

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

ITA NO. 5789/MUM/2010 : **A.Y : 2006-07**

M/s. ICICI Securities Limited
(earlier known as ICICI Brokerage
Services Limited)
(in the case of erstwhile ICICI Web
Trade Limited which was merged
with ICICI Brokerage Services Ltd.),
Taxation Department, ICICI Bank
Ltd., ICICI Bank Towers, 9th floor,
East Wing, South Tower, Bandra-
Kurla Complex, Bandra (E),
Mumbai 400 051.
PAN : AAACI6284P (Appellant)

Vs. Additional Commissioner of
Income-tax, Range-4(1),
Mumbai. (Respondent)

ITA NO. 6001/MUM/2010 : **A.Y : 2006-07**

Assistant Commissioner of
Income-tax, Range-4(1),
Mumbai (Appellant)

Vs. M/s. ICICI Securities Limited
(erstwhile ICICI Web Trade Ltd.)
ICICI Bank Ltd., Laxmi Towers,
2nd floor, Bandra-Kurla Complex,
Bandra (E), Mumbai 400 051.
PAN : AAACI6284P
(Respondent)

Assessee by : **Ms. Aarti Vissanji**
Revenue by : **Shri Neil Philip**

Date of Hearing : **17/05/2019**

Date of Pronouncement : **26/07/2019**

ORDER**PER G.S. PANNU, VICE PRESIDENT**

The captioned are cross-appeals filed by the assessee and the Revenue, directed against the order of CIT(A) - 8, Mumbai dated 14.05.2010 pertaining to assessment year 2006-07, which in turn has arisen from an order passed by the Assessing Officer dated 26.12.2008 under Section 143(3) of the Income Tax Act 1961 (in short "the Act").

2. First, we may take-up the appeal of the assessee in ITA No. 5789/Mum/2010 wherein the Grounds of appeal read as under:-

“(A) Re : Non allowance of depreciation on stock exchange card - Rs.29,49,800 [Para 2, page 1 of the CIT(A) order]

[2] On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of depreciation on Stock Exchange membership amounting to Rs.29,49,800.

(B) Re: Disallowance of client assistance charges - Rs.20,29,59,185 and client maintenance charges Rs. 42,43,44,600 aggregating to Rs. 62,73,03,785 under section 40A(2)(b) of the Act [Para 5, pages 2 to 13 of the CIT(A) order]

[3] On the facts and circumstances of the case and in law, the CIT(A) erred in invoking provisions of section 40A(2)(b) of the Act without appreciating the fact that ICICI Bank Limited is not the holding company of the Appellant and does not come within the purview of the section 40A(2)(b) of the Act.

[4] On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the disallowance of client assistance charges of Rs.20,29,59,185 and client maintenance charges of Rs.42,43,44,600 made to ICICI Bank Limited

in pursuance to the service provider agreements dated June 30, 2004 and April 1, 2006 respectively.

[5] *The CIT(A) ought to have appreciated that the client assistance charges were incurred for deputed staff and training sessions conducted by the staff of ICICI Bank (Service Provider) which were allowed in the previous year.*

[6] *The CIT(A) ought to have appreciated that the client maintenance expenses were incurred for upgrading the technology platform and efficient operation of the 3 in 1 account.*

(C) *Re: Disallowance u/s. 14A: Rs.25,29,860*

[7] *On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the apportionment of expenses amounting to Rs.25,29,860 to the dividend income exempt under section 10(34) and 10(35) of the Act.*

[8] *The CIT(A) failed to consider the Appellant's contention that no disallowance ought to be made under section 14A of the Act as the investments are made out of the Appellant's own funds which do not carry any interest cost.*

(D) *Re: Disallowance of Bad debts - Rs.13,90,390*

[9] *On the facts and circumstances of the case and law, the CIT(A) erred in confirming the disallowance of bad debts of Rs.13,90,390 claimed by the Appellant following the order of the preceding assessment year on the ground that the Appellant had failed to establish that the debts had become bad.*

(E) *Re : Interest under Section 234B*

[10] *The CITA erred on facts and circumstances of the case and in law, in confirming the levy of interest under section 234B and 234D of the Act."*

3. Briefly put, the relevant facts are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and is a member of the National Stock Exchange and Bombay Stock Exchange Ltd. The

assessee is also a distributor agent for non-equity products such as Mutual Funds, IPO, Post Office Savings. It filed its return of income for assessment year 2006-07 on 30.11.2006 declaring total income of Rs. 20,33,14,940/-. Subsequently, the case of the assessee was selected for scrutiny assessment and order under Section 143(3) of the Act dated 26.12.2008 was passed after making addition on various grounds. Aggrieved by the same, assessee preferred an appeal before the CIT(A) who allowed partial relief to the assessee. Not being satisfied by the same, assessee is in appeal before us and the Revenue is in appeal against the reliefs allowed by the CIT(A). We shall first deal with the appeal of the assessee.

