

**आयकर अपील अाधिकरण, अहमदाबाद ढायापीठ**  
**IN THE INCOME TAX APPELLATE TRIBUNAL,**  
**"SMC" BENCH, AHMEDABAD**  
**(CONDUCTED THROUGH VIRTUAL COURT)**

**BEFORE, SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**And**

**Ms. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 738/AHD/2018

अाधारण वर्ष/Asstt. Year: 2007-2008

M/s.Neptune Securities Pvt. Ltd., 104, Shyamak Complex, B/h Kamdhenu Complex, Panjra Pole, Ambawadi, Ahmedbad.  <b>PAN: AAACN6965E</b>	Vs.	I.T.O., Ward-1(3)(4), Ahmedabad.
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<b>(Applicant)</b>		<b>(Respondent)</b>
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Assessee by :	Shri Tushar Hemani, with Shri P.B. Parmar, A.Rs
Revenue by :	Shri Deelip Kumar, Sr. D.R

सुनवाई का तारख / **Date of Hearing** : **14/07/2020**

घोषणा का तारख / **Date of Pronouncement**: **30/07/2020**

**आदेश / O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeal has been filed at the instance of the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-10, Ahmedabad [Ld. CIT(A) in short], dated 22/01/2018 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 29/02/2016 relevant to Assessment Year (A.Y) 2007-08.

2. The assessee has raised the following grounds of appeal:

1. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the action of AO of disallowing depreciation of Rs. 4,64,087/- on membership card of Ahmedabad Stock Exchange.*
2. *The learned CIT(A) has erred both in law and on the facts of the case in not appreciating that once the membership card entered the block of assets, it lost its individual identity and was eligible for depreciation as part of the block.*
3. *The learned CIT(A) has erred both in law and on the facts of the case in confirming the disallowance on the basis of erroneous facts that AO 'made disallowance after comparison of rules of ASE and BSE as directed by ITAT.*
4. *Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.*
5. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id.AO in levying interest u/s.234 A/B/C of the Act.*
6. *The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id.AO in initiating penalty u/s.271(10(c) of the Act.*

*The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.*

3. The solitary issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by sustaining the addition for the amount of Rs. 4,64,087/- on account of depreciation on the intangible assets.

3.1 The facts in brief are that the assessee in the present case is a private limited company and engaged in the business of trading of share & securities and stock broking. The assessee in the year under consideration has claimed depreciation on the membership card obtained from the Ahmedabad stock exchange amounting to Rs. 4,64,087/- only. However, the AO was of the view that the membership card of the Ahmedabad stock exchange does not represent any intangible assets. Therefore he disallowed the depreciation claimed by the assessee for Rs. 4,64,087/- and added to the total income of the assessee vide original assessment order dated 18<sup>th</sup> December 2009. The assessee carried the matter to the learned CIT (A) who confirmed the order of the AO vide order dated 24<sup>th</sup> November 2010. Subsequently, the assessee preferred an appeal to the ITAT vide ITA No- 31/Ahd/2011 which set

aside the finding of the learned CIT (A) and restore the matter to the file of the AO for fresh adjudication as per the provisions of law by observing as under:

*Since the judgment of the Hon'ble Apex Court rendered in the case of Techno Shares & Stocks Ltd. (327 ITR 323) is applicable with regard to rules and by-laws of Bombay Stock Exchange governing membership card. It is not clear whether the rules of Bombay Stock Exchange and that of the Ahmedabad Stock Exchange are similar, therefore under these facts, the issue is restored back to the file of AO to make verification with regard to the rules of Bombay stock Exchange and Ahmedabad Stock Exchange and after making comparison of rules, if it is found that the Bombay Stock Exchange membership and the Ahmedabad Stock Exchange card are pari material are same, then the AO would allow the claim of the assessee*

4. However, the AO in the consequential order has again confirmed the disallowance of the depreciation by observing that the judgement of the Hon'ble Supreme Court in the case of Techno shares and stock Ltd reported in 327 ITR 323 relates to the assessment year 1999-2000 to 2002-03 whereas the issue in the case on hand pertains to the assessment year 2007-08. Accordingly the AO was of the view that the principles laid down by the Hon'ble Supreme Court in the case cited above are not applicable. Thus he disallowed the amount of depreciation of Rs. 4,64,087/- and added to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who confirmed the order of the AO.

6. The learned AR before us submitted as under:

a. The learned AR submitted that controversy on hand revolves around disallowance of depreciation on "*stock exchange membership card*" forming part of "*block of assets*" of Plant and Machinery.

b. This is the *second round of litigation*. Relevant facts w.r.t the first round of litigation are as follows:

- i. AO framed assessment vide order dated 18.12.09 wherein various disallowances were made including disallowance of Rs.4,64,087/-being depreciation on "stock exchange membership card";

- ii. CIT(A), vide order dated 24.11.10, deleted certain disallowances but confirmed the disallowance of Rs.4,64,087/- in respect of depreciation on "stock exchange membership card";
- iii. Hon'ble ITAT, vide order dated 19.03.14 passed in ITA 3 I/Ahd/2011, considered the ratio laid down in "Techno Shares & Stocks Ltd. - 327 ITR 323 (SC)" and thereafter, net-aside the issue pertaining to depreciation on "stock exchange membership card" to the file of AO with a direction *to make verification with regard to rules of Bombay Stock Exchange and Ahmedabad Stock Exchange and after making comparison of rules, if it is found that the Bombay Stock Exchange and Ahmedabad Stock Exchange Card are part materia same, then the AO would allow the claim of assessee* (ITAT's order - Annex. "A");

c. The learned AR further submitted that in the *set-aside proceedings*, AO again disallowed the claim of depreciation on "stock exchange membership card" and such disallowance came to be confirmed by CIT(A) as well. Hence, the present appeal.

### **6.1 The AO in the set-aside proceedings, cannot travel beyond the scope of directions given by Hon'ble ITAT while setting aside the matter**

a. Hon'ble ITAT considered the ratio laid down by Hon'ble Apex Court in "**Techno Shares & Stocks Ltd. - 327 ITR 323 (SC)**"; Thereafter, the issue on hand was set-aside to the file of the AO along with following directions (**Pgs.3-4, Para 4 of Hon'ble ITAT's order**):

- i. To compare rules and bye-laws of BSE and ASE; and
- ii. If it is found that BSE and ASE membership cards are pan materia, then depreciation must be granted;

b. Thus, the scope of inquiry before AO in the set-aside proceedings was strictly restricted to "comparison of rules and bye-laws of BSE and ASE membership cards" and if the same are found to be pari materia, then depreciation was to be granted without pondering over other issues.

c. The above finding reveals that Hon'ble ITAT was, otherwise, convinced with the claim of deprecation on stock exchange membership card in view of decision in the case of "Techno Shares and Slock Ltd. - 327ITR 323 (SC)". However, since the said decision was rendered in context of membership card issued by "Bombay Stock Exchange ", Hon'ble the ITAT set-aside the issue to AO to compare the rules and bye-laws of BSE and ASE.

d. However, AO again disallowed depreciation in question on the count that "Assessment Years involved in decision of Hon 'ble Apex Court in the case of Techno Shares and Stock Ltd. (327 ITR 323) were 1999-00 to 2002-03 whereas in the case of the assessee, year in question was Asst. Year 2007-08 and hence, disallowance of depreciation was correctly made while passing order ti/s 143(3) of the Act" (**Para 7, Pgs.5-6 of Asst. Order**).

e. Thus, AO has clearly travelled beyond the scope of directions given by Hon'ble the ITAT while setting aside the matter to AO. Such an act is not permissible. Reliance is placed on "**DCIT vs. Surat Electricity Co. Ltd. - 337 ITR 271 (Guj)**".

f. At this stage, it is clarified that CIT(A) has given & *factually incorrect finding* that AO disallowed depreciation on the count that assessee had not given comparison of rules of ASE and BSE (**Pg.5, Para 3.4 of CIT(A)'s order**).

g. *Firstly*, it is submitted that AO has not at all referred to comparison of rules of ASE and BSE. *Secondly*, the assessee, vide letter dated 15.02.16, had given all the details including rules, bye-laws and regulations of ASE presenting comparison of by-laws between ASE and BSE (**Pgs.3-4, Para 5 of CIT(A)'s order**).

h. It may further be appreciated that AO has not at all brought anything on record so as to demonstrate that there is rules and bye-laws of BSE and ASE and not same. This implies that even as per AO, such rules and bye-laws are same and hence, he chose not to comment on the same. Under such circumstances, question of disallowance does not arise at all.

i. CIT(A) has also observed that decision of Hon'ble Apex Court in the case of "Techno Shares" (*supra*) will not be applicable since the same was for AY 1999-2000 to 2002-03 when corporatization and demutualization of BSE had not taken place. After corporatization and demutualization, stock exchange membership card is no more in existence and the cardholders have been issued 10,000 shares of BSE, cost of which shall be NIL as per proviso to S.55(2)(ab) of the Act (**Pg.6, Para 3.5 of CIT(A)'s order**). The aforesaid observation is also not tenable in the eye of law in view of the fact that the

"membership card" in question had already entered the concerned **"block of assets"**. The said contention is elaborately discussed here-in-after.

**6.3 Once an asset enters the "block of assets", it loses its "individual identity" and hence, claim of depreciation cannot be denied:**

a. In any case, the "membership card" in question was forming part of the **"block of assets"** of "Plant and Machinery". Accordingly, assessee claimed depreciation @ 25% in the said block **(Pg.2. Para 3.2 of Asst. Order)**.

b. Once an asset enters the **"block of assets "**, it loses its **"individual identity"**

c. Even if something happens to the "individual asset" subsequent to such asset entering the "block of asset", assessee would still be eligible for the claim of depreciation on the concerned "block of assets". Reliance is placed on:

- i. Navkar Share and Stock Broker Pvt Ltd. vs. ACIT - ITA 1823/Ahd/2011 (Annexure "B");
- ii. Deepak Nitrite Ltd. vs. DCIT - Tax Appeal No. 429 of 2007 (Guj) (Annexure "C");

In view of the above, no case is made out for disallowance of depreciation in question. Hence, the impugned disallowance deserves to be deleted.

**6.4 In any case, claim of depreciation on the "Ahmedabad Stock Exchange Membership Card" is allowable**

a. In any case, claim of depreciation on the "Ahmedabad Stock Exchange Membership card" is allowable in view of the consistent view being taken by the Ahmedabad Bench of ITAT in following bases wherein ratio laid down in **"M/s. Tec ft no Shares & Stocks Ltd. vs. CIT~ 327 ITR 323 (SC)"**:

- i. ACIT vs. ASE Capital Markets Ltd. - ITA 373/Ahd/2011 and others (Annexure "D");
- ii. ACIT vs. Anagram Capital Ltd. - ITA 1531/Ahd/2011(Annexure "E");

Hence, even on that score, the impugned disallowance deserves to be deleted in the larger interest of justice.

7. On the other hand the learned DR vehemently supported the order of the authorities below.

8. We have heard the rival contentions of both the parties and perused the materials available on record before us. It is the 2<sup>nd</sup> round of litigation before us. The ITAT in the 1<sup>st</sup> round of litigation in ITA number 31/Ahd/2011 vide order dated 19<sup>th</sup> March 2014 set aside the proceedings to the file of the AO with the direction which has been reproduced in the preceding paragraph.

8.1 On perusal of the direction of the ITAT in the 1<sup>st</sup> round of litigation, we note that the AO was under the obligation to carry out a comparison between the rules of Bombay stock exchange and Ahmedabad stock exchange in relation to the membership card and if he finds the rules of both the stock exchanges are pari materia, then he will allow the claim of the depreciation to the assessee. However, the AO in the set aside proceedings did not make such comparison but confirmed the disallowance of the depreciation claimed by the assessee. However the learned CIT (A) has made the comparison in his order and pointed out one difference in the rules of Bombay stock exchange and Ahmedabad stock exchange i.e. rule 11 of Bombay stock exchange provides that a member of not less than 3 years standing may nominate any person for admission in its place whereas rule 11 of Ahmedabad stock exchange provides a member of not less than 7 years may nominate a person in his place.

8.2 However, the learned CIT (A) has also observed in his order that the complete comparison between the rules of the stock exchanges as discussed above were not made. But such finding of the learned CIT (A) appears to be contrary for the reason that the learned CIT (A) has also recorded in his order that:

*It is apparent that appellant had submitted the comparison of rules of ASE hand BSE before the AO.*

8.3 As such if the learned CIT (A) was of the view that the complete comparison has not been made by the assessee then it was his duty to make such comparison in full but he failed to do so despite the necessary details of the rules of the both the stock exchanges were available before him. In fact the Id. CIT-A has not brought any difference between the rules of the ASE and BSE as directed by the ITAT in its order dated 19<sup>th</sup> March 2014 except one as discussed above. Furthermore, the difference, as pointed out by the learned CIT (A) in the rule 11 of the BSE and ASE, was not having any significant bearing on the issue on hand i.e. depreciation on the membership of the stock exchange. Therefore, we find that the authorities below has not pointed out any significant difference in the rule of the Bombay stock exchange viz a viz Ahmedabad stock exchange. As such we note that both the stock exchanges are allowing the right to nominate the persons but upon the completion of different number of years.

8.4 It is also important to note that it was the 2<sup>nd</sup> round of litigation before the authorities below and the scope of dispute was limited to the direction provided by the ITAT in the order dated 19<sup>th</sup> March 2014. Such direction has already been reproduced somewhere in the preceding paragraph. But we note that the authorities below, instead of following the direction of the ITAT, have decided the issue against the assessee after considering other material facts which were not in dispute or required to be considered in the present facts and circumstances being the set-aside proceedings. Thus, the controversy in the present facts of the case whether the authorities below can extend the scope of dispute beyond the direction provided by the ITAT stands negative in view of the judgement of Hon'ble Gujarat High Court in the case of Saheli Synthetics Pvt. Ltd Vs. CIT reported in 302 ITR126 wherein it was held as under:

*"Similarly even where an assessment is set aside simpliciter, without any enhancement proposal, it is always in the context of the appeal against an order of assessment and cannot be read to mean that the appellate authority granted powers to the Assessing Officer in relation to items of assessment which were never forming part of the appeal before the appellate authority. At the cost of repetition it is required to be noted that processing a new source of income which was on the record before the Assessing Officer but is not forming part of subject-matter of appeal before the appellate authority can be undertaken by the appellate authority only in the course of enhancement of the assessment and, therefore,*

*any set aside, which does not involve a proposal for enhancement, cannot be used for the purpose of expanding the scope of the powers available to the Assessing Officer while making a fresh assessment pursuant to a set aside."*

8.5 We also find support and guidance from the judgement of Hon'ble Gujarat High Court in the case of the CIT versus server electricity company Ltd reported in 337 ITR 271 wherein it was held as under:

*The Gujarat High Court, in the case of Saheli Synthetics (P.) Ltd. v. CIT [2008] 302 ITR 126, held that the set aside of assessment made by the appellate authority was always in accordance with the directions given by the appellate authority for making a fresh assessment. But, the most material part of the provision [of section 251] was the opening portion which stipulates 'in an appeal against an order of assessment'. In other words, the entire gamut of powers which are available to the appellate authority is governed within the four corners of the subject matter of the appeal. The subject matter of the appeal is the assessment of income which forms part of the order of assessment in light of the return of income filed by an assessee. Examining the facts of the present case in the light of the aforesaid decision, it was apparent that the Assessing Officer was required to make a fresh assessment in accordance with the directions given by the Commissioner (Appeals) and could not have travelled beyond the same. [Para 8]*

In view of the above we hold that the authorities below have exceeded the jurisdiction for deciding the issue on hand in the present set-aside proceedings. Accordingly, we reject the findings of the authorities below. Hence the ground of appeal of the assessee is allowed.

8.6 As regards the other contentions raised by the learned AR for the assessee at the time of hearing, we do not want to adjudicate the same for the reasoning that the assessee gets the relief on the preliminary technical issue as discussed above. Hence the other grounds of appeal of the assessee become infructuous.

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

**Order pronounced in the Court on 30/07/2020 at Ahmedabad.**

**-Sd-**

**(Ms MADHUMITA ROY)  
JUDICIAL MEMBER**

Ahmedabad; Dated  
Manish

**-Sd-**

**(WASEEM AHMED)  
ACCOUNTANT MEMBER**

**(True Copy)  
30/07/2020**