IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " F ", MUMBAI

BEFORE SHIRI R. S. PADVEKAR, J.M. AND
SHRI RAJENDRA SINGH, A.M.

ITA No. : 6876/Mum/2007
Assessment Year : 2002-03
&
ITA No. : 7047/Mum/2007
Assessment Year : 2003-04
&
ITA No. : 7048/Mum/2007
Assessment Year : 2004-05

M/s. V. N. Parekh Securities Pvt. Ltd. Bhupen Chambers, Gr. Floor, 9, Dalal Street, Fort, Mumbai-400 023 **PAN NO: AABCV 0547 M**	Vs.	Assistant Commissioner of Income Tax Central Circle-40, Mumbai
(Appellant)		(Respondent)

Appellant by	:	Shri Rajiv Khandelwal
Respondent by	:	Dr. P. Daniel
Date of hearing	:	15.12.2011
Date of Pronouncement	:	23.12.2011

O R D E R

PER BENCH :

These appeals by the assessee are directed against different orders all dated 14.09.2007 of CIT(A)-VII, Mumbai for the Assessment Years 2002-03 to 2004-05. As the dispute raised in theses appeals are identical, these are being disposed off by a single consolidated order for the sake of convenience. The dispute raised relates to discontinue of business, allowability of depreciation on BSE card and employer / employees contribution to PF.

2. We first take up the issue relating to discontinuance of business, as this is a basic issue having bearing on other grounds of appeal and is common in all the years. The facts in brief are that the assessee who was a share broker having BSE membership card had not undertaken any share trading activities during the relevant years. The assessee had received interest income from FDR pledge for the purpose of share broking and / or dividend income from shares held in trading account which had been declared as business income. The assessee had however, claimed various expenses including depreciation on BSE card against the said income. The AO disallowed the depreciation on BSE card, but had allowed other expenses and the net income was determined at loss. The AO in the Assessment Year 2003-04, treated the interest and dividend income as income from other sources both in Assessment Years 2002-03 and 2004-05, he allowed the same as part of business income as claimed by the assessee. In appeal, CIT(A) observed that since the assessee had not undertaken any share trading activities, the expenses should have been allowed. CIT(A), therefore, asked the assessee to explain as to why the assessment should not be enhanced and the expenses should not be disallowed. As per CIT(A), there was no response from the assessee. CIT(A) noted that SEBI had barred the assessee from doing any share business and, therefore, the assessee could not trade in shares. As there was no business at all, the expenses claimed by the assessee could not be allowed. CIT(A), therefore, held that the assessee was not entitled to claim any business loss and carry forward the same. Accordingly, he directed the AO to disallow the business loss and the benefit of carry forward in all the three years under reference.

Aggrieved by the decision of the CIT(A) the assessee is in appeal before the Tribunal.

3. Before us, the Ld. AR for the assessee submitted that the business of the assessee had not been discontinued, but had only been suspended due to the orders of the SEBI. It was pointed out that SEBI vide order dated 10.04.2001 had debarred the assessee from undertaking any fresh business as stock broker and Merchant Bankers till further orders. SEBI passed an order dated 21.06.2001 stating that the ban on business would continue till further notice. Further, vide order dated 08.03.2004, SEBI had cancelled the certificate of registration of the assessee. The assessee had filed an appeal to the Securities Appellate Tribunal (SAT) in April, 2004, which was also dismissed by order dated 11.05.2007. It was argued that dismissal of the appeal by the assessee was a subsequent development and till that time the business of the assessee was only suspended and not closed. It was also pointed out that the assessee company had not been delisted as a member of the Stock Exchange. It was argued that interest and dividend income had been rightly offered as business income. The Ld. AR also submitted that the same issue had been considered by the Tribunal in case of Classic Share & Stock Broking Services Ltd. vide ITA No. 191/M/2008 and 1135/M/2008 for the Assessment Year 2003-04 and the Tribunal had accepted the claim that business had not discontinued and expenses were allowed. It was accordingly, urged that order of the CIT(A) should be set aside and the claim of the assessee should be allowed. The Ld. DR, on the other hand, supported the order of CIT(A).

4. We have perused the records and considered the rival contentions carefully. The dispute is regarding the closure of the

business. The assessee was in share broking business. SEBI vide order dated 10.04.2001 had debarred the assessee from undertaking any fresh business as stock broker or Merchant Bankers till further orders, due to allegation of irregularity and manipulation. Subsequently, the license of the assessee had also been cancelled vide order dated 04.03.2004. The assessee had filed an appeal to SAT against the order of SEBI, which was dismissed on 04.05.2007. The issue is, whether on the facts of the case business of the assessee can be considered as having been closed. The same issue had been considered by the Tribunal in case of another concern of the same group i.e. M/s. Classic Share & Stock Broking Services Ltd. (supra), in which case also similar orders had been passed by the SEBI and the appeal of the assessee had been dismissed by SAT. The Tribunal observed that SEBI had debarred the assessee from undertaking share business till further orders and the appeal of the assessee had been dismissed by the SAT only in the year 2007, which was a subsequent event and, therefore, during the year under consideration the business of the assessee could only be considered as suspended and not closed. The Tribunal, therefore, following the judgment of Hon'ble High Court of Madras in case of CIT vs. Vellore Electric Corporation Ltd. (243 ITR 529) held that the business of the assessee had not been closed and the claim of the expenditure has to be allowed against the interest income declared as business income. Facts in case of the assessee are identical. Therefore, respectfully following the decision of the Tribunal in case of Classic Share & Stock Broking Services Ltd. (supra), we hold that the business of the assessee had not closed and the expenses claimed have to be allowed in all the three years.