4. The first Ground raised by the assessee pertains to disallowance of Depreciation of Rs.29,49,800/- on Stock Exchange Card. The claim of Depreciation on Stock Exchange Card was disallowed by the Assessing Officer. On appeal, CIT(A) held that the issue of claim of Depreciation on Stock Exchange Card is covered against the assessee by the decision of Hon'ble Bombay High Court in the case of *CIT vs. Techno Shares & Stock Limited in ITA No. 971 of 2006 and 218 of 2007*. Aggrieved by the order of CIT(A), assessee is in appeal before us.

5. At the time of hearing, the Id. Representative for the assessee fairly pointed out that the above issue is covered by the decision of co-ordinate bench in the case of *Sino Securities (P.) Ltd. vs. ITO [2012] 134 ITD 321 (Mumbai)* wherein it was held that BSE Card is not an asset of the nature referred under Section 32(1)(ii) of the Act and thus, depreciation on the said asset is not allowable. Thus, the Id. Representative agrees that the issue is

covered against the assessee and in favour of the Revenue. As such, this Ground of appeal is dismissed.

6. The next issue pertains to disallowance of Client Assistance Charges and Client Maintenance Charges paid by the assessee to ICICI Bank Ltd. In this regard, the relevant facts are that during the year under consideration, the assessee paid Rs.1,09,54,85,747/- to ICICI Bank Ltd. towards client servicing charges. The charges comprised of :-

Sr. No.	Particulars	Amount paid	Amount disallowed by the AO
1.	Client assistance charges for deputed staff & session cost	62,33,14,500	20,29,59,185/-
2.	Client servicing charges paid to International Banking Division of ICICI Bank for servicing NRI Clients	4,54,80,504	Nil
3.	Client maintenance charges for maintaining broking accounts	42,43,44,660	42,43,44,660
	Total	109,54,85,747	62,73,03,785

7. There existed a Service Agreement dated 04.06.2004 ('original agreement') between the assessee and ICICI Bank ("Bank") which was renewed by an amendment agreement dated 20.03.2006 effective from 01.04.2005. During the year under consideration, the Client Assistance and Maintenance Charges were paid by assessee to the Bank under the said amended agreement. The nature of activities provided by the Bank to the assessee included soliciting customers, cross-selling icicidirect.com to the customers, capturing leads and referring customers to the Bank's sales team, contacting customers referred through lead captures, giving demo of icicidirect.com to walk-in customers, training the customer to trade and assisting him to put through a trade, form filling, documentation etc., providing facilities to the

common customers to trade through internet/intranet facilities at the Bank's branch and conducting customer training sessions at regular intervals, etc. In consideration of the aforesaid set-up of resources and services, the Bank charged the assessee on the basis of the following parameters - number of branches, manpower allocated, computers, office space, office infrastructure, number of customer queries handled and number of training sessions for customers. The charges varied for metro, urban and semi-urban branches of the service provider.

8. The details of Client Assistance Charges comprised of charges for the deputed staff location-wise and fixed amount per session cost for metro and non-metro locations in assessment year 2005-06 and present year i.e. assessment year 2006-07 are placed at page 65 of the Paper Book. The assessee paid a sum of Rs.62,33,14,500/- to the Bank for Client Assistance Charges out of which Rs.20,29,59,185/- was disallowed by the Assessing Officer.

9. A separate agreement dated 01.04.2005 catered to provision of services by the Bank to assessee's customers through its Finnacle system to enable them to trade online using the assessee's platform called ICICI Direct.com. Charges of the Bank were fixed at Rs.150 per quarter per customer for the 3-in-1 account which linked the customer's Trading account with his Bank account and Depository account maintained with the Bank. The Bank, in turn, incurs costs for Finnacle licences, annual maintenance and support of the systems, lease lines, IT security, etc. apart from other operation costs. Copy of the agreement along with Annexure - A enumerating the scope of services is placed at pages 66-76 of the Paper Book. A flow chart showing the link

between the customer, the assessee and the Bank as the service provider, is annexed to the assessment order. The payment of Rs.42,43,44,660/- by the assessee has been disallowed in totality.

10. The Assessing Officer disallowed (a) Rs.42,43,44,600/- being payments made by the assessee under the agreement dated 01.04.2005 as not having been incurred wholly and exclusively for the purpose of its business for the reasons stated in paragraphs 8.17 to 8.24 of the assessment order. Two principal reasons for the disallowance are that (i) the agreement dated 01.04.2005 was a colourable device to transfer the assessee's profit to ICICI Bank Ltd. without paying Dividend Distribution Tax ("DDT") of 12.5% during financial year 2005-06 and 15% from 01.04.2006, that both being related parties, the transactions were not at arm's length price and had been entered for extra commercial considerations; (ii) the 3-in-1 accounts were maintained and hence were mutually beneficial to both parties, viz., the assessee and the Bank, and thus, payment was for non-commercial considerations (b) Rs.20,29,59,185/- as excess payment made under the amended agreement dated 20.03.2006 on the ground that the increase in rate with retrospective effect was not genuine and was a means to transfer the assessee's profit without payment of DDT. The CIT(A) has confirmed the disallowance, against which assessee is in appeal before us.

