IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'H' MUMBAI

BEFORE SHRI J. SUDHAKAR REDDY (AM)
AND SMT. ASHA VIJAYARAGHAVAN (JM)

ITA No.5858/Mum/2009
Assessment Year-2006-07

HDFC Securities Ltd., Office Floor 8, "I Think" bldg., Jolly Board Campus, Opp. Crompton Greaves, Kanjur (E), Mumbai-400 047 PAN-AAACH8215R	Vs.	The ACIT, Range 4(1), Mumbai
(Appellant)		(Respondent)

ITA No.5937/Mum/2009
Assessment Year-2006-07

The ACIT, Range 4(1), Mumbai	Vs.	HDFC Securities Ltd., Office Floor 8, "I Think" bldg., Jolly Board Campus, Opp. Crompton Greaves, Kanjur (E), Mumbai-400 047 PAN-AAACH8215R
(Appellant)		(Respondent)

Assessee by: Shri Shreesh Kumar
Department by: Shri Narendra Singh

O R D E R

PER SMT. ASHA VIJAYARAGHAVAN (JM)

This set of cross appeals consisting of one appeal filed by the assessee and the other filed by the Revenue is directed against the order dt. 10.8.2009 passed by the Ld. CIT(A) in the matter of assessment u/s. 143(3) of the I.T. Act 1961 for the assessment year 2006-07.

ITA 5858/M/2009-Asst. Year -2006-07

2. The only issue in assessee's appeal against the order of the Commissioner of Income Tax (A) IV Mumbai upholding the action of the Additional Commissioner of Income Tax, Range 4(1) Mumbai of making protective addition in respect of depreciation on the Stock Exchange Card allowed in the earlier financial years.

3. The assessee is a member of BSE and NSE and main business activity is offering brokerage services to its clients on BSE and NSE in equity and futures and options segment. During the year assessee derives income from brokerage income, fee income and other income. The assessee had claimed depreciation of Rs. 17,09,572/- on BSE Membership Card. Vide notice u/s 142(1) dated 28.8.2008, the assessee was asked explain why the claim of depreciation of stock exchange card amounting to Rs. 17,09,572/- should not be disallowed as it is not eligible for depreciation. The assessee vide letter dated 9.9.2008 submitted a revised computation of income in which the claim of depreciation on BSE Membership Card was withdrawn by it. It was also submitted that a revised return has also been filed on 29.3.2008 for withdrawing this claim.

4. Further the assessee was asked to explain as to why the depreciation already allowed to the assessee in earlier years in pursuance to appellate orders should not be added back as income u/s 28(iv) of the I.T. Act 1961 for the current year. This query was raised on account of assessee having received 10000 shares of BSE Ltd at a notional rate of Rs 1 per share on demutualization of BSE Ltd during this year. The AO was of the view that the cost of acquisition of these shares as per section 55(2)(ab) of the I.T. Act 1961 is to be taken as the cost of acquisition of the original membership of the Exchange.

5. In case of the assessee, the cost of acquisition of original membership was Rs 2.88 Crores on which depreciation amounting to Rs 21961712/- has already been allowed till 31.3.2005. Thus, this amount accrued to the assessee as a benefit u/s 28(iv) during this year. The assessee vide reply dated 20.11.2008 has submitted as follows:

In the context of the transaction as a consequence of exchange, the erstwhile membership card ceased to exist. As a result, the block of assets on which depreciation was claimed also ceases to exist. Consequently sec 50(2) comes into play and deemed short term capital gains would have accrued in that year. However as stated above, in view of sec 47(xiiia) which grants exemption to such transfer, such deemed short term capital gains are not taxable. Thus,when taxability of a transaction is governed by specific provisions under section 45 of the Act, the general provisions of sec 28(iv) cannot apply. In the following cases, it is held that the specific provisions of the Act override the general provisions.

1. *Commissioner of Income Tax v Roadmaster Industries Of India (P) Ltd (271 ITR 0247(P & H)*

2. *Gopal Das Gupta v Union Of India and Others (080 ITR 022 (Cal)*

3. *Rao Bahadur Revula Subba Rao and Another v Commissioner of Income Tax Madras (020 ITR 0337 (Mad)*

4. *Commissioner of Income Tax. Madras v Rao Bahadur Ravula Subba Rao And Another (014 ITR 0232(Mad)*

In order that the amount should be taxable under sec 28(iv) it should be income from business and that it should arise in kind. Section 28(iv) merely provides for the assessment of such income, where it is assessable under the head profits and gains from business and profession. The Assessee has not received any additional benefit upon substitution of the erstwhile membership card by shares and trading rights of BSE Ltd. In fact, by such substitution the existing capital asset was merely segregated into two separate assets which earlier existed under a single asset.

