आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.733, 734 & 735/Mds/2015**
निर्धारण वर्ष / Assessment Years : 2008-09, 2010-11 & 2011-12

M/s Shriram Insight Share Brokers Limited, Mookambika Complex, No.4, Lady Desika Road, Mylapore, Chennai - 600 004.	v.	The Deputy Commissioner of Income Tax, Corporate Circle 6(1), Chennai - 600 034.
PAN : AAACI 2727 H (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri R. Sivaraman, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri Arun C. Bharat, CIT

सुनवाई की तारीख/Date of Hearing : 04.02.2016
घोषणा की तारीख/Date of Pronouncement : 05.05.2016

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

All the three appeals of the assessee are directed against the respective orders of the Commissioner of Income Tax (Appeals)-15, Chennai, for the assessment year 2008-09, 2010-11 and 2011-12. Since common issue arises for consideration in all

these appeals, we heard these appeals together and disposing of the same by this common order.

2. The first issue arises for consideration is with regard to reopening of assessment under Section 147 of the Income-tax Act, 1961 (in short 'the Act').

3. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the issue of reopening of assessment arises for consideration for the assessment year 2008-09. According to the Ld. counsel, the assessee-company is engaged in the business of share broking. The original assessment was passed under Section 143(3) of the Act on 13.12.2010. Subsequently, the Assessing Officer issued notice on 26.03.2012 to reopen the assessment under Section 147 of the Act on the ground the ESOP cost of ₹1,11,18,000/- cannot be allowed as expenditure in the hands of the assessee-company. According to the Ld. counsel, the shares of the assessee-company were purchased by Shriram Insight Welfare Trust at the rate of ₹340/- per equity share from the employees of the assessee-company. This cost of acquisition of 32,700 equity shares of the company to the extent of ₹1,11,18,000/- was claimed as expenditure by the assessee as ESOP cost. The Assessing

Officer, however, found that this cannot be allowed as expenditure and reopened the assessment by issuing notice under Section 148 of the Act. The Ld.counsel submitted that all the particulars were available with the Assessing Officer, therefore, the reopening of assessment is only due to change of opinion. According to the Ld. counsel, when the assessee has filed the details before the Assessing Officer, the Assessing Officer allowed the claim of the assessee in the original assessment. There cannot be any reason for reopening the assessment on the ground that the particulars of income in the nature of ESOP cost escaped assessment. Therefore, according to the Ld. counsel, reopening of assessment is invalid. Hence, the consequent assessment made by the Assessing Officer cannot stand in the eye of law.

4. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the assessee reimbursed the cost of purchase of shares from its employees by Shriram Insight Welfare Trust to the extent of ₹1,11,18,000/-. According to the Ld. D.R., expenditure for purchasing the shares of the assessee's employees by the Trust cannot be a business expenditure. Therefore, it is not an allowable expenditure either under Section 37 of the Act or

otherwise. The Ld. D.R. submitted that the Assessing Officer has not discussed anything in the assessment order about the allowability of the cost of ESOP. Therefore, it cannot be said that the Assessing Officer has taken one of the possible view. According to the Ld. D.R., reopening the assessment is not due to change of opinion. In the absence of any opinion framed by the Assessing Officer in the original assessment order, according to the Ld. D.R., it cannot be said that the Assessing Officer reopened the assessment due to change of opinion. The Ld. D.R. further submitted that the assessment proceeding was reopened under Section 147 of the Act within four years from the end of the relevant assessment year. Since the entire expenditure was incurred by Shriram Insight Welfare Trust and not by the assessee-company, according to the Ld. D.R., the Assessing Officer has rightly reopened the assessment.

5. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the assessment was completed under Section 143(3) of the Act on 13.12.2010. There was no discussion in the assessment order about the cost incurred by the assessee for ESOP scheme. When the Assessing Officer has not framed any opinion in the original

assessment, this Tribunal is of the considered opinion that it cannot be said that the Assessing Officer reopened the assessment due to change of opinion. For change of opinion, an opinion must have been formed by the Assessing Officer in the original assessment order. In the absence of any opinion formed by the Assessing Officer in the original assessment under Section 143(3) of the Act, at no stretch of imagination it can be said that the Assessing Officer reopened the assessment due to change of opinion. In view of the above, this Tribunal is of the considered opinion that the Assessing Officer has rightly reopened the assessment within a period of four years from the end of the relevant assessment year. In view of this, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly, the same is confirmed.

6. The next ground of appeal is regarding disallowance of ₹1,11,18,000/- towards ESOP expenses.

7. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the assessee-company introduced Employee Stock Option Plan 2006 with an intention to motivate the employees of the assessee-company to encourage them to increase their performance. The Ld.counsel submitted that the assessee-

company has discretion to offer the Employees Stock Option Plan Scheme either directly by the company itself or through a Trust. In this case, the assessee-company opted to form a Trust with a view to offer the stock option to its employees. Referring to the Employees Stock Option Plan 2006, the Ld.counsel submitted that the ESOP Committee determined to offer the option to the eligible employees. On acceptance by the respective employees, shares were allotted to them. Therefore, the expenditure incurred by the assessee has to be allowed under Section 37 of the Act. Referring to the Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014, the Ld.counsel submitted that the company may grant the benefit of stock option either directly or indirectly to the eligible employees. Therefore, merely because the assessee established a Trust for implementation of ESOP Scheme, the expenditure incurred by the assessee cannot be disallowed. Referring to the order of the CIT(Appeals), the Ld.counsel submitted that the ESOP Plan was approved by the Board and shareholders, the assessee has advanced a sum of ₹1,76,25,000/- to the Trust to enable them to purchase and allot the shares to the employees. In fact, the Trust purchased 3,50,000 equity shares from existing promoters of the company at a price of

₹15/- per equity shares which were sold to the eligible employees at ₹15/- per equity share. Subsequently, the Trust purchased the shares from the employees to whom the shares were allotted. The expenditure incurred by the Trust to the extent of ₹1,11,18,000/- to buy back the equity shares was claimed as expenditure by the assessee-company. The Ld.counsel submitted that the Assessing Officer disallowed the claim of the assessee in respect of ₹1,11,18,000/- which was utilised to buy back the equity shares from the respective employees. The Ld.counsel submitted that all the expenditures were incurred by the assessee in ESOP Scheme, therefore, there is no reason to disallow the claim of the assessee. The purchase of shares by the Shriram Insight Welfare Trust from the employees by using the funds advanced by the assessee-company is for the benefit of employees, therefore, it is allowable under Section 37 of the Act.

8. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the assessee has not allotted even a single share to its employees during the year under consideration. No shares were issued to the Shriram Insight Welfare Trust during the year under consideration. Therefore, the contention of the

assessee that the ESOP Scheme was implemented through the Trust is not justified. In the case before us, the Trust purchased the shares from the employees of the assessee-company on a consideration of ₹ 340/- per equity share. According to the Ld. D.R., the ESOP Scheme cannot be extended for reimbursing the expenditure incurred by the Trust to buy back the shares from the assessee's employees. Referring to the judgment of Madras High Court in CIT-III v. PVP Ventures Limited (211 Taxmann 554), the Ld. D.R. submitted that in the case before the Madras High Court, the issue was whether the excess market price paid by the assessee over and above the value of the shares allotted to the employees are allowable as deduction or not? In this case, it is not the excess market value paid by the company for allotting the shares to its employees. It is a case of buy back of shares from employees by the Trust. Therefore, the cost of purchase of shares by the Trust cannot be a business expenditure in the hands of the assessee-company. Therefore, according to the Ld. D.R., the CIT(Appeals) has rightly confirmed the addition made by the Assessing Officer.