4.1 As regards, the interest and dividend income in Assessment Year 2003-04, interest income had arisen from FDR pledge for the purpose of business and dividend income had arisen from shares held on trading account. Interest income in identical situation in case of M/s. Classic Share & Stock Broking Services Ltd. (supra) has been held assessable as business income. The dividend income arising from trading shares has to be assessed as incidental business income. We, therefore, held that interest and dividend income has to be assessed as business income.

5. The second dispute which is also common in all the years is regarding allowability of claim of depreciation on BSE membership card. The assessee had acquired the BSE membership card on 31.02.1997 and had claimed depreciation on the same. The assessee claimed that BSE membership card was a plant used in the business of share broking and, therefore, depreciation was allowable. It was also submitted that it was an intangible asset, on which depreciation was allowable u/s.32(1)(ii). The AO, however, held that the BSE card could neither be considered as a plant nor an intangible asset within the meaning of the word used u/s. 32(1)(ii). He, therefore, disallowed the claim of depreciation. In appeal, CIT(A) observed that there were contrary decisions of the Tribunal on this issue. In case of Techno Shares and Stock Ltd. vs. ITO (101 TTJ 349), the Tribunal held that BSE card was an intangible asset used in the business and, therefore, depreciation was allowable. But in case of Vyomit Shares, Stock and Investments Pvt. Ltd. vs. DCIT (107 TTJ 422), it was held that BSE card was an intangible asset and depreciation could be allowed only from the Assessment Year 1999-2000 as per section 32(1)(ii). CIT(A) further observed that irrespective of the fact whether BSE card was an intangible asset entitled for depreciation or not, depreciation could not be allowed, as there was no business in existence and, therefore, no user of the card. CIT(A), therefore, confirmed the disallowance made by

the AO aggrieved by which the assessee is in appeal before the Tribunal.

6. Before us, the Ld. AR for the assessee submitted that depreciation in respect of the same BSE card has been allowed by the AO in the Assessment Year 1999-2000 following the direction of ITAT in ITA No.3716/Mum/2004 and, therefore, depreciation could not be disallowed in the subsequent year in view of the principle of consistency. The Ld. DR, on the other hand, submitted that depreciation on BSE card treating the same as intangible asset can be allowed only from the Assessment Year 1999-2000. But in this case, the asset had been acquired prior to Assessment Year 1999-2000 and, therefore, depreciation should not be allowed.

7. We have perused the records and considered the rival contentions carefully. The dispute is regarding the allowability of depreciation on the BSE card. Under the provisions of section 32(1)(ii), depreciation is allowable on certain intangible assets such as know-how, patents, copyrights, trade mark, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after 01.04.1998. Whether BSE card is an intangible asset or not has been a debatable issue, which has been finally settled by the Hon'ble Supreme Court in the case of Techno Shares and Stock Ltd. (327 ITR 323), holding that BSE card is an intangible asset entitled for depreciation. Therefore, there is no dispute regarding the allowability of depreciation on BSE card. The only dispute raised by the Ld. DR is that since the card had been acquired prior to 01.04.1998, no depreciation could be allowed u/s.32(1)(ii). However, we find that in assessee's own case in Assessment Year 1999-2000, depreciation has been allowed in respect of the same BSE

card by the AO on the direction of the ITAT in ITA No.3716/Mum/2004. Since, depreciation has already been allowed on the direction of the ITAT in the earlier year, in our view, it will not be appropriate to disallow the same in the subsequent year. We, therefore, set aside the order of the CIT(A) on this point and allow the claim of depreciation.

8. The third dispute which is relevant only for the Assessment Years 2002-03 and 2003-04 is regarding allowability of deduction on account of contribution made by employer and employees to PF. The AO had disallowed the contribution made to the PF both by the employer and employees, on the ground that the same had not been paid within due date. In appeal, the assessee submitted that the contribution had been paid within the grace period of 5 days from the due date or before the due date of filing the return of the income and, therefore, the same should be allowed. CIT(A) however, did not accept the contentions raised and confirmed the disallowance made by the AO aggrieved by which the assessee is in appeal before the Tribunal.

9. We have heard both the parties, perused the records and considered the matter carefully. The dispute is regarding the allowability of contribution to PF by employers and employees. Under the statutory provisions relating to the PF, contributions are required to be deposited by 15^{th} day of the subsequent month. Further, a grace period of 5 days has been allowed under the internal circular of PF Authorities. Therefore, there cannot be any dispute regarding the allowability of claim, in case the contributions have been deposited within the grace period. However, the Hon'ble Supreme Court in the case of Alom Extrusions Ltd. (319 ITR 306) have held that amendment to section 43B by the Finance Act, 2003 is retrospective in nature, as

the same had been inserted to remove intended consequences. The effect of the said judgment is that contributions deposited before the due date of filing of return of income has to be allowed as deduction. Following the said judgment, the various benches of the Mumbai Tribunal have been allowing the claim both in relation to the employer's contribution and employee's contribution, if deposit is within the due date of filing the return of income. We, therefore, direct the AO to allow the deduction if contributions have been paid before the due date of filing the return of income after necessary verification.

10. In the result, all the appeals of the assessee are allowed in terms of the order above.

Order pronounced on this 23rd day of December, 2011.

Sd/- Sd/-

(R. S. PADVEKAR)
JUDICIAL MEMBER

(RAJENDRA SINGH)
ACCOUNTANT MEMBER

MUMBAI, Dt: 23/12/2011

Copy forwarded to :

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

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Roshani