आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASSEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 2021/Ahd/2017

(**निर्धारण वर्ष /** Assessment Year: 2013-14)

M/s. Edelweiss Broking Ltd. (on behalf of amalgamating company, Edelweiss Financial Advisors Ltd.) 801-804, 8th Floor, Abhishree Avenue, Opp. Hanumanji Temple, Nehrunagar, Ambawadi, Ahmedabad-380015	**बनाम**/ Vs.	DCIT Cricle-1(3), 1st Floor, B-109, Pratyaksh Kar Bhavan, Nr. Panjrapole, Ambawadi, Ahmedabad-380015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCE9421H		
(अपीलार्थी /**Appellant**)	··	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No. 1939/Ahd/2017

(**निर्धारण वर्ष /** Assessment Year: 2013-14)

DCIT Cricle-1(3), 1st Floor, B-109, Pratyaksh Kar Bhavan, Nr. Panjrapole, Ambawadi, Ahmedabad-380015	**बनाम**/ Vs.	M/s. Edelweiss Broking Ltd. (on behalf of amalgamating company, Edelweiss Financial Advisors Ltd.) 801-804, 8th Floor, Abhishree Avenue, Opp. Hanumanji Temple, Nehrunagar, Ambawadi, Ahmedabad-380015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCE9421H		
(अपीलार्थी /**Appellant**)	··	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Purushottam Kumar, Sr. DR
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Vartik Chokshi, AR

सुनवाई की तारीख / **Date of Hearing**	21/10/2021
घोषणा की तारीख /**Date of Pronouncement**	27/10/2021

आदेश/O R D E R

PER MAHAVIR PRASAD - JM:

These two cross appeals have been preferred by the assessee in ITA No. 2021/Ahd/2017 and Revenue in ITA No. 1939/Ahd/2017 against the order of Ld. CIT(A)-10/DCIT. Cir-1(3)/10589/16-17 dated 27.06.2017 arising out of assessment order dated 24.02.2016.

2. In ITA No. 1939/Ahd/2017 the Revenue has taken following grounds of appeal:-

> *"1. That the ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO on account of depreciation, interest and insurance on vehicle amounting to Rs. 14,28,238/-.*
> *2. That the ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO on account of penalty of Rs. 9,04,286/-.*
> *3. That the ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO u/s 40(a)(ia) of Rs. 9,16,306/-.*
> *4. That the ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO on account of bad debt of Rs. 2,58,14,680/-."*

3. Facts of the case are that the Ld. AO in his order stated that vehicles are not in the name of Appellant Company but are in the names of individuals and further hold that assessee has not proved that domain over such asset is vested with it. On the other hand, the assessee's contention was that main motive for not registered the vehicle in the name of the assessee company was that if vehicles are registered in the name of individual director same will minimize the tax payable to RTO and to avoid the tax which would have legitimately due to the Government. Considering facts of the case the Ld. AO disallowed depreciation of Rs. 13,55,778/-, interest expenses of Rs. 55,585/- and insurance of Rs.

16,875/- and made aggregated disallowance of Rs. 14,28,238/-. In appeal before the Ld. CIT(A) thereafter assessee preferred First Statutory Appeal before the Ld. CIT(A), granted relief to the assessee as predecessor CIT(A) as appeared in assessee's own case granted relief to the assessee, therefore, on the principle of consistency Ld. CIT(A) deleted addition of Rs. 14,28,238/-.

4. Against the said order Department has come before us and ITAT in several matters in ITA No. 445/Ahd/2016 granted relief to the assessee and for A.Y. 2012-13 department appeal was dismissed on account of low tax effect. This ground of appeal is, thus, dismissed.

5. Now we come to ground no. 2 relating to that CIT (A) has erred in law and on facts in deleting the disallowance made by the Ld. AO on account of penalty of Rs. 9,04,285/-.