Further, section 28 starts with the words "The following income shall be charged ….."Therefore before any benefit can *be taxed u/s 28(iv) it must be in nature of "Income". Now, the term income has to be understood in commercial sense, as held by the Hon'ble Supreme Court in U. State Industrial Development Corporation (225 ITR 703). Depreciation allowed under the Act is an allowance, it is not receipt of income. It has never been the intention of the legislation to grant allowance for depreciation on one hand and to tax such allowance granted as a benefit chargeable u/s 28(iv) thereby nullifying or withdrawing the allowance u/s 32. Based on the above submissions, there is no question of taxing the depreciation granted on BSE card u/s 32 of the Act as an allowance benefit chargeable to tax u/s 28(iv). The Assessee also submitted without prejudice to the above submissions, the Tax Department has consistently disallowed our claim for depreciation u/s 32 up to assessment year 2005-06.Therefore, consistent with its own stand it cannot tax such depreciation u/s 28(iv).*

6. But the Assessing officer rejected the submissions of the assessee observing as under:

> *" The assessee has stopped claiming further depreciation on BSE Card from AY 2006-07. Now due to the provisions of sec 55(2)(ab) against the written down value as on the date of exchange of BSE card with shares of BSEL and BSEL trading rights the assessee gets entitled to claim the original cost of the acquisition of membership of BSE i.e. Rs. 2.8 crores as cost of acquisition of shares of BSEL. Therefore there accrues a benefit to the extent of depreciation claimed and allowed by the ITAT up to AY 2005-06 in this year although this will be realized in the year in which sale is made. In fact it is the direct consequence and incident following from the legal fiction enunciated by section 55(2)(ab) This tantamount to recovering back the allowance of depreciation amounting to rs 21961712. Provisions of section 50 do not effect this accrual of benefit because as discussed above, exchange of BSE card with shares of BSEL and trading right of BSEL do not amount to transfer and hence are out of the purview of section 45 and section 50. It may be mentioned here that due to these provisions no benefit is accruing in the hands of those share brokers who have not claimed any depreciation on BSE card any time up to AY 2005-06. This accrual of benefit is only applicable to share brokers who have claimed and*

have been allowed depreciation on BSE card. It may be argued that the benefit will arise only in the year of transfer and not in the current year. However the fact remains that since the exchange has taken place in the relevant year, the benefit as per section 55(2)(ab) and 28(iv) accrues in this year, although it may be realized later.

Since the department has taken a stand that depreciation cannot be allowed on BSE Membership the addition can be made only on a protective basis in case of brokers, who have claimed depreciation in earlier years. The same shall become substantive in case, it is finally held that depreciation is permissible to the assessee and he claims the original cost of membership of BSE as his cost of acquisition.

It is a fact that department has not accepted the claim of depreciation on membership card in earlier years and appeals are lying before the High Courts. Hence, this addition is being made on protective basis subject to outcome of appellate proceedings. Accordingly an amount of Rs 21961712 is added to the total income of the assessee."

7. Aggrieved the assessee filed an appeal before the Ld.CIT(A). The Ld. CIT(A) dismissed the assessee's appeal observing as under:

"In case of the assessee the cost of acquisition of original membership was Rs 2.88 Crores on which depreciation amounting to Rs 21961712/- has already been allowed till 31.3.2005.Thus, this amount accrued to the assessee as a benefit u/s 28(iv) during this year.

As para 4.5 the AO has quoted the assessee's reply. At para 4.6 and 4.13 (incorrectly shown as para 4.7 after the para 4.11) the AO has given finding that the addition is being made as protective addition.

The appellant submitted that protective addition s not correct and addition cannot be made on notional basis but the benefit u/s 28(v) is taxable in the year of transfer of BSEL shares. It was further submitted that no tax be levied on addition made on protective basis.

> *I have gone through the order of the AO and the submission of the appellant. The action of the AO to make protective addition to protect the interest of revenue is correct as protective assessment to protect the interest of revenue is recognized in case of Lalji Haridas vs ITO 43 43 ITR 387(SC) but no demand on protective addition may be enforced. The AO is directed not to enforce demand pertaining to protective addition."*

8. Aggrieved the assessee is on appeal before us. The facts of the case are that the assessee acquired a membership card in the Bombay Stock exchange for a cost of Rs. 2.88 crores. The Assessee had claimed depreciation on Stock Exchange Card on the ground that it constituted a commercial asset which falls within the definition of Asset for the purpose of sec 32. While the claim of depreciation by the Assessee was rejected by the AO, the same was allowed by the Appellate Authority. The issue is before the High Court. We find that the Apex court has held in the case of Techno Shares & Stocks Ltd. Vs CIT (iv) Civil Appeal No. 7780-7781 of 2010 arising out of SLP No. 4053-4054 of 2010 that depreciation is allowable in respect of Stock exchange card, as it constituted a commercial Rights by the virtue of which the Stock Broker can carry on his business of stock broking through the stock exchange.

