Respondent.

Assessee by : Shri S.C. Kapadia.
Department by : Shri Girija Dayal and
Shri V.Krishnamoorthy.

Date of hearing : 18-09-2012
Date of pronouncement : 28-9-2012.

O R D E R

Per P.M. Jagtap, A.M. :

Out of these three appeals filed in the case of one assessee, two appeals being ITA No. 5304/Mum/2011 and 5544/Mum/2011 are cross appeals which are directed against the order of learned CIT(Appeals)-8, Mumbai dated 09-05-2011 for assessment year 2008-09 while the remaining third appeal is the appeal filed by the assessee against the order of learned CIT(Appeals)-8, Mumbai dated 09-06-2011 whereby he confirmed the penalty of Rs.88,147/- imposed by the AO u/s 271(1)(c).

2. First we shall take up the appeal of the Revenue for assessment year 2008-09 being ITA No. 5304/Mum/2011. In ground of No. 1 of this appeal, the Revenue has challenged the action of the learned CIT(Appeals) in deleting the addition of Rs.2,06,961/- made by the AO on account of penalty levied by the Stock Exchange on the assessee for violation of its bye-laws. At the time of hearing before us, the learned representatives of both the sides have agreed that this issue is squarely covered in favour of the assessee, inter alia, by the decision of Hon'ble Bombay High Court in the case of CIT vs. M/s Stock & Bond Trading Co. (I.T. Appeal No. 4115 of 2010 dated 14th Oct., 2011) wherein the decision of the Tribunal cancelling the disallowance made by the AO on account of penalty imposed by the National Stock Exchange on the assessee by invoking the Explanation to section 37(1) of the Act was upheld by the Hon'ble Bombay High Court holding that the payments made by the assessee to Stock Exchange for violation of their regulation are not on account of offence which is prohibited by Law and, therefore, invocation of Explanation to section 37 of the Act was not justified. Respectfully following the said decision of Hon'ble jurisdictional High Court in the case of Stock & Bond Trading Co.(supra), we uphold the impugned order of the learned CIT(Appeals) deleting the addition made by the AO on this issue and dismiss ground No.1 of the Revenue's appeal.

3. In ground No.2 of this appeal, the Revenue has challenged the action of the learned CIT(Appeals) in restricting the addition of Rs.15,84,14,904/- made by the AO on account of STT u/s 88E to Rs.14,14,89,148/-.

4. In its return of income filed for the year under consideration, the assessee had claimed total rebate of Rs.15,84,14,904/- u/s 88E. While working out the said rebate, the assessee had deducted the entire direct expenses from the respective income of all the operations and thereafter indirect expenses had been apportioned in the ratio of turnover for the purpose of determining the quantum of rebate u/s 88E. According to the AO, indirect expenses should have been apportioned in the ratio of income and not turnover for the purpose of determining the quantum of rebate u/s88E. Accordingly he recomputed the rebate allowable to the assessee u/s 88E at Rs.14,14,89,148/- and restricted the claim of the assessee for rebate u/s 88E to that extent. Before the learned CIT(Appeals), it was submitted on behalf of the assessee that allocation of indirect expenses in the ratio of turnover for the purpose of determining the quantum of rebate u/s 88E was made in the earlier years also and the same was accepted by the AO in the scrutiny assessment made for assessment years 2005-06 and 2007-08. It was also contended that the expenditure does not depend on the profit & loss arisen from the business activity because if the basis of apportionment of expenditure is taken as income then in case of no income or loss, no expenditure can be apportioned to such activity which is not justifiable. It was contended that the rebate u/s 88E as worked out by the assessee was proper and reasonable and the same should be allowed. The learned CIT(Appeals) found merit in the contentions raised by the assessee on this issue. He, however, found some contradictions in the facts mentioned in the assessment order and the submissions made on behalf of the assessee before him. He, therefore, directed the AO to determine the quantum of rebate u/s 88E by

allocating indirect expenses on proportionate basis in the ratio of gross turnover after getting clarified the factual contradictions.