6. The Ld. AO has discussed issue in Paragraph 5 to 5.4 on pages 9 to 12 and CIT(A) has discussed Para 9 to 13 on Pages 9 to 11 and identical issue came before the ITAT in ITA No. 413/Ahd/2016 in Departmental Appeal and ITAT dismissed the ground of appeal of the Revenue with following observation:

> *"6. Heard both the sides and perused the material on record. The relevant part of the decision of the ITAT as referred above is reproduced as under:-*
>
> *"74. We heard the rival contentions of both the parties and perused the materials available on record. The first issue that arises for our consideration is whether the impugned loss incurred by the assessee relates to the sale and purchase activities carried out by the assessee for itself or it relates to the other clients of the assessee. It is a question of fact which can verified based on the documentary evidence. Indeed, the assessee has not furnished the sufficient documentary evidence in support of his contention. But looking at the amount of impugned loss in comparison to the volume of the brokerage business carried out by the assessee, we find that such loss is of negligible value. Furthermore, the tax audit report in form*

3CD suggests that the assessee is engaged in the activity of stock broking only and not in the activity of sale purchase of securities. The copy of form 3 CD is placed on pages 133 to 165 of the Paper Book. Similarly, the AO has also recorded in his order the nature of business of the assessee i.e. stock broking. Even in the earlier Assessment Year 2006-07, the impugned loss was also treated as speculative in nature but the Learned CIT (A) deleted the same as the assessee was able to justify his contention based on the documentary evidence that such loss relates to its clients. This finding of the Ld. C1T-A, if analyzed in aggregation of other facts i.e. form 3CD report, profit & loss account, nature of the business as recorded by the AO, the fact emerges that that the assessee is not carrying out share trading activities in its accounts.

> *75. On perusal of the financial statements placed on pages 59 to 132 of the Paper Book, it was observed that there was no transaction shown by the assessee as purchase and sale of the shares. In view of the above and after considering the details as discussed above we hold that the impugned loss incurred by the assessee does not pertain to its accounts rather it relates to the accounts of its clients. Accordingly, we conclude that the provisions of explanation to Section 73 of the Act cannot be applied to the case on hand. In holding so we find support and guidance from the order of this Tribunal in the case of Parker securities Ltd versus DCIT reported in 102 TTJ 235 wherein it was held as under: "Explanation to Section 73 provides that where any part of the business of a company (other than certain specified companies as mentioned in the Explanation) consists in the purchase and sale of .-shares of other companies, such company shall, for the purposes of this Section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. It is dear from ihe said provision that sale and purchase of shares of other companies, within the ambit of the Explanation, must be carried out as an activity of business. The term 'business' has been defined in Section 2(13). Noting the definition of 'business' from the view point of Explanation to Section 73, it has been observed by the Karnataka High Court in the case of Mysore Rolling Mills (P.) Ud. v. CIT[19921 195 1TR 404/63 Taxmun 416 that any kind of venture would nut fall within this inclusive definition. The venture or the adventure will have to be in the nature of trade, commerce or manufacture. Basically, the concept of business involves a frequent activity of a particular nature. Therefore, to find out that the assessee carried on purchase and sale of shares of other companies as its business in a given case, the facts cif that case will have to be examined and the tests which could determine such situation are -(i) nature of assessee's business in general, (ii) the purpose behind the particular transaction, and (Hi) the effect of the transaction etc. In the instant case, the nature of the assessee's business in general was to earn income as a broker of stock exchange and the purpose behind the transactions in regard to which the assessee had incurred loss was the purchase for and on behalf of certain clients 10 earn brokerage income therefrom. It was only an eventuality that some of the clients disowned only part of the transactions which under compulsion were to be taken by the assesses as its own. I Para 28]"*

75.1 In view of the above, once it has been held that loss does not relate to .e activity of sale7purchase of shares by the assessee for itself, then the provisions of explanation to Section 73 of the Act cannot be applied. Hence, the ground of appeal of the Revenue is dismissed whereas the ground of appeal of the assessee is allowed."

Vide the order of the Co-ordinate Bench of the ITAT as supra, similar issue on identical facts have been decided in favour of the assessee. Therefore, applying the finding of the Co-ordinate Bench of the ITAT as referred above on similar issue and identical facts, the appeal of the assessee is allowed."

Thus, in parity with above said ITAT order we dismissed this ground of appeal of the Revenue.

7. Now we come to ground no. 3 of the Revenue that the Ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO under Section 40(a)(ia) of Rs. 9,16,306/-. The Ld. AO has discussed the issues at Paras 7 to 7.12 on pages 23 to 43 and Ld. CIT(A) has discussed in Paras 19 to 22 on Pages 17 to 24.

8. On identical issue has covered in favour of the assessee in its own case vide ITAT order for A.Y. 2010-11 bearing ITA No. 268/Ahd/2016 for A.Y. 2010-11 with the following observation:

"116. The next issue raised by the assessee in ground No. 6 is that the Learned CIT (A) erred in upholding the disallowance of Rs. 2,29,932/- representing the payment made to the stock exchange on account of Non-deduction of TDS under Section 194J of the Act.

117. The assessee during the assessment proceedings submitted that it has incurred an expense of Rs. 2,29,932/- towards the membership fees paid to the stock exchanges. As per the assessee such membership subscription is not a payment in the nature of technical/professional services and therefore the same is not subject to the TDS under the provisions of Section 194J of the Act.

117.1 However, the AO observed that the stock exchanges are providing a platform to its members for carrying out sale purchase of the securities/derivatives through the screen based system. Under this system, the buyers of the securities/derivatives are able to find

out the prospective seller and vice versa. The stock exchanges to provide such services charges various fees such as listing fees, admission fees, arbitration fees and transaction charges. Accordingly, the AO was of the view that such membership subscription and transaction charges incurred by the assessee are subject to the provisions of TDS under Section 194J of the Act. But the assessee failed to do so, therefore the AO disallowed the same and added to the total income of the assessee.

118. On appeal, the Learned CIT(A) confirmed the order of the AO by observing as under: (i) So far as payment for depository transactions are concerned, it is observed that Central Government has issued notification on 31st December, 2012 wherein it is stated that such charges are not subject to provisions of TDS but notification is applicable from 1st January, 2013 hence it cannot have retrospective effect. Considering these facts, it is held that Appellant has failed to deduct TDS on payment made to HDFC Bank hence disallowance under Section 40(a)(ia) is required to be upheld subject to legal issue regarding applicability of Finance Act, 2012, as discussed herein under.

(ii) So far as subscription and membership fees paid to exchange are concerned, it is observed that same are paid for obtaining various facilities as provided by exchange for carrying out screen based trading transactions on behalf of clients. The exchanges have provided managerial services which are in nature of technical services as mentioned in Section 194J the decision of Bombay High Court relied upon by Appellant is on the issue whether payment5 of lease-line charges and VSAT charges are subject to TDS under Section 194J of the Act or not and they are dealing with payment referred hereinabove hence same cannot be made applicable while adjudicating present issue. Thus, non-deduction TDS would lead to disallowance under Section 40(a)(ia) subject to legal issue regarding app0licability of Finance Act, 2012, as discussed herein under:

(iii) So far as disallowance under Section 40(a)(ia) for VSAT and lease-line charges are concerned, my predecessor CIT(Appeals)-XVI vide his order dated 28th April, 2011 for A.Y. 2008-09 has upheld the disallowance and held as under:

"10.3.1. I have considered the submission made by the appellant and observation of the Assessing Officer. With respect to NSE lease line charges of Rs.5,40,372/- NSC, VSAT charges of Rs.14,56,083/- lease line expenses of Rs.12,54,523/- apart from what the Assessing Officer has stated above, the most important thing is that the assessee has been making payment to the stock exchange in respect of each and every

transaction made by the assessee called transaction charges in addition to VSAT charges and lease the charges which are quarterly or annual payments made for the use of equipment which consists of lease line, dish, satellite link, IDE box etc. These charges are dependent upon the bandwidth taken by the Appellant and not on the transactions made by the Appellant for the purchase and sale of shares. Over and above, these quarterly/annual payments the Appellant is making payment for each and every transaction of share purchase and also of share sale. These are transaction charges. Therefore, the VSAT charges and lease line charges are definitely nothing but rent for the various equipment which does not belong to the assessee but belongs to either the stock exchange or the service provider, who manages this facility. These payments are exactly same as those made by the subscriber of landline telephone with zero free call charges. He makes monthly payment of fixed amount and usage payment for every call made. Similarly, the Appellant makes payment for every transaction of sale and every transaction of purchase and another charges fixed quarterly or annual payment whether any purchase/sale transaction is made or not. Therefore, these payments are nothing but rental payments on which TDS should have been deducted under se4ction 194I".

119. Being aggrieved by the order of the Learned CIT (A), the assessee is in appeal before us.
120. The Learned AR before us submitted that the stock exchange is not providing any service in the nature of technical services. Therefore, the provisions for the TDS under Section 194J of the Act cannot be applied on the payment made by the assessee for the membership subscription and transaction charges.

121. On the other hand, the Learned DR vehemently supported the order of the authorities below.

122. We have heard the rival contentions of both the parties and perused the materials available on record. For attracting the provisions of TDS under Section 194J of the Act, the payment as 'fees for technical services' should have been paid in consideration of rendering by the recipient of payment of any (a) managerial service, (b) technical or consultancy services. The stock exchanges merely provide facility to its members to purchase and sell shares, securities, etc., within the framework of its bye laws. In the event of dispute it provides for mechanism for settlement of dispute. It regulates conditions subject to which a person can be a member and as to when and in what circumstances membership can be transferred, cancelled, suspended, etc. The exchange provides a place where the members can meet and transact business. The membership subscription /transaction fee paid is on the basis of volume of transaction effected by a member. The stock exchanges

neither render any managerial service nor any technical consultancy service. The transaction fee is not paid in consideration of any service provided by the stock exchange. It is a payment for use of facilities provided by the stock exchange and such facilities are available for use by any member. The provisions of Section 194J which cast a burden on a person to deduct tax at source and treat him as a defaulter on his failure to deduct tax at source, need to be interpreted strictly and in the absence of a clear obligation on the part of a person, spelt out in unambiguous terms by the provisions of Section 194J, read with Explanation 2 to Section 9(1)(vii), such obligation cannot be implied or left to the ipsi dixit of the revenue authorities. Therefore, transaction fee paid could not be said to be a fee paid in consideration of the stock exchange rendering any technical services to the assessee. The provisions of Section 194J were, thus, not attracted. In holding so we draw support and guidance from the judgment Hon'ble Supreme Court in the case of CIT versus Kotak Securities Ltd reported in 67 Taxmann.com 356 wherein it was held as under:

> *"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."

In view of the above we hold that there was no obligation on the part of the assessee to deduct tax at source. Consequently, the provisions of Section 40(a)(ia) were also not attracted and, therefore, the disallowance made was to be deleted. Hence the ground of appeal of the assessee is allowed.

123. The next issue raised by the assessee is that the Learned CIT-A erred in partly confirming the disallowance made by the AO on the payment made to the stock exchange for Rs. 9,14,619/-on account of VSAT and lease line charges.

124. The AO during the year under consideration found that the assessee has paid VSAT and lease line charges amounting to Rs. 37,46,013/- without deducting the TDS under the provisions of Section 194-I of the Act. Accordingly, the AO disallowed the same and added to the total income of the assessee.

On appeal, the Learned CIT (A) partly confirmed the order of the AO.

125. Being aggrieved by the order of the Learned CIT-A the assessee is in appeal before us.

126. The Learned AR before us submitted that the payment to the stock exchange towards the VSAT charges and lease line charges are not subject to the provisions of TDS under Section 194-I of the Act as there is no element of income rather it represents the reimbursement of expenses.

127. On the other hand, the Learned DR vehemently supported the order of the authorities below. 128. We have heard the rival contentions of both the parties and perused the materials available on record. The issue for deducting the TDS on the payment made to the stock exchange on account of VSAT charges and lease line charges is no longer res integra by virtue of the order of the ITAT Mumbai in the case of Destimoney Securities Private Ltd vs. ITO in ITA No. 4106 /MUM/2014, after relying the judgment of the Hon'ble Bombay High Court, wherein it was held as under:

> *"12. We now take up the issue as regards the liability of the assessee to deduct tax at source on payments towards lease line charges. We find that the issue involved herein is no more res integra, as the same is squarely covered in favour of the assessee by the judgment of the Hon'ble High Court of Bombay in the case of:- (i) Income Tax Commissioner, Mumbai City-4 Vs. Angel Capital & Debit Market Ltd. (ITA (L) No. 475 of 2011, dated 28.07.2011)(Bom) (ii) CIT-4, Vs. M/s. The Stock and Bond Trading Company Ltd. (ITA No. 4177 of 2010, dated 14.10.2011)(Bom). We find that the Hon'ble Jurisdictional high Court in the aforesaid judgments had clearly held that VSAT and lease line charges paid by the assessee to stock exchange are merely in the nature of reimbursement of the charges paid/payable by the stock exchange to the department of the telecommunication, and thus in the absence of any element of income involved in the said payments, the issue as regards deduction of tax at source on the same does not arise at all. We are of the considered view that in the backdrop of the aforesaid judgment of the Hon'ble Jurisdictional High Court, the order of the CIT(A) treating the assessee as being in default u/s. 201(1)/201(1A) in respect of failure to deduct tax at source as regards the payments made towards lease line charges, cannot be sustained, and is thus set aside. The Ground of appeal No. 2 raised by the assessee before us is allowed."*

128.1 In view of the above, we hold that the assessee was not subject to the provisions of TDS under Section 194-I of the Act as alleged by the authorities below. Accordingly no disallowance on account of non-deduction of TDS is warranted.

129. Before parting, it is also important to note that the ITAT in the own case of the assessee for the Assessment Year 2008-09 in ITA No. 1718/AHD/2011 has set aside the identical issue to the file of the AO for fresh adjudication after verifying whether payees have included the amount received from the assessee in their income tax return. However in that order, there was no whisper about the Tribunal order as discussed above in the case of Destimoney Securities Private Ltd versus ITO in ITA No. 4106 /MUM/2014, which was decided in favour of the assessee after placing reliance on the order of Bombay High Court as discussed here in above. Thus the issue on hand on merit has been decided by a higher forum in favour of assessee which is binding on us. Accordingly, we are not impressed with the finding of the ITAT in the own case of the assessee and accordingly, the principles laid down by the ITAT in its own case in earlier years are not applicable. Thus, the grounds of appeal of the assessee is allowed."

9. Now we come to ground no. 4 of the Revenue that the Ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO on account of bad debts of Rs. 2,58,14,680/-. The Ld. AO has discussed the issues at Paras 8 to 8.3 on pages 43 to 52 and Ld. CIT(A) has discussed in Paras 23 to 26 on Pages 24 to 28.

10. On identical issue has covered in favour of the assessee in its own case vide ITAT order for A.Y. 2010-11 bearing ITA No. 413/Ahd/2016 for A.Y. 2010-11 in departmental appeal the ITAT has dismissed the ground of appeal of the Revenue with the following observation:

> *"51. The next issue raised by the Revenue is that the Learned CIT-A erred in deleting the addition made by the AO for Rs. 1,18,89,628/- on account of bad debts as the conditions specified under Section 36 (2) were not satisfied.*
>
> *52. The assessee during the year under consideration has claimed bad debts amounting to Rs. 1,18,89,628/- only. As per the assessee, its client has purchased the shares through the stock exchange but failed to make the payment to it (the assessee). Accordingly, the assessee after making the sale of such shares, has written off the loss in the books of accounts as bad debts as the recovery for the same was not certain. The assessee also claimed that the brokerage on account of purchase and sale of shares on behalf of the client was offered to tax by crediting the profit and loss account. However, the principal amount of purchase and sale was not shown in the profit and loss account but the difference either as loss or gain was reflected in the profit and loss account as bad debt or gain as the case may be. It was done so, with respect to the transactions carried out by it on behalf of the clients but who failed to make the payment. In most of the transactions loss was incurred which was claimed as bad debts.*
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> *53. The assessee alternatively contended that such loss has been incurred in the course of the business and therefore the same should be allowed as deduction either under Section 28 or 37 of the Act if the same is disallowed under the provisions of Section 36(2) of the Act.*
>
> *54. However, the AO disregarded the contention of the assessee by observing that the deduction on account of bad debts can be admitted*

only upon the fulfilment of the condition specified under Section 36(1) (vii) r.w.s 36(2) of the Act. In the case on hand, the specified conditions have not been complied with therefore the same cannot be allowed as deduction under Section 36 (1)(vii)/36 (2), 37 or 28 of the Act.

55. Aggrieved assessee preferred an appeal to the Learned CIT-A, who deleted the addition made by the AO by observing as under:-

> *" On careful consideration of entire facts it is observed that issue regarding disallowance of proportionate interest is covered in favour of Appellant by decision of Hon'ble Ahmedabad ITAT in Appellant's own case for A.Y. 2008-09 (ITA No. 1531/Ahd/2011) wherein Hon'ble ITAT vide its order dated 6th November, 2015 has held as under:*
>
> *"5. The CIT(A) deletes this bad debts disallowance after quoting case law of TRF Ltd. Vs. CIT, 323 ITR 397 (SC) to the fact that it is not necessary to prove the same to have actually become bad as per the relevant law amended from 01.04.1989. The CIT(A) comes to latter aspect (supra). The assessee submitted in the lower appellate proceedings that it had already credited its brokerage income in profit and loss account thereby offering it for taxation. It clarified that sale/purchase price of shares had been credited in the respective accounts. The CIT(A) follows special bench decision of the tribunal (2010) 5 ITR (Trib) 1 (Bom.) DCIT vs. Shreyas S. Morakhia as upheld in (2012) 342 ITR 285 (Bom.) CIT vs. Shreyas S. Morakhia that value of the share transacted by a broker-assessee on behalf of the concerned client is very much allowable as bad debts. The Revenue fails to rebut this legal position. We reject this third substantive ground accordingly."*
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> *Following the above decision of Ahmedabad ITAT in Appellant's own case, disallowance of Rs. 1,18,89,628 is deleted. This ground of appeal is allowed."*

56. Being aggrieved by the order of the Learned CIT-A the Revenue is in appeal before us.

57. Both the Learned DR and the AR before us vehemently supported the order of the respective authorities below to the extent favourable to them.

58. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the Tribunal in the own case of the assessee in ITA No. 1531/AHD/2011 for the Assessment Year 2008-09 vide order dated 6th November 2015, involving identical issue has decided the matter

in favor of the assessee. The relevant extract of the order is reproduced as under:

> *"The Revenue's third substantive ground assails correctness of the CIT(A) action in deleting bad debt disallowance of Rs.27,35,991/-comprising of debit balance written off of Rs.25,60,148/- and bad debt of Rs.1,75,843/-. These entries are mainly in the nature of vatav kasar. Some of them are less than of Rs.10,000/- even. The Assessing Officer observed that there was no material on record to prove the same to have been actually become bad. And also that the assessee had offered only brokerage sums as its income u/s 36(2) of the Act in profit and loss account. He accordingly made the impugned disallowance of this bad debts claim."*

59. The Learned DR at the time of hearing has not brought anything on record contrary to the finding of the ITAT as discussed above suggesting that there was any change in the facts and circumstances or under the provisions of law. Hence, there being no change in the facts and circumstances viz a viz under the provisions of law, we confirm the order of the Ld. CIT-A in view of the order of this tribunal in the own case of the assessee (supra). Accordingly, we direct the AO to delete the addition made by him. Hence, the ground of appeal of the Revenue is dismissed."

11. In ITA No. 2021/Ahd/2017 the assessee has taken following grounds of appeal:-

1.1 In law and in the facts and circumstances of the Appellant's case, the learned CIT(A) has grossly erred in sustaining the addition made by the learned A.O by treating a normal business loss [Saudafer loss] of Rs. 13,79,652/- as speculation loss.

1.2 Without prejudice to the foregoing, in law and the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in treating loss of Rs. 5,62,583/- on Futures and Options [F&O]Transactions and Rs. 32,817/- on Currency derivatives segment undertaken in recognized Stock exchanges as a part of the speculation loss. The aforesaid amounts were included in the total amount of loss of Rs. 13,79,652, nature of which are expressly excluded from the definition of 'speculative transaction' vide sub clause (v) of clause (5) of section 43 of the Income Tax Act, 1961 Hence the impugned disallowance could have been only for Rs. 784,252 which was rightly considered in the summary of the disallowances in Para 10 of the Assessment Order but omitted in para 6.3 of the said order.

2. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in not ordering for the

deletion of the levy of interest u/s. 234B and 234C challenged by the appellant vide ground No. 9 of its appeal, inter alia, on the ground that the levy under that provision was not at all attracted if consideration was given to all the prepaid taxes.

3. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in dismissing Ground No. 10 of the appellant's appeal before him challenging the initiation of penalty proceedings u/s. 271(1)(c). He ought to have appreciated, inter alia, that in the peculiar facts and circumstances of the appellant's case, initiation of penalty proceedings for concealment of income was not at all warranted and that, therefore, he ought to have ordered for the cancellation of those proceedings, thereby saving the appellant as well as the Department from having to undergo avoidable litigation.

4. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal.

12. The Ld. AO has discussed issue in Paragraph 6 on pages 12 to 23 and CIT(A) has discussed Para 14to 18 on Pages 11to 17 and identical issue is covered in favour of assessee in its own case vide ITAT order for A.Y. 2010-11 bearing ITA no. 413/A/2016 with the following observation:

"60. The next issue raised by the Revenue is that the Learned CIT (A) erred in deleting the addition made by the AO for Rs.17,02,013/- on account of Saudafer loss.

61. The assessee during the assessment proceedings submitted that it has made certain mistakes while carrying out transactions of purchases and sales of securities on behalf of the clients which has resulted loss of Rs. 38,40,074/- only. As per the assessee such loss should be allowed as deduction under Section 28 (1) of the Act as it did not occur in its own account and the same should not be treated as speculative loss under explanation to Section 73 of the Act.

62. The assessee further contended that had such loss been debited in the account of the clients, but such clients would not have paid for such losses as the loss was incurred due to the mistake of the assessee. In such a situation, the loss was allowable as deduction either under Section 36(1) as bad debts or as a business loss under Section 28(1) of the Act.

63. However, the AO disagreed with the contention of the assessee by observing that the assessee has not furnished the details of the mistake committed by it, such as clients in whose accounts the transaction was entered, non-delivery of the shares to the exchange and incorrect execution of orders. The AO also observed that there was disallowance made by his predecessor in the own case of the assessee for the

Assessment Year 2006-07 treating such loss as speculative in nature. Accordingly, the AO added the same to the total income of the assessee and allowed the same to be carried forward.

64. Aggrieved assessee preferred an appeal to the Learned CIT (A).

65. The assessee before the Learned CIT (A) submitted that the impugned loss of Rs. 38,40,074/- is inclusive of the loss of Rs.17,02,013/- which was incurred out of future and option segment carried out through the recognized stock exchange. Therefore such loss of Rs. 17,02,013/- cannot be treated as speculative transaction as per clause (d) of sub-Section 5 to Section 43 of the Act. Therefore, to the extent of Rs.17,02,013/- such loss cannot be treated as speculative in nature.

66. The assessee also contended that it has declared of gross brokerage income of Rs. 60,34,33,815/- only and the amount of impugned loss debited stands at Rs. 38,40,074/- which is less than 0.6% of the total turnover. Therefore, there is no justification on the part of the AO to disbelieve its (assessee) version.

67. However, the Learned CIT (A) found that the assessee has not furnished necessary details about the parties on whose case the mistake was committed by it. Thus, in the absence of such information, it has to be presumed that the impugned loss was incurred on assessee's account.

68. Nevertheless, the Learned CIT (A) deleted the addition made by the AO for the Assessment Year 2006-07 for the reason that the assessee has furnished the necessary evidence to justify that the loss was not on its account. Rather such loss was incurred by the assessee on behalf of its client. But in the case on hand the assessee has not furnished the necessary details. Thus, the Learned CIT (A) in the absence of sufficient documentary evidence concluded that such loss relates to the assessee's account.

69. However, the Learned CIT (A) held that the loss to the extent of Rs. 17,02,013/- relates to the future and option segment which was carried out through the recognized stock exchange. Therefore, such loss of Rs. 17,02,013/- cannot be treated as speculative transaction as per clause (d) of sub Section 5 to Section 43 the Act and under the explanation to Section 73 of the Act. Accordingly, the Learned CIT (A) deleted the addition made by the AO for such loss of Rs. 17,02,013.00. Thus, the Learned CIT (A) allowed the ground of appeal of the assessee in part.

70. Being aggrieved by the order of the Learned CIT (A) both the Revenue and the assessee are in appeal before us. The Revenue is in appeal against the deletion of the addition made by the AO for Rs.17,02,013/- treating such loss relating to future option segment which was carried out through the recognized stock exchange whereas the assessee is in appeal against the confirmation of the addition of Rs. 21,38,061/- which was treated by the Learned CIT (A) as speculative in nature in pursuance to the explanation to Section 73 of the Act. The ground No. 4 of appeal filed by the assessee in ITA No. 268/AHD/2016 reads as under:

"4. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in sustaining the Ld. AO's action of treating what was normal business los [Saudafer loss] as speculation loss to the extent of Rs. 21,38,061 [out of Rs. 38,40,074 so treated by the Ld. A.O.]."

71. The Learned DR before us submitted that the loss claimed by the assessee for Rs. 17,02,013/- is deemed to be speculative loss under explanation to Section 73 of the Act.

72. On the other hand, the Learned AR before us reiterated the contention of the assessee as raised before the authorities below.

73. Both the Learned DR and the AR before us vehemently supported the order of the authorities below to the extent favourable to them.

74. We heard the rival contentions of both the parties and perused the materials available on record. The first issue that arises for our consideration is whether the impugned loss incurred by the assessee relates to the sale and purchase activities carried out by the assessee for itself or it relates to the other clients of the assessee. It is a question of fact which can verified based on the documentary evidence. Indeed, the assessee has not furnished the sufficient documentary evidence in support of his contention. But looking at the amount of impugned loss in comparison to the volume of the brokerage business carried out by the assessee, we find that such loss is of negligible value. Furthermore, the tax audit report in form 3CD suggests that the assessee is engaged in the activity of stockbroking only and not in the activity of sale purchase of securities. The copy of form 3 CD is placed on pages 133 to 165 of the Paper Book. Similarly, the AO has also recorded in his order the nature of business of the assessee i.e. stockbroking. Even in the earlier Assessment Year 2006-07, the impugned loss was also treated as speculative in nature but the Learned CIT (A) deleted the same as the assessee was able to justify his contention based on the documentary evidence that such loss relates to its clients. This finding of the Ld. CIT-A, if analyzed in aggregation of other facts i.e. form 3CD report, profit & loss account, nature of the business as recorded by the AO, the fact emerges that that the assessee is not carrying out share trading activities in its accounts.

75. On perusal of the financial statements placed on pages 59 to 132 of the Paper Book, it was observed that there was no transaction shown by the assessee as purchase and sale of the shares. In view of the above and after considering the details as discussed above we hold that the impugned loss incurred by the assessee does not pertain to its accounts rather it relates to the accounts of its clients. Accordingly, we conclude that the provisions of explanation to Section 73 of the Act cannot be applied to the case on hand. In holding so we find support and guidance from the order of this Tribunal in the case of Parker securities Ltd versus DCIT reported in 102 TTJ 235 wherein it was held as under:

"Explanation to Section 73 provides that where any part of the business of a company (other than certain specified companies as mentioned in the Explanation) consists in the purchase and sale of shares of other

companies, such company shall, for the purposes of this Section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. It is clear from the said provision that sale and purchase of shares of other companies, within the ambit of the Explanation, must be carried out as an activity of business. The term 'business' has been defined in Section 2(13). Noting the definition of 'business' from the view point of Explanation to Section 73, it has been observed by the Karnataka High Court in the case of Mysore Rolling Mills (P.) Ltd. v. CIT [1992] 195 ITR 404/ 63 Taxman 416 that any kind of venture would not fall within this inclusive definition. The venture or the adventure will have to be in the nature of trade, commerce or manufacture. Basically, the concept of business involves a frequent activity of a particular nature. Therefore, to find out that the assessee carried on purchase and sale of shares of other companies as its business in a given case, the facts of that case will have to be examined and the tests which could determine such situation are - (i) nature of assessee's business in general, (ii) the purpose behind the particular transaction, and (iii) the effect of the transaction etc. In the instant case, the nature of the assessee's business in general was to earn income as a broker of stock exchange and the purpose behind the transactions in regard to which the assessee had incurred loss was the purchase for and on behalf of certain clients to earn brokerage income therefrom. It was only an eventuality that some of the clients disowned only part of the transactions which under compulsion were to be taken by the assessee as its own. [Para 28]"

75.1 In view of the above, once it has been held that loss does not relate to the activity of sale/purchase of shares by the assessee for itself, then the provisions of explanation to Section 73 of the Act cannot be applied. Hence, the ground of appeal of the Revenue is dismissed whereas the ground of appeal of the assessee is allowed."

Thus, in parity with above said ITAT order we allow the ground of appeal of the assessee.

13. In the combined result, appeal filed by the assessee is allowed and appeal filed by the Revenue is dismissed.

This Order pronounced in Open Court on 27/10/2021

Sd/-	Sd/-
(WASEEM AHMED)	(MAHAVIR PRASAD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 27/10/2021

TANMAY ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue,
2. आवेदक / Assessee,
3. संबंधित आयकर आयुक्त / Concerned CIT,
4. आयकर आयुक्त- अपील / CIT (A),
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad,
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।