11. At the outset, it has been asserted that the CIT(A) has wrongly observed in para 5.3.1 (b) of his order that the amendment dated 30.06.2004 to the agreement dated 04.06.2004 was suppressed before the Assessing Officer. It has been brought out that there is a specific reference to the agreement dated 30.06.2004 in the Statement of Facts before the CIT(A) stating that the

Assessing Officer has overlooked the said agreement; and, page 65 of the Paper Book contains a comparative statement of payments made in assessment year 2005-06 under the agreement dated 30.06.2004 and amendment dated 20.03.2006 along with the basis of the charges by the Bank. In respect of disallowance of Rs.42,43,44,600/-, the Id. Representative for the assessee submitted before us that assessee was providing an online trading platform to its customers. For a customer to trade online, his account with the assessee had to be linked to his Bank account and Depository account with the Bank. The assessee's online share trading platform could not operate independently. It was dependent on the Finnacle system of the Bank for allocation/de-allocation of funds and Deposit systems of the Bank as Depository participant for allocation/de-allocation of securities through computer to computer link ('CTCL') application of the Bank. The efficacy of the assessee's online trading platform when linked to the Bank and Depository accounts, which each customer maintained with the Bank, resulted in the growth of its customer base by 38% from 603390 as on 01.04.2005 to 835117 as on 31.03.2006, the market turnover was 173% of the turnover in financial year 2004-05. The integration of the customers' Bank account and Demat account in the Bank with the broking account with the assessee through the system provided by the Bank, was essential for conduct of online trade. The payment was, therefore, wholly for the purpose of its business. In the past, disallowance was made under Section 40A(2)(b) of the Act and deleted by the Tribunal, whereas in this assessment year, it has been disallowed on the ground that expenditure has not been incurred by the assessee for the purpose of its business. In support, copy of the order of Tribunal for assessment year 2004-05 has been placed at pages 57-62 of the Paper Book. It

has been asserted that during the year, the Bank continued to render services to the assessee as in the past.

12. The Id. Representative referred to the discussion by the Assessing Officer, in paragraph 8.18 while considering the services in relation to the 3-in-1 accounts, to the effect that '*For all these services, the assessee was making payment to the bank in earlier years as per the existing agreement*' and then holds '*the bank has not provided any additional services during F.Y.2005-06 for which it has been paid by the assessee in terms of the provisions of agreement dated 1.4.2005.*' It has been pointed out that in the earlier year, expenditure for the same type of services has not been disallowed as non-business expenditure or on the ground that the service agreement was a colourable device. Part disallowance made under Section 40A(2) of the Act in the past was deleted by the Tribunal on the ground that the fact of services provided to the assessee by the Bank is not disputed. As the services were genuine, the agreement under which the payment was made can neither be said to be colourable device to transfer profit and nor the disallowance of the entire expenditure is justified on the ground that it was not laid out for the purpose of assessee's business. It is contended that the stand of the Assessing Officer that corresponding benefit by way of increase in deposits and receipt of transaction charges when the Demat account was utilised was derived by the Bank from which it made earnings, is of no consequence. It is well settled that once the nexus between the expenditure and the purpose of the business has been established, as in the present case, the Revenue cannot claim to put itself in the armchair of the businessman and disallow the expenditure. It was open to the Assessing Officer to disallow expenditure which he considered excessive or unreasonable under Section 40A(2) of the Act provided the onus of proving

the expenditure to be excessive or unreasonable was discharged. According to the Id. Representative, barring a passing reference to Section 40A(2) of the Act in paragraph 8.23 of the assessment order, the expenditure has been disallowed as not incurred wholly and exclusively for the purpose of the assessee's business. It has been pointed out that the assessee had paid Dividend Distribution Tax of Rs.3,19,77,000/- on the amount distributed as dividend in financial year 2005-06, and that both the assessee and the Bank were profit making companies, thus there was no attempt to avoid payment of taxes.

13. It was further submitted that the stand of the Assessing Officer that the Client Maintenance Charges were paid to ICICI Bank in lieu of dividend to evade the Dividend Distribution Tax is not justified for the reason that the agreement pursuant to which the Client Maintenance Charges were fixed was entered into on 01.04.2005, i.e. at the beginning of the year, at which point in time the assessee could not have predicted whether or to what extent it would earn profits during the year. These charges were paid irrespective of profits earned by the assessee.

14. In respect of the disallowance of Rs.20,29,59,185/-, it was submitted that the Assessing Officer has worked out the disallowance by comparing the salary cost per employee per branch per annum mentioned in the agreement dated 04.06.2004 and the amendment dated 20.03.2006. It has been explained that in doing so, the Assessing Officer has overlooked the amendment dated 30.06.2004; and, that it was clear from a comparison of the salary cost per employee per branch per annum under the original agreement and the two subsequent amendments that there is no increase between the

first and second amendments to the original agreement and hence, the conclusion of the Assessing Officer is factually erroneous. A Tabulation enumerating the costs under different agreements was referred to, which is as under :

Sr. No.	Classification	Salary cost per	Employee per	Branch Per Annum
		As per original agreement dated 04.06.2004	As per amendment dated 30.06.2004	As per amendment dated 30.03.2006
1.	Metro locations	7,11,751	10,43,751	10,44,000
2.	Urban locations	6,14,751	9,35,751	9,36,000
3.	Semi-urban locations	4,66,751	7,41,751	7,44,000
4.	Low Business Potential	75,000 (per location)	75,000 (per location)	

The Id. Representative pointed out that the increase in the cost in assessment year 2005-06 as compared to preceding year was on account of increase in the number of employees and the number of session costs, and the payments made in assessment year 2005-06 in terms of the amendment dated 30.06.2004 have been allowed. The assessee was utilising the Bank's India wide network of branches and specialized staff including sales executives and other support staff who were performing the various activities enumerated in the agreement dated 04.06.2004. It has also been argued that the fact that services were indeed rendered is not disputed since sum of Rs.42,03,55,315/- has been allowed out of Rs.62,33,14,500/-. The disallowance of Rs.20,29,59,185/- on the ground that such increase was not genuine has no basis.

15. On the other hand, the Id. DR appearing for the Revenue has defended the stand of the lower authorities by reiterating the reasoning contained in the respective orders. As in the earlier paras we have already noted in sufficient detail the stand of the lower authorities, we do not repeat the same for the sake of brevity.

16. We have carefully considered the rival submissions and perused the material on record. The limited controversy before us is whether the Client Assistance Charges and Client Maintenance Charges paid by the assessee to Bank for services provided by the Bank is allowable or not. Firstly, we shall discuss the Client Assistance Charges paid by the assessee to Bank during the year under consideration. In this regard, we find that the assessee had claimed Rs.62,33,14,500/- towards Client Maintenance Charges, of which the Assessing Officer disallowed only Rs. 20,29,59,185/- treating the same to be excessive. Thus, it is an undisputed fact that the Bank has provided services to the assessee and it is not the case of the Assessing Officer that no services have been provided by the Bank to the assessee. Thus, the Assessing Officer, in effect, has disputed the quantum of expenditure and we shall accordingly restrict ourselves to that question. The Assessing Officer has disallowed the excess payment holding that during the year under consideration the assessee has increased the Client Assistance Charges paid to the Bank as compared to earlier year and such increase was not justified and, therefore, the increased amount was disallowed by the Assessing Officer. It was also held by the Assessing Officer that the Bank is a related party and assessee has tried to shift the profit to Bank to avoid paying Dividend Distribution Tax on profits earned by the assessee which can be distributed to the ICICI Bank. It is also the case of the Assessing Officer that the agreement entered into by the assessee is a

colourable device. In this regard, it was pointed out by the Id. Representative for the assessee that in assessment year 2005-06, addition made on account of Client Assistance Charges was deleted by the Tribunal. It was further submitted that the main charge made by the Assessing Officer is that assessee has increased the cost per location, per branch whereas, in fact, there is no increase in the cost per location, per branch as compared to the agreement dated 30.06.2004; and, in this regard, a comparative chart of the charges per location, per branch paid during the year under the existing agreement and paid earlier pursuant to the agreement dated 30.06.2004 and prior to that was submitted. On perusal of the said comparative chart, we find that there is no increase in the cost per location, per branch as compared to the agreement dated 30.06.2004 which was prevailing during assessment year 2005-06. We find that during assessment year 2005-06, the agreement dated 30.06.2004 was very much in operation and the payment was made by the assessee pursuant to the said agreement. The Assessing Officer had made addition in assessment year 2005-06 on account of Client Assistance Charges, which was deleted by the Tribunal in ITA No. 6860/Mum/2008. As such, we find that once the Tribunal has allowed the expenditure pursuant to an agreement in one year, the said agreement cannot be treated as colourable device in subsequent assessment year and payment made pursuant to the said agreement cannot be disallowed in subsequent assessment year. On perusal of the working of Client Assistance Charges, we find that it is not the cost per location, per branch which has increased, but the number of branches served by the Bank has increased, which has lead to increase in expenditure which fact the Assessing Officer has ignored while passing the assessment order. Further, we find that the turnover of the assessee for the year under consideration has substantially increased to Rs. 269.58 Crores as compared to

assessment year 2005-06 wherein turnover was Rs. 154.31 Crores and assessment year 2004-05 wherein the turnover was Rs. 95.09 crore. Thus, the increased cost of client assistance is justified by the corresponding increase in revenues of the assessee. Thus, we do not find any merit in the observation made by the Assessing Officer in the assessment order.

