

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, एफ, मुंबई ।**

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

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं**

**श्री रमित कोचर, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and  
Shri Ramit Kochar, Accountant Member**

**ITA NO.322/Mum/2009  
Assessment Year: 2005-06**

M/s Four Dimensions Securities (India) Ltd. 29, Bank Street, 1 <sup>st</sup> Floor, Fort, Mumbai	<b>बनाम/</b> Vs.	Addl. Commissioner of Income Tax, Range-4(1), 6 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AAACF1734F		

**ITA NO.790/Mum/2009  
Assessment Year: 2005-06**

Addl. Commissioner of Income Tax, Range-4(1), 6 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai-400020	<b>बनाम/</b> Vs.	M/s Four Dimensions Securities (India) Ltd. 29, Bank Street, 1 <sup>st</sup> Floor, Fort, Mumbai
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN. No.AAACF1734F		

**ITA NO.1011/Mum/2010  
Assessment Year: 2006-07**

M/s Four Dimensions Securities (India) Ltd. 29, Bank Street, 1 <sup>st</sup> Floor, Fort, Mumbai	<b>बनाम/</b> Vs.	Addl. Commissioner of Income Tax, Range-4(1), 6 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
PAN. No.AAACF1734F		

**ITA NO.7252/Mum/2011**  
**Assessment Year: 2005-06**

M/s Four Dimensions Securities (India) Ltd. 29, Bank Street, 1 <sup>st</sup> Floor, Fort, Mumbai	<b>बनाम/</b> Vs.	Addl. Commissioner of Income Tax, Range-4(1), 6 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai-400020
(निर्धारिती / Assessee)		(राजस्व / Revenue)
PAN. No.AAACF1734F		

राजस्व की ओर से / Revenue by	Ms. R.M. Madhavi -DR
निर्धारिती की ओर से / Assessee by	Shri Vijay Mehta

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>22/09/2015</b>
<b>आदेश की तारीख /Date of Order:</b>	<b>28/10/2015</b>

**आदेश / O R D E R**

Per Joginder Singh (Judicial Member)

The assessee as well as the Revenue are in appeal for Assessment year 2005-06 and 2006-07 challenging the orders of the ld. First Appellate Authority, Mumbai, dated 12/11/2008, 20/11/2009 and 29/09/2011 (ITA No.7252/Mum/2011).

2. First, we shall take up appeal of the assessee (ITA No.322/Mum/2009), wherein, first ground pertains to confirming the disallowance on account of loss on purchase and sale of mutual funds unit at Rs.92,94,104/- invoking section 94(7) of the Income Tax Act, 1961 (hereinafter the Act). The crux of arguments advanced by Shri Vijay Mehta, ld. counsel for the assessee, is that it is a case of dividend stripping transaction and dividend is tax free. It was contended that section 94(7) of the Act was introduced on

01/04/2002 and even Assessing Officer says, dividends were bought within three months prior of declaration of dividend, so the provision of section 94(7) is attracted. It was contended that the assessee sold within a period of nine month from the date of declaration of dividend. Reliance was placed upon the decision in 326 ITR 1 (SC), wherein, it was held that prior to insertion, this provision is not applicable. The units were explained to be stock in trade, sold in current year on a sale consideration of Rs.6.96 crores resulting into loss of Rs.92,94,105/- and total loss of both the years was claimed to be Rs.37,01,938/- and all units were sold in current year. It was pointed out that in A.Y. 2004-05, loss was allowed to the assessee while passing order u/s 143(3) of the Act. It was argued that later on assessment was reopened by saying that provision of section 94(7) is applicable, so loss cannot be allowed. Our attention was invited to various dates when the units were sold after three months. Our attention was invited to order of the Tribunal of earlier year (ITA No.7951/Mum/2010). The crux of argument is that once the transaction is completed, which is irreversible, how the assessee can comply with law. Reliance was placed upon the decision in 375 ITR 392 (SC) by claiming that the case of the assessee is much better than the ratio laid down by the Hon'ble Apex Court as even theoretical possibility is not there in the case of the assessee.

2.1. On the other hand, the ld. DR, Ms. R.M. Madhvi, strongly defended the conclusion arrived at in the impugned order by contending that the assessee was aware of the

provision in the month of February and the provision is having retrospective operation. It was contended that the Sarkar Case is not applicable to the present facts of the assessee and section 94(7), prior to substitution, refers the period of three months. The addition was claimed to be within the parameter of the provision.

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee company is a corporate member of National Stock Exchange (NSE) engaged in the business of broking of shares and securities, trading in shares and securities in cash as well as in futures and options segments. The assessee declared income of Rs.6,50,75,610/- in its return filed on 30/10/2005, which was processed u/s 143(1) of the Act on 04/05/2006, determining refund of Rs.50,72,948/-. The ld. Assessing Officer made additions/disallowances u/s 94(7) on purchase and sale of shares, amounting to Rs.4,34,519/- and on purchase and sale of mutual fund units at Rs.92,467/-(aggregating disallowances of Rs.5,26,918/-). The Assessing Officer also disallowed loss arising on account of redemption of mutual fund units which were purchase in A.Y. 2004-05 by invoking the provision of section 94(7) of the Act, thus, the losses disallowed comes to Rs.2,77,07,834/-. The alleged losses were bifurcated as under:-

Assessment Year	Loss bifurcated (amount in Rs.)
2005-06	Rs.92,94,104/-

2004-05	Rs.1,84,13,730/-
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It is noted that the loss of A.Y. 2004-05 was disallowed on protective basis and loss of current year (2005-06) was disallowed on substantive basis.