9. The AO and the Ld.CIT(A) have held that the depreciation allowed in the earlier years on the value of the Stock exchange card is a benefit because u/s 55(2)(ab), the cost of acquisition of the shares in the stock exchange, issued in lieu of the stock exchange card, is deemed as the cost of acquisition of the Stock Exchange card and hence the depreciation claimed and allowed in the earlier years constitutes a benefit chargeable in this year.

10. The lower authorities feel that the cost of acquisition of the shares should be equivalent to the WDV of the Stock exchange Card as already the Assessee has claimed deduction of the balance amount as a

deduction from its income by way of depreciation. We do not see how this view can be sustained. The statute has provided for the deemed cost of acquisition of the shares in the Stock exchange company. Merely because the cost of acquisition as provided in the statute is higher than the cost of acquisition/ WDV of the assets as on the date of such exchange does not mean that the assessee has acquired any benefit u/s 28(iv). Sec 55(2) provides for a deemed cost of acquisition in respect of certain assets while computing capital gains. It is a machinery section providing for determination of the capital gains. It cannot be considered as granting any taxable benefit to the assessee. If at all this has to be considered it will be at the time of sale of shares and only at that time the provisions of sec 55(2)(ab) regarding computation of capital gains will apply and not in the year of allotment of shares. Allotment of shares in lieu of the stock exchange card by itself does not confer any benefit on the assessee. It merely confers the right to the assessee to participate in the sale and purchase of shares through the platform offered by the Stock Exchange .As contended by the assessee, if the value of the shares issued in lieu of the Stock exchange card is considered to have higher value than the WDV of the Stock exchange card, the difference can be taxed only as short term capital gains u/s 50. This is not possible as u/s 47(xiiia) any transfer of a stock exchange card for shares issued by the Stock exchange in a scheme of corporatisation is not regarded as a transfer. Hence the difference cannot be taxed u/s 50. Further the benefit does not arise from the conduct of business by the assessee. It has arisen from the conversion or corporatisation of the Stock Exchange, without any change in the rights of the Assessee. Again the transaction is in the capital field being exchange of a depreciable asset with shares. It is not a benefit or perquisite assessable as business income and hence cannot be brought to tax under sec 28(iv).

11. In view of the above we delete the addition of Rs. Rs 21961712/- , being depreciation granted in the earlier year.

12. In the result, the appeal filed by the assessee is allowed.

ITA No. 5937/Mum/2009- A.Y. 2006-07(Departmental Appeal):

13. The only issue in the departmental appeal is the deletion by the CIT() of the disallowance of VSAT charges amounting to Rs.413192/- and transaction charges amounting to Rs. 67,12,842/- u/s 40(a)(1a), paid by the assessee to the Stock exchange. VSAT charges are covered in favour of the assessee by order dt. 19.3.2010 in assessee's own case for A.Y. 2005-06 wherein it has been held as follows:

> *Having carefully heard the submissions of the rival parties and perusing the material available on record we find that the facts are not in dispute. In Angel Broking Ltd.(supra) relied on by the ld. Counsel for the assessee it has been held by the Tribunal in para-10 of its order dated 9.12.2009 as under :*
>
> *We have already given nature of VSAT charges and lease line charges, other charges, BOLT charges, Demat charges, paid by the assessee. Stock exchanges as measure of providing infrastructure to its members installs VSAT, lease line facilities, BOLT Charges and Demat Charges to its members. Fees collected in this regard is nothing but fee paid for use of facilities provided by the stock exchange. Such facilities are available for use by any member. Satellite based trading enables trading member to trade on exchange from their place of work across the country. Stock exchange has to get permission of Department of Telecommunication for installing and setting up VSAT or lease line system. Charges levied by the stock exchange on its members are for the purpose of recovery of its cost in providing these facilities to the members. Stock Exchanges do not provide any technical services by*

