

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

आयकर अपील सं./ITA No.4581/Mum/2012,
ITA No.7328/Mum/2011 & ITA No.6204/Mum/2013
(निर्धारण वर्ष / Assessment Year :2009-10, 2008-09 & 2010-11)

M/s Motilal Oswal Securities Ltd., 2 nd Floor, Palm Spring Centre, Link Road, Malad(W), Mumbai-64	Vs.	DCIT, Central Circle-22, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACD 3654 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.4577/Mum/2012,
ITA No.7463/Mum/2011 & ITA No.5788/Mum/2013
(निर्धारण वर्ष / Assessment Year :2009-10, 2008-09 & 2010-11)

ACIT, Central Circle-22, Mumbai-400020	Vs.	M/s Motilal Oswal Securities Ltd., 2 nd Floor, Palm Spring Centre, Link Road, Malad(W), Mumbai-64
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACD 3654 Q		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Vijay Mehta

राजस्व की ओर से /Revenue by : Chandra Vijay

सुनवाई की तारीख / Date of Hearing : 16/12/2015

घोषणा की तारीख/Date of Pronouncement 19/02/2016

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the cross appeals filed by the assessee and revenue against the order of CIT(A)-Mumbai, for the assessment years 2008-09 to 2010-11.

2. Common grounds have been taken in all the years under consideration, therefore, all the appeals were heard together and are now decided by this consolidated order.

3. Rival contentions have been heard and record perused. Facts in brief are that assessee is a share-broker having membership of both BSE & NSE. During the course of scrutiny assessment the AO disallowed assessee's claim of depreciation on the customers' rights, bad debts, depreciation on VSAT, Vanda loss, mark to market loss and claim of expenses incurred on earning exempt income. By the impugned order the CIT(A) deleted disallowance on account of bad debts, depreciation on VSAT, Vanda loss, mark to market loss, depreciation on goodwill. Against the above order of CIT(A), both assessee and revenue are in appeals before us.

4. The first common ground in the assessment years 2009-2010 & 2010-2011, pertains to disallowance of depreciation on customer rights. From the record we found that in the assessment year 2009-2010, the assessee acquired customer rights aggregating to Rs.6,83,52,328/- from three concerns in course of business acquisitions made through legally enforceable agreements in the immediately preceding year and had claimed 25% depreciation on the same. The AO disallowed assessee's claim and CIT(A) confirmed the action of the AO.

4.1 We have considered rival contentions and perused the record. The issue under consideration is covered by the order of the Tribunal in assessee's own case for the assessment year 2007-08, vide order dated 21-1-2015. The relevant para of the Tribunal order reads as under :-

26. Reverting to ground no. 4, the fact that the assessee acquired customers rights when it acquired the business, the assessee claimed the expenditure to be capital in nature and claimed depreciation. The revenue authorities denied the claim of

depreciation holding the transaction of acquiring customers rights to be sham.

27. Before us, the AR placed reliance on the decision of

“i) Hidelberg Cement India Ltd. vs Addl. CIT -31 DTR 582(Mum) – In this case non-compete fees was paid for a period of 1 year and the same was allowed as revenue expenditure.

ii) CIT v Everest Advertising (Bombay High Court) – In this case non-compete fees was paid for a period of 3 years and the same was allowed as revenue expenditure.

Sr.No.	Case law	Citation
i.	India Capital Markets P Ltd. v DCIT	56 SOT 32(Mum)
ii.	SKS Micro Finance Ltd v DCIT	145 ITD 111(Hyd)
iii.	DCIT v Weizman Forex Ltd	51 SOT 525 (Mum)
iv.	Jyoti (India) Metal Industries P Ltd vs Asst. CIT	ITA No.181/M/2008

and in the case of India Capital Markets (P) Ltd. (supra), it has been held,

“A perusal of the provision of section 32(1)(ii) suggests that certain intangible assets on which depreciation could be claimed are: know-how, patents, copyrights, trademarks, licenses, franchise or any other business or commercial rights of similar nature. This expression ‘any other business or commercial rights of similar nature’ by itself would mean to include all kinds of commercial rights.