9. We have considered the rival submissions on either side and perused the relevant material available on record. During the year under consideration, the assessee claims that it implemented ESOP Scheme to the benefit of its employees. The Scheme was said to be implemented through Shriram Insight Welfare Trust. In fact, the Trust purchased 3,50,000/- equity shares from the existing promoters of the company at a price of ₹15/- per equity share. Thereafter it was allotted to eligible employees at a price of ₹15/- per equity share. Subsequently, the Trust purchased 32,700 equity shares from the employees at a price of ₹340/- per equity share. The assessee-company granted a sum of ₹1,11,80,000/- for the purpose of buying back the equity shares by the Trust from its employees. The question arises for consideration is whether the sum of ₹1,11,18,000/- advanced by the assessee to the Trust for buying back the equity shares from its employees can be allowed as expenditure or not? As per the scheme of ESOP, as approved by the Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014, the scheme can be implemented either directly or through a Trust. In this case, the assessee opted to implement the scheme through a Trust. The CIT(Appeals) found that the Trust is a separate legal entity and the

expenditure incurred for buying back the shares from its employees was accounted in the books of account of the Trust. Therefore, the CIT(Appeals) found that the amount advanced by the assessee for buying back the shares from the employees has to be treated as loan. Even though the assessee has produced material before the authorities below for purchase of 3,50,000 equity shares from the existing promoters of the company at a price of ₹15/- per equity share, there is no material available on record to suggest that when the shares were allotted to the employees of the assessee-company. Whereas the assessee-company claims that the shares purchased by the Trust from the promoters of the assessee-company were allotted to the eligible employees at a price of ₹15/- per equity share. The assessee also claims that the Trust again purchased the shares from the employees at ₹340/- per share. It is not known when the shares were said to be allotted at ₹15/- per equity share, why the very same shares were claimed to be purchased at a cost of ₹340/- per equity share? This arrangement of purchase of very same shares said to be allotted at ₹15/- per equity share were bought back at ₹340/- per equity share creates a doubt whether the shares were in fact allotted to the respective employees or not? In the absence of any material, this Tribunal is

of the considered opinion that the CIT(Appeals) has rightly confirmed the disallowance made by the Assessing Officer.

10. We have carefully gone through the decision of Bangalore Bench of this Tribunal in Novo Nordisk India Pvt. Ltd. v. DCIT (2014) 63 SOT 242. In the case before the Bangalore Bench, the actual issue of shares of the parent company by the assessee to its employees is not in dispute. Therefore, the difference between the fair market value of the shares of the parent company on the date of issue of shares and the price at which those shares were issued by the assessee to its employees was reimbursed by the assessee to its parent company. This sum was claimed as expenditure in the Profit & Loss account. The Bangalore Bench of the Tribunal in fact found that the difference between fair market value of the shares and the price at which the shares were allotted to the employees is revenue expenditure and therefore, it has to be allowed as deduction while computing the income. The Bangalore Bench further found that the very object of issuing of shares to the employees at a discounted premium is to compensate them for the continuity of their services in the company. In the case before us, it is the case of the assessee-company that the Trust allotted the

shares to its employees. The assessee-company advanced funds to the Trust for purchasing shares of the promoters of the company at a price of ₹15/-. The very same shares were claimed to be purchased from the employees at ₹340/-. The assessee is not claiming difference between fair market value and allotment price as expenditure. The assessee is claiming the purchase price at ₹ 340/- from its employees as expenditure. Therefore, this Tribunal is of the considered opinion that the decision of Bangalore Bench in Novo Nordisk India Pvt. Ltd. (supra) is not applicable to the facts of the case. Since the shares were purchased by the Trust from the promoters of the assessee-company at the rate of ₹15/- per equity share and the same was also claimed to be allotted to the employees of the assessee-company at a price of ₹15/- per equity share, this Tribunal is of the considered opinion that the buy back of the shares from the very same employees at a cost of ₹340/- per equity share cannot be an expenditure for the assessee-company. This Tribunal is of the considered opinion that the claim of the assessee is only to reduce the taxable income of the assessee. Therefore, the same cannot be allowed under Section 37 of the Act. In view of the above, this Tribunal do not find any reason to interfere

with the order of the lower authority and accordingly, the same is confirmed.

