

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member**

ITA No. 321/Mum/2013
(Assessment Year: 2009-10)

Fiduciary Shares & Stock P. Ltd. Unit No. T7B, 5 th Floor, Phoenix House, Block No. 2, Phoenix Mills Compound, 462, Senapati Bapat Marg, Mumbai 400013	Vs. ACIT, Circle 4(2) Àayakar Bhavan, M.K. Road Mumbai 400020
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PAN - AAACF9759N

Appellant

Respondent

Appellant by: Shri B.V. Jhaveri
Respondent by: Shri Sumit Kumar

Date of Hearing: 12.04.2016
Date of Pronouncement: 13.05.2016

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-8, Mumbai dated 06.12.2012 for A.Y. 2009-10.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a company engaged in consultancy and dealing in shares and debt instruments, filed its return of income for A.Y. 2009-10 on 29.09.2009 declaring income of ₹1,58,26,201/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. The assessment was completed under section 143(3) of the Act vide order dated 22.12.2011 wherein the income of the assessee was determined at ₹4,16,55,840/- in view of the following disallowances: -

i. Disallowance u/s. 14A r.w. Rule 8D	₹12,58,232/-
ii. Disallowance of loss on trading of shares as per Explanation to Section 73	₹2,43,32,584/-
iii. Disallowances of transaction charges	₹2,38,821/-

2.2 Aggrieved by the order of assessment for A.Y. 2009-10 dated 22.12.2011, the assessee preferred an appeal before the CIT(A)-8, Mumbai. The learned CIT(A) disposed off the appeal vide the impugned order dated 06.12.2012 allowing the assessee partial relief.

3. Aggrieved by the order of the CIT(A)-8, Mumbai dated 06.12.2012 for A.Y. 2009-10, the assessee has preferred this appeal before the Tribunal raising the following grounds: -

- “1. On the facts and circumstances of the case the learned CIT(A) erred in retaining the disallowance u/s 14A of the Income Tax Act amounting to Rs.12,58,232/- by incorrectly applying rule 8D of the Income Tax Rules, though your appellant had not incurred any expenditure for the purpose of earning any tax free income.*
- 2. On the facts and circumstances of the case the learned CIT(A) erred in confirming that treatment given by the learned A.O. to the business loss of Rs.2,43,32,584/- as speculation loss by incorrectly applying the provisions contained in explanation in sec 73 of the I.T. Act.*
- 3. On the facts and circumstances of the case the learned CIT(A) erred in confirming the disallowance of Rs.2.38,821/- made by the Assessing Officer being the transaction charges paid to the exchange authorities.*
- 4. Your appellant craves leave to add to, amend, alter or delete any of the above grounds as may be advised.”*

4. Ground No. 1: Disallowance under section 14A 4.2. Rule 8D

4.1 In the year under consideration, the Assessing Officer (AO) noticed that the assessee had earned tax free dividend income of ₹5,44,972/- and that no expenses had been allocated as having been expended for earning such exempt income. On being queried in this regard, the assessee contended that it had not incurred any expenses for earning the exempt income. The AO rejected the assessee's explanation and held that a certain percentage of the expenses claimed by the assessee company would definitely be attributable to the exempt income earned as the assessee-company had a common pool of human and financial resources which were being utilized to earn income in various forms. In this view of the matter, the AO applying the provisions of Rule 8D of the I.T. Rules computed disallowance of expenses under Rule 80(2)(ii) of ₹9,24,619/- and

under Rule 8D(iii) of ₹3,28,613/-; whereby the total disallowance under section 14A r.w. Rule 8D was ₹12,58,232/-. On appeal, the learned CIT(A), inter alia, placing reliance on the decisions of the ITAT Special Bench in the case of Daga Capital Management Pvt. Ltd. (117 ITD 169) and the decision of the ITAT Special Bench in the case of Cheminvest Ltd. vs. Income Tax Officer [124 TTJ 477 (Delhi) (SB)] held that the disallowance under section 14A r.w. Rule 8D of the Act made by the AO was justified and accordingly upheld the same.

4.2.1 The learned A.R. for the assessee was heard in support of the grounds raised. It was submitted that the assessee-company is carrying on business as share broker and dealing/ trading in shares. Reiterating the submission which were put forth before the learned CIT(A), it was submitted that the assessee had no investment at all as was evident from its Balance Sheet as on 31.03.2009. The assessee-company had borrowed for acquiring its stock-in-trade which consists of government securities and shares and other securities. It is submitted that the income earned from trading in stock-in-trade is taxable and it is only the incidental dividend income that is exempt from tax. It was further submitted that the AO had erroneously considered the stock-in-trade as investment while computing the disallowance under section 14A r.w. Rule 8D. In support of the proposition that no disallowance under section 14A of the Act can be made in respect of dividend held as stock-in-trade, the learned A.R. for the assessee placed reliance on the decision of the Hon'ble Bombay High Court in the case of CIT vs. India Advantage Securities Ltd. in ITA No. 1131 of 2013 dated 17.03.2015 which it was submitted was followed by the Coordinate Benches of the Tribunal in the following cases: -

- i. *Devkant Synthetics (India) P. Ltd. in ITA Nos. 2663/to 2665/Mum/2015 dated 28.10.2015 for assessment years 2009-10 to 2011-12;*
- ii. *KSM Securities & Finance Pvt. Ltd. in ITA No. 3632/Mum/2013 dated 11.09.2015;*
- iii. *Shri Durga Capital Ltd. in ITA No. 7405/Mum/2011 dated 03.08.2015.*

4.2.2 The learned A.R. for the assessee also relied on the decision of the Hon'ble Karnataka High Court in the case of CCI Ltd. vs. JCIT [(2012) 20

Taxmann.com 176)]. It was submitted that as the assessee-company is dealing in shares, dividend is the incidental income whereas the income from trading from shares is taxable in the hands of the assessee-company and therefore the provisions of section 14A r.w. Rule 8D cannot be invoked in respect of shares held as stock-in-trade. It was also contended that the decision of the Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd. vs. DCIT (328 ITR 81), referred to by the AO, is not applicable to the assessee in the case on hand as it did not deal with the issue of whether the disallowance under section 14A can be made when dividend income is incidental to the trading in shares.

4.3 Per contra, the learned D.R. placed strong reliance on the decision of the learned CIT(A) to contend that the disallowance under section 14A of the Act applying Rule 8D is correct as the assessee-company has earned exempt dividend income and for earning such income the assessee would have incurred expenses which are to be disallowed.

4.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited and placed reliance upon. The issue for adjudication before us is as to whether the shares held by the assessee-company under the head 'stock-in-trade' are to be considered for making disallowance under section 14A r.w. Rule 8D. As submitted by the learned A.R. for the assessee we find that the Hon'ble Jurisdictional Court in the case of India Advantage Securities Ltd. in ITA No. 1131 of 2013 dated 17.03.2015 has held that disallowance, if any, to be made under section 14A r.w. Rule 8D should only be made with regard to investments and not with regard to shares held as stock-in-trade. This decision of the Hon'ble Bombay High Court (supra) has been followed by the Coordinate Bench of this Tribunal in the case of Devkant Synthetics (India) Pvt. Ltd. in ITA No. 2663 to 2665/Mum/2015 dated 28.10.2015 wherein at para 12 and 13 thereof it has been held as under: -

"12. We heard the parties and perused the record. We notice that the Hon'ble Karnataka High Court has held in the case of CCI Ltd (supra) that the shares held as stock in trade should be excluded for the

purpose of computing disallowance u/s 14A of the Act, since they cannot be said to be “investment” made for the purpose of earning dividend income. In the case of India Advantage Securities Ltd (supra), the Hon’ble Bombay High Court has noticed that the CIT(A) took into account the words of the Rule and found that the figures as derived by the Assessing officer cannot be taken into consideration. The Ld CIT(A) had observed that, one can at best disallow the expenses which are incurred for earning dividend income and for that purpose, the figures under the head “Investment” could be taken and some charges apportioned for the purpose of computing expenses. The decision rendered by the Tribunal in the case of India Advantage Securities Ltd (supra) was found to be neither perverse nor vitiated by any error of law apparent on the face of record by Hon’ble Bombay High Court. We further notice that the decision rendered in the case of CCI Ltd (supra) has been followed by the co-ordinate benches of Tribunal in the case of India Advantage Securities Ltd (ITA No.6711/Mum/2011 and Ganjam Trading Co. Pvt Ltd (supra).

13. In the case of Ganjam Trading Co.P.Ltd (supra), the Tribunal took note of the decision rendered by the Special Bench of the Tribunal in the case of ITO V/s. Daga Capital Management (P.) Ltd. [2009] 117 ITD 169 (Mum)(SB) also. However, following the decision of Hon’ble Karnataka High Court in the case of CCI Ltd (supra), the Tribunal held that the disallowance of interest in relation to dividend received from shares held as stock-in-trade cannot be made.”

4.4.2 Respectfully following the decisions of the Hon'ble Bombay High Court in the case of India Advantage Securities Ltd. (supra), the Hon'ble Karnataka High Court in the case of CCI Ltd. (Supra) and the Coordinate Bench of this Tribunal in the case of Devkant Synthetics (India) Pvt. Ltd. (supra), we hold that the disallowance under section 14A r.w. Rule 8D cannot be made in respect of shares held as stock-in-trade and therefore direct the AO to delete the disallowance made under section 14A r.w. Rule 8D. Consequently, ground No. 1 of the assessee’s appeal is allowed.

5. Ground No. 2: Disallowance of Business Loss by invoking Explanation to section 73

5.1 During the year under consideration, the assessee had reported operating income earned as under: -

Brokerage and Commission	₹5,50,41,964.56
Profit/(Loss) on sale of shares - speculation	(-)(₹11,30,493.74)
Profit/(Loss) on sale of shares -Derivatives	(-)(₹59,48,289.62)
Profit/(Loss) on Trading of shares	<u>(-)(2,13,23,589.99)</u>
	<u>₹2,66,39,591.02</u>

5.2 In the course of assessment proceedings, the AO noticed that the assessee had incurred share trading loss of ₹2,13,23,590/- and loss on sale of shares - speculation of ₹11,30,494/- and had set off share trading loss on delivery based transactions against business income from non-speculation business in the form of brokerage and commission income. The AO, invoking the provisions of Explanation to section 73 of the Act, disallowed the adjustment of loss on trading of shares against brokerage and commission income holding that the loss on trading of shares is speculative loss which can only be adjusted against speculative income. The AO also apportioned indirect expenses incurred for earning various sources of income and allocated ₹21,96,147/- as indirect expenses incurred for trading in shares. The AO further added the direct expenses of ₹8,12,847/- which were incurred for trading in shares. In this manner, the AO disallowed the loss of ₹2,43,32,584/- incurred in share trading, holding it to be speculation loss and that therefore the same is not allowable to be set off against non-speculation business income. On appeal, the learned CIT(A) upheld this disallowance made by the AO by invoking the provisions of Explanation to section 73 of the Act and by relying on the decision of the Hon'ble Bombay High Court in the case of Prasad Agents (P) Ltd. in 333 ITR 275 (Bom).

5.3.1 The learned A.R. for the assessee was heard in support of the ground raised on this issue. It is submitted that the AO invoked the provisions of Explanation to section 73 of the Act for disallowing the assessee's claim for setting off the loss on trading of shares against other business income. In this regard, the learned A.R. for the assessee referred to the recommendations of Wanchoo Committee report of December, 1971 pursuant to which the Explanation to section 73 of the Act was inserted by the Taxation Laws (Amendment) Act, 1975 w.e.f. 01.04.1977; the relevant portion of which is extracted hereunder: -

“A tax avoidance device often resorted to by business houses controlling groups of companies is manipulation of results from dealings in shares of the companies controlled by them. In our opinion, such manipulation in share dealings for the purpose of tax avoidance can be checked effectively if the results of dealings in shares by such

*companies are treated for tax purposes in a manner analogous to speculation. **No doubt, companies whose main business activities centre around investment in shares will have to be left out. Accordingly, we recommend that the results of dealings in shares by companies, other than investment, banking and finance companies, should be treated in a manner analogous to speculation business.***"

5.3.2 The learned A.R. for the assessee also referred to CBDT circular No. 204 dated 27.07.1976 (110 ITR St. 21) explaining the scope and effect of the Explanation to section 73 of the Act, which reads as under: -

"19.1 Section 73 provides that any loss computed in respect of speculation business carried on by an assessee will not be set off except against the profits and gains, if any, of another speculation business. Further, where any loss, computed in respect of a speculation business for an assessment year is not wholly set off in the above manner in the said year, the excess shall be allowed to be carried forward to the following assessment year and set off against the speculation profits, if any, in that year, and so on. The Amending Act has added an Explanation to section 73 to provide that the business of purchase and sale of shares by companies which are not investment or banking companies or companies carrying on business of granting loans or advances will be treated on the same footing as a speculation business. Thus, in the case of aforesaid companies, the losses from share dealings will now be set off only against profits or gains of a speculation business. Where any such loss for an assessment year is not wholly set off against profits from a speculation business, the excess will be carried forward to the following assessment year and set off against profits, if any, from any speculation business.

"19.2 The object of this provision is to curb the device sometimes resorted to by business houses controlling groups of companies to manipulate and reduce the taxable income of companies under their control.

"19.3 This provision will come into force with effect from 1-4-1977 and will apply in relation to the assessment year 1977-78 and subsequent years."

5.3.3 According to the learned A.R. for the assessee, from a perusal of the recommendation in the Wanchoo Committee Report (supra) and the CBDT Circular No. 204 dated 24.07.1976, it is clear that the Explanation to section 73 of the Act was inserted to curb the methods sometimes resorted to by business houses controlling a group of companies to manipulate and reduce the taxable income of companies under their control by showing

losses incurred on purchase and sale of shares of group companies. It was contended that while making its recommendations, the Wanchoo Committee did not intend to treat losses incurred in purchase and sale of shares by all companies. It is for this reason that an exception was carved out of the Explanation at the time of insertion of the Explanation by providing that the provisions of section 73 of the Act will be applicable to business of purchase and sale of shares by companies other than investment companies, banking companies or finance companies as speculation business. The learned A.R. for the assessee further contended that Explanation to section 73 of the Act created a fiction to the effect that where any part of the business of a company consists of purchase and of share of other companies, such company shall be deemed to be carrying on speculation business to the extent to which business consists of purchase and sale of such shares. It is submitted that this fiction had overlooked the purpose for which it was inserted, namely to curb tax avoidance devices/methods resorted to by business houses controlling a group of companies manipulate the purchase and sale of shares of group companies and declare loss which was being adjusted against other income of the group companies.

5.3.4 It was further contended by the learned A.R. for the assessee that in order to achieve the real objective of curbing tax avoidance methods resorted to by business houses controlling their group companies, the Legislature by inserting an amendment to Explanation to section 73 of the Act by Finance (No. 2) Act, 2014, has extended the exception carved out in the Explanation by putting all the companies, the principal business of which is the business of trading in shares into the exception. Thus, it is submitted by the learned A.R. for the assessee that the companies whose principal business is not the business of trading in shares and they have purchased and sold shares and incurred losses, only such companies fall in the ambit of the Explanation to section 73 of the Act so that their losses are treated as speculation loss, which was the object to be achieved by the insertion of the Explanation to section 73 of the Act. In support of his contentions that the insertion of amendment by Finance (No. 2) Act, 2014

in the Explanation to section 73 of the Act is clarificatory in nature and therefore such amendment will have to be given retrospective effect, i.e. from the year in which the Explanation was inserted, the learned A.R. for the assessee referred to/placed reliance on various decisions of the Hon'ble apex Court, inter alia, on CIT vs. J.H. Gotla (156 ITR 323), CIT vs. Gold Coin Health Food Pvt. Ltd. (304 ITR 308) and CIT vs. Podar Cement P. Ltd. (226 ITR 625). It was therefore contended by the learned A.R. for the assessee that in view of the amendment made to Explanation to section 73 of the Act, the loss incurred by the assessee on account of trading in shares is not a speculative loss and hence the same can be adjusted against other business income like brokerage and commission.

5.4 It was contended by the learned A.R. for the assessee, alternatively, that since brokerage and commission income being also earned by the assessee on account of purchase and sale of shares of other companies, such income should also be treated as speculative income and accordingly the loss from trading in shares may be allowed to be adjusted against such brokerage and commission income.

5.5 Per contra, the learned D.R. for Revenue strongly supported the decision of the learned CIT(A) on this issue and placed reliance on the decision of the Hon'ble Bombay High Court in the case of Prasad Agents Pvt. Ltd. vs. Income Tax Officer (333 ITR 275) to contend that the authorities below had correctly not allowed the assessee to claim adjustment of loss from share trading against other business income of the assessee-company.

5.6.1. We have heard the rival contentions of both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited. **Section 73 of the Act** stipulates that any loss computed in respect of speculation business shall not be set off except against profits and gains of speculation business. **Section 43(5) of the Act** clarifies 'speculative transaction' to mean a transaction in which a contract for purchase or sale of any commodity including stock and shares is periodically or ultimately settled otherwise than by actual delivery.

Explanation 2 to section 28 of the Act stipulates that where speculative transactions carried on by an assessee are of such a nature so as to constitute a business, the speculation business shall be deemed to be distinct and separate from other business. The sections 73, 43(5) and Explanation 2 to section 28 of the Act are on the statute since 01.04.1962.

5.6.2 Pursuant to the Wanchoo Committee Report of December, 1971, Explanation to section 73 of the Act was inserted by the Taxation Laws (Amendment) Act, 1975 w.e.f. 01.04.1977. Therefore, prior to 01.04.1977, if any assessee was carrying on any speculative transactions, i.e. a contract ultimately settled otherwise than by actual delivery; which are of such a nature to constitute a business, then such speculative transactions are considered as speculation business. If the assessee incurs a loss in such speculation business, then the loss from such speculation business can be adjusted only against profits of another speculation business as provided under section 73 of the Act. In other words, transactions prior to 01.04.1977, which were delivery based, were not treated as speculative transactions and hence the loss arising from such transactions was allowed to be adjusted against the income of the year under consideration. After the insertion of Explanation to section 73 of the Act, companies other than investment companies or finance companies carrying on business of purchase and sale of shares, then the loss from such business would be treated as speculation business loss. Therefore, by virtue of the insertion of Explanation to section 73 of the Act, if companies whose principal business is of purchase and sale of shares suffer losses from share trading, then such loss from share trading is to be treated as speculative business loss. The intention behind the insertion of Explanation to section 73 of the Act has been explained by the CBDT, Circular No. 204 dated 24.07.1976 (extracted supra) was to curb the methods/devices sometimes resorted to by business house controlling groups of companies to manipulate and reduce the taxable income of companies under their control by showing loss on purchase and sale of shares of group companies. It appears that the intention of the Legislature, from a perusal of the Wanchoo Committee Report and CBDT Circular No. 204 dated

24.07.1976, was not to treat purchase and sale of shares by companies whose main business is trading in shares as speculative business and therefore the Explanation to section 73 of the Act should be read only to the extent of the purpose for which it was inserted. The subsequent amendment made by Finance (No.2) Act, 2014 in the Explanation to section 73 of the Act appears to be made in order to clarify the real intention behind the insertion thereof, by removing the obvious hardship caused to various assessees whose main business is trading in shares. The amendment has removed the anomaly and brought the ambit of the Explanation to section 73 of the Act in line with the intention of the Legislature by placing the companies whose principal business is trading in shares as part of the exception to Explanation to section 73 of the Act, because such companies were not the companies for whom the Explanation was inserted.

5.6.3 The insertion of the amendment in the Explanation to section 73 of the Act by the Finance (No. 2) Act, 2014, in our view, is curative and classificatory in nature. If the amendment is applied prospectively from A.Y. 2015-16, a piquant situation would arise that an assessee who has earned profit from purchase and sale of shares in A.Y. 2015-16 would be treated as normal business profit and not speculation business profit in view of the exception carried out by the amendment in Explanation to section 73 of the Act. In these circumstances, speculation business loss incurred by trading in shares in earlier years will not be allowed to be set off against such profit from purchase and sale of shares to such companies in A.Y. 2015-16. For this reason also, the amendment inserted to Explanation to section 73 of the Act by Finance (No. 2) Act, 2014 is to be applied retrospectively from the date of the insertion to Explanation to section 73 of the Act. In coming to this view, we draw support from the decision of the Hon'ble Apex Court in the case of CIT vs. Alom Extrusions Ltd. (319 ITR 306) wherein their Lordships were considering the amendment made by Finance Act, 2003 by omitting the second proviso to section 43B of the Act w.e.f. 01.04.2004 and bringing about uniformity in the first proviso by equating tax, duty, cess and fees with contribution to

welfare funds (viz. Provident Fund, etc.). The Hon'ble Apex Court held that the aforesaid amendment in section 43B of the Act by Finance Act, 2003 is curative in nature and would therefore apply retrospectively w.e.f. 01.04.1988.

5.6.3 In the case of Allied Motors Pvt. Ltd. vs. CIT (224 ITR 677), the question before the Hon'ble Apex Court was whether Sales Tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant Sales Tax Law should be disallowed under section 43B of the Act. The Income Tax Officer disallowed the deduction of Sales Tax collected by the assessee for the last quarter of the accounting year as the same was paid in the subsequent year. The aforesaid difficulty was cured by the insertion of the first proviso w.e.f. 01.04.1988. The Hon'ble Apex Court held that when a proviso is inserted to remedy unintended consequences and to make the provision workable, the proviso which supplies an obvious omission in the section and which is to be read into the section to give it a reasonable interpretation, it could be read as retrospective in operation to give effect to the section as a whole. The Hon'ble Apex Court held that the first proviso to section 43B of the Act was curative in nature and hence retrospective in operation, i.e. w.e.f. 01.04.1984 from when the section was brought on the statute.

5.6.4 The Hon'ble Apex Court in the case of CIT vs. J.H. Gotla (156 ITR 323) at page 339 and 340 thereof has observed as under: -

"In the case of Varghese v. ITO [1981]131 ITR 597, this court emphasised that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided.

*"Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. **The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used.** It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by judge Learned Hand that one should not make a fortress out of the dictionary but remember that statutes always have*

some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.

"We have noted the object of s. 16(3) of the Act which has to be read in conjunction with s. 24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act, which in this case is to counteract the effect of the transfer of assets so far as computation of income of the assessee is concerned, then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be sub served by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. Furthermore, in the instant case, we are dealing with an artificial liability created for counteracting the effect only of attempts by the assessee to reduce tax liability by transfer. It has also been noted how for various purposes the business from which profit is included or loss is set off is treated in various situations as the assessee's income. The scheme of the Act as worked out has been noted before."

5.6.5 The Hon'ble Apex Court in the case of CIT vs. Gold Coin Health Foods Pvt. Ltd. (304 ITR 308) while reversing the decision of the Division Bench of the Apex Court in the case of Virtual Soft Ltd. vs. CIT (289 ITR 83) observed that "A combined reading of the recommendations of the Wanchoo Committee and Circular NO. 204 dated July 24, 1976, makes the position clear that Explanation 4(a) to section 271(1)(c)(iii) intended to levy penalty not only in the case where after addition of concealed income, a loss returned after assessment becomes positive income, but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between April 1, 1976 and April 1, 2003, the position was that penalty was leviable even in a case where addition of concealed income reduces the returned loss."

5.6.6 The Hon'ble Apex Court in the case of CIT vs. Podar Cement P. Ltd. (226 ITR 625) has held that the circumstances under which the amendment was brought in and the consequences of the amendment will have to be taken care of while deciding the issue as to whether the

amendment was clarificatory or substantive in nature and whether it will have retrospective or prospective effect.

5.6.7 In the case of Daga Capital Management Pvt. Ltd. (117 ITD 169) the Tribunal by majority view held that the ultimate test for considering the retrospective or prospective operation of an amendment is to consider its nature rather than going by the date on which it is stated to be applicable from.

5.6.8 In the case of Rajeev Kumar Agarwal vs. Addl.CIT [(2014) 45 taxmann.com 555 (Agra-Trib.)], the assessee had made interest payments without discharging his obligation to withhold tax under section 194A and the AO therefore disallowed the interest payments under section 40(a)(ia) of the Act. On appeal, the assessee contended that in view of the insertion of second proviso to section 40(a)(ia) by Finance Act, 2012 and in view of the fact that the recipients of the interest had included the income embedded in these payments in their tax returns filed under section 139 of the Act, the disallowance under section 40(a)(ia) of the Act could not be invoked. It was also contended that even though this second proviso is stated to be w.e.f. 01.04.2013, since the amendment is declaratory and curative in nature, it should be given retrospective effect from 01.04.2005, i.e. the date from which sub-clause (ia) of 40(a) was inserted in the statute by way of Finance (No.2) Act, 2004. At para 7 thereof the Tribunal held as under: -

“7. When we look at the overall scheme of the section as it exists now and the bigger picture as it emerges after insertion of second proviso to section 40(a)(ia), it is beyond doubt that the underlying objective of section 40(a)(ia) was to disallow deduction in respect of expenditure in a situation in which the income embedded in related payments remains untaxed due to non deduction of tax at source by the assessee. In other words, deductibility of expenditure is made contingent upon the income, if any, embedded in such expenditure being brought to tax, if applicable. In effect, thus, a deduction for expenditure is not allowed to the assessee, in cases where assessee had tax withholding obligations from the related payments, without corresponding income inclusion by the recipient. That is the clearly discernable bigger picture, and, unmistakably, a very pragmatic and fair policy approach to the issue – howsoever belated the realization of unintended and undue hardships to the taxpayers may have been. It

seems to proceed on the basis, and rightly so, that seeking tax deduction at source compliance is not an end in itself, so far as the scheme of this legal provision is concerned, but is only a mean of recovering due taxes on income embedded in the payments made by the assessee.”

5.6.9 In the case of Subhalakshmi Vanijya Pvt. Ltd. vs. CIT [(2015) 60 taxmann.com 60 (Cal-Trib.)] an issue before the Bench was whether insertion of proviso to section 68 of the Act by Finance Act, 2012 w.e.f. 01.04.2013 empowering the AO to examine the genuineness of the share capital in the case of a company in which the public are not substantially interested is prospective OR is clarificatory and therefore applicable with retrospective effect. The Tribunal answered the question in para 13.aa thereof holding that the amendment to section 68 of the Act by insertion of proviso is clarificatory and hence retrospective.

5.6.10 We have carefully perused the decision of the Hon'ble Bombay High Court in the case of Prasad Agents (P) Ltd. in 333 ITR 275 (Bom) and are of the humble opinion that the decision/finding rendered therein would not apply to the issue in the case on hand since the issue raised before the Hon'ble High Court was whether the loss due to valuation of stock is covered by Explanation to section 73 of the Act as it stood in 2009 and not in respect to the effect of the amendment by way of the insertion of exception in Explanation to section 73 of the Act by Finance Act (No. 2) Act, 2014 which is before us. The Hon'ble High Court in the cited case (supra) held that there cannot be difference in the treatment between losses suffered in the course of trading in shares and losses in terms of book value of stock-in-trade, even if there was no trading in the course of financial year as the Explanation to section 73 of the Act would cover both shares which are stock-in-trade and shares which are traded for the purpose of considering the profit and loss for the year.

5.6.11 In our humble view, drawing support from the judicial pronouncements cited at paras 5.6.3 to 5.6.9 of this order (supra) we are of the considered opinion and hold that the amendment inserted in Explanation to section 73 of the Act by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 is clarificatory in nature and would therefore operate

retrospectively from 01.04.1977 from which date the Explanation to section 73 was placed on the statute since this amendment to section 73 of the Act ‘... or a company the principal business of which is the business of trading in shares’ brings in the assessee whose principal business is trading of shares. Therefore, the loss incurred in share trading business by such companies, i.e. like the assessee will not be treated as speculation business loss but normal business loss, and hence the same loss can be adjusted against other business income or income from any other sources of the year under consideration. In this view of the matter, we direct the AO to allow the assessee’s claim for setting off the loss from ‘share trading business’ against ‘other business income’ and income from any other sources during the year under consideration. Since we have allowed the assessee’s primary contention/ground, we do not consider it necessary to adjudicate the alternative contention raised by the assessee.

6. **Ground No. 3: Disallowance of transaction charges paid to the Stock Exchange**

6.1 The AO noticed that in the year under consideration, the assessee had debited ₹2,38,821/- on account of transaction charges paid to the Stock Exchange. The AO observing that the assessee had not deducted tax at source while making the payment of transaction charges to the Stock Exchange invoked provisions of section 40(a)(ia) of the Act and disallowed the same. On appeal, the learned CIT(A) held that the transaction charges were paid to the Stock Exchange for rendering the managerial services which constituted fees for technical services under section 194J r.w. Explanation to section 9(1)(vii) of the Act and hence the assessee was liable to deduct tax at source before crediting the transaction charges to the Stock Exchange. In that view of the matter, the disallowance made was upheld.

6.2.1 The learned A.R. for the assessee was heard in support of the ground raised. It was submitted that the assessee company was incorporated on 25.04.2006 and in the first year ending 31.03.2007, the assessee had paid transaction charges of ₹5,25,432/- without deducting tax at source thereon as per the practice prevailing among the stock brokers at the

Stock Exchange, Mumbai. It is submitted that the return for this period i.e. A.Y. 2007-08 was only processed under section 143(1) of the Act and it was for the first time in A.Y. 2009-10 that the AO disallowed transaction charges of ₹2,85,821/- under section 40(a)(ia) of the Act for non deduction of TDS thereon while making payment to the Stock Exchange. It was further submitted that most of the brokers started deducting tax at source on payment of transaction charges to the Stock Exchange from the previous year relevant to A.Y. 2010-11 and the assessee also accordingly following this practice, there is no disallowance under section 40(a)(ia) of the Act in the case on hand for A.Y. 2010-11 onwards.

6.2.3 In support of its plea that no TDS is required to be made on payment of transaction charges to Stock Exchanges, the learned A.R. for the assessee placed reliance on the decision of the Hon'ble Apex Court in the case of CIT vs. Kotak Securities Ltd. (in Civil Appeal No. 3141 of 2016 dated 29.03.2016) contending that in this decision the Hon'ble Apex Court has reversed the view of the Hon'ble Bombay High Court in the same case reported in 340 ITR 333 to hold that the transaction charges paid to Stock Exchange by its members are not for 'technical services' rendered but are really in the nature of payments made for facilities provided by Stock Exchange. Hence, no TDS on such payments would, therefore, be deductible under section 194J of the Act.

6.3 Per contra, the learned D.R. for Revenue emphatically supported the orders of the authorities below.

6.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record, including the judicial pronouncements cited. We find the question of whether at all TDS is deductible under section 194J of the Act on payments of transaction charges made by members to Stock Exchange has been considered by the Hon'ble Apex Court in the assessee of CIT vs. Kotak Securities Ltd. in Civil Appeal No. 3141 of 2016 dated 29.03.2016 wherein after considering this issue has held that no TDS is required to be deducted on payments of transaction charges paid by members to Stock Exchange as they are not

for 'technical services' rendered but are in the nature of payments for facilities provided by the Stock Exchange. The relevant portion of this judgement at paras 6 to 10 thereof is extracted hereunder: -

"6. What meaning should be ascribed to the word "technical services" appearing in Explanation 2 to clause (vii) to Section 9(1) of the Act is the moot question. In Commissioner of Income-Tax Vs. Bharti Cellular Ltd.1 this Court has observed as follows:

"Right from 1979, various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of noscitur a sociis, particularly, because the words "technical services" in section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services".

7. "Managerial and consultancy services" and, therefore, necessarily "technical services", would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts including this Court in Bharti Cellular Ltd. (supra). However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.

8. A reading of the very elaborate order of the Assessing Officer containing a lengthy discourse on the services made available by the Stock Exchange would go to show that apart from facilities of a faceless screen based transaction, a constant upgradation of the services made available and surveillance of the essential parameters connected with the trade including those of a particular/ single transaction that would lead credence to its authenticity is provided for by the Stock Exchange. All such services, fully automated, are available to all members of the stock exchange in respect of every transaction that is entered into. There is nothing special, exclusive or customised service that is rendered by the Stock Exchange. "Technical services" like "Managerial and Consultancy service" would denote seeking of services to cater to the special needs of the consumer/user as may be felt necessary and the making of the same available by the service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While the former is special and exclusive to the seeker of the service, the latter, even if termed as a service, is available to all and would therefore stand out in distinction to the former. The service provided by the Stock Exchange for which transaction charges are paid fails to satisfy the aforesaid test of specialized, exclusive and individual requirement of the user or consumer who may approach the service provider for such assistance/service. It is only service of the above kind that, according to us, should come within the ambit of the expression "technical

services” appearing in Explanation 2 of Section 9(1)(vii) of the Act. In the absence of the above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by the aforesaid provision of the Act.

9. There is yet another aspect of the matter which, in our considered view, would require a specific notice. The service made available by the Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which the charges in question had been paid by the appellant – assessee are common services that every member of the Stock Exchange is necessarily required to avail of to carry out trading in securities in the Stock Exchange. The view taken by the High Court that a member of the Stock Exchange has an option of trading through an alternative mode is not correct. A member who wants to conduct his daily business in the Stock Exchange has no option but to avail of such services. Each and every transaction by a member involves the use of the services provided by the Stock Exchange for which a member is compulsorily required to pay an additional charge (based on the transaction value) over and above the charges for the membership in the Stock Exchange. The above features of the services provided by the Stock Exchange would make the same a kind of a facility provided by the Stock Exchange for transacting business rather than a technical service provided to one or a section of the members of the Stock Exchange to deal with special situations faced by such a member(s) or the special needs of such member(s) in the conduct of business in the Stock Exchange. In other words, there is no exclusivity to the services rendered by the Stock Exchange and each and every member has to necessarily avail of such services in the normal course of trading in securities in the Stock Exchange. Such services, therefore, would undoubtedly be appropriate to be termed as facilities provided by the Stock Exchange on payment and does not amount to “technical services” provided by the Stock Exchange, not being services specifically sought for by the user or the consumer. It is the aforesaid latter feature of a service rendered which is the essential hallmark of the expression “technical services” as appearing in Explanation 2 to Section 9(1)(vii) of the Act.

10. For the aforesaid reasons, we hold that the view taken by the Bombay High court that the transaction charges paid to the Bombay Stock Exchange by its members are for 'technical services' rendered is not an appropriate view. Such charges, really, are in the nature of payments made for facilities provided by the Stock Exchange. No TDS on such payments would, therefore, be deductible under Section 194J of the Act.”

6.4.2 Respectfully following the decision of the Hon'ble Apex Court in the case of Kotak Securities Ltd. in Civil Appeal No. 1131 of 2016 dated 29.03.2016, we hold that no TDS is deductible on payment of transaction charges paid by members to Stock Exchange under section 194J of the

Act, as they are not for technical services rendered but are in the nature of payments for facilities provided by the Stock Exchange and accordingly direct the AO to delete the disallowance of ₹2,38,821/- made on account of transaction charges paid to Stock Exchange.

7. In the result, the assessee's appeal for A.Y. 2009-10 is allowed as indicated above.

Order pronounced in the open court on 13th May, 2016.

Sd/-
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 13th May, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -8, Mumbai*
4. *The CIT - 4, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.