IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1230 OF 2013

The Commissioner of Income Tax-4, .. Appellant.
Vs.
M/s. HSBC Securities &
Capital Markets (India) P. Ltd. .. Respondent.

Mr. A.R. Malhotra along with Mr.N.A. Kazi and Ms.Padma Divakar for the Appellant.
Mr. J.D. Mistri, Sr. Counsel along with Mr.Atul K. Jasani for the Respondent.

CORAM : S.C. DHARMADHIKARI AND A.K. MENON, JJ.

DATED : 20TH APRIL, 2015.

P.C. :

1. This appeal by the revenue challenges the order passed by the Income Tax Appellate Tribunal dated 29th June, 2012.

2. The appeal, according to Mr.Malhotra raises four substantial questions of law. They are formulated at Page 7 and 8. They are as under :

> "6.1 Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the disallowance made by the A.O. u/s 40(a)(ib) of the deduction of STT claimed by the Assessee?

6.2 Whether, on the facts and circumstances of the case and in law, the Hon'ble Tribunal was justified in restoring back to the A.O. the issue regarding the loss said to have been incurred on account of error trade to examine afresh whether the loss occurred on account of error trades conducted by the Assessee on behalf of clients and if so, the loss has to be accepted as business loss in view of the decision of Hon'ble Tribunal Ahmedabad in the case of Parker Securities Ltd. vs. DCIT reported in 102 TTJ (Ahd) 235?

6.3 Whether, on the facts and circumstances of the case and in law, the Hon'ble Tribunal was justified in directing the A.O. to disallow the expenses relating to earning of exempt income relying on the decision of Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. as the Revenue has not accepted this decision and has filed SLP against this decision?

6.4 Whether, on the facts and circumstances of the case and in law, the Hon'ble Tribunal relying on the decision on Hon'ble Bombay High Court in the case of CIT vs. Kotak Securities Ltd. 15 Taxmann.com77 was justified in deleting the disallowance made by the Assessee to Stock Exchanges without deduction to tax at sources when the Revenue has not accepted this decision for A.Y. 2005-06 and has filed SLP against this decision?”

3. Mr.Malhotra would submit that on question 6.1 the Tribunal misread the provisions, namely, section 40(a)(ib) and wrongfully deleted disallowance made by the Assessing Officer of deduction of security transaction tax. It is submitted that the deduction was claimed by the assessee of this tax. Mr.Malhotra submits that the assessee projected as if he is merely collecting tax. However, this was to get out of the clear language of this provision, namely, section 40(a)(ib) as it stood then. That provision clearly states that any sum paid on account of security transaction tax under Chapter VII of the Finance Act, 2004 cannot be the subject matter of deduction in computing income chargeable under head "Profits and gains of business or profession". Mr.Malhotra submits that the nature of relationship is not to the knowledge of the Assessing Officer or authorities. The Assessing Officer rightly, therefore, disallowed this deduction. The Tribunal has permitted him. Though, the language of the statute prohibits the same by accepting the stand of the assessee that he is merely collecting tax which in any event was payable by the parties dealing with the shares, namely, its clients.

4. As far as remaining three questions are concerned, Mr.Malhotra would submit that though the issue regarding loss said to have been incurred on account of error trade has been sent

back to the assessing officer still, the tribunal has termed this loss as error trade. Now, there is no opportunity to probe or investigate this loss though the matter is sent back and restored to the file of the assessing officer, therefore, question No.6.2 is also the substantial question of law.

5. In relation to question 6.3 and 6.4 the decision of this Court relied upon has not been accepted by the revenue and the same is under challenge in the Supreme Court of India.

6. We are not impressed by any of the submissions of Mr.Malhotra with regard to the first question. It is evident that the deduction claimed by the assessee was of security transaction tax collected by him on behalf of his clients. Such tax was included in the bill which was raised by the assessee - broker on its clients. The assessee broker pointed out that apart from brokerage the component of this tax was included in bill. Thereafter, the rules have been segregated by pointing out the component of tax and only to the extent of tax in this case the deduction is claimed. Section 40(a)(ib) does not apply to such non deletion.

7. We are of the opinion that the assessing officer was aware of the obligation to pay security transaction tax. That is

obligation clearly referable to two statutory provisions which have been referred by the assessing officer and rightly relied upon by Mr.Mistri, learned senior counsel for the assessee. Section 98 and 100 of the Security Transaction Tax Act has been set out in the order of the assessing officer. In this case the assessment year is 2005-06 and the assessee pointed out as to how this very tax which was to be collected by the stock exchange from every person being purchaser or seller has been collected and for remission and onward forwarding the same to the revenue. We do not see that we should go into any provision and particularly the deduction that could have been claimed on the basis of such payment by clients of the assessee. Beyond being a conjecture and surmise, we do not think that either the nature of the transaction or relationship itself was in dispute. The requisite details of the clients have been provided by the assessee clearly. If the parties are clients of the assessee and from whom brokerage is collected by raising bills, then, there is no dispute that it is this very tax which is collected by the assessee. In the circumstance, the Tribunal's order on this point does not raise any substantial question of law. Even in relation to the second question we do not find that the Tribunal, in any manner, concluded the matter. The Tribunal merely invited attention of the parties that the claim of error trade has not been examined either by the Assessing Officer or by the Commissioner of Income

Tax (Appeals). The assessee's advocate had no objection to sending back the matter to the assessing officer for necessary verification. Thereafter the Tribunal found that the matter requires fresh examination and in case loss is found to have occurred on account of error trade conducted by assessee on behalf of clients, then the claim will have to be accepted as business loss if the law laid down by the Tribunal in the case of Parker Securities Ltd. (8 SOT 257) applies. Such direction far from concluding the matter only highlights the aspects of the case and particularly in relation to non consideration of the claim of error trade. If that is the issue which has been restored to the assessing officer for necessary examination, then, it would be open for the revenue to point out that the loss if any has not occurred on account of error trade and conducted by the assessee. The Question No.2 is therefore, not substantial question of law at all. It is fairly stated that the Tribunal has followed in relation to Question No.3, Section 14A and Rule 8D of the Income Tax Rules, 1962. The issue is squarely covered by the case of Godrej and Boyce Mfg. Co. Vs. Deputy Commissioner of Income Tax (328 ITR Page 81).

8. In relation to the last question, it is clear that the judgment of this Court in case of *Commissioner of Income Tax vs. Kotak Securities Ltd. (2012) 340 ITR 333* covers the question.

The party with which we are concerned is the Stock Exchange and transaction charges paid by the assessee being in the nature of fees for technical services, that this question need not detain us. It stands answered in terms of the judgment of this Court in *Commissioner of Income Tax vs. Kotak Securities Ltd.*

9. As a result of the above discussion, none of the questions and projected before us are substantial questions of law. The appeal is devoid of merits and is dismissed. No costs.

(A.K. MENON,J.) **(S.C. DHARMADHIKARI,J.)**