installing VSAT network. It is the facility provided to its members, such payment cannot be said to be nature of fees for any technical services rendered. Stock Exchanges merely provide facilities for its members to purchase and sell shares within frame work of its bye-laws. It also provides for a mechanism for settlement of dispute between the brokers and its customers. Stock Exchanges do not involve them in providing any technical services to any of its members. We are of the view that this ratio of Hon'ble Madras High court will apply to the facts of the present case. The Assessing Officer in coming to the conclusion that the payment was for fee for technical services has relied on the fact that the screen based trading is sophisticated method of trading. This by itself will not be sufficient to holding technical services being rendered. The Assessing Officer has also held that services are not available to the public at large but only to registered members, again this by itself will not make the services in question as technical services. Another reason given by the Assessing Officer is that speed at which transactions were completed and the ease with which transactions are done in screen based trading. This again is not relevant criteria for holding that the services rendered were technical services. Fact that the data provided on screen will provide better data for carrying out transaction will not again be sufficient to hold that technical services are being rendered. All the above features present in screen based trading saves time. This is the result of improved technology. That does not mean that stock exchange is providing technical services. Members of the stock exchange and the public at large are beneficiaries of these technical improvements. Stock exchanges are not the owner of this technology to provide them for a fee to prospective use. They are themselves consumers of the technology. We are therefore of the view that learned CIT(A) was right in holding that the payment in question is not fee for technical services rendered. We therefore confirm the order of learned CIT(A) and dismiss this appeal of the Revenue."

In the absence of any distinguishing feature brought on record by the revenue we respectfully following the order of the Tribunal supra, hold that the payment of V-SAT charges and leaseline charges cannot be considered as fees for technical services rendered and accordingly we are inclined to uphold the order of the ld. CIT(A) in deleting the disallowance made by the AO. The grounds taken by the revenue are therefore rejected.

Respectfully following the above we allow this ground raised by the assessee.

14. We also find that the transaction charges are covered in favour of the assessee by the decision of the Mumbai Tribunal in the case of Kotak Securities Ltd. vs Addl. CIT in 25 SOT 440, wherein it has been held as under:

"To call a payment as fees for technical services it should have been said in consideration for rendering by the recipient of payment of any (a) managerial service (b) technical or consultancy services; stock exchanges merely provide facility for its members to purchase and sell shares, securities etc. within the framework of its bye laws. In the event of dispute it provides mechanism for settlement of disputes. It regulates conditions subject to which a person can be a member and when and in what circumstances membership can be transferred , cancelled, suspended. The exchange provides a place where the members meet and transact business. The transaction fee is not paid in consideration of any service provided by the stock exchange. It is a payment for use of facilities provided by the stock exchange and such facilities are available for use by any member. The provision of s. 194J which casts a burden on a person to deduct at source and treat him a defaulter on failure to deduct tax at source, needs to be interpreted strictly and in the absence of a clear obligation on the part of a person spelt out in unambiguous terms by the provisions of s. 194J r/w Expln. 2 to s. 9(1)(vii). Such obligation cannot be implied or left to the dixit of the Revenue authorities. Therefore transaction fee paid cannot said to be a fee paid in consideration of the stock exchange rendering a technical services to the assessee. The provisions of s. 194J are therefore not attracted. Therefore,

> *there was no obligation on the part of the assessee to deduct tax at source. Consequently, the provisions of S. 40(a)(ia) were also not attracted and therefore the disallowance made directed to be deleted.*
>
> *Transaction fee paid to stock exchange on the basis of volume of transaction is payment for use of facilities provided by stock exchange and not for any services, either technical or managerial, hence provisions of s. 194J are not attracted and no disallowance can be made by invoking 40(a)(ia)."*

15. Following the decision of the ITAT in assessee's own case (supra) which has decided in favour of the assessee, we uphold the order of the Ld. CIT(A) in deleting the disallowance of Rs. 413132/- being the VSAT charges payable by the assessee to the Stock exchange. Following the decision in the case of Kotak Securities (supra), we delete the disallowance Rs. 67,12,842/- being transaction charges.

16. In the result, the revenue's appeal is dismissed.

Order pronounced on this 27th day of October, 2010

Sd/-	Sd/-
(J. SUDHAKAR REDDY)	(ASHA VIJAYARAGHAVAN)
Accountant Member	Judicial Member

Mumbai, Dated 27th
October, 2010
Rj

Copy to :
1. *The Appellant*
2. *The Respondent*
3. *The CIT-concerned*
4. *The CIT(A)-concerned*
5. *The DR 'H ' Bench*

True Copy

By Order

Asstt. Registrar, I.T.A.T, Mumbai

		Date	Initials	
1	Draft dictated on:	18.10.2010		Sr. PS/PS
2.	Draft placed before author:	18.10.2010	______	Sr. PS/PS
3.	Draft proposed & placed before the second member:	_________	______	JM/AM
4.	Draft discussed/approved by Second Member:	_________	______	JM/AM
5.	Approved Draft comes to the Sr. PS/PS:	_________	______	Sr. PS/PS
6.	Kept for pronouncement on:	_________	______	Sr. PS/PS
7.	File sent to the Bench Clerk:	_________	______	Sr. PS/PS
8.	Date on which file goes to the Head Clerk:	_________	______	
9.	Date of dispatch of Order:	_________	______	