The language in section 32(1)(ii) clearly invites the application of the Rule of Eiusdem Generis which means that words of a general nature following specific and particular words should be construed as limited to things which are of same nature as those specified.

The specific words in section 32 reveal the similarity in the sense that all the intangible assets specified are tools of the trade which facilitates the assessee to carry on the business. Therefore, the expression ‘any other business or commercial rights of similar nature’ would include such rights which can be used as a tool to carry on the business. [Para 13]

It cannot be denied that by getting a right over 3709 clients of company ‘AFC’, such right is used as a tool to carry on the business by the assessee. Merely because the assessee showed the payment to be on account of goodwill in the books of account, no adverse inference could be drawn against it. [Para 14]

Goodwill in stock market

Even assuming that the payment has been made for the purchase of goodwill of company 'AFC', it has to be accepted that in this line of business the goodwill of the broker is paramount. Because of certain stray incidences which have taken place in the stock market which have shaken the confidence of the public at large in the past, the investors always depend upon the good will of the broker because no investor would like to burn his fingers by the unscrupulous activities undertaken by certain fraudulent broker. The company 'AFC' had a strong clientele base of 3709 persons which itself show that 'AFC' was holding a strong repute in the eyes of its clients. Undoubtedly by purchase of rights to do the business with these 3709 clients the assessee has actually purchased the goodwill of 'AFC' [Para 15]

Commercial rights gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customer associate with such assets. [Pam 17]

It is not in doubt or dispute that purchase of the clientele business by the assessee from 'AFC' is a right which can be used as a tool to carry on the business. It can also be seen from the angle of purchase of entire marketing network by the assessee in 'AFC' Even if considered from this angle the assessee is eligible for depreciation on payment of Rs. 2.5 crores [Para 20]".

28. The AR, therefore, pleaded that being genuine expenditure incurred for the purposes of acquiring business, the depreciation has to be allowed to the assessee.

29. The DR submitted that the assessee had not given classification on the expenditure.

30. We have heard the arguments and have perused the orders & the case laws cited before us. The fact that the assessee acquired business of Peninsula is not disputed, therefore, the expenditure of acquisitions of customers rights also have to be treated as genuine. The bald assertions of the revenue authorities cannot substantiate the disallowance.

31. Once it is seen that the expenditure has been incurred for acquiring the business, we cannot hold that acquisition of customer rights are bogus. We, therefore, hold that the expenditure as such was genuine.

32. Once the expense has been accepted by us to be genuine, it would fall within the inclusions of section 32(1)(ii). Also, respectfully following the decisions as cited, we set aside the order of the

CIT(A) on this issue and direct the AO to allow the depreciation as per law.

33. Ground no. 4 is therefore, allowed.”

As the facts and circumstances during the year under consideration are same, respectfully following the order of Tribunal in assessee's own case, we direct the AO to allow assessee's claim of depreciation on customers' rights.

5. The next grievance of assessee pertains to disallowance u/s.14A. The assessee has received exempt income. In the computation assessee has suo motu disallowed Rs.9,82,352/- u/s.14A. The AO calculated disallowance under Rule 8D which comprises of interest and other expenses. By the impugned order the CIT(A) directed the AO to exclude the amount of bank guarantee commission as part of interest expenses while computing disallowance under Rule 8D2(ii), however, the CIT(A) confirmed the disallowance made by the AO on account of balance amount of interest and administrative expenses.

5.1 We have considered rival contentions and found that assessee is in the business of stock broking having taxable brokerage of income. Most of the expenses were incurred for the purpose of business and the expenditure incurred for investment in shares was suo motu offered for disallowance. So far as disallowance of interest is concerned, we found that interest income earned by the assessee was more than the interest expenditure and since the interest income is positive no interest disallowance can be made. For this purpose reliance can be placed on the decision in the case of Trade Apartments, ITA No.1277/Kol/2011, order dated 30-3-2012 and Morgan Stanley India Securities, ITA No.5072/Mum/2005, dated 13-4-2011. Respectfully following the proposition

of law laid down in these cases, we direct the AO to delete the disallowance of interest.