2.3. On appeal, before the Id. Commissioner of Income Tax (Appeals), invocation of section 94(7) of the Act was affirmed and thus the disallowance of Rs.92,94,104/- was affirmed. The assessee is in further appeal before this Tribunal.

2.4. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the Id. respective counsel, if kept in juxtaposition and analyzed, we note that section 94(7) of the Act was introduced by the legislature on 01/04/2002. The stand of the Revenue is that the assessee incurred loss of Rs.2,07,59,835/- (pages 2 to 7, para 4 of the assessment order) on account of sale of units of mutual funds. The Assessing Officer calculated the loss at Rs.3,13,56,930/- (as detailed at page 6 of the assessment order). The assessee received dividend on the sale of said units at Rs.2,77,07,834/- and thus losses were disallowed invoking section 94(7) of the Act. The Assessing Officer bifurcated the loss of Rs.2,77,07,834/- into two figures i.e. Rs.92,94,104/- and Rs.1,84,13,730/- by holding that the loss of Rs.92,94,104/- is hit by section 94(7), whereas, the remaining loss of

Rs.1,84,13,730/- pertains to A.Y. 2004-05, for which notice u/s 148/147 is being issued separately, thus, for the year under consideration, loss of Rs.92,94,104/- was disallowed u./s 94(7) of the Act. Before coming to any conclusion, we are reproducing hereunder the relevant provision of the Act.

*(7) Where—*

*(a) any person buys or acquires any securities or unit within a period of three months prior to the record date;*

*(b) such person sells or transfers—*

*(i) such securities within a period of three months after such date; or*

*(ii) such unit within a period of nine months after such date;*

*(c) the dividend or income on such securities or unit received or receivable by such person is exempt,*

*then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purposes of computing his income chargeable to tax.*

2.5. As per section 94(7)(b)(i), such person sells or transfers such securities within a period of three months after such dates or (ii) such units within a period of nine months after such date. It is noted that substitution was made by the Finance (No.2) Act, 2004, with effect from 01/04/2005 and prior to a substitution clause (b) reads as under:-

“(b) such person sells or transfers such securities or units within a period of three months after such dates.”

It is noted that the date of sale is 02/04/2004, which is falling after a period of three months. Further bill was introduced on 08/07/2004 in Parliament (see 268/St./31) which got the ascent of the Hon’ble President on 10/09/2004, meaning thereby, much before the bill was introduced in the

parliament, the transaction was over, therefore, once the transaction is complete, which is irreversible, the assessee is not expected to comply with law because vested interest cannot be taken away by the legislature by introducing a later amendment. Our view is fortified by the ratio laid down by Hon'ble Apex Court in CIT vs Sarkar Builders (2015) 375 ITR 392 (SC) by holding that change of law w.e.f 01/04/2005 which is not applicable to the projects, where approval of local authority was granted prior to 01/04/2005, even if the project is completed thereafter. Thus, it can be said that the cardinal Principle of tax law that the law is to be applied has to be the law in force in the assessment year is qualified by the exception when it is provided otherwise expressly or by necessary implication. That the law which is in force in the assessment year would prevail is not an absolute principle and exception can be either expressed or implied by necessary implication. The hon'ble Apex Court while coming to the above conclusion duly considered following decisions:-

- i. Reliance Jute and Industries Ltd. vs CIT (1979) 120 ITR 921 (SC)
- ii. CIT vs Happy Homes Enterprises (2015) 372 ITR 1 (Bom.)
- iii. CIT vs Brahma Associates 333 ITR 289 (Bom.)(para-5)
- iv. CIT vs Gold Coin Health Food Pvt. Ltd. 304 ITR 308 (SC)
- v. CIT vs Shah Sadiq & Sons 166 ITR 102 (SC) (Para-9)
- vi. CIT vs Vatika Township Pvt Ltd. (2014), 367 ITR 466 (SC)(para-9).

It is also noted that the case of the assessee is squarely covered by the ratio laid down in M/s Krish Enterprises vs ACIT (ITA No.5554/Mum/2014) order dated 05/01/2015 and CIT vs CHD developers (ITA No.2902 & 4694/Del./2010) order dated 26/09/2012, which was affirmed by Hon'ble Delhi High Court. The crux of the decision is that the assessee is not expected to fulfill the conditions which were not on the statute book when the transaction was completed and the vested right of the assessee cannot be taken away by a later amendment, which is unless and otherwise made effective from retrospective date.