5. We have heard the arguments of both the sides on this issue and also perused the relevant material on record. The learned DR has mainly relied on the order of the AO in support of the Revenue's case on this issue whereas the learned counsel for the assessee has relied on the impugned order of the learned CIT(Appeals) submitting that the submissions made on behalf of the assessee before the learned CIT(Appeals) as narrated in paragraph No. 4 of his impugned order may be taken into consideration while deciding this issue. It is observed that the only point in dispute in the present context is whether the allocation of indirect expenses is to be done in the ratio of turnover as claimed by the assessee or in the ratio of income as done by the AO for the purpose of determining the quantum of rebate u/s 88E. As rightly submitted on behalf of the assessee before the learned CIT(Appeals) as well as before us, the expenditure does not depend on the profit of a particular business activity and, therefore, making the allocation or apportionment of the expenditure on the basis of income or profit may not be proper and correct and may give absurd results. For instance, if there is no profit earned by the assesee from a particular business activity, it cannot be said that there is no indirect expenditure incurred for the said activity. The turnover, in our opinion, is therefore the right basis for allocation or apportionment of indirect expenses for the purpose of determining the quantum of rebate u/s 88E and the learned CIT(Appeals), therefore, was fully justified in directing the AO to adopt the same. We, therefore, find no infirmity in the impugned order of the learned CIT(Appeals) giving relief to the assessee on this issue and upholding the same, we dismiss ground No.2 of the Revenue's appeal.

6. In ground No.3 of its appeal, the Revenue has challenged the action of the learned CIT(Appeals) in allowing rebate u/s 88E on account of STT paid even against the tax payable u/s 115JB of the Income-tax Act.

7. At the time of hearing before us, the learned representatives of both the sides have agreed that this issue is squarely covered in favour of the assessee, inter alia, by the decision of Hon'ble Karnataka High Cour in the case of CIT vs. Horizon Capital Ltd.(I.T. Appeal No. 434 of 2010 dated 24th Oct., 2011) wherein the benefit of rebate u/s 88E was held to be also available to the assessee whose total income is assessed u/s 115JB. It was held by the Hon'ble Karnataka High Court that when the total income is assessed and the tax chargeable is computed , it is from that tax which is chargeable, the tax paid u/s 88E is given deduction by way of rebate u/s 87 of the Act. Respectfully following the said decision of Hon'ble Karnataka High Court, we uphold the impugned order of the learned CIT(Appeals) giving relief to the assessee on this issue and dismiss ground No. 3 of the Revenue's appeal.

8. Now we shall take up the appeal of the assessee for assessment year 2008-09 being ITA No. 5544/Mum/2011, ground No.1 of which relates to the issue of disallowance of Rs.8,85,223/- made by the AO and confirmed by the learned CIT(Appeals) u/s 14A of the Act read with Rule 8D of Income-tax Rules, 1962. During the year under consideration, the assessee had earned dividend income of Rs.7,01,222/- which was claimed to be exempt from income-tax. In the return of income, disallowance u/s 14A to the extent of Rs.70,122/- was made by the assessee being 10% of the dividend income on account of expenses incurred in relation to earning of the said exempt income. The AO, however, worked out such expenses to be disallowed u/s 14A at Rs.9,55,345/- by applying Rule 8D of Income-tax Rules, 1962 and made a further disallowance of Rs.8,85,223/- . On

appeal, the learned CIT(Appeals) confirmed the disallowance made by the AO u/s 14A applying Rule 8D for the following reasons given in paragraph No. 1.2 to 1.4 of his impugned order:

> "1.2 Upon consideration of relevant facts and the appellant's submission, I find that the A.O. has justifiably invoked the provisions of Rule 8D to determine the quantum of expenses which has to be disallowed u/s 14A with respect to earning of exempt income. The assessment had not maintained separate accounts of expenses incurred for earning of exempt income. Further, the assessee itself allocated a sum of Rs.70,122/- as expenditure for earning of exempt income, which clearly establishes that there is no basis for contention that no expenditure whatsoever had been incurred for earning of exempt dividend income. However, the basis of determination of the amount of such expenditure which had been incurred for the purpose of earning of exempt income at 10% of such income is without any justification and, therefore, the A.O. was justified in rejecting the assessee's claim. Further, the assessee had not maintained any separate records or account of expenditure having been incurred for earning of dividend income. In absence of such record, the A.O. blindly cannot be fastened with any burden to discover such expenditure with exempt income. It is under such circumstances, when in absence of relevant details of such expenditure, it will not be possible to directly determine the amount of expenditure having been incurred for earning of exempt income, that the provisions of Rule 8D come into lay. The appellant's contention that the provisions of section 14A does not provide for appointment of expenses is not correct in view of insertion of sub-section (2) of section 14A with effect from 01.04.2007 requiring the A.O. to determine such amount in accordance with such method as has been prescribed. Such method as mentioned in sub-section (2) of section 14A has been prescribed as per Rule 8D. I, therefore, hold that there is not merit in the appellant's contention that the provisions of section 14A do not provide for apportionment of expenses unlike section 80HHC. As regards the appellant's contention that it had not utilized any borrowed fund for investment in securities that earned dividend income merely

because the balance-sheet as on 31.03.2008 shows the balance of own fund of Rs.41.65 crore and outstanding borrowed fund as on 31.03.2008 shows the balance of own fund of Rs.41.65 crore and outstanding borrowed fund as on 31.03.2008 at Rs.1.41 crore, it cannot be said that no borrowed fund had ever been utilized for the purpose of making investment or undertaking transactions which had yielded dividend income which has been claimed as exempt merely on the basis sof balance in the balance-sheet. The appellant has failed to produce any cash-flow or any other material which can establish that borrowed fund had not been utilized for earning of exempt income in as much as no such fund had been utilized for making investment from which dividend had been received. Merely, on the basis of balance of own fund and borrowed fund as on the date of the balance-sheet, it cannot be presumed that borrowed fund had not been utilized for earning of exempt income. It has, therefore, to e concluded that certain expenditure had been incurred for earning dividend.

1.3 In the case of Godrej & Boyce Mfg. Co. Ltd.[ITA No.626/2010], the Hon'ble Bombay High Court had held that Rule 8D was applicable from A Y 2008-09. Thus, addition of the amount determined as per Rule 8D can be made for the current year i.e. A Y 2008-09.

1.4 The appellant's contention that no expenditure had been incurred to earn exempt income is not acceptable for the reason that the assessee being a share trader, undertakes transactions of share which includes those transactions which subsequently yielded dividend and capital gain which was exempt. The expenses debited to P & L Account had been incurred for undertaking transactions of shares which also included such transactions which yielded exempt dividend. Therefore, the expenses debited to P & L Account include expenditure incurred for undertaking transactions of shares which yielded exempt income. Apparently, any expenditure incurred for undertaking transactions for shares which subsequently yielded exempt income is required to be treated as expenditure for earning of exempt dividend income. Therefore, the assessee's contention that no expenditure had been incurred for earning of exempt income is not acceptable. The assessee has however, not maintained any details of expenses incurred for undertaking transactions of shares which have yielded exempt income. The amount of such expenditure is, therefore, required to be determined on the basis of provisions of Rule 8D. The addition made by the A.O. of Rs.8,85,223/- is, therefore, upheld. The addition is confirmed. The appeal on this ground is not allowed."

9. We have heard the arguments of both the sides and also perused the relevant material on record. As held by the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra), Rule 8D is applicable from assessment year 2008-09 and as rightly pointed out by the learned DR, the AO has correctly applied the said rule in the present case involving assessment year 2008-09 after having found that the conditions for applying the said rules are duly satisfied in the facts of the assessee's case. At the time of hearing before us, the learned counsel for the assessee has not been able to controvert or rebut the findings recorded by the AO in this regard as well as by the learned CIT(Appeals) in his impugned order while confirming the disallowance made by the AO u/s 14A. He has also not been able to explain satisfactorily any basis for the disallowance made by the assessee u/s 14A to the extent of 10% of the dividend income. We, therefore, find no justifiable reason to interfere with the impugned order of the learned CIT(Appeals) confirming the disallowance made by the AO u/s 14A by applying Rule 8D and upholding the same, we dismiss ground No.1 of the assessee's appeal.

10. In ground No.2(i), the assessee has challenged the disallowance of Rs.11,91,611/- made by the AO and confirmed by the learned CIT(Appeals) on account of bad debs u/s 36(1)(vii) read with section 36(2) while ground No.2(ii)

raises the assessee's alternative claim that the loss as a result of bad debts treated by the authorities below as capital loss may be allowed to be set off against the capital gain.

11. In the profit & loss account filed along with its return of income, the assessee had debited a sum of Rs.11,91,611/- on account of sundry balances written off. During the course of assessment proceedings, it was found by the AO that the balances so written off represented a sum of Rs.11,11,111/- paid to M/s Syntex Pharmaceuticals Pvt. Lt. against purchase of office premises while remaining amount of Rs.80,500/- was a payment made by the assessee company on behalf of its subsidiary company. Since both these amounts never formed part of income of the assessee either for the year under consideration or even for the earlier years, the AO held that condition laid down in section 36(2) was not satisfied and the assessee, therefore, was not entitled to claim deduction on account of bad debts written off. On appeal, the learned CIT(Appeals) confirmed the disallowance made by the AO on this issue. As regards the alternative contention of the assessee that the loss on this account be treated as capital loss and set off against capital gain, the learned CIT(Appeals) held that the non recovery of advance could not be said to have arisen on account of capital asset owned by the assessee and the loss arisen on account of such transaction could not be allowed to be set off against capital gains.

12. We have heard the arguments of both the sides on this issue and also perused the relevant material on record. As rightly held by the authorities below, the condition laid down in section 36(2) has not been satisfied in the present case and the learned counsel for the assessee has also not been able to dispute this position. As regards the alternative claim of the assessee for the loss to be treated as capital

loss and allowed to be set off against capital gain, we find ourselves in agreement with the learned CIT(Appeals) that the loss on account of non recovery of the amounts in question has not arisen as a result of any transfer of capital asset so as to treat the same as loss under the head "Capital gains". The assessee, therefore, cannot be allowed to set off the said loss against capital gain and its alternative claim, in our opinion, cannot be allowed as rightly held by the learned CIT(Appeals). We, therefore, uphold the impugned order of the learned CIT(Appeals) on this issue and dismiss ground No.2 of the assessee's appeal.

13. Now we shall take up the appeal of the assessee for assessment year 2005-06 being ITA No. 5543/Mum/2011 wherein the assessee has challenged the penalty of Rs.88,147/- imposed by the AO u/s 271(1)(c) and confirmed by the learned CIT(Appeals).

14. In the assessment completed u/s 143(3), addition of Rs.2,40,890/- , inter alia, was made by the AO as per the provisions of section 94(7). On confirmation of the said addition by the learned CIT(Appeals) in the quantum proceedings, a notice was issued by the AO requiring the assessee to show cause as to why penalty u/s 271(1)(c) should not be imposed in respect of the said addition. In reply, it was submitted by the assessee that disallowance u/s 94(7) was made by it in the computation of total income suo motu inadvertently and the same being not intentional or deliberate, it was not a fit case to impose penalty u/s 271(1)(c). The AO did not accept this stand of the assessee. According to him, the relevant provisions of section 94(7) were very clear and the assessee who was advised by expert tax advisor should have made the disallowance under the said provisions suo motu. He held that it was thus a case of furnishing of inaccurate particulars of its income by the assessee and penalty of Rs.88,147/- was imposed by him u/s

271(1)(c) being 100% of the tax sought to be evaded by the assessee in respect of the addition of Rs.2,40,890/- made to its total income. On appeal, the learned CIT(Appeals) confirmed the penalty imposed by the AO observing that the disallowance u/s 94(7) was clearly attracted in the case of the assessee and had the scrutiny proceedings not been initiated, the assessee would have got away without the said disallowance. Aggrieved by the order of the learned CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

15. We have heard the arguments of both the sides on this issue and also perused the relevant material on record. As pointed out by the learned counsel for the assessee from the computation of total income of the assessee placed at page No.8 of his paper book, a security transaction tax of Rs.1,82,74,840/- was paid by the assessee in the year under consideration while rebate u/s 88E on account of STT paid could be claimed by it only to the extent of Rs.1,53,30,239/-. Keeping in view this position, we find merit in the contention of the learned counsel for the assessee that there was no intention of the assessee to evade any tax by not making the disallowance u/s 94(7) suso motu in the computation of total income and not making such disallowance was not with any intention of evading tax. It was thus an inadvertent mistake on the part of the assessee with no intention to evade any tax which, in our opinion, cannot be equated with concealment as envisaged in section 271(1)(c) to attract penalty under the said provision. We, therefore, cancel the penalty imposed by the AO u/s 271(1)(c) and confirmed by the learned CIT(Appeals) and allow this appeal of the assessee.

16. In the result, the appeal of the assessee for assessment year 2005-06 being ITA No. 5543/Mum/2011 is allowed whereas the appeals filed by the assessee and

the Revenue for assessment years 2008-09 being ITA No.5544/Mum/2011 and ITA No. 5304/Mum/2011 are dismissed.

Order pronounced on this 28th day of Sept. , 2012.

Sd/-	Sd/-
(D.K. Agarwal)	(P.M. Jagtap)
Judicial Member	Accountant Member

Mumbai,
Dated: 28th Sept., 2012.

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, E-Bench.

(True copy)

By Order

Asstt. Registrar,
ITAT, Mumbai Benches, Mumbai.

Wakode