11. Now coming to assessment year 2010-11, the first issue raised by the assessee is with regard to addition of ₹50,23,360/-.

12. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the assessee disclosed brokerage income of ₹50,23,360/- out of ₹51,21,960/-. According to the Ld. counsel, the balance amount of ₹98,600/- represents service tax payable to security deposit. The assessee explained before the Assessing Officer that a sum of ₹78,000/- represents security deposit and another sum of ₹20,600/- represents service tax and the balance amount of ₹50,23,360/- remained as payable. According to the Ld. counsel, the amount collected by the assessee represents excess brokerage charged on the clients and which was disputed by the clients. Therefore, the amount was kept pending till the dispute is resolved. If the clients refuse to pay higher brokerage, then the assessee-company has to refund the same to the clients. Since the amount is subjected to dispute, according to the Ld. counsel, a sum of ₹50,23,360/- was not shown as income of the assessee.

13. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the assessee had disclosed a sum

of ₹50,23,360/- as brokerage in the Profit & Loss account. It is also claimed that the same is payable to various parties. The assessee in fact treated the amount payable to the extent of ₹50,23,360/- as revenue expenditure. The Assessing Officer rejected the claim of the assessee on the ground that the assessee is expected to refund the amount only in case the dispute was decided in favour of respective clients. As on today, the assessee is retaining the amount with it, therefore, it has to be treated as income of the assessee. The Ld. D.R. further pointed out that the assessee was unable to substantiate the existence of corresponding liability. The Ld. D.R. further submitted that the assessee charged brokerage from various customers and accepted the same as trading receipt in the books of account. However, for the year under consideration, a part of amount received from the customers as payable and same was shown as liability in the balance sheet without any substantive evidence. The assessee is admittedly following mercantile system of accounting. The gross brokerage income was shown as trading receipt in the books of account. Therefore, the claim of the assessee that the part of the amount to the extent of ₹50,23,360/- was not receivable is not correct. Therefore, according to the Ld.

D.R., the claim of the assessee that a sum of ₹50,23,360/- is a revenue expenditure is not justified.

14. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the Profit & Loss account shows brokerage income after netting to the extent of ₹50,23,360/-. The claim of the assessee that a sum of ₹50,23,360/- is payable to various clients since there was dispute pending among them, was not substantiated by any material. The assessee could not produce any evidence before the authorities below that the liability has arisen during the year under consideration. It is also not in dispute that the brokerage income was shown as trading receipt in the books of account. The only contention of the assessee before the Assessing Officer is that the refund arises only in case the case was decided in favour of respective clients. Therefore, the liability of the assessee is contingent one on deciding the issue in favour of respective clients. As on today, the amount was treated as trading receipt in the books of account, and the assessee is not expected to refund the same till the issue was decided in favour of respective clients, this Tribunal is of the considered opinion that the CIT(Appeals) has rightly found that the claim of the assessee cannot be allowed as revenue

expenditure. In the absence of any material to show the liability of the assessee, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

15. The next ground of appeal is disallowance made by the Assessing Officer under Section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962.

16. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the Assessing Officer disallowed a sum of ₹4,37,291/-. According to the Ld. counsel, the assessee received dividend income of ₹15,41,947/- and claimed the same as exempted under the provisions of Income-tax Act. The assessee claimed that no expenditure was incurred for earning the dividend income of ₹15,41,947/-. The assessee claimed a sum of ₹7,200/- as expenditure for earning the exempted income. However, the Assessing Officer disallowed the claim of the assessee. The CIT(Appeals) also confirmed the addition made by the Assessing Officer. According to the Ld. counsel, unless the Assessing Officer is not satisfied with the correctness of the claim of the assessee, the Assessing Officer shall not determine the amount of expenditure incurred in connection with earning of the income which is

warranted under the provisions of the Income-tax Act. The Ld.counsel further submitted that the expenditure in relation to exempted income needs to be satisfactorily considered.

17. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that Rule 8D provides for method of computation of disallowance under Section 14A of the Act. The Assessing Officer, after taking into consideration of Rule 8D, found that the average income computed under second and third limb of Rule 8D(2) needs to be disallowed. Accordingly, the Assessing Officer computed the average expenditure by applying second and third limb of Rule 8D(2), and arrived at ₹4,44,491/-. The expenditure admitted by the assessee to the extent of ₹7,200/- was also reduced and the expenditure was computed to ₹4,37,291/-. This was disallowed by the Assessing Officer.

18. We have considered the rival submissions on either side and perused the relevant material available on record. The CIT(Appeals), after considering the material available on record, found that the assessee has earned dividend income of ₹15,41,947/- which was exempted from the provisions of Income-tax Act. The assessee claimed before the lower authorities that a sum

of ₹15,41,947/- was received through ECS credit. Therefore, no expenditure was incurred for earning the dividend income. The assessee itself disallowed a sum of ₹7,200/- towards administrative expenses. Being not satisfied with the explanation of the assessee, the Assessing Officer adopted the provisions of Rule 8D and found the average expenditure by applying limb (ii) and (iii) of Rule 8D(2) to ₹4,44,491/-. After reducing the expenditure admitted by the assessee to the extent of ₹7,200/-, the balance of ₹4,37,291/- was treated as expenditure for earning the excess income. Since the CIT(Appeals), after applying the provisions of Rule 8D(2), which is mandatory for the year under consideration, rightly confirmed the disallowance made by the Assessing Officer at ₹ 4,37,291/-, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

19. The next ground of appeal is with regard to computation of book profit under Section 115JB of the Act.

20. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that an amount of ₹4,44,491/- was added in the book profit of the assessee-company. The expenditure relating to ₹4,44,491/- was to be added to the book profit.

21. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the assessee has not properly computed the receipt relating to expenditure income for the purpose of Section 115JB of the Act. Therefore, the Assessing Officer computed the income on the basis of material available on record. The question arises for consideration is when the disallowance was made under Section 14A read with Rule 8D, whether such disallowance would go to increase the total income of the assessee in computing income under Section 115JB of the Act? According to the Ld. D.R., in the absence of any specific provision in 115JB of the Act, deduction cannot be allowed.

22. Referring to Section 115JB of the Act, the Ld. D.R. submitted that once book profit was computed according to the provisions of Companies Act, the same has to be increased or reduced as provided in Explanation to Section 115JB of the Act. In the case before us, according to the Ld. D.R., Explanation 1(f) to Section 115JB(2) of the Act clearly provides for increasing the amount of expenditure relatable to any income to which Section 10 (other than the provisions contained in clause (38) thereof). In this case, the expenditure was incurred on earning the dividend income which

was exempted under Section 10(34) of the Act. Therefore, the book profit computed under the Companies Act has to be increased by the expenditure relatable to earning of exempted income.

23. We have considered the rival submissions on either side and perused the relevant material available on record. A sum of ₹4,37,291/- was disallowed being an expenditure for earning dividend income. The question arises for consideration is whether ₹4,37,291/- was to be increased while computing income under Section 115JB of the Act? We have carefully gone through the provisions of Section 115JB of the Act. Explanation 1(f) to Section 115JB(2) of the Act clearly says that the amount of expenditure relatable to any income to which Section 10 (other than the provisions contained in clause (38) thereof) has to be increased with book profit computed under the provisions of Parts II and III of Schedule VI to the Companies Act, 1956. In the case before us, the dividend income earned by the assessee to the extent of ₹15,41,947/- is exempted under Section 10(34) of the Act. Therefore, the expenditure relatable to such income has to be increased after computing the book profit under the provisions of Companies Act. In view of the specific provision in Explanation 1(f)

to Section 115JB(2) of the Act, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

24. The next ground of appeal is with regard to deduction of interest under Section 244A of the Act to the extent of ₹16,51,266/-.

25. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the assessee received interest under Section 244A of the Act. However, the same was added to the income of the assessee. According to the Ld. counsel, this income relates to assessment year 2007-08, therefore, no addition can be made for the year under consideration.

26. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the assessee by letter dated 03.09.2012 submitted before the Assessing Officer that an amount of ₹7,11,919/- may be added to the income of the assessee. In pursuance of the letter dated 03.09.2012, the same was taken as income of the assessee. Therefore, the CIT(Appeals) has rightly confirmed the addition made by the Assessing Officer.

27. We have considered the rival submissions on either side and perused the relevant material available on record. A bare reading of assessment order shows that the assessee by letter dated 03.09.2012 accepted the interest amount received to the extent of ₹7,11,919/- which needs to be added to the total income of the assessee. The assessee itself admitted before the Assessing Officer by letter dated 03.09.2012 that the interest income of ₹7,11,919/- may be added to the total income. In view of this, the Assessing Officer has rightly found that the sum of ₹7,11,919/- would form part of total income. The CIT(Appeals) confirmed the order of the Assessing Officer. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

28. The next ground of appeal is with regard to direction of the CIT(Appeals) to exclude a sum of ₹32,300/- being an excess interest.

29. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the Assessing Officer charged interest under Section 234A of ₹1,41,740/-, even though the return of income was filed within the stipulated period. According to the Ld. counsel, the due

date of return of income was extended upto 15.10.2010 for the assessment year under consideration. Therefore, the interest, if any, has to be recomputed in accordance with the CBDT notification.

30. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the due date for filing of return of income was 15.10.2010. After taking into consideration the due date, and the CBDT circular dated 27.09.2010, the CIT(Appeals) directed the Assessing Officer to compute the interest keeping in view of the CBDT circular. Therefore, according to the Ld. D.R., no interference is called for.

31. We have considered the rival submissions on either side and perused the relevant material available on record. Section 244A of the Act provides for refund of interest on any amount due to the assessee. In the case before us, the assessee claimed that the return of income was filed within the due date extended by the CBDT. Therefore, the CIT(Appeals) directed the Assessing Officer to verify the due date for filing of return of income and thereafter compute the interest accordingly. In view of the above direction of the CIT(Appeals), this Tribunal do not find any reason to interfere

with the order of the lower authority and accordingly, the same is confirmed.

32. The next ground of appeal is with regard to credit for TDS to the extent of ₹13,81,600/-.

33. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the TDS was ₹38,17,769/-. The Assessing Officer gave a credit of ₹24,36,169/-. However, the credit was not given to the extent of ₹13,81,600/-. According to the Ld. counsel, since the TDS was deducted from the amount paid to the assessee, it has to be given credit.

34. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the Assessing Officer gave a credit of ₹38,17,769/-. No evidence was filed either before the Assessing Officer or before the CIT(Appeals) to the extent of ₹13,81,600/-. Therefore, according to the Ld. D.R., the CIT(Appeals) directed the Assessing Officer to verify the records with respect to the TDS amount and comply with the direction of the CBDT after making due verification. Therefore, according to the Ld. D.R., no interference is called for.

35. We have considered the rival submissions on either side and perused the relevant material available on record. In the absence of any evidence for TDS to the extent of ₹13,81,600/-, the CIT(Appeals) directed the Assessing Officer to verify the claim on the basis of CBDT circular. This Tribunal is of the considered opinion that the Assessing Officer has to verify the claim and if any TDS was made, credit should be given in accordance with the provisions of Income-tax Act and the instruction given by the CBDT. Therefore, this Tribunal do not find any infirmity in the order of the lower authority and accordingly the same is confirmed.

36. Now coming to the assessment year 2011-12, the first ground is with regard to disallowance made by the Assessing Officer under Rule 8D of Income-tax Rules, 1962.

37. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the assessee received a sum of ₹15,51,317/- as dividend income through ECS system, therefore, no expenditure was incurred. However, the Assessing Officer estimated the expenditure by applying the provisions of Rule 8D. According to the

Ld. counsel, in the absence of any expenditure incurred by the assessee, there is no question of disallowance.

38. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the Assessing Officer is not satisfied by the claim of the assessee, therefore, he recomputed the expenditure by applying provisions of Rule 8D. The Assessing Officer has taken the average expenditure as per limb (ii) and (iii) of Rule 8D.

39. We have considered the rival submissions on either side and perused the relevant material available on record. As rightly submitted by the Ld. D.R., the Assessing Officer computed the disallowance by applying limb (ii) and (iii) of Rule 8D(2) and took the average as expenditure. Since the application of Rule 8D is mandatory for the year under consideration, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

40. The next ground of appeal is with regard to addition of loss on arbitration to the extent of ₹3,30,348/-.

41. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that three claims of the assessee appeared in arbitration proceeding. On the basis of arbitration award, the assessee has to pay to the clients a sum of ₹3,30,348/-. According to the Ld. counsel, this is only consequent to the arbitration award as mechanism for dispute resolution, therefore, it cannot be construed as penalty.

42. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the claim made by the assessee was for violating the contractual obligation. Penalty has also been imposed for violation of rules and regulations framed by Securities and Exchange Board of India with regard to settlement of stocks. Therefore, the arbitrator decided the dispute in favour of the claimant. Hence, according to the Ld. D.R., the Assessing Officer found that the payment of ₹3,30,348/- is not a business expenditure. Therefore, according to the Ld. D.R., the CIT(Appeals) has rightly confirmed the addition made by the Assessing Officer.

43. We have considered the rival submissions on either side and perused the relevant material available on record. The payment of ₹3,30,348/- was in pursuance of arbitration award passed by

arbitrators in the course of business activity. Of course, there was a violation of contractual obligation. Therefore, the arbitrator decided the matter in favour of claimant. This Tribunal is of the considered opinion that meeting the obligations pursuant to award passed by arbitration cannot be construed as penal consequence. This Tribunal is of the considered opinion that the expenditure of ₹3,30,348/- incurred by the assessee consequent to arbitration, was for the purpose of meeting the business expenditure. Therefore, it cannot be construed as penalty. This is only violation of contractual obligation. Hence, the expenditure has to be allowed as revenue in nature. Therefore, this Tribunal is unable to uphold the orders of the lower authorities. Accordingly, the orders of the lower authorities are set aside and the addition of ₹3,30,348/- is deleted.

44. The next ground of appeal is with regard to disallowance of bad debt of ₹11,36,85,242/-.

45. Shri R. Sivaraman, the Ld.counsel for the assessee, submitted that the assessee claimed a sum of ₹11,36,85,242/- as bad debt written off in the books of account. According to the Ld. counsel, one Smt. Nirmala Ben Shah and M/s Grannayak Traders Pvt. Ltd., being the clients of the assessee, requested the assessee

to purchase shares. Accordingly, the assessee purchased shares on their request. The debit balance in the accounts was intimated to them and inspite of several requests, the payment was not made. The share price went down to ₹6.35. If the shares were sold at that price, the assessee has to incur heavy loss. Since the clients have not honoured their commitment, the amount due from the clients was written off in the books of account. Referring to the regulations of the stock exchange, the Ld.counsel submitted that the assessee has to settle the amount to the stock exchange regardless of whether the assessee received the payment from the clients or not. If the payment was not made, the assessee will be declared as defaulter and the assessee will not be allowed to transact business in exchanges. Therefore, the assessee was forced to make the payment. Similarly, in the case of M/s Grannayak Traders Pvt. Ltd., the share price went down to ₹31.85 as on 31.03.2011. The client failed to honour its commitment. Therefore, an amount of ₹72,77,034/- was written off. Since the debt could not be recovered from the respective client, accordingly, the same was claimed as bad debt.

