

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'C' BENCH, KOLKATA**

(Before Sri Aby T. Varkey, Judicial Member & Dr. A.L. Saini, Accountant Member)

**I.T.A. No. 517/Kol/2017**

Assessment Year: 2008-09

**M/s. Manoj Kumar**

**Damani.....Appellant**

**11B, Kalakar Street**

**Kolkata – 700 007**

**[PAN : ADTPD 8356 N ]**

**ACIT, Circle-44,Kolkata.....Respondent**

**Appearances by:**

*Shri Rakesh Jain, AR, appeared on behalf of the assessee.*

*Shri Saurabh Kumar, Addl. CIT, appearing on behalf of the Revenue.*

Date of concluding the hearing : March 28<sup>th</sup>, 2018

Date of pronouncing the order : May 23<sup>rd</sup>, 2018

**ORDER**

**Per Dr. A.L. Saini, AM :-**

By way of this appeal, the assessee/appellant has challenged the correctness of the order dated 3<sup>rd</sup> October, 2016, passed by the Id. Commissioner of Income Tax (Appeals)-13, Kolkata, in the matter of assessment u/s 143(3)/263 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), for the Assessment Year 2008-09.

2. The grievances of the assessee are as follows:-

*1. That in the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata, erred in confirming the disallowance made by the Id. Assessing Officer on loss in F & O amounting to Rs.45,32,817/- which is bad in law and on facts.*

*2. That in the facts and circumstances of the case, the Ld. Commissioner of Income Tax (Appeals)-13, Kolkata erred in confirming the addition made by the Id. Assessing Officer for a sum of Rs.8,88,000/- towards salary which is bad in law and on facts.*

*3. That in the facts and circumstances of the case, the Ld. Commissioner of the Income Tax (Appeals)-13, Kolkata erred in confirming the disallowance made by the Id. Assessing Officer on account of consultancy charges amounting to Rs.12,36,500/- which is bad in law and on facts.*

*4. That in the facts and circumstances of the case, the Ld. Commissioner of the Income Tax (Appeals)-13, Kolkata erred in confirming the action of the Id.*

*Assessing Officer in not granting rebate claimed u/s 88E of the I.T. Act, 1961 amounting to Rs.12,75,452/- which is bad in law and on facts.*

*5.That in the facts and circumstances of the case, the appellant craves leave to add, alter, modify and/or submit further or more ground(s) of appeal either before or at any time during the hearing of the appeal.*

**3.The first ground raised by the assessee relates to disallowance made by the Assessing Officer on account of transactions done by assessee in Future and Option(F&O) segment, amounting to Rs.45,32,817/-**

4. The brief facts apropos this issue are that the assessee has done share transaction in cash segment and F & O segment during the Assessment Year 2008-09. During the assessment proceedings, the Assessing Officer noted that the assessee had operated his transactions, in the stock exchange through three brokers, namely, K.Damani Securities Pvt. Ltd., ICICI Brokerage Services Ltd. and Sunchen Securities Pvt. Ltd. The NSE Authorities furnished information to AO, vide their letter dated 10/03/2014 separately for capital market segment and F & O Segment. The NSE provided certain client code modifications pertaining to future and option segment with M/sSunchen Securities Ltd., a broker under the client code No. NHM071 from 07-01-2008 to 25-03-2008, through whom the assessee had transacted in the NSE. Details of the transactions are as follows:-

Sl.No.	Date	Debited Amount of loss
1	07.01.2008	Rs.2,93,053.89
2	17.01.2008	Rs.5,90,080.55
3	29.02.2008	Rs.6,31,690.37
4	03.03.2008	Rs.19,58,764.02
5	25.03.2008	Rs.10,59,229.02
	Total	Rs.45,32,817.00

The Assessing Officer issued a showcause notice to the assessee to explain as to why the bogus losses debited in the Profit and Lossaccount, by way of client code modifications, arranged through M/s Sunchen Securities Ltd, amounting to Rs.45,32,817/- be disallowed. In response to the showcause notice, the assessee replied stating that transactions with all share brokers including M/s Sunchen Securities Ltd., were furnished before the Income-tax Authorities. The Client Code is allotted by the broker and not by the assessee. The Client cannot make modification in client code and such things are beyond the control of the dealer or investor in

shares and therefore no wrong inference shall be drawn against the assessee. If the assessee was dealing with such stock broker before his registration has been cancelled, then the transaction of the assessee does not become fake and bogus. However, the Assessing Officer rejected the contention of the assessee and held that whatever be the reason, the assessee cannot deny the entry of bogus losses arranged through M/sSunchen Securities Ltd. and since the assessee is a beneficiary of the client code modification made by the broker, and the assessee cannot now conveniently absolve himself and shift the blame on the broker alone. In view of the above, the amount of Rs.45,32,817/-, was added by the AO to the total income of the assessee.

5. Aggrieved by the stand of the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is aggrieved, and is in further appeal before this Tribunal.

6. The Learned counsel for the assessee begins by pointing out that during the assessment proceedings, assessee has submitted all the contract notes, vouchers and other details to substantiate the transactions and all the transactions were settled through account payee cheques. The assessee also submitted before us the detail of the transactions with K. M. Damani Securities Pvt. Ltd. (PB 6 to 17). The assessee also submitted before us details of the transactions entered into by him with M/s Sunchan Securities Ltd and stated that these transactions were done through stock exchange. (PB 74 to 91). With help of these documents, the Id. Counsel for the assessee submitted before us that assessee has every kind of evidence in his possession and he does not have any control over Client Code Modification (CCM) and the broker (M/s Sunchan Securities Ltd) has not done CCM at the instance of the assessee. The fact that M/sSunchen Securities Ltd. is black listed by SEBI, does not mean that the transactions undertaken with him are bogus. Subsequent cancellation of registration of M/s. Sunchen Securities Ltd. does not impact the genuineness of the transactions of the assessee under consideration. The Counsel stated that the Department has accepted the nature of business of the assessee and on similar lines the assessment was completed u/s 143(3) of the Act, in the previous years and subsequent Assessment Years. The assessee has submitted the details of the purchase of shares, contract notes and other relevant

documents and the fact that all the transactions were carried out through banking channels, therefore, by no stretch of logic, the transactions of the assessee can be held as bogus.

7. The Id. DR for the Revenue, on the other hand, has primarily reiterated the stand taken Assessing Officer, which we have already noted in our earlier para, and is not being repeated for the sake of brevity.

8. We have given a careful consideration to the rival submissions and perused the material available on record. We note that the assessee under consideration has done the transaction through recognised stock exchange and produced before us the contract notes, details of the transactions, and details of payment through account payee cheques. We note that transactions have been carried out through proper banking channels/account payee cheques, through the existence of the brokers and stock exchange and these facts were not disputed by the Id DR for the Revenue. In the assessee's case, the Assessing Officer treated the transactions as bogus only on the basis that the broker, M/s. Sunchen Securities Ltd., has been blacklisted by SEBI and its registration was cancelled subsequently. The fact that the registration has been cancelled subsequently does not mean that the transactions are invalid. The assessee cannot be punished for the default of the brokers and therefore the share transactions cannot be held to be bogus. For this we rely on the judgement of the Co-ordinate Bench of the Kolkata Tribunal in the case of *Rahul Vasisht vs. Income Tax Officer in ITA No. 140/Kol/2009, Assessment Year 2005-06, order dated 20<sup>th</sup> November, 2009*, wherein it was held as follows:-

*"8.....Further the fact that M/s. Ahilya Commercial Pvt. Ltd., through whom the shares are sold, has been barred from entering into transactions w.e.f. September, 2005 whereas these transactions entered by the assessee are entered much prior to the date of suspension of the share broker i.e. on 24.12.2004. Therefore, there is no reason to disbelieve this transaction...."*

In addition to this, we also rely on the judgments of jurisdictional, Hon'ble Calcutta High Court in the case of *Commissioner of Income-tax v. Emerald Commercial Ltd.* [2002] 120 Taxman 282 (Calcutta), wherein it was held that where the details of purchase and sale of shares were furnished. The payment and receipt were by account payee cheque. The identity of seller and purchaser was not in dispute. The

disallowance should not be made by assessing officer merely because the assessee failed to produce the brokers for verification of the transaction.

10. We note that the Assessing Officer has not brought any material on record to support his findings that transaction between broker, M/s. Sunchen Securities Ltd and assessee are bogus and what has been entered into between M/s. Sunchen Securities Ltd (the broker) and the assessee, is an unaccounted money. For that we also rely on the judgment of the Co-ordinate Bench of the Kolkata Tribunal in the case of *Sunita Khemka in ITA No. 714 to 718/Kol/2011, order dt. 28/10/2015*, wherein it was held that the assessee had all the original contract copies of the bills, and bank statements. All the purchases were done by the concerned stock broker and recorded in the books of account. All the transactions were done through the recognised stock exchanges and the prices at which the shares has been sold is also published in the daily Quotation issued by the NSE/BSE and the security transaction tax has been deducted on the profit, therefore, the transactions can not be treated as bogus.

Based on the above facts and circumstances, we note that when purchase and sale of shares are supported by proper Contract Notes, deliveries of shares were received through demat accounts maintained with various agencies, the shares were purchased and sold through recognised broker and the sale considerations were received by Account Payee Cheques, hence the transactions cannot be treated as bogus. Therefore, we are of the view that addition made by the Assessing Officer and confirmed by the Id. CIT(A) needs to be deleted. Accordingly, we delete the addition made by the Assessing Officer and allow this ground of the assessee.

**11. Ground No.2 raised by the assessee relates to an addition of Rs.8,88,000/-, on account of salary paid to specified persons u/s 40A(2)(b) of the Act.**

12. The brief facts qua the issue are that the assessee has paid salaries amounting to Rs.8,88,000/-, to three persons, namely, Anand Mehta Rs.4,50,000/-, Renu Mohta Rs.2,38,000/- and Kinjal Mohta Rs.2,00,000/-. All these three persons were residing in Surat. The Payment of salary of Rs.15,000/- was also made to Shri

NawneetBhattar and Rs.1,21,100/- to Smt. Lata Devi Bhattar, both of whom were specified persons u/s 40A(2)(b) of the Act. The Assessing Officer noted that the salary of Shri NawneetBhattar has increased by 300% over the year. During the assessment proceedings, the assessee submitted before the Assessing Officer that Shri NawneetBhattar, is a tax-payer and has filed his return of income. The assessee filed the details salary paid. The assessee also submitted a comparative statement of increase in salary of the staff before the Assessing Officer and stated that payments were made for services rendered by them, in their individual capacity for the business purpose. However, the Assessing Officer noted that the assessee has not filed any cogent reasons for making payment to persons staying in Surat.

Since the assessee's business has been found to be trading in shares with K. Damani Securities Pvt. Ltd., ICICI Brokerage Services Ltd. and Sunchen Securities Pvt. Ltd., therefore payments made to the above said persons in Surat was found to be irrelevant and without any reasonable cause of service rendered, therefore, the Assessing Officer disallowed Rs.8,88,000/-.

13. Aggrieved by the stand of the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before this Tribunal.

14. The Id. Counsel for the assessee submitted before us a comparative chart of salaries paid to various persons and stated that the salary has been paid for the purpose of business and the salary expenses have been incurred for the purpose of business.

The Id. D/R, on the other hand, has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para, and is not being repeated for the sake of brevity.

15. We have given a careful consideration to the rival submissions and perused the material available on record. The assessee has employed the staff during the Assessment Year under consideration and paid salary for the purpose of business. The Assessing Officer has failed to bring any cogent evidence on record that why the salary paid by the assessee does not relate to the business of the assessee. The persons to whom the salaries were paid, were helping the assessee for doing his

business. It is the assessee's prerogative to decide how much salary is to be paid to the particular staff. The Department cannot sit on an arm chair and dictate the assessee what is reasonable expenditure and what is unreasonable expenditure. However, the Revenue has power to interfere only when the excess salary is paid to the specified persons u/s 40A(2)(b) i.e. in excess of the fair market value of goods and services and except to this, the Revenue does not have power to interfere in the assessee's business to decide how much amount has to be paid to a particular person for his services. All the payments have been made by the assessee for commercial expediency and to run the business smoothly, therefore, these expenses are allowed u/s 37(1) of the Act. We note that the Assessing Officer has not disputed that these payments are bogus or fictitious and not paid to the concerned person. The only grievance of the Assessing Officer was that the assessee has paid excessive amount to some persons without their entitlements. We note that the Assessing Officer failed to bring any cogent evidence on record to show that salary payments made by the assessee is excessive as compared to the fair market value of services. The AO failed to bring on record the comparative fair market value of similar services from external market or from competitors of similar business to establish that payment of salary by the assessee is more than the fair market value of similar services in the open market. Hence, addition made by the assessing officer and confirmed by the Id CIT(A) needs to be deleted. Accordingly, we delete the addition of Rs.8,88,000/-

**16. Ground No.3 raised by the assessee relates to disallowance of consultancy charges amounting to Rs.12,36,500/-.**

17. The brief fact *qua* the issue are that the assessee has made payment of consultancy fee to six persons, who has special knowledge in the field of share transactions. These persons were located at Jharkhand, Mumbai and elsewhere and were helping the assessee in share transaction with their knowledge and expertise. However, the Assessing Officer noted that the assessee has not produced any documentary evidence to prove that the special knowledge and expertise of these persons were applied in his business. Therefore, the Assessing Officer noted that the nexus of the services rendered vis-a-vis payment of consultancy fee paid, could

not be established by the assessee and, therefore, he added Rs.12,36,500/-, to the income of the assessee.

18. Aggrieved by the stand of the Assessing Officer, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before this Tribunal.

19. The Id. Counsel for the assessee submitted before us that during the Assessment Year under consideration, the assessee has paid the consultancy fee amounting to Rs.12,36,500/-, to various persons for the purpose of his business. The persons to whom the consultancy fee paid, were having knowledge and expertise of the share market and they were helping the assessee in the share transactions. Therefore, the payment made to these persons towards consultancy fee are for the purpose of the business of the assessee and should be allowed u/s 37 (1) of the Act.

20. The Id. D/R, on the other hand, has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para, and is not being repeated for the sake of brevity.

21. We have given a careful consideration to the rival submissions and perused the material available of record, we note that before us, the Id. Counsel for the assessee submitted a comparative chart of the consultancy fee paid in the Assessment Year 2007-08, 2008-09 & 2009-10 (PB 136), wherein, the assessee has explained that there is a correlation between the turnover and the consultancy fee paid. In the Assessment Year 2007-08, the total turnover was to the tune of Rs.1,63,57,579/- and the amount of consultancy fee paid was to the tune of Rs.3,00,000/-. In the Assessment Year under consideration, the total turnover was Rs.2,71,28,170/- and the amount of consultancy fee paid was to the tune of Rs.12,36,500/-. In the Assessment Year 2009-10, the total turnover was Rs.1,13,52,046/- and the amount of consultancy fee paid was to the tune of Rs.3,00,000/-. Therefore, the consultancy fee, is by and large associated with the turnover achieved by the assessee and is genuine expenditure incurred by the assessee for the purpose of business. We note that the Id. Counsel also submitted before us the income tax returns of some of the consultants who disclosed the consultancy charges received, in their income tax

returns. We note that the Assessing Officer has failed to bring any cogent evidence to establish the fact that the consultancy fee paid by the assessee was not genuine, therefore, considering the factual position explained above, the addition needs to be deleted. Accordingly, we delete the addition of Rs.12,36,500/-.

**22. Ground No.4, raised by the assessee is against the disallowance on account of rebate claimed u/s 88E of the Act, amounting to Rs.12,75,452/-.**

23. The brief facts apropos the issue are that the Assessing Officer in his assessment order allowed the Securities Transaction Tax (STT) u/s 88E of the Act, to the tune of Rs.48,46,680/- against the claim of the assessee to the tune of Rs.61,22,142/-. During the assessment proceedings, the Assessing Officer has not assigned any reason that why he has not allowed the rebate claimed by the assessee to the tune of Rs.61,22,142/-. The assessee noted that the Assessing Officer has not allowed rebated u/s 88E of the Act to the tune of Rs.12,75,462/- (Rs.61,22,142/- (minus) Rs.48,46,680/-).

24. Aggrieved by the stand of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), but without success. The assessee is not satisfied and is in further appeal before this Tribunal.

25. We have heard both the parties and perused the material available on record, we note that the Id. Counsel for the assessee has submitted that the assessee has debited in his profit and loss account, the total amount of Security Transactions Tax to the tune of Rs.61,22,142/-. The sum has been disallowed in the computation of income. The assessee produced the necessary STT Certificate in Form No. 10BB before the Assessing Officer for the entire amount. But the Assessing Officer has allowed rebate u/s 88E only for a sum of Rs.48,46,680/-, without giving any reason in his order. The Id. Counsel stated that while making disallowance or addition or non-granting of rebate, the Id. Assessing Officer is required to be given cogent reasons for the disallowance but the assessment order nowhere speaks for such granting of rebate u/s 88E of the Act, to the extent of Rs.12,75,462/-(Rs.61,22,142/- (minus) Rs.48,46,680/-). The Id. Counsel for the assessee submitted that the assessee has filed the STT Certificate before the Assessing Officer in respect of the amount

debited in the profit and loss account and submitted the Form 10BB, therefore, the claim of the assessee by no stretch of imagination can be a false claim as the transaction were done through recognised stock exchange and payments were made through proper banking channels. The assessee has also produced before us the statement of computation of income wherein he has shown the total STT to the tune of Rs.61,22,142/-. We note that the Assessing Officer has disallowed the STT Rebate of the assessee based on conjectures and surmises without bringing any evidence on record that the assessee's claim in respect of STT is not genuine. The assessee has submitted Form No. 10BB and all the transactions were carried through recognised stock exchanges and settled through proper banking channels, therefore, the claim of the assessee for STT u/s 88E of the Act, should be allowed.

Considering the factual position explained above, we are of the view that the disallowance made by the Assessing Officer u/s 88E of the Act, is not justified and, therefore, we delete the disallowance made by the Assessing Officer and direct the AO to provide the rebate u/s 88E of the Act, to the tune of Rs.12,75,462/-, after due verification and in accordance with law. Therefore, we allow this ground of the assessee for statistical purposes.

26. In the result, appeal of the assessee is partly allowed.

***Kolkata, the 23<sup>rd</sup> day of May, 2018.***

Sd/-  
**[Aby T. Varkey]**  
Judicial Member

Sd/-  
**[Dr. A. L. Saini]**  
Accountant Member

Dated : 23.05.2018  
{SC SPS}

*Copy of the order forwarded to:*

**1. M/s. Manoj Kumar Damani**  
**11B, Kalakar Street**  
**Kolkata – 700 007**

**2. ACIT, Circle-44, Kolkata**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy  
By order

Senior Private Secretary  
Head of Office/ D.D.O. ITAT, Kolkata Benches