6. With regard to disallowance of other expenditure Id. AR placed on record an order of Tribunal in the case of group concern i.e. M/s Stock Holding Corporation of India Ltd., ITA No.5348/Mum/2012 for assessment year 2009-2010. , wherein it has been held that before applying provisions of Rule 8D, the AO was duty bound to record his dissatisfaction that the working of disallowance made by the assessee u/s.14A of the Act was incorrect. It was also brought to our notice that in the case of sister concern of the assessee similar working was accepted by the AO for A.Y.2009-10 to 2011-12. It was submitted by Id. AR that for A.Y,2008-09, in the case of sister concern of the assessee, the AO had calculated disallowance u/s.14A of the Act in accordance with Rule 8D which was challenged before the Tribunal. The Tribunal accepted the contention of assessee and sent the matter back to the file of AO to recompute the disallowance u/s.14A of the Act in accordance with the method adopted by the assessee. The AO in the set aside proceedings accepted the working of the assessee for calculating disallowance u/s.14A of the Act. In view of the same, it was submitted that the similar working of the assessee for calculating disallowance u/s.14A of the Act may kindly be accepted.

6.1 We have considered rival contentions and gone through the order of the Tribunal as discussed above. In the interest of justice, with regard to disallowance of other expenses, matter is restored to the file of AO for deciding afresh in terms of direction given by the Tribunal in the above case. We direct accordingly.

7. In the assessment year 2009-2010, the revenue is aggrieved for disallowance of claim of bad debts. From the record we found that the assessee claimed bad debts of Rs.3,02,30,904/- which is also written off to P/L account. The brokerage earned in respect of the said parties in last 3 years amounted to Rs.1,36,63,844/-. By the impugned order after giving detailed finding the CIT(A) has deleted disallowance.

7.1 We have considered rival contentions and found that the issue is covered in favour of assessee vide order of the Tribunal in assessee's own case for A.Y.2007-08 in ITA No.168/Mum/2011, dated 21-1-2015. The issue is also squarely covered by the decision of the special bench in the case of CIT Vs. Shreyas S. Morakhia. Further, the decision of Special Bench has been upheld by the Hon'ble Bombay High Court in the case of CIT Vs. Shreyas S. Morakhia, 342 ITR 285. Respectfully following the judicial pronouncements in assessee's own case, we uphold the action of CIT(A) for deleting disallowance of bad debts.

8. With regard to deleting disallowance of depreciation on VSAT, we found that the assessee company had claimed depreciation of Rs.1,04,41,922/- on VSAT(Very Small Aperture Terminal) @ 60% of WDV considering the same as part computer. By following earlier assessment order, the AO declined assessee's claim of depreciation. The CIT(A) also following his earlier order for assessment year 2007-08, deleted the disallowance, against which the revenue is in appeal before us.

8.1 We have considered rival contentions and found that the issue is covered in favour of the assessee by the order of Tribunal in assessee's own case for :

- i) A.Ys.2001-02 to 2004-05 being ITA No.6738 to 6741/Mum/2001;
- ii) AY.2005-06 being ITA No.4606/Mum/2008;
- iii) A.Y.2006-07 being ITA No.6371/Mum/2008; and
- iv) A.Y.2007-08 being ITA No.168/Mum/2011.

As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal, as stated above, we confirm the action of CIT(A) for deleting the disallowance of depreciation on VSAT.

9. The revenue is also aggrieved for deleting disallowance of Vanda loss. The assessee incurred net loss on account of Vanda transactions of Rs.82,68,912/-. The assessee claimed the said loss as normal business loss u/s.28/37(1) of the Act. The AO was of the view that the said loss is speculative in nature as per Explanation to Section 73 of the Act as the loss arising from the transactions were carried on by assessee himself for its own purpose.

9.1 We have considered rival contentions and found that the issue is covered in favour of assessee vide order of the Tribunal in assessee's own case for A.Y.2007-08 in ITA No.168/Mum/2011 dated 21.1.2015. The issue is also covered in favour of the assessee vide order of the Tribunal in the following cases :-

- i) Parkar Securities Ltd., 102 TTJ 235 (Ahd); and
- ii) Rajvi Securities (P) Ltd., 50 SOT 592.

As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal, we confirm the order of CIT(A) for deleting disallowance on Vanda loss.

10. The revenue is also aggrieved by the order of CIT(A) in deleting disallowance of mark to market loss.

10.1 We found that the CIT(A) has deleted disallowance by relying on the order of special bench of the Tribunal in the case of CIT Vs. Bank of Baharain. The issue is covered in favour of the assessee vide decision of the Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor, 312 ITR 254. As

the facts and circumstances during the year under consideration are same, therefore, respectfully following the decision of Special Bench of the Tribunal (supra) and the decision of Hon'ble Supreme Court cited above, we do not find any error on the part of CIT(A) in deleting the disallowance made on mark to market loss.

11. With regard to disallowance on depreciation on goodwill, we found that the consideration paid for business acquisition was fixed towards customers rights, fixed assets, goodwill & non-compete fees. It is submitted that depreciation was claimed in respect of fixed assets and customer rights, however, inadvertently, no depreciation was claimed on goodwill in the return and before the AO. The CIT(A) has deleted the disallowance by following his earlier order for assessment year 2007-08. The issue is covered in favour of the assessee vide order of the Tribunal in assessee's own case for A.Y.2007-08 in ITA No.168/Mum/2011 dated 21.1.2015, wherein the Tribunal relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. Smiff Securities, 348 ITR 302 and upheld the view of the CIT(A).

11.1 Respectfully following the decision of Hon'ble Supreme Court in the case of Smiff Securities (supra), we do not find any infirmity in the order of CIT(A) for deleting disallowance of depreciation on goodwill.

Assessment Year 2010-2011 :

12. The grounds taken by the assessee with regard to disallowance of depreciation on customers' rights, disallowance u/s.14A are same. Following the reasoning given hereinabove, we direct the AO to delete the disallowance of depreciation on customers' rights and disallowance on interest u/s.14A. The

disallowance of other expenses is directed to be worked out afresh as per direction given in the assessment year 2009-2010 above.

13. The grounds taken by the revenue in its appeal with regard to disallowance on bad debts, depreciation non VSAT, disallowance on Vanda loss, mark to market loss, depreciation on goodwill, are the same as discussed in the assessment year 2009-2010. Following the reasoning given in the assessment year 2009-2010, we confirm the action of CIT(A) in terms of our observation given in the assessment year 2009-2010 above.

Assessment Year 2008-09 :

14. In this year, the assessee is aggrieved for disallowance on foreign exchange loss. The issue is covered in favour of the assessee vide order of the Tribunal in assessee's own case for the assessment year 2007-08, ITA No.168/Mum/2011, dated 21-1-2015. As the facts and circumstance during the year under consideration are same, we direct the AO to delete the disallowance on foreign exchange loss.

15. Next grievance pertains to disallowance u/s.14A. As the reasoning for disallowance are same as discussed in the assessment year 2009-2010, following the same reasoning, we direct the AO to delete the disallowance of interest. Disallowance of other expenses is to be worked out afresh as per the direction given in the assessment year 2009-2010 above.

16. the issue with regard to depreciation on customers' rights are the same, therefore, the AO is directed to delete the disallowance of depreciation on customers' rights in terms of direction given by us in the assessment year 2009-2010.

17. The issue with regard to indexed cost of stock exchange card is covered in favour of the assessee vide order of the Tribunal in case of M/s Parag Parikh Financial Advisory Services Ltd., ITA No.3118/Mum/2012, dated 29-1-2014.

17.1 We have considered rival contentions and found that in case of M/s Parag Parikh Financial Advisory Services Ltd. (supra), the Tribunal held as under :-

“8. We have heard the Id. representatives of both the parties and also have gone through the records. Section 2(42A)(ha) is relevant for deciding the point in issue which for the sake of convenience is reproduced as under:

*“2. Definitions In this Act, unless the context otherwise requires,-
[\(42A\)](#) [“short-term capital asset” means a capital asset held by an assessee for not more than [thirty-six] months immediately preceding the date of its transfer :]*

[Provided that in the case of a share held in a company [or any other security listed in a recognised stock exchange in India or a unit of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963) or a unit of a Mutual Fund specified under clause (23D) of [section 10](#)] [or a zero coupon bond], the provisions of this clause shall have effect as if for the words “thirty-six months”, the words “twelve months” had been substituted.]

[Explanation 1].—(i) In determining the period for which any capital asset is held by the assessee—

(ha) in the case of a capital asset, being equity share or shares in a company allotted pursuant to demutualisation or corporatisation of a recognised stock exchange in India as referred to in clause (xiii) of [section 47](#), there shall be included the period for which the person was a member of the recognised stock exchange in India immediately prior to such demutualisation or corporatisation;]”

9. The long term capital asset has been defined under section 2(29A) of the Act as a capital asset which is not a short term capital asset. So in determining the period for which any capital asset is held by the assessee the provisions of section 42A will be applicable and after determining the period of holding of an asset as per the explanation 1 to section 42A, if the asset is found to be held by an assessee for not more than 36 months immediately preceding the date of its transfer, the same will fall in the definition of short term capital asset and if the period is more than 36 months then the asset will fall in the definition of long term capital asset. As per the express provisions of clause (ha) as reproduced above, for determining the holding period of capital asset being equity shares allotted in pursuance to demutualisation or corporatisation of a recognised stock exchange in hand, the period for which the assessee was a member

of the recognised stock exchange prior to such demutualisation or corporatisation shall also be included. Hence, the holding period of the asset is to be calculated from the acquisition of date of 'BSE card' and not from the date of conversion of 'BSE card' into equity shares. As per the section 55(2)(ab) of the Act, the cost of acquisition in relation to equity shares allotted to a shareholder under a scheme of demutualisation or corporatisation shall be the cost of acquisition of his original membership of the exchange. For the sake of convenience section 55 (2) (ab) is reproduced as under:

"55.(2). [For the purposes of [sections 48](#) and [49](#), "cost of acquisition,—

[(ab) in relation to a capital asset, being equity share or shares allotted to a shareholder of a recognised stock exchange in India under a scheme for [demutualisation or] corporatisation approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall be the cost of acquisition of his original membership of the exchange:]"

10. *So from the above stated express provisions, it is clear that the cost of acquisition of 'BSE card' shall be the cost of acquisition of BSE shares and the shares are deemed to be acquired on the date of acquisition of 'BSE card' and not from the date of their conversion. Hence, the date of holding/acquisition of an asset being equity shares allotted pursuant to demutualisation or corporatisation of a recognised stock exchange will be the date of acquisition of original 'BSE card'. Accordingly, this issue is decided in favour of the assessee and the enhancement of income made by the CIT(A) on this account is hereby ordered to be deleted.*

11. *In the result, the appeal of the assessee is partly allowed.*

As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal, we direct the AO to recompute the indexed cost in terms of above decision.

18. *Ground taken by the revenue with regard to deleting disallowance on bad debts, depreciation on VSAT, Vanda loss, and depreciation on goodwill are same as discussed in the assessment year 2009-2010. Following the reasoning given hereinabove, we direct the AO to decide these issues accordingly.*

19. In the result, appeals of assessee and revenue are allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on this 19/02/2016

Sd/-
(RAM LAL NEGI)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 19/02/2016

प्र.कु.मि/pkm, नि.स/ PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai