IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No.1588/M/2012
Assessment Year: 2008-09

M/s. KJMC Capital Market Services Ltd., 168, 16th Floor, Atlanta Building, Nariman Point, Mumbai – 400 021 **PAN: AAACK2239E**	Vs.	Deputy Commissioner of Income Tax, Circle -4(3), Mumbai
(Appellant)		(Respondent)

ITA No.1701/M/2013
Assessment Year: 2009-10

ITO 4(3)(2), R.No.648, Aayakar Bhavan, Mumbai- 400 020	Vs.	M/s. KJMC Capital Market Services Ltd., 168, 16th Floor, Atlanta Building, Nariman Point, Mumbai – 400 021 **PAN: AAACK2239E**
(Appellant)		(Respondent)

CO No.77/M/2014
(Arising out of ITA No.1701/M/2013)
Assessment Year: 2009-10

M/s. KJMC Capital Market Services Ltd., 168, 16th Floor, Atlanta Building, Nariman Point, Mumbai – 400 021 **PAN: AAACK2239E**	Vs.	ITO 4(3)(2), R.No.648, Aayakar Bhavan, M.K. Marg, Mumbai- 400 020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Sunil Nahta, A.R.
Revenue by : Shri S. Michael Jerald, D.R.

Date of Hearing : 27.11.2019
Date of Pronouncement : 14.02.2019

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 30.12.2011 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The issue raised in ground No.1 is against the order of Ld. CIT(A) upholding the order of AO wherein the long term capital gain was computed on sale of BSE equity shares at Rs.2,89,84,795/- by taking the depreciated value of BSE card as on 31.03.2005 as cost of acquisition of BSE shares.

3. The facts in brief are that the assessee is a share broker and during the year has shown long term capital gain of Rs.1,79,77,183/- on sale of shares of BSE Ltd. The assessee sold 6386 of shares of BSE Ltd. for a consideration of Rs.3,32,07,200/- and after claiming the index cost of acquisition of Rs.1,52,30,017/- from the sales consideration ,the long term capital gain was computed at Rs. 1,79,77,183/-. The assessee was a holder of BSE membership card which was purchased in May 2000 for a value of Rs.2,50,90,000/- and thereafter the assessee claimed the depreciation on the said card from A.Y. 2001-02 to A.Y. 2005-06. In August 2005 the BSE underwent demonization and corporatization. Under the said scheme, the BSE card holders were allotted equity shares of Rs.1/- each. The assessee opted for the scheme and was accordingly allotted 10,000 shares of Rs.10,000/-. Out of the

said shares assessee sold 6,386/- shares back to BSE on 17.05.2007 and on the sale of these shares , assessee computed long term capital gain of Rs.1,79,77,183/-. While computing the long term capital gain the assessee took the cost of acquisition of shares at Rs.2,60,90,000/- which was calculated by adding together the original cost of acquisition of BSE membership card i.e. Rs.2,50,90,000/- + price paid for the cost of acquisition of 10,000 shares Rs.10,000/- with indexation from 2000-01. The AO had taken the cost of acquisition of 10,000 shares as on 31.03.2005 at WDV cost as on that date and accordingly calculated the WDV of 6386 shares at Rs.38,08,594/-. After indexing the same to inflation index of F.Y. 2017-18, the indexed cost of acquisition was calculated at Rs.42,22,405/- and the long term capital gain was computed at Rs.2,89,84,795/- as against Rs.1,79,77,183/- computed by the assessee.

4. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

> "2.13 In view of the above, I am of the considered opinion, that as the appellant has been allowed depreciation on the membership right of the BSE (AOP) from which such shares have emerged, such allowance of depreciation should be reduced from the cost of acquisition of the shares of BSE Ltd. while calculating the long term capital gains on sale of such shares as the shares of BSE Ltd. are long term capital asset .within the meaning of section 2(42A)(ha). On the same analogy that the assessee is not entitled to take the benefit of double: deduction, the benefit of indexation u/s, 48 should also be available only from the asst. year in which status of BSE changed from AOP to company i.e. from AY 06-07.
>
> 2.14 I find that the AO has rightly followed the above laid down principle and accordingly this ground of appeal is dismissed."

5. The Ld. Counsel of the assessee, at the outset submitted that the issue is squarely covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal (Third

Member) in ITA No.5938/M/2012 A.Y. 2008-09 dated 30.08.2019 wherein the identical issue has been decided in favour of the assessee. The ld. A.R., therefore, prayed that the appeal of the assessee may be allowed on this issue by following the said decision of the co-ordinate bench 3rd Member.

6. The Ld. D.R., on the other hand, fairly agreed that the decision of the co-ordinate bench of the Tribunal in ITA No.5938/M/2012 A.Y. 2008-09 has been given on the identical issue, however, strongly relied on the orders of authorities below.

7. After hearing both the parties and perusing the material on record and the decision in the case of Techno Shares & Stocks Ltd. in ITA No.5938/M/2012 A.Y. 2008-09 (supra), we observe that the identical issue has been decided by the co-ordinate bench 3rd Member wherein it has been held that the cost of acquisition of the shares of BSE shares shall be the original cost of acquisition to the members of card in terms of section 55(2)(ab) of the Act even though the assessee has claimed depreciation on the cost of membership card in the earlier year. The operative part of the decision is reproduced as under:

> "24. I have heard the rival submissions and considered the material on record. Ostensibly, the facts have been succinctly noted in the earlier paras, and there is no dispute on facts. The controversy before me is whether the cost of shares allotted to members of BSE pursuant to its corporatisation/ de-mutualisation should be computed as per Section 50 or 55(2)(ab) of the Act in a situation where the assessee had already claimed depreciation on the BSE membership card and whether the indexation benefit will be available to the assessee from the date of acquisition of BSE membership card or from the date of allotment of shares in BSE Ltd. To recapitulate, and as discussed in earlier part of the order, the assessee acquired BSE membership card for Rs. 94.50 Lakhs on which it claimed depreciation. Subsequently, pursuant to its corporatisation/ de-mutualisation, assessee was allotted shares in BSE Ltd and trading rights in BSE Ltd. From the date of allotment

of shares in BSE Ltd., assessee stopped claiming any depreciation on the shares allotted to it. Section 55(2)(ab) of the Act was inserted by the Finance Act 2001 with effect from 1-4-2002 to provide that the cost of equity shares allotted to a shareholder of the recognized stock exchange pursuant to the Scheme of Corporatization and Demutualization shall be the cost of acquisition of his original membership of the exchange. The proviso to Section 55(2)(ab) of the Act inserted by the Finance Act 2003 with effect from 1-4-2004 provides that the cost of trading or clearing right of the recognized stock exchange shall be deemed to be NIL. The relevant extract of Section 55(2)(ab) of the Act is reproduced hereunder:

> *"55(2) For the purposes of sections 48 and 49, "cost of acquisition"-*
> *….*
> *[(ab) in relation to a capital asset, being equity share or shares allotted to a shareholder of a recognised stock exchange in India under a scheme for [demutualisation or] corporatisation approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall be the cost of acquisition of his original membership of the exchange;]*
>
> (underlined for emphasis by me)

From above, it is amply clear that in terms of Section 55(2)(ab) of the Act, the cost of shares allotted to the assessee pursuant to the demutualisation and corporatisation has to be as per the original cost of acquisition of his original membership card of BSE. The section does not prescribe for any pre-condition to claim the cost of acquisition as the cost of shares allotted to the assessee. Thus, I find that language of Section 55(2)(ab) of the Act is unambiguous and clear.

25. Now, the grievance of the Assessing Officer is that since the assessee has claimed depreciation on the cost of membership card, the computation of Capital Gains on sale of shares of BSE Ltd. will be governed by Section 50 of the Act, which provides for calculation of Capital Gains on assets forming part of the block of assets and on which depreciation has been allowed under this Act. The relevant extract of Section 50 of the Act reads as under:

> *"[Special provision for computation of capital gains in case of depreciable assets.*
> *50. Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :"*
>
> (underlined for emphasis by me)

As is evident from a perusal of Section 50 of the Act, in order to get governed by the provisions of Section 50 of the Act, twin conditions need to be satisfied; namely, the capital asset must be an asset forming part of block of assets; and, depreciation must have been allowed on the said assets under the Act.

26. I shall now test whether the above twin conditions are fulfilled in the present case or not. Firstly, I shall make it clear that the asset which is being transferred and on which capital gains is being computed is the share of BSE Ltd. Neither the Assessing Officer nor the learned Accountant Member has given a finding that the shares of BSE Ltd. was ever forming part of block of assets of the assessee company. Thus, it is undisputed fact that the asset in question, i.e. share of BSE Ltd. never entered the block of assets of the assessee company. Once that is so, the question of depreciation having been allowed on the said shares, in the context of Section 50 of the Act, does not arise. Nevertheless, even Section 32 of the Act, which provides for claim of depreciation, does not have any category to allow depreciation on the shares. As such, even otherwise, the shares which are transferred by the assessee is not at all a depreciable asset and thus, the question of claiming depreciation on the same does not arise.

27. In the perception of the Assessing Officer as well as the learned Accountant Member, the above interpretation of the statute will lead to allowance of double deduction to the assessee, which is not permitted under law. In this regard, I find that when the language employed by the legislature is so clear and unambiguous, the same should be adhered to, even when the same results in double deduction in the hands of the assessee. In this regard, it would be pertinent to refer to the remark made by the Hon'ble Supreme Court in the case of *Yokogawa India Ltd. (supra),* which is reproduced hereunder:-

> *"The cardinal principles of interpretation of taxing statues centers around the opinion of Rowalatt, J. in Cape Brandy Syndicate v. Inland Revenue Commissioner [1921] 1 KB 64 which has virtually become the locus classicus. The above would dispense with the necessity of any further elaboration of the subject notwithstanding the numerous precedents available inasmuch as the evolution of all such principles are within the four corners of the following opinion of Rowlatt, J.*
>
> > *"……..in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*
>
> (underlined for emphasis by me)

The above analysis clearly reveals that while interpreting the taxing statute, nothing is to be assumed, nothing is to be implied. One has to only look at the language used in the statute. The interpretation which prevailed with the learned Accountant Member will require assumption to the fact that the legislature never intended the double deduction. However, on a plain reading of the section, there is no ambiguity, a facet, which even the learned Accountant Member agrees to. The interpretation accepted by the learned Accountant Member will require one to go beyond the language employed in the section, even when there is no ambiguity in the text of Section 55 of the Act. The above aspect also gets support when one is to consider the provisions of Section 50 and 55(2)(ab) of the Act, as the following

discussion would show. I further find that provisions of Section 50 of the Act are general in nature and does not provide for any case specific situation. The provisions of Section 55(2)(ab) of the Act were subsequently brought into statute book and specifically provides for cost of acquisition of the shares allotted to the members of the BSE pursuant to the Corporatization and Demutualization. Thus, Section 55(2)(ab) of the Act is a specific provisions dealing with the present situation. It is well-settled law that a specific provision shall prevail over the general provision. Therefore, I find that provisions of Section 55(2)(ab) of the Act, being specific in nature, shall prevail over Section 50 of the Act, which is general in nature. It is also pertinent to note that provisions of Section 50 of the Act are in the statute book from the date of enactment of the Act, whereas provisions of Section 55(2)(ab) of the Act were subsequently brought into the statute book. When the amendments are made in the statute or new law is brought in, it is to be understood that the legislature was well versed with the prevailing law and sections and the amendments brought in by the legislature are after considering the effect of the prevailing section or law. In other words, while inserting the provisions of Section 55(2)(ab) of the Act, Section 50 of the Act was already in existence and the legislature must have considered the impact of Section 50 of the Act and even after considering the impact of Section 50 of the Act, they deemed it appropriate to bring in provisions of Section 55(2)(ab) of the Act. A doubt may arise that the assessee was allowed depreciation on the membership card by the Hon'ble Supreme Court after a long drawn litigation and as such, the legislature at the time of insertion of Section 55(2)(ab) of the Act might not have envisaged the situation that the depreciation could be claimed by the assessee on cost of membership card. This doubt also gets repelled, once it is appreciated that the courts do not write the law, but only interpret the law in the correct perspective. Thus, the law remains the same and there is no change in the law consequent to a court judgment. So, the argument of the learned DR that first the assessee claimed the depreciation on the cost of membership card after long drawn litigation till Hon'ble Supreme Court and thereafter, claiming cost of the same at the time of sale of shares, has no substance. Thus, it will be wrong to say that the legislature must not have envisaged the present situation while amending Section 55 of the Act.

28. If for a moment, the argument of the learned DR is accepted that provisions of Section 50 of the Act and not Section 55(2)(ab) of the Act are applicable, then the moot question which arises is as to what was the purpose of insertion of Section 55(2)(ab) of the Act. It is a well settled principle of interpretation that all the sections dealing with the same subject should be given effect to in such a way that none of the sections are rendered infructuous. If I interpret the provisions of Section 50 and Section 55(2)(ab) of the Act the way the learned DR has canvassed, it will surely make the provisions of Section 55(2)(ab) of the Act redundant and infructuous, an approach which ought to be avoided, especially when the language of Section 55(2)(ab) of the Act is unambiguous and clear.

29. At this stage, it would also be important to refer the cases, which arose in a situation wherein the cost of purchase of fixed assets by the Charitable Trusts was allowed as application of income in the year of purchase and on the same cost of purchase, the Trusts were allowed depreciation in subsequent year, leading to

making of a charge of double deduction by the Assessing Officer. The matter travelled upto the Hon'ble Supreme Court in the case of *Rajasthan and Gujarati Charitable Foundation (supra)* and the Trust's claim of both application of income and depreciation was upheld by the Hon'ble Supreme Court, though it had imprints of a double deduction. It also pertinent to refer to the decision of the Hon'ble Bombay High Court in the case of *A.L.A. Chemicals (P.) Ltd. (supra)* wherein the facts were that the assessee-company claimed deduction under Section 35 of the Act in respect of capital expenditure incurred on scientific research and development in the preceding two assessment years, which was allowed. The Assessing Officer excluded the amount of aforesaid expenditure from the capital computation for the purposes of deduction under Section 80J of the Act. On appeal, the AAC, however, allowed this amount to be included in the capital computation for the purpose of Section 80J of the Act. The Tribunal confirmed this decision. On Revenue's appeal to Hon'ble High Court, the High Court discussed the applicability of the decision of the Hon'ble Supreme Court in the case of *Escorts Ltd. (supra).* The relevant part of the said discussion is reproduced hereunder:-

> *"**11.** In our view, however, the observations of the Supreme Court in the case of Escorts Ltd. (supra) will not have any application to the benefit granted to an assessee under section 80J. The Supreme Court in the case of Escorts Ltd. (supra) was concerned with interpreting the provisions of section 32 and section 35. Both these provisions form a part of Chapter IV, which deals with the computation of business income. While arriving at the total income of an assessee, certain deductions are allowed as set out in the said Chapter itself. Section 29 of the Act which forms part of Chapter IV states that:*
>
> > *"Income from profits and gains of business or profession, how computed.— The income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43C."*
>
> *These sections include, inter alia, deduction of depreciation under section 32 and deduction regarding expenditure on scientific research in the manner set out in section 34. Therefore, the deductions which the Supreme Court was concerned with, were the deductions which were within the scheme of Chapter IV, to be taken into account while computing the income under section 28 of the Act. Section 80J. on the other hand, forms part of Chapter VIA which provides for certain additional deductions which are to be made from the gross total income of the assessee as computed under Chapter IV. Thus, for example, section 80A provides :*
>
> *"In computing total income of an assessee, there shall be allowed from his gross total income, the deductions specified in sections 80C to 80U."*
>
> *These are additional deductions. They are quite different in kind from deductions which fall under Chapter IV. Under section 80J what is*

provided is an additional deduction which is calculated as a percentage of the capital employed by the assessee in certain undertakings as set out in section 80J. Section 80J(1A)(II) prescribes the manner of ascertaining the value of such capital assets. The assets which are to be taken into account for computation of capital are also specified in that section. These include under sub-clause (i) of section 80J(1A)(II) assets entitled to depreciation. In that case their written down value has to be taken into account. It also includes assets which are acquired by purchase and which are not entitled to depreciation, such as, assets in the present case. In the case of such assets, we have to take into account the actual cost of such assets to the assessee. Since the assets are acquired by the assessee by purchase, the actual cost would certainly include at least the price of those assets to the assessee, though it may also include something more as we have pointed out earlier. This section also includes in addition assets which may be acquired by an assessee otherwise than by purchase which are not entitled to depreciation. These may be assets which may be gifted to the assessee. Their actual cost to the assessee is nil. Yet, their value is also required to be taken into account under clause (iii) of section 80J(1A)(II). In their case, the value of the assets when they become assets of the business, has to be taken into account. Therefore, the question whether the assessee has expended any amount for the acquisition of those assets or whether he has been reimbursed in respect of such expenditure indirectly by reason of any tax benefit which he may have got or whether the assets are gifted to the assessee, is not strictly relevant for the purpose of section 80J except to the extent so specified. What we have to ascertain is whether assets are such as are includible in the computation of capital. If so, their value is to be ascertained as set out in section 80J(1A)(II).

12. *In such a situation there is no question of any double deduction of the nature contemplated by the Supreme Court in Escorts Ltd.'s case (supra). In fact, the Supreme Court has made this clear (page 874) when it says that the two deductions, i.e., deductions under sections 32 and 35 are, 'basically of the same nature intended to enable the assessee to write off certain items of capital expenditure against his business profits'. A deduction under section 80J is not of the same nature as a deduction under section 35. Therefore, in our view, the ratio of the Supreme Court judgment in Escorts Ltd. 's case (supra)will not apply to the computation of capital under section 80J for the purpose of determining the quantum of deduction under section 80J.”*

(underlined for emphasis by me)

The above analysis of the Hon'ble High Court clearly answers the question that even if for the time being it is assumed that there is a double deduction, the nature of deduction claimed, i.e. as cost of shares under the head ‘Capital Gains’ and nature of deduction claimed earlier, i.e. depreciation on cost of membership card under the head ‘Income from Business and Profession’ is quite different and cannot be

said to be of the same nature and thus, the ratio of the Hon'ble Supreme Court in the case of *Escorts Ltd. (supra)* cannot be said to be militating against the position canvassed by the assessee.

30. I may also refer to the reasoning taken by the Hon'ble Madras High Court in the case of *Kali Aerated Water Works vs. CIT, 242 ITR 79 (Mad),* in the context of Section 50 of the Act, which was to the effect that Section 50 will apply only to cases where the depreciation had been obtained by "*the assessee*". The assessee before the Hon'ble Madras High Court was the new partnership firm formed after dissolution of the old firm. The case of the Revenue was that the WDV as on the date of dissolution of the firm was to be adopted for the purposes of calculation of Capital Gain, which was resisted by the assessee therein. The claim of the Revenue, based on Section 50 of the Act, was negatived by the Hon'ble High Court on the ground that the assessee-firm had not obtained depreciation after the asset became property of the newly constituted firm, which was the assessee therein. Applying the same analogy, it is quite pertinent to find herein that the asset, which is the subject-matter of consideration, has not suffered depreciation and therefore Section 50 of the Act cannot be applied. The claim of depreciation on the old asset is of no relevance to address the present controversy. In fact, at this stage, I may refer to the observation of the learned Accountant Member at para 7.6 of his order. As per the learned Accountant Member, adoption of Section 55(2)(ab) of the Act in the present case "would lead to allowing claim of double deduction on the same asset". In my considered opinion, the misconception about the "*same asset*" leads to an anomalous interpretation. As my discussion in the earlier part of this order show, the subject matter of consideration, i.e. share of BSE Ltd., has not been subject to allowance of any depreciation. Thus, in my view, the view canvassed by the learned Judicial Member is apt under the facts and circumstances of the case.

31. As regards the reliance of the learned DR on the decision of the Hon'ble Supreme Court in the case of *J. K. Synthetic Ltd. (supra)*, I find that the decision rendered relied on by the learned Representative for the assessee in the case of *Rajasthan and Gujarati Charitable Foundation (supra)* was rendered subsequent to the decision of the Hon'ble Supreme Court in the case of *J. K. Synthetic Ltd.* upholding the double deduction to the charitable trusts. Further, we find that the Hon'ble Supreme Court in the case of *J. K. Synthetic Ltd.* has not laid down a law that double deduction is not permissible. It only stated that the same should be expressly provided for under the Act. In the present case, admittedly Section 32 of the Act provides for allowance of depreciation of cost of membership card. Further, Section 55(2)(ab) of the Act provides that cost of shares of BSE Ltd. shall be the cost of acquisition of membership card. Section 55(2)(ab) of the Act does not prescribe any reservation or exception for cases wherein assessee has already claimed depreciation on the cost of membership card. This implies that the legislature in its wisdom has considered the scenario of double deduction while bringing in such amendment. In such cases, it cannot be inferred that the benefit granted to the assessee was unintentional and shall not be allowed to the assessee. When the language of the section is so clear and no conditions are attached with the allowance available to the assessee, while interpreting the section this bench cannot suo-moto put certain conditions to take away the benefit granted by the

statute even when the same may lead to double deduction. Such an act on our part will be without jurisdiction, and without authority of law.

32. As regards the reference made by the learned Accountant Member and learned DR on the decision of our co-ordinate in case of *Twin Earth Securities (P.) Ltd. vs. ACIT 66 taxmann.com 258*, I find that in that case none appeared on behalf of the assessee therein and as such, arguments of the losing party were not articulated before the bench. In this regard, it is pertinent to refer to the reliance placed by the learned Representative for the assessee on the book of P. J. Fitzgerald, M.A. named "*Salmond on Jurisprudence*" to argue that when the matter is not argued or is not fully argued, the same cannot be taken as valid precedent as in that case, the court did not have the occasion to consider the arguments of the losing party. The relevant extract from the said book is reproduced hereunder:

> *"We now turn to the wider question whether a precedent is deprived of its authoritative force by the fact that it was not argued or not fully argued, by the losing party. If one looks at this question merely with the eye of common sense, the answer to it is clear. One of the chief reasons for the doctrine of precedents that a matter has once been fully argued and decided should not be allowed to be reopened. Where a judgment is given without the losing party having been represented there is no assurance that all the relevant consideration have been brought to the notice of the court, and consequently the decision ought not to be regarded as possessing absolute authority, even if it does not fall within the sub silentio rule."*
>
> (underlined for emphasis by me)

Due to the above reason, I am not inclined to follow the ratio laid down in the said decision. Further, I find that in the concluding para of the said decision, the Bench has partially applied Section 55(2)(ab) of the Act and held that cost of trading rights will be NIL as per Section 55(2)(ab) of the Act, whereas for cost of shares, it applied Section 50 of the Act. I find that such a partial application of Section 55(2)(ab) of the Act is not correct application of Section 55(2)(ab) of the Act and, as such, the same is not a good precedent.

33. As regards the reliance placed by the learned DR on the decision of *M/s Pavak Securities Pvt. Ltd. vs. ITO in ITA No. 1803/Mum/2012*, the same is distinguishable on facts as in that case, assessee had not argued and claimed that it was eligible to claim entire cost of acquisition of membership card while computing Long Term Capital Gains. Rather, assessee itself chose to claim only the WDV as the cost of acquisition of membership card. Such an action on the part of the assessee in that case cannot be said to be a valid binding precedent and thus, the same cannot help the cause of Revenue in the present case.

34. In light of the above discussion, I hereby hold that the cost of acquisition of shares of BSE Ltd. shall be the original cost of acquisition of membership card in terms of Section 55(2)(ab) of the Act even though assessee has claimed depreciation on the cost of membership card in the earlier years.

35. As regards the period of holding of shares of BSE Ltd., I find that as per clause (ha) inserted in Explanation 1 to Section 2(42A) of the Act by the Finance Act, 2003, period for which the person was a member of the recognised stock exchange in India immediately prior to such demutualisation or corporatisation shall also be included in period of holding of shares. In terms of the clear and unambiguous language of the section, I hold that the period of holding of shares of BSE Ltd. shall be reckoned from the date of original membership of BSE and not from date of allotment of shares in BSE Ltd.

36. I thus agree with the view taken by the learned Judicial Member that the cost of shares will be original cost of the membership card in terms of Section 55(2)(ab) of the Act.

37. In view of the foregoing discussion, the questions put forth before me are answered in the positive and in favour of the assessee. The decision arrived at by learned Judicial Member is the appropriate view, and I concur with the view adopted by the learned Judicial Member on this issue.

38. The Registry of the Tribunal is directed to list this appeal before the Division Bench for passing an order in accordance with the majority view.

8. Since the facts involved in the present case are identical to ones as decided by the co-ordinate bench of the Tribunal (supra), we are therefore respectfully following the ratio laid down in the said decision, set aside the order of Ld. CIT(A) and allow the ground raised by the assessee. The AO is directed accordingly.

9. The issue raised in 2nd ground of appeal is against the order of Ld. CIT(A) confirming the disallowance made by the AO of loss of Rs.16,24,254/- as claimed by the assessee being loss on mark to market basis in respect of trading in derivatives.

10. The facts in brief are that the AO during the course of assessment proceedings observed that assessee has claimed loss of Rs.42,50,188/- in the P&L account out of which Rs.16,24,254/- was booked on account of market value of

unsettled derivative transactions. Accordingly, the AO called upon the assessee to state as to why such loss should not be disallowed and added back to its income which was replied by the assessee vide written submission dated 16.11.2010. The assessee submitted before the AO that during assessment year 2008-09 a total loss of Rs.53,19,665/- was incurred on trading in derivative instrument which includes loss of Rs.16,24,254/- being loss computed by applying mark to market basis in relation to derivative contracts outstanding on 31.03.2010. It was submitted by the assessee that mark to market losses referred to losses computed on a particular date with reference to prevailing market rate in respect of contracts that have not matured and is existing on that date. The assessee submitted that accounting standard 30 issued by CAI, the assessee is required to account for the mark to market loss in its books of accounts in respect of those contracts which are yet to be matured at the balance sheet and accordingly this loss was computed and therefore allowable as business loss. The assessee submitted that it is following mercantile system of accounting and recognizing loss in respect of derivative contracts as per the prevailing rate of exchange on March 31st. In defence of his argument, the assessee relied on a series of decisions namely CIT v. Woodward Governor India (P.) Ltd. (2009) 312 ITR 254 (SC) and DCIT vs. Bank of Bahrain & Kuwait ITA No.4404 & 1883/M/2004 Special Bench. However, the contentions of the assessee did not find favour with the AO and the AO came to the conclusion that said loss represented unascertained liability which may or may not crystallize at the time of settlement of contracts and accordingly the said notional

loss was not allowed and added back to the income of the assessee.

11. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing that assessee is not recognizing the profits on such derivative contracts whereas the losses were being recognized and thus the Hon'ble Supreme Court's decision in the case of CIT vs. Woodward Governor India (P.) Ltd. (supra) is not applicable.

12. After hearing both the parties and perusing the material on record, we observe that in this case the assessee has treated the derivatives as stocks during the year as the assessee is a share broker in BSE. The assessee has computed mark to market loss at Rs.16,24,254/- as on 31.03.2008 with reference to the prevailing rate of foreign exchange in respect of those contracts which were not settled at the end of the year and thus recognized the said loss according to the accounting standard-30 issued by ICAI. The AO has disallowed the said loss as contingent and being unascertained as the settlement of the derivative contracts have not taken place. However, it is undisputed that assessee is dealing in derivatives which has to be valued on prevailing foreign exchange rate at the year end in view of the mercantile system being followed by the assessee. In our opinion the said loss is allowable as the issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India (P.) Ltd. (supra) and also in the case of Edelweiss Capital 8 taxmann.com 187 and Motilal Oswal Securities Ltd. vs. DCIT ITA No.7328/M/2011.

Taking the facts of the case in entirety and also following the ratio laid down in the above decisions, we are inclined to allow the appeal of the assessee by setting aside the order of Ld. CIT(A). The ground is allowed.

13. The issue raised in ground No.3 is against the confirmation of disallowance of Rs.1,80,369/- by Ld. CIT(A) as made by the AO under rule 14A read with rule 8D.

14. The facts in brief are that the AO in the assessment proceedings observed that the assessee has earned dividend income of Rs.6,84,354/- which was claimed as exempt. However, the assessee suo-moto disallowed a sum of Rs.5000/- as expenses relating to earning of exempt income. The AO simply applied the provisions of section 14A rule 8D and completed the disallowance at Rs.1,89,369/- without giving any reason or recording any satisfaction as to how the suo-moto disallowance made by the assessee is wrong having regard to the books of accounts maintained by the assessee.

15. In the appellate proceedings, the Ld. CIT(A) confirmed the addition made by the AO by holding that AO has correctly invoked the provisions of section 14A read with rule 8D with respect to expenses incurred in relation to exempt income. Ld. CIT(A) noted that the assessee has not maintained the separate books of accounts incurred for earning of exempt income and thus held that the application of provisions of section 14A read with rule 8D is mandatory w.e.f. assessment year 2007-08.

16. After hearing both the parties and perusing the material on record, we observe that in this case the AO has simply applied

the provisions of section 14A read with rule 8D and computed the disallowance at Rs.1,80,369/- without recording any satisfaction as to how the suo-moto disallowance made by the assessee is incorrect. Under these circumstances, we are of the view that a mechanical application of section 14A read with rule 8D is not correct and against the provisions of the Act. The case of the assessee is squarely covered by the decision of the Hon'ble Supreme Court in the case of Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT [(2017) 394 ITR 449 (SC)] wherein the Hon'ble Supreme Court has held that AO must record his satisfaction as to how the assessee's calculation is incorrect having regard to the books maintained by the assessee. The Hon'ble Apex Court has held that in absence of any satisfaction by the AO, the provisions of section 14A read with rule 8D can not be invoked. We, therefore, respectfully following the same set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

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

ITA No.1701/M/2013 (Revenue's appeal)

18. The only issue raised by the Revenue is against the order of Ld. CIT(A) computing the long term capital gain on sale of BSE equity shares by taking the depreciative value of BSE card as on 31.03.2005 as cost of acquisition of BSE equity shares and adopting indexation from F.Y. 2005-06.

19. We have already decided identical issue in ITA No.1588/M/2012 in assessee's appeal wherein we have decided the issues in favour of the assessee. Consequently the Revenue's appeal becomes infructuous and is dismissed.

CO No.77/M/2014

20. The only issue raised in CO is against the confirmation of disallowance of Rs.95,867/- by Ld. CIT(A) as made by the AO under section 14A read with rule 8D. In the assessment proceedings, the AO noted that the assessee has earned exempt income of Rs.2,46,345/- and made a suo-moto disallowance of Rs.5000/- under section 14A. Accordingly, asked the assessee to furnish the working of the disallowance as per rule 8D. Accordingly, the assessee furnished the calculation how the disallowance of Rs.5000 was arrived at. The AO without pointing any mistake or any fallacy or recording any satisfaction applied the provisions of section 14A read with rule 8D and thus computed the disallowance at Rs.95,867/- which was also upheld by the Ld. CIT(A).

21. Now the assessee has challenged the said disallowance on the basis that AO has not recorded any satisfaction before invoking the provisions of section 14A read with rule 8D as to how the disallowance computed by the assessee is wrong having regard to the books of accounts maintained by the assessee. While the Ld. D.R. relied heavily on the orders of authorities below so far as the disallowance under section 14A read with rule 8D is concerned.

22. The identical issue has been decided by is in ITA No.1588/M/2012 for A.Y. 2008-09 in favour of the assessee by holding that the AO has not recorded any satisfaction before invoking the provisions of section 14A read with rule 8D and therefore no disallowance can be made. Our decision in ground

No.3 in ITA No.1588/M/2012 would ,mutatis mutandis, apply to this CO also. Accordingly, cross objection is allowed and AO is directed to delete the addition.

23. In the result, appeal and cross objections of the assessee are allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 14.2.2019.

Sd/-	**Sd/-**
(Amarjit Singh)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 14.2.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.