17. In light of our above discussion, we find that the increase in client assistance cost is justified by the corresponding increase in turnover and moreover, the increase in cost was due to the fact that the Bank had served more locations as compared to the preceding year, which can be termed as an expansion of business and not excess payment, as sought to be made out by the Assessing Officer. We accordingly set aside the order of CIT(A) and direct the Assessing Officer to allow the entire Client Assistance Charges paid by the assessee to Bank.

18. As regards the disallowance of Rs. 42,43,44,660/- towards Client Maintenance Charges, the Assessing Officer noted that the assessee has entered into agreement dated 01.04.2005 with the Bank to pay Rs. 150 per customer per quarter towards Client Maintenance Charges. The Assessing Officer noted that in earlier years also, similar payments were made and the scope of this service is covered in the main agreement and that there was no need to enter into separate agreement for this service. As per the Assessing Officer, the entire arrangement is a colourable device and has been entered in order to shift the profits to ICICI Bank, which is stated by him to be a related party in terms of Section 40A(2)(b) of the Act. Before us, the Id. Representative for the assessee has argued that the said payment has been made for the purpose of technical support provided by the Bank with respect

to 3-in-1 accounts opened by the Bank. All the transactions of the clients are carried out with the help of technical support extended by the Bank. It was further argued that in earlier years also, similar payments were made to ICICI Bank and have been allowed by the Tribunal in those years. Our attention was also drawn to the decision of the Tribunal in assessee's own case for assessment year 2004-05 and it was argued that in that year also, similar payment was disallowed by the Assessing Officer and the Tribunal allowed the appeal in favour of the assessee.

19. As explained by the Id. Representative for the assessee, the business model of the assessee and ICICI Bank Ltd. is such that it cannot function in isolation without the use of the technical support from ICICI Bank Ltd. The clients execute transactions on the software maintained and operated by the Bank. The Bank incurs various expenditure for operation and maintenance of the software and, in turn, recovers it from the assessee. It is not the case of the Assessing Officer that the software on which clients of the assessee carry on the transactions is owned by the assessee. The question that arises for consideration is, if the Bank does not own any software, how does it serve its customers? This question remains unanswered in the assessment order. Secondly, if the assessee was owning and maintaining such software, the assessee would have incurred huge sum of expenditure and, in that case, the same would have been allowed as business expenditure. Instead of making such huge investment, the assessee is availing the services provided by ICICI Bank Ltd. and, in turn, paying the amount charged by it for providing services which the Assessing Officer has treated to be not for the purpose of the business. It was also pointed out before us that both the assessee and ICICI Bank Ltd. have earned profits and as such, it cannot be the case that instant

arrangement is a *modus operandi* used by the assessee for reduction of tax liability. The Assessing Officer further noted that in cases where customers have maintained 3-in-1 account, even the ICICI Bank Ltd. earns revenue due to the assessee and as such, assessee should also recover some amount from the ICICI Bank Ltd. In this regard, we find that the amount paid by the assessee to ICICI Bank Ltd. is not towards soliciting clients, but for the purpose of technical support extended by the ICICI Bank Ltd. to the assessee. Further, similar payment was made in earlier years also, and the same has been allowed. The instant agreement entered into by the assessee is merely extension of the past agreement and nothing else. The Assessing Officer has disallowed the expenditure in this year stating that the same is not incurred wholly and exclusively for the purpose of business. As discussed above, the expenditure incurred by the assessee was very much for the purpose of business of the assessee and rather, these services are vital for running the business of the assessee. As regards various other contentions raised by the Assessing Officer in the assessment order, we find that the same have been extensively dealt with by our co-ordinate bench while allowing the appeal of the assessee for assessment year 2004-05 in ITA No. 6304/Mum/2008, wherein it was held that ICICI Bank Ltd. does not fall in the definition of '*related party*' in terms of Section 40A(2)(b) of the Act. Thus, following the precedent, the contentions of the Assessing Officer are not again discussed here.

20. In light of our above discussion and the decision of our co-ordinate bench in assessee's own case for assessment years 2004-05 and 2005-06, we hereby set-aside the order of the CIT(A) and direct the Assessing Officer to delete the addition made on account of Client Assistance and Client Maintenance Charges.