2.6. The case of the assessee is further fortified by the decision from Hon'ble Apex Court in CIT vs Walfort Share & Stock Broker Pvt. Ltd. (20100 326 ITR 1(SC) order dated 06/07/2010 with respect to transaction in securities by holding that purchase of security and sale thereof, if, within three months, loss has to be ignored as per section 94(7) of the Act. In that case, the department disallowed the set off claim. The Tribunal, on appeal, deleted the disallowance by holding that the assessee was entitled to set off the loss from the transaction in question against its other income chargeable to tax. This view was affirmed by Hon'ble High Court. The department preferred before the Hon'ble Apex Court. The Hon'ble Supreme Court held as under:-

*Held, affirming the decision of the High Court, (i) that it was established that there was a sale, the assessee received a dividend, and that dividend was tax-free. The assessee had made use of the provisions of section*

*10(33) and such use could not be said to be "abuse of law". Even assuming that the transaction was pre-planned, there was nothing to impeach the genuineness of the transaction. In the case of assessments before April 1, 2002-i.e., before the insertion of section 94(7) losses pertaining to exempted income could not be disallowed. However, after April 1, 2002, such losses to the extent of the dividend received by the assessee could be ignored by the Assessing Officer in view of section 94(7) . Applying section 94(7) to cases for assessment years falling after April 1, 2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, losses over and above the amount of received would still be allowed from which it followed that Parliament had not treated the dividend stripping transaction as sham or bogus. After April 1, 2002, losses over and above the dividend received would not be ignored under section 94(7).*

*(ii) That sections 14A and 94(7) operated in different fields. Section 14A dealt with disallowance of expenditure incurred in earning tax-free income against the profits; on the other hand, section 94(7) dealt with disallowance of the loss on the acquisition of an asset.*

*(iii) That a mere receipt of dividend subsequent to purchase of units, on the basis of a person holding units at the time of declaration of dividend on the record date, could not offset the cost of acquisition of the units.*

While coming to the aforesaid decision, the Hon'ble Apex Court affirmed the decision of Hon'ble Bombay High Court in (2009) 310 ITR 421, while considering the following judicial pronouncements:-

- i. *CIT v. Indian Bank Limited [1965] 56 ITR 77 (SC) (para 13)*
- ii. *CIT v. Walfort Share and Stock Brokers P. Ltd. [2009] 310 ITR 421 (Bom) (para 3)*

- iii. *McDowell and Co. Ltd. v. CTO [1985] 154 ITR 148 (SC) (para 20)*
- iv. *Rajasthan State Warehousing Corporation v. CIT [2000] 242 ITR 450 (SC) (para 13)*
- v. *Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC) (para 20)*

If this issue is analyzed with the provision contained in the Income Tax Act itself, section 294 of the Income Tax Act, 1961 by providing that “if on the first day of April in any assessment year, provision has not yet been made by the Central Act for the charging the income tax, for that assessment year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding assessment year or the provision proposed in the bill then in the Parliament, whichever is more favourable to the assessee, were actually in force. Section 294 of the 1961 Act corresponds to section 67B of the 1922 Act. The words “or super tax” were omitted by the Finance Act, 1965 which integrated Income Tax Act and super tax in to one Income Tax Act. This proposition is otherwise supported by the ratio laid down by Hon’ble Apex Court in CIT vs Sarkar Builders (2015) 375 ITR 392 (SC) order dated 15/05/2015. If totality of facts are analyzed, the assessee completed the transaction, which was irreversible much before the bill was introduced in the Parliament on 08/07/2004 and got the assent before Hon’ble President of India on 10/09/2004, thus, the vested interest, already accrued to the assessee, cannot be taken by the later

legislative amendment. This ground of the assessee is, therefore, allowed.

3. The next ground raised by the assessee pertains to directing the Assessing Officer to compute disallowance u/s 14A of the Act as per Rule 8D of the Rules. The crux of argument advanced on behalf of the assessee is that the said direction may be set aside as Rule 8D is not applicable. It was also prayed that what the Assessing Officer has done may be confirmed and the direction of the Id. Commissioner of Income Tax (Appeals) may be deleted. The Id. DR contended that the Rule 8D is applicable.

3.1. We have considered the rival submissions and perused the material available on record. Uncontrovertedly, the appeal to be adjudicated before us pertains to assessment year 2005-06, therefore, in view of the decision from Hon'ble jurisdictional High Court in *Godrej & Boyce*, Rule 8D is not applicable, therefore, we affirm the stand of the Id. Assessing Officer, thus, this ground of the assessee is disposed off in terms indicated hereinabove.

4. The next ground pertains to confirming disallowance of software expenses of Rs.53,897/- by treating the same as capital expenditure. The crux of argument advanced on behalf of the assessee is that the impugned amount is nothing but annual maintenance charges for which our attention was invited to paper book pages 3 to 16 by further contending that such software expenses are for specific period of one year, therefore, these are revenue in

nature. The ld. DR, though defended the disallowance, but could not controvert the assertion of the assessee.

4.1. On perusal of record and after hearing the rival submissions, we find that the software expenses are specifically for a period of one year and since these are annual maintenance charges as is evident from record and more specifically pages 3 to 16 of the paper book, these are not of enduring nature, thus are held to be revenue expenses. This ground is allowed.

5. The last ground, in this appeal, pertains to confirming the disallowance of Rs.84,88,660/- made on account of Keyman Insurance premium. The crux of argument on behalf of the assessee is that impugned issue is covered by the decision of the Tribunal in ITA No.3694/Mum/2009 and ITA No.6016/Mum/2008. Our attention was invited to the resolution passed by the shareholders on 29/03/2003, resolution was passed by the Board of Directors on 11/03/2005, inviting our attention to para 10 (page 18) of the assessment order. On the other hand, the ld. DR, defended the conclusion arrived at by the ld. Assessing Officer as well as Commissioner of Income Tax (Appeals) by contending that the payment was made on account of insurance cover taken for Mr. Rohit Kothari, an employee, drawing salary of Rs.80,000 per month.

5.1. If the observation made in the assessment order, leading to addition made to the total income, conclusion

drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, the undisputed fact is that Mr. Rohit Kothari is an employee of the assessee and the share holders passed a resolution on 29/03/2003 appointed Mr. Rohit Kothari, relative of the Director of the company to hold and continue as Chief Executive Officer in terms of conditions contained in service agreement and the Board in its meeting held on 11/03/2005 rectified and to take Keyman Insurance cover for Shri Rohit Kothari, CEO of the assessee company. Without going into much deliberation, we note that the impugned issue is covered by the decision of the Tribunal in the case of ACIT vs M/s Baader Schulz Laboratories Shantivilla Shantivan Co-op. Hsg. Soc. (ITA No. 6224/Mum /2011), order dated 01/07/2015, which is reproduced hereunder for ready reference and analysis:-

*“The Revenue is aggrieved by the impugned order dated 20/06/2011 of the ld. First Appellate Authority, Mumbai, on the ground, deleting the addition of Rs.31,25,000/- made on account of payment towards keyman insurance premium, taken on the life of the partners.*

2. *During hearing of the appeal, Dr. Yogesh Kamat, ld. DR, contended that the partners, in respect of whom, the insurance premium was paid, were neither managing partners nor working partners as they did not receive any premium from the assessee firm, ignoring the fact that the benefit would not accrue to the assessee firm. On the other*

*hand, Shri Pradeep D. Shah, ld. counsel for the assessee, defended the conclusion arrived at in the impugned order.*

2.1. *We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is a partnership firm engaged in the business of manufacturing of poultry and cattle feeds, filed its return dated 30/09/2008. The assessee company took insurance policy on the life of the partners and claimed deduction on the premium paid for such policy. It was claimed before the Assessing Officer that the premium paid towards keyman insurance policy is deductible by placing reliance upon circular no. 762 dated 18/02/1998. The ld. Assessing Officer denied the claim against which the assessee went in appeal before the ld. Commissioner of Income Tax (Appeals). The ld. Commissioner of Income Tax (Appeals) examined the claim and found that the amount of Rs.31,25,000/- was paid in respect of ICICI prudential keyman insurance policies (Policy No.01615183, 01615296 and 01051293). The ld. Commissioner of Income Tax (Appeals) decided in favour of the assessee against which the Revenue is in appeal before this Tribunal. We find that the persons for whom the keyman insurance policy was taken and consequent premium was paid are closely connected with the business of the assessee firm. Keyman insurance policy means a life insurance policy taken by a person for the life of another person who is or was the employ of the first mentioned person or is was connected in any manner whatsoever with the business of the first mention persons, who is paying for such person, who is closely connected with the business of the payer. The ratio*

*laid down in CIT vs B.N. Exports (190 taxman 325), the Hon'ble jurisdictional High Court held that the keyman insurance premium paid only policies of the lives of the partners is an allowable deduction. In the present appeal, the ld. Assessing Officer did not allow the keyman insurance premium broadly on two counts (a) the partners in respect of whom insurance premium was paid were neither managing partners nor working partners as they did not receive any remuneration from the firm and (b) the policies were assigned to the partners and the benefit would not accrue to the assessee firm. However, if it is analyze, the keyman insurance premium paid in respect of any person, who is connected with the business of the assessee would be treated as keyman. There is no requirement, that such person should be a working partner or managing partner. The Hon'ble Delhi High Court in CIT vs Rajan Nanda (2012) 349 ITR 8 (Del.) held that premium on keyman insurance is a deductible business expenditure u/s 37 of the Act. The relevant portion of the order is reproduced hereunder for ready reference:-*

*The assessee took keyman insurance policies on the lives of two employees/directors in different years. After paying premia for a certain period, they were assigned to the two employees/directors receiving the surrender value from them. For the remaining period of the policies, the insurance premia were paid by the assignees. The Assessing Officer held that since the expenditure incurred on the premia paid on the keyman insurance policies was much more than the surrender value realized by the assessee on the assignment of these policies to the employees/directors, the amount paid by the assessee as premia on the policies could not be treated as expenditure incurred wholly and exclusively for the business purpose of the assessee. Therefore, he disallowed the premia paid in different years which was*

*claimed as business expenditure. The Commissioner (Appeals) and the Tribunal, however, held that the amount was deductible.*

*In so far as the employees/directors were concerned, the question was whether the difference between the actual premium paid and the surrender value given by them was to be treated as "salary" in their hands and was to be taxed accordingly and whether the maturity value received by them on the policy was to be taxed or not. The Assessing Officer held that the directors had taken a substantial benefit by paying only the surrender value as against the much higher amount of premia paid by the assessee. The difference between the premia paid by the assessee and the surrender value paid by them was treated as benefit to be taxed in their hands. The Tribunal held that merely by assignment in a particular year when the policy was still continuing, no taxable event had taken place and, therefore, no tax could be charged. It had also held that the amount in question could not be taxed as perquisite so as to fall within the scope of section 17(3). The Tribunal took note of the certificate obtained by the assessee from the LIC whereby it had certified that a keyman insurance policy after assignment assumed the status of an ordinary insurance policy. The Tribunal while giving requisite relief brought to tax the amount of the surrender value at the time of assignment subject to verification by the Assessing Officer. On appeal to the High Court :*

*Held, dismissing the appeals, (i) that the Department had itself allowed the expenditure incurred on the premium paid for the keyman insurance policies in previous years as business expenditure under section 37 of the Act. Right from 1991-92 to 1993-94 and thereafter even in respect of the assessment year 1997-98, the expenditure was allowed. Thereafter, the expenditure was disallowed, but again the claim was accepted for the assessment years 2001-02 and 2002-03. The principle of consistency would, therefore, be applicable in such a case. The object of a keyman insurance policy is to enable business organizations to insure the life of a key man in order to protect the business against the financial loss which may occur in the likely eventuality of his premature death. Such an expenditure is treated as business expenditure by the Department and recognised as such in circular dated February 18, 1998. The circular is binding on the Income-tax Department, which categorically stipulates that premium on keyman policy should be allowed as business expenses. Merely because the policy was assigned after some time that would not mean*

*that the expenditure incurred in the first instance would lose the flavour of “business expenditure”. The premia were deductible as business expenditure.*

*(ii) That the Explanation to section 10(10D) gives the meaning to “keyman insurance policy” and only that sum received under this policy would be treated as income. Sub-clause (ii) of clause (3) of section 17 taxes “any sum received in a keyman insurance policy”. The word “received” assumes significance. The Legislature in its wisdom thought to tax only that payment, which is received by the employee-assessee under the keyman insurance policy. The purport of sub-clause (ii) is altogether different. Such an amount due or received by the assessee has to be : (a) before joining any employment ; or (b) after cessation of its employment. No such contingency occurred when the keyman insurance policy was assigned by the company in favour of the director-assessee. The tax event did not occur, as no such amount was received at the time of assignment of the policy by the company as employer to the director-assessee, as employee. The amounts were not taxable in the hands of the directors.*

*(iii) That there is no prohibition on the assignment or conversion of keyman insurance under the Act. Once there is an assignment, it leads to conversion and the character of the policy changes. The insurance company had itself clarified that on assignment, it does not remain a keyman policy and gets converted into an ordinary policy. Hence, the policy in question was not a keyman insurance policy and when it matured, the advantage drawn therefrom was not taxable.*

*In another case of CIT vs Gem Art (2012) 208 taxman 47 (Guj.), wherein, premium was paid by the firm for partners under keyman insurance policy, the Hon’ble High Court treated it as revenue expenditure. Respectfully following the aforesaid decisions from Hon’ble Delhi and Gujarat High Courts, we affirm the stand of the ld. Commissioner of Income Tax (Appeals), thus, appeal of the Revenue is dismissed.*

*Finally, the appeal of the Revenue is dismissed.”*

5.2. In view of the above, we are expected to analyse the provision of the Act. Explanation to section 10(10D) gives the meaning to “keyman insurance policy” and only that sum received under this policy would be treated as income. Sub-clause (ii) of clause (3) of section 17 taxes “any sum received in a keyman insurance policy”. The word “received” assumes significance. The Legislature in its wisdom thought to tax only that payment, which is received by the employee-assessee under the keyman insurance policy. The purport of sub-clause (ii) is altogether different. Such an amount due or received by the assessee has to be : (a) before joining any employment ; or (b) after cessation of its employment. No such contingency occurred when the keyman insurance policy was assigned by the company in favour of the director-assessee. The tax event did not occur, as no such amount was received at the time of assignment of the policy by the company as employer to the director-assessee, as employee. The amounts were not taxable in the hands of the directors.

In the case of CIT vs Gem Art (2012) 208 taxman 47 (Guj.), wherein, premium was paid by the firm for partners under keyman insurance policy, the Hon’ble High Court treated it as revenue expenditure. Respectfully following the aforesaid decisions from Hon’ble Delhi High Court (discussed in the aforesaid order) and Gujarat High Court, we find merit in the contention of the assessee. So far as, the contention of the ld. DR that the impugned issue is covered in favour of the Revenue in Taparia Tools Ltd. vs JCIT 260 ITR 102 (Bom.). This decision has been reversed by Hon’ble Apex Court in

Taparia Tools vs JCIT 372 ITR 605 (SC), order dated 23/03/2015, thus, this ground of the assessee is allowed.

6. Now, we shall take up the Cross appeal raised by the Revenue (ITA No.790/Mum/2009) (A.Y. 2005-06), wherein, grounds no. 1 to 7 pertains to deleting the disallowance of Rs.41.32 lakhs made in respect of V-SAT, Leaseline charges and transaction charges and non-deduction of TDS thereon. The crux of argument advanced on behalf of the Revenue is that these are composite charges and no TDS was deducted by the assessee by contending that the Id. Commissioner of Income Tax (Appeals), without appreciating the facts, granted relief to the assessee for which our attention was invited to para 2.2 (page-7) of the impugned order. On the other hand, the Id. counsel for the assessee, contended that this issue is covered by the decision from Hon'ble jurisdictional High Court in CIT vs Angel Capital & Debit Market Ltd. (ITA No.475 of 2011) order dated 28/07/2011. This factual matrix was not controverted by the Revenue.

6.1. We have considered the rival submissions and perused the material available on record. We note that the Hon'ble jurisdictional High Court vide order dated 28/07/2011 (supra) with respect to V-SAT and leaseline charges, paid by the assessee, to stock exchange, were held to be merely reimbursement of charges paid/payable by the stock exchange to the Department of telecommunication and since these charges, paid by the assessee, do not have any

element of income, no question arises for deducting TDS, while making such payments. Following the decision from Hon'ble High Court, we decide the issue of lease line charges in favour of the assessee.

6.2. So far as transaction charges are concerned, the issue has been settled against the assessee by Hon'ble High Court in CIT vs Kotak Securities Ltd. (2012) 340 ITR 333 (Bom.) order dated 21/10/2011. Our attention was invited to order of the Tribunal in ITO vs M/s Grishma Securities Pvt. Ltd. (ITA No.6162/Mum/2010) order dated 30/11/2011, wherein, in view of the guidelines laid down by Hon'ble High Court, the Assessing Officer was directed to verify the stand of the assessee from the relevant record and decide afresh after verification in the light of the guidelines laid down by the Hon'ble High Court in para 31. We are reproducing hereunder the relevant portion of the aforesaid order of the Tribunal dated 30/11/2011 for ready reference:-

*“ This appeal is preferred by the Revenue against the order of learned CIT(Appeals)-8, Mumbai dated 07-06-2010 whereby he deleted the disallowance of Rs.26,30,456/- made by the AO u/s 40(a)(ia) on account of transaction charges etc. paid by the assessee to Stock Exchange for its failure to deduct the tax at source from the payment thereof.*

*2. The assessee in the present case is a company which is engaged in the business of stock broking as a member of Bombay Stock Exchange and National Stock Exchange. The return of income for the year under consideration was filed*

by it on 26-08-2007 declaring total income of Rs.9,08,490/-. In the profit & loss account filed along with the said return, a sum of Rs.26,30,456/- was debited by the assessee on account of transaction charges paid to the Stock Exchange. According to the AO, the assessee was required to deduct tax at source from the payment of transaction charges made to the Stock Exchange as per the provisions of section 194J. Since no such deduction of tax at source was made by the assessee, he disallowed the deduction claimed by the assessee on account of transaction charges by invoking the provisions of section 40(a)(ia). On appeal, the learned CIT(Appeals) deleted the said disallowance following the decision of the Mumbai Bench of ITAT in the case of Kotak Securities vs. Addl.CIT 25 SOT 440 wherein it was held that the services rendered by Stock Exchange to its members not being in the nature of managerial or technical services, tax at source was not deductible from the payment made by the assessee as stock broker to the Stock Exchange on account of transaction charges. Aggrieved by the order of the learned CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

3. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that the decision of the Tribunal in the case of Kotak Securities (supra), relied upon by the learned CIT(Appeals) in his impugned order while giving relief to the assessee on the issue under consideration has been subsequently overruled by the Hon'ble Bombay High Court vide its judgment dated October 21, 2011 passed in ITA No. 3111 of 2009 wherein it is held that with a view to regulate the trading in securities,

*the Stock Exchange provides risk management and surveillance to the stock brokers to ensure the safety of the market. It is held that the surveillance function involves price monitoring, exposure of the members, rumour verification on a daily basis and remedial actions like reduction of filters, imposition of special margin, suspension of scrips / members. It is held that these are some of the identified managerial services rendered by the stock exchange for which transaction charges are levied and the assessee who is a stock broker is liable to deduct tax at source before crediting the transaction charges to the account of the stock exchange as per the provisions of section 194J. This issue thus now stands covered in favour of the Revenue and against the assessee by the decision of Hon'ble Bombay High Court in the case of Kotak Securities Ltd. (supra) and this position has been accepted even by the learned counsel for the assessee in so far as this aspect of the issue is concerned.*

*4. The learned counsel for the assessee, however, has contended that the decision of the Tribunal holding that disallowance made by the AO on account of transaction charges u/s 40(a)(ia) was not sustainable, has been finally upheld by the Hon'ble Bombay High Court in the case of Kotak Securities Ltd. (supra) on the ground that the assessee had bonafide reason to believe that the tax was not deductible at source from the payment of transaction charges u/s 194J and the AO, therefore, was not justified in disallowing the transaction charges by invoking section 40(a)(ia) In this context, he has invited our attention to the*

*relevant observations recorded by the Hon'ble High Court in paragraph No. 31 of the judgment which is extracted below :*

*“ The object of introducing Section 40(a)(ia) as explained in the CBDT circular No. 5 dated 15/7/2005 is to augment compliance of TDS provisions in the case of residents and curb bogus payments. Moreover, though Section 194J was inserted with effect from 1/7/1995, till the assessment year in question that is AY 2005-06 both the revenue and the assessee proceeded on the footing that Section 194J was not applicable to the payment of transaction charges and accordingly, during the period from 1995 to 2005 neither the assessee has deducted tax at source while crediting the transaction charges to the account of the stock exchange nor the revenue has raised any objection or initiated any proceedings for not deducting the tax at source. In these circumstances, if both the parties for nearly a decade proceeded on the footing that Section 194J is not attracted, then in the assessment year in question, no fault can be found with the assessee in not deducting the tax at source under Section 194J of the Act and consequently, no action could be taken under Section 40(a)(ia) of the Act. It is relevant to note that from AY 2006-07 the assessee has been deducting tax at source while crediting the transaction charges to the account of the stock exchange though not as fees for technical services but as royalty. It is further relevant to note that it is not the case of the revenue that on account of the failure on the part of the assessee to deduct tax at source, the revenue has suffered presumably because, the stock exchange has discharged its tax liability for the*

***assessment year in question. In any event, in the facts of the present case, in view of the undisputed decade old practice, the assessee had bonafide reason to believe that the tax was not deductible at source under Section 194J of the Act and, therefore, the assessing officer was not justified in invoking Section 40(a)(ia) of the Act and, therefore, the assessing officer was not justified in invoking Section 40(a)(ia) of the Act and disallowing the business expenditure by way of transaction charges incurred by the assessee.”***

5. The learned counsel for the assessee has submitted that the relevant fact situation involved in the present case is similar to the one involved in the case of Kotak Securities Ltd. (supra) on the basis of which the assessee in that case was held to have bonafide reason to believe that tax was not deductible at source from the payment of transaction charges u/s 194J. He has contended that this part of the judgment of the Hon'ble Bombay High Court in the case of Kotak Securities Ltd. (supra) thus is in favour of the assessee in the present case and the impugned order of the learned CIT(Appeals) giving relief to the assessee by deleting the disallowance made by the AO u/s 40(a)(ia) deserves to be upheld by following the same. He has also made an attempt to demonstrate that the facts involved in the present case are similar to the facts involved in the case of Kotak Securities Ltd. (supra) which formed the basis of the relief given by the Hon'ble Bombay High Court. We have also heard the learned DR on this issue.

6. After considering the rival submissions and perusing the relevant material on record, we find merit in the contention

*of the learned counsel for the assessee that the disallowance made by the AO on account of transaction charges by invoking section 40(a)(ia) has been finally held to be unsustainable by the Hon'ble Bombay High Court in the case of Kotak Securities Ltd. (supra) on the ground that the assessee, in the facts and circumstances involved in that case, had bonafide reason to believe that the tax was not deductible at source from the payment of transaction charges u/s 194J. Although the learned counsel for the assessee has tried to demonstrate before us that the relevant facts involved in the present case are similar to the case of Kotak Securities Ltd. (supra), we are of the view that this stand of the assessee requires verification since this aspect of the matter has come up for consideration for the first time before the Tribunal. We, therefore, consider it fair and proper and in the interest of justice to restore this issue to the file of the AO for verifying the stand of the assessee from the relevant record and decide the same afresh on such verification in the light of guidelines laid down by the Hon'ble Bombay High Court in paragraph No. 31 of the judgment as extracted above.*

*7. In the result, the appeal of the Revenue is treated as allowed for statistical purposes.*

*Order pronounced in the open court on this 30th day of Nov.,2011."*

6.3. In view of the above, we direct the ld. Assessing Officer to examine whether there was a bona fide belief and after examining the facts decide in accordance with law in the light of the direction contained in the aforesaid order of the

Tribunal dated 30/11/2011, thus, this ground of the assessee is allowed for statistical purposes only.

7. So far as, grounds no 8 to 12 are concerned, these were claimed to be covered by the decision from Hon'ble jurisdictional High Court in CIT vs Angel Capital & Debit Market Ltd. (ITA No.475 of 2011) order dated 28/07/2011. This factual matrix was not controverted by ld. DR.

7.1. We have considered the rival submissions and perused the material available on record. We find that so far as deleting the addition made on account of penalty of Rs.76,410/-, on violation of bye-laws of stock exchange, penalty imposed under SEBI Rules 1995 is concerned, the Hon'ble High Court held that such payments were not on account of infraction of law, hence, allowable as business expenditure and further explanation to section 37 of the Act will not apply. This ground of the Revenue, is therefore, has no merit.

8. The last ground pertains to deleting the disallowance of protective addition amounting to Rs.1,84,13,370/-, the ld. DR defended the disallowance made by the Assessing Officer. On the other hand, the ld. counsel for the assessee claimed that substantive addition was made in A.Y. 2004-05, therefore, protective addition cannot survive. In view of the assertion of the ld. counsel for the assessee that substantive addition was made in A.Y. 2004-05, protective

addition made in A.Y. 2005-06 cannot survive, therefore, we find no merit in the ground raised by the Revenue.

9. Now, we shall take up appeal of the assessee (ITA No.7252/Mum/2011) which pertains to penalty of Rs.66,99,993/-, imposed u/s 271(1)(c) of the Act. The ld. counsel for the assessee explained that penalty was levied on three additions (i) the amount of Rs.4,34,519/- with respect to addition made u/s 94(7) of the Act on transaction in shares, (ii) Rs.92,462/- u/s 94(7), transaction in units, and (iii) Rs.92,94,104/- u/s 94(7), which was claimed to be consequential.

So far as, the first addition of Rs.4,34,519/- is concerned, it was explained by the ld. counsel that moment it was pointed out to the assessee by the Assessing Officer, the assessee accepted the bona fide mistake and paid taxes. It was pleaded that similar mistake was committed by the assessee in A.Y. 2006-07, wherein, on identical facts and circumstances, penalty was deleted (ITA No.2542/Mum/2012) Page-2 (para-2), ITA No.5352/Mum/2009 and ITA No.1625/Mum/2012. This factual matrix was not controverted by the ld. DR and merely reliance was placed upon assessment order/Commissioner of Income Tax (Appeals).

9.1. We have considered the rival submissions and perused the material available on record. So far as, imposition

of penalty u/s 94(7) of the Act on the amount of Rs.92,94,104/- is concerned, this issue has been deliberated upon by us while dealing with ground no.1 of ITA No.322/Mum/2009 (supra), deciding in favour of the assessee, therefore, it is consequential in nature.

9.2. So far as, penalty on account of disallowance made u/s 94(7) for reduction in claim of rebate u/s 88E etc are concerned, the Tribunal for A.Y. 2006-07 (ITA No.2542/Mum/2012) order dated 16/01/2015 considering the decision in City Group Global Markets India Pvt. Ltd. (ITA No.5352/Mum/2009 order dated 13/12/2011 and Ramesh Damani (ITA No.1625/Mum/2012) order dated 22/08/2014 deleted the penalty with reference to provisions of section 94(7) of the Act and with respect to penalty imposed on addition made for legal and professional fee, the issue was restored back by the Commissioner of Income Tax (Appeals) to the Assessing Officer with a direction to verify the nature of expenditure, thus, the penalty so imposed was set aside to the file of Assessing Officer to decide afresh. In the light of these cases, we direct the Assessing Officer to decide in accordance with law in the light of the decision dated 16/01/2015 in the case of assessee for A.Y. 2006-07.

10. The last appeal is of the assessee (ITA No.1011/Mum/2010), wherein, first ground raised by the assessee pertains to enhancing the assessment by restricting the claim of depreciation on UPS at Rs.12,678/-, applying the

rent of 10%, against the depreciation of Rs.31,695/-, granted by the Assessing Officer at the rate of 25%. The crux of argument on behalf of the assessee is that the impugned issue is covered by the decision of the Delhi Bench of the Tribunal in *Expeditors International (India) Private Ltd. vs Addl. CIT* (ITA No.2684/Del/2005; (2008) 118 TTJ (Del.) 652 order dated 29/08/2008, which was claimed to be affirmed by Hon'ble Delhi High Court. This factual matrix was not controverted by ld. DR.

10.1. We have considered the rival submissions and perused the material available on record. We find that the Hon'ble Delhi High Court in *CIT vs BSES Yamuna Powers Ltd.* (ITA No.1267/2010) order dated 31/08/2010 exactly on identical issue as contained in para 2 (page-2) of the order of the Hon'ble Delhi High Court held that since computer accessories and peripherals such as printers, scanners and server etc forms an integral part of computer system consequently, they are entitled to depreciation at higher rate of 60%, thus, following the aforesaid decisions, we direct the Assessing Officer to decide in the light of the aforesaid decisions.

11. The next ground i.e. no. 2, pertains to confirming disallowance of Rs.1,69,37,876/- made by Assessing Officer u/s 14A of the Act as expenses attributable to exempt dividend income. The ld. counsel for the assessee contended that Rule-8D is not applicable. We are in agreement with the proposition of the ld. counsel that Rule 8D is not applicable,

being Assessment Year involved is 2006-07, therefore, we remand this issue to the file of the Assessing Officer to examine the claim of the assessee and decide in the light of the decision from Hon'ble jurisdictional High Court in Godrej & Boyce. This ground of the assessee is allowed for statistical purposes.

12. The next ground pertains to disallowance made on account of Keyman Insurance Premium at Rs.60,000/-. On hearing the rival submissions, we find that this issue has been deliberated upon by us in preceding para of this order, therefore, it is consequential in nature.

13. The last ground pertains to confirming the allocation of Keyman Insurance Premium data base access charges, travelling, conveyance, legal and professional fee to share trading business for the purposes of computing rebate u/s 88E of the Act. The ld. counsel for the assessee invited our attention to the direction by the ld. Commissioner of Income Tax (Appeals) to the ld. Assessing Officer. It was contended that the Assessing Officer may be directed to follow the directions of the ld. Commissioner of Income Tax (Appeals). The ld. DR placed reliance upon the order of the ld. Commissioner of Income Tax (Appeals).

13.1. We have considered the rival submissions and perused the material available on record. We find that from Para 7 onwards (page-5) of the order of the ld. Commissioner

of Income Tax (Appeals), the issue has been discussed and finally Assessing Officer was directed to verify the nature of expenditure and then allocate such expenses and recomputed the rebate u/s 88E of the Act. We find no infirmity in the direction of the Commissioner of Income Tax (Appeals), therefore, the Assessing Officer is directed to follow the direction of the Id. First Appellate Authority and decide in accordance with law.

13.2. The additional grounds raised in ITA No.1011/Mum/2010 were not pressed by the Id. counsel for the assessee, therefore, the additional grounds are dismissed as not pressed.

Finally, all these appeals are disposed off in terms indicated hereinabove.

This Order was pronounced in the open court in the presence of Id. representatives from both sides at the conclusion of the hearing on 22/09/2015.

Sd/-  
(Ramit Kochar)

Sd/-  
(Joginder Singh)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 28/10/2015

*Shekhar, P.S.* नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
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 (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**