46. On the contrary, Shri Arun C. Bharat, the Ld. Departmental Representative, submitted that the bad debt has to be allowed

provided the conditions stipulated in Section 36 of the Act are complied with. Section 36(1)(vii) of the Act clearly says that the deduction of bad debt can be allowed provided the same was written off. The debt should be an actual debt which was offered for taxation in the earlier assessment year. In the case before us, according to the Ld. D.R., the assessee is not doing any money lending business. It is not the case of the assessee that the bad debt claim was formed part of income in any of the earlier assessment years. The business of the assessee is purchase and selling of shares. The income of the assessee is only from brokerage and commission for the purchase and sale of shares from the registered clients of the assessee. Therefore, what forms the income of the assessee is only a commission or brokerage. Referring to the order of the Assessing Officer, the Ld. D.R. submitted that in case the assessee spends ₹100/- for purchase of share and sells the same for ₹102/-, then the actual income of the assessee is only ₹2/-. If at all there is any loss, the assessee at the best can claim only ₹2/- and not the entire amount of ₹102/-. The amount which is remained to be settled by clients for purchasing of shares cannot be construed as bad debt. The stock purchased by the assessee is very well with the assessee. The assessee can sell

the same at any time and reimburse the cost. Therefore, according to the Ld. D.R., at any stretch of imagination, it cannot be said that the amount cannot be recovered from the clients. At the best, what can be claimed as loss is the difference between the amount invested by the assessee and sale proceeds recovered on sale of the shares. In this case, according to the Ld. D.R., the shares were not sold so far. It remains with the assessee. Therefore, according to the Ld. D.R., merely because the market rate went down from purchase price, it cannot be construed as loss in the hands of the assessee as on today. It may be loss in the hands of the clients of the assessee. Therefore, according to the Ld. D.R., the outstanding amount from the clients cannot be construed as debt.

47. We have considered the rival submissions on either side and perused the relevant material available on record. Section 36(2)(i) of the Act reads as follows:-

> "*36(2)In making any deduction for a 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."

In view of the above, it is for the assessee to establish that the bad debt has been taken into account in computing the income of the assessee of any of the previous year or the money was lent in the course of ordinary business of the assessee. In case the money lending is not the business of the assessee, then the assessee has to necessarily establish that the so-called debt was taken as income of the assessee for the previous year in which the amount of such debt or part thereof is written off or of an earlier previous year. There is no material on record to suggest that the amount invested in shares was taken as income of the assessee in any of the previous year. Moreover, as rightly submitted by the Ld. D.R., the shares purchased by the assessee remained with assessee. The price of the share might have gone down considerably, however, the fact remains that the shares remained with the assessee and the assessee has a right to hold the same till the payment was made by the respective clients. Therefore, merely because the clients could not honour their respective commitment of paying the purchase price, it does not mean that the assessee suffers loss at this stage. The assessee has to first sell the shares and the

assessee could not realise the entire amount invested, then the amount which could not be realized may be claimed as business loss. At no stretch of imagination, it can be said that the amount due from the clients is bad debt. Since the provisions of Section 36(2)(i) was not complied with, this Tribunal is of the considered opinion that the outstanding amount cannot be construed as bad debt. Therefore, there is no question of allowing the same as bad debt. Since the shares remained with the assessee and it can be sold at any time, at the best, it can be claimed as business loss in the year in which those shares are sold provided there is any actual loss. Accordingly, the Assessing Officer shall verify whether the assessee sold the shares during the year under consideration and suffered any loss. If the assessee suffered loss on sale of such shares, the same shall be allowed as business loss.

48. In the result, I.T.A. Nos.733 & 734/Mds/2015 are dismissed and I.T.A. No.735/Mds/2015 is partly allowed.

Order pronounced on 5th May, 2016 at Chennai.

sd/-	sd/-
(ए. मोहन अलंकामणी)	(एन.आर.एस. गणेशन)
(A. Mohan Alankamony)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 5th May, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-15, Chennai
4. आयकर आयुक्त/CIT-6, Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.