21. The next issue pertains to disallowance of Rs. 25,29,860/- under Section 14A r.w.r. 8D of the Income Tax Rules, 1962 ("Rules"). The assessee in its return of income claimed that it has not incurred any expenditure pertaining to exempt income earned by it during the year and, therefore, it did not disallow any part of the expenditure under Section 14A r.w.r. 8D of the Rules. In the course of assessment proceedings, assessee was asked to show cause why no disallowance under Section 14A r.w.r. 8D of the Rules should be made. The assessee submitted that it has not incurred any expenditure pertaining to exempt income. Further, it was submitted that assessee had sufficient own funds to make the investments and no interest bearing funds were utilized for the purpose of investment and, therefore, no disallowance under Section 14A r.w.r. 8D of the Rules was warranted. The Assessing Officer without assigning any reason for rejecting the claim of the assessee proceeded to invoke Rule 8D of the Rules and disallowed Rs.22,68,864/- being proportionate interest expenditure and Rs. 2,60,996/- being 0.5% of the average value of investment. On appeal, CIT(A) upheld the action of Assessing Officer in making disallowance of Rs. 22,68,864/- and Rs.2,60,996/-. Aggrieved by the same, assessee is in appeal before us.

22. Before us, the Id. Representative for the assessee submitted that assessee was having own funds in the form of Share Capital and Reserves of Rs.38,38,14,093/- as against investment of Rs. 5,52,93,567/-. As such, it was having sufficient own funds and no disallowance of interest expenditure was warranted under Section 14A r.w.r.8D of the Rules. The Id. Representative for the assessee further relied on the decision of *Reliance utilities & Power Ltd.*

331 ITR 340 (Bom.) to state that when assessee has sufficient own funds to cover the investments, no disallowance of interest expenditure was warranted.

23. On the other hand, the Id. DR appearing for the Revenue has defended the stand of the lower authorities by reiterating the reasoning contained in the respective orders.

24. In this regard, we find that it is undisputed that as per Balance sheet of the assessee for the year ended 31.03.2006, Share Capital and Reserves stood at Rs.38,38,14,093/- as against investment of Rs. 5,52,93,567/-. Thus, admittedly, the own funds of assessee are higher than the investment made by the assessee. The Hon'ble Bombay High Court in the case of *Reliance utilities & Power Ltd. (Supra)* has held that if the own interest free funds of the assessee are higher than the amount of investment, then it should be presumed that the investment has been made out of the own funds and no disallowance of interest expenditure should be made. Respectfully following the decision of Jurisdictional High Court in the case of *Reliance utilities & Power Ltd. (Supra)*, we hereby set-aside the order of CIT(A) and direct the Assessing Officer to delete the addition made in this ground.

25. Further, we find that Rule 8D was inserted in the statute w.e.f. assessment year 2008-09 and the Hon'ble Supreme Court in the case of *CIT vs. Essar Techholdings Ltd. [2018] 90 taxmann.com 2 (SC)* held that Rule 8D is prospective in operation and cannot be applied to any assessment year prior to assessment year 2008-09. We, in the present case, are concerned with assessment year 2006-07, which is prior to assessment year 2008-09, the provisions of Section 8D of the Act are not applicable for the year under

consideration. Thus, we hold that invoking of Rule 8D of the Rules in the instant year is not permissible. Accordingly, the invoking of Rule 8D by the CIT(A) was thus without authority of law and addition made invoking the said provision is *void ab initio* and bad in law and accordingly, we delete the addition made by the CIT(A). Thus, on this aspect assessee succeeds.

26. The next Ground pertains to disallowance of Bad debts of Rs.13,90,390/- by the Assessing Officer holding that assessee failed to submit details of bad debts and justification for its write-off. On appeal, CIT(A) upheld the action of the Assessing Officer following his order for assessment year 2004-05 in assessee's own case. In this regard, the Id. Representative contended before us that there is no dispute that the bad debts have been actually written-off in the books of account of the assessee. It was further argued that as per Section 36(1)(vii) of the Act, the only condition for claiming deduction of bad debts is that the bad debts must be written-off in the books of account of the assessee; and, the assessee is neither required to give any justification for writing-off the bad debt and nor is he required to establish that the debt has actually become bad. In this regard, reliance has been placed on the decision of the Hon'ble Supreme Court in the case of *T.R.F. Limited vs. CIT, 323 ITR 397 (SC)*. It was further pointed out that in assessment year 2004-05, similar matter had travelled to the Tribunal, and the claim has been allowed.

27. On the other hand, the Id. DR has defended the stand of the Assessing Officer by reiterating that the justification for write-off has not been spelt out and no efforts have been shown to be made for recovery.

28. We have carefully considered the rival submissions and perused the material on record. We find that in assessment year 2004-05, on same issue, the Tribunal has allowed the appeal of the assessee. The relevant part of the said order is reproduced hereunder:-

“3.2..

We have heard the rival submissions and perused the material before us. We find that after 01.04.1989, the only requirement of writing off of bad debt is entries in the books of accounts by the assessee concerned. It has not to prove the justification of its action i.e. writing off, once it makes necessary entries in P & L account. The Hon’ble Apex Court in the matter of T.F.R. Ltd. (supra) had laid down the above basic principal and same is being followed by various Courts. Respectfully following the same we decide ground no. 2 in favour of the assessee.”

Following the above decision, we hereby allow the claim of bad debts of the assessee and delete the addition made by the Assessing Officer. Thus, on this Ground, assessee succeeds.

29. In the result, appeal of the assessee is allowed.

30. Now, we take up the appeal of the Revenue wherein the Grounds of appeal read as under:-

- “1. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the addition of Rs. 123,00,800/- u/s. 28(iv) on account of depreciation on BSE Membership Card.*
2. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.2,35,929/- made by Assessing Officer.*
3. (i) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.3,21,50,335/- made u/s.40(a)(ia) in respect of transactional charges paid to Stock Exchange, without appreciating the facts that these were composite charges for*

professional and technical services rendered by the stock exchange to its members and the assessee has failed to deduct TDS thereon.

ii. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in ignoring the fact that these services are essential in nature as they can only be availed by members of Stock Exchange.

iii. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in ignoring the facts that use of technology and algorithmic based programs have converted an erstwhile physical market into a digitally operated market.

iv. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the fact that the services rendered by the brokers are not standard services but services that has been developed to cater to the needs of the broker community to facilitate trading.

v. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has overlooked the fact that the brokers, have in subsequent years themselves started deducting the TDS on such payments and that there is no reason to give a different treatment in this year.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 65,660/- made in respect of mark to market losses of open interest in derivative transactions at the end of the year relying upon the Supreme Court of India in the case of CIT vs Woodward Governor India P. Ltd. 312 ITR 254 (SC).

5. On the facts and in the circumstances of the case, the impugned order of the Ld. CIT(A) is contrary to law to be set aside and that of the Assessing Officer be restored.”

31. The first Ground raised by the Revenue in its appeal pertains to deletion of addition of Depreciation of Rs. 1,23,00,800/- allowed in earlier years on BSE Card under Section 28(iv) of the Act. The facts in this regard are that the assessee received 10,000 shares of BSE Ltd. at Rs. 1 per share on demutualisation of BSE Ltd. during the year. The assessee had acquired

membership of BSE at a cost of Rs. 2.41 crores and was allowed depreciation of Rs. 1.23 crores till 31.03.2005. The Assessing Officer brought to tax the depreciation allowed to the assessee in earlier year as a benefit chargeable under Section 28(iv) of the Act on protective basis. On appeal, CIT(A) deleted the addition on the ground that the Assessing Officer's reasoning that the assessee would get a double benefit was not correct as the assessee had taken only Rs.1 per share as the cost when it sold 5,474 shares of BSE Ltd. in assessment year 2008-09. Aggrieved by the same, Revenue is in appeal before us.

32. Before us, the Id. DR relied on the order of Assessing Officer to contend that the allowance of Depreciation to the assessee will amount to double deduction in the hands of the assessee; firstly, by way of allowance of Depreciation; and, secondly, while computing Capital Gains at the time of sale of share. Thus, to protect the Revenue, protective addition in the hands of the assessee to the extent of Depreciation claimed by the assessee was justified.

33. Per contra, the Id. Representative for the assessee submitted that in the present assessment year no benefit can be said to have been derived by the assessee under Section 28(iv) of the Act as in this year consequent to corporatisation and demutualisation of BSE, the assessee was allotted shares in substitution of the BSE card. Secondly, the assessee did not claim proportionate higher cost of acquisition of BSE card when it sold the shares. It claimed Rs. 1 per share and offered higher Capital Gains, which showed that no double benefit has been taken by the assessee. It was further submitted that this issue is covered in favour of the assessee by the decision of our co-

ordinate bench in the case of *ACIT vs. Omniscient Securities P. Ltd.*, ITA No. 5538/Mum/2009 dated 16.03.2011.

34. We have carefully considered the rival submissions and perused the material on record. We find that in the present case the addition on account of depreciation allowed in the earlier years on BSE membership card has been made by treating it as a benefit flowing to the assessee in the current year on protective basis for the reason that assessee has been allotted shares of BSE Ltd. pursuant to it holding BSE membership card; and, the apprehension of the Assessing Officer is that the assessee may claim cost of BSE membership card as expenditure while computing the Capital Gains at the time of sale of shares of BSE Ltd. In our opinion, no addition can be made merely on an apprehension that the assessee may take a double benefit in future. Assessment of income has to be made on the basis of 'real income' theory and not on the basis of any perceived future contingent happening. Moreover, in the instant case, it has been factually explained by the assessee that at the time of sale of part shares of BSE Ltd. in assessment year 2008-09, assessee has claimed cost of shares at Rs.1 and has not derived any double benefit as apprehended by the Assessing Officer and thus, addition on protective basis is not warranted. In our view, the CIT(A) has rightly analysed the fact-position that assessee has not derived any double benefit and accordingly, deleted the addition made by the Assessing Officer. We thus uphold the order of the CIT(A), and accordingly Revenue fails on this Ground.

35. The next Ground pertains to excess claim of Deprecation of Rs.2,35,929/-. The relevant facts are that assessee had not claimed the Depreciation for assessment years 2000-01 and 2001-02, and thereafter in

subsequent year, claimed Depreciation on the brought forward original cost of the assets. The Assessing Officer computed notional depreciation for assessment years 2000-01 and 2001-02 and re-computed the revised WDV of the assets in this year and allowed Depreciation on the same and disallowed the excess Depreciation. At the time of hearing, both the parties agreed that this issue is covered in favour of the assessee by way of the order of the Tribunal in assessee's own case for assessment year 2005-06 vide ITA No. 7037/Mum/2008 dated 03.02.2015. Accordingly, the Ground raised by the Revenue is hereby dismissed with direction to the Assessing Officer to apply the order of the Tribunal dated 03.02.2015 (supra).

36. The next issue pertains to addition on account of non-deduction of TDS on transaction charges under Section 40(a)(ia) of the Act. The assessee paid transaction charges amounting to Rs. 3,21,50,353/- to the Stock Exchanges and did not deduct any TDS on the same. The Assessing Officer disallowed the expenditure under Section 40(a)(ia) of the Act relying upon his order for assessment year 2005-06. On appeal, CIT(A) deleted the addition made by the Assessing Officer relying on the decision of our co-ordinate bench in the case of *Kotak Securities Ltd 25 SOT 440* wherein it was held that the Stock Exchange did not provide managerial services to its members and the fees paid by the member were not for any technical services, hence tax was not deductible on the same. Aggrieved by the same, Revenue is in appeal before us.

37. The Id. DR before us relied upon the order of Assessing Officer to contend that since TDS was not deducted on payment made to Stock Exchanges the disallowance under Section 40(a)(ia) of the Act was rightly made by the Assessing Officer.

38. Per contra, the Id. Representative for the assessee submitted that the question whether disallowance could be made in subsequent years has been considered by the Tribunal in *ACIT vs. Twenty First Century Shares & Securities Ltd. [2014] 61 SOT 17 (Mum-Trib.)*. The assessment year involved therein was assessment year 2007-08. The Tribunal in that case referring to the decision in the case of *ACIT vs. DICGC* restored the matter to the file of Assessing Officer to ascertain whether the return of income for assessment year 2007-08 was filed before the completion of proceedings for assessment year 2006-07 (when the transaction charges were first disallowed) and whether the assessee was under a bonafide belief that it was not liable to deduct tax from transaction charges. The assessee in present case filed its return of income for assessment year 2006-07 on 30.11.2006 and the disallowance of transaction charges was first made in assessment year 2005-06 and assessment order for that year was passed after 30.11.2006. As such, assessee was under bonafide belief that tax was not deductible. It was thus argued that in light of the decision of our coordinate bench in the case of *Kotak Securities Ltd. (supra)* the disallowance has been rightly deleted by the CIT(A).

39. We have carefully considered the rival submissions. It is pertinent here to refer to the decision of the Hon'ble Supreme Court in the case of *CIT vs. Kotak Securities Ltd. [2016] 383 ITR 1 (SC)* wherein it was held that transaction charges are in the nature of payments made for facilities provided by the Stock Exchange and no TDS on such payments would, therefore, be deductible under Section 194J of the Act. Respectfully, following the decision of the Hon'ble Supreme Court in the case of *Kotak Securities Ltd. (Supra)*, we hereby uphold

the order of CIT(A). Accordingly, this Ground of appeal raised by the Revenue is dismissed.

40. The next issue pertains to addition on account of mark to market loss on outstanding derivative contract of Rs. 65,600/-. The assessee claimed loss of Rs. 65,600/- on marked to market valuation of derivative contracts outstanding as at the year end. The Assessing Officer disallowed this loss as notional loss. On appeal, CIT(A) allowed the loss relying on decision of the Hon'ble Supreme Court in the case of *CIT vs. Woodward Governor India P. Ltd.* 312 ITR 254. Aggrieved by the decision of CIT(A), the Revenue is in appeal before us.

41. Before us, the Id, DR relied on the order of Assessing Officer to contend that the loss claimed by the assessee is notional loss and, therefore, the same should not be allowed.

42. Per Contra, the Id. Representative for the assessee relied on the order of CIT(A) and submitted that the issue is covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of *Woodward Governor India P. Ltd. (supra)* and also decision of the Hon'ble Bombay High Court in the case of *CIT vs. HDFC Bank Ltd.* 368 ITR 377 (Bom).

43. We find that the above issue is fully covered in favour of the assessee by the decision of Hon'ble Supreme Court in the case of *Woodward Governor India P. Ltd. (supra)*. Accordingly, we do not find any infirmity in the order of the CIT(A) and thus we uphold the decision of CIT(A) on this issue.

44. Resultantly, appeal of the assessee is allowed and that of department is dismissed, as above.

Order pronounced in the open court on 26th July, 2019.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Mumbai, Date : 26th July, 2019

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "C" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai