

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

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

**ITA No. 1243/Mum/2014**  
(Assessment Year: 2010-11)

First Global Stockbroking P. Ltd.  
#2, Crescent Chambers  
4<sup>th</sup> Floor, Tamarind Lane  
Fort, Mumbai 400001

DCIT, Range 4(1)  
Room No. 640, 6<sup>th</sup> Floor  
Vs. Aayakar Bhavan, M.K. Road  
Mumbai 400020

PAN – AAACF0661K

**Appellant**

**Respondent**

Appellant by: Shri Satish R. Mody  
Respondent by: Shri Mallikarjun Utture

Date of Hearing: 03.10.2016  
Date of Pronouncement: 05.10.2016

**ORDER**

**Per Jason P. Boaz, A.M.**

This appeal by the assessee is directed against the order of the CIT(A)-8, Mumbai dated 10.12.2013 for A.Y. 2010-11.

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

2.1 The assessee, a company engaged in business as share broker filed its return of income for A.Y. 2010-11 on 08.10.2010 declaring total income of Rs.50,49,390/- after setting off business loss of Rs.2,01,95,300/-. 'Book Profits' under section 115JB of the Act was computed at Rs.1,28,29,061/-. 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 12.12.2012, wherein the income of the assessee under normal provisions was determined at Rs.64,58,213/- in view of the following additions/disallowances: -

- |      |                         |             |
|------|-------------------------|-------------|
| (i)  | Under section 14A       | ₹4,90,318/- |
| (ii) | Under section 40(a)(ia) | ₹9,18,509/- |

'Book Profits' under section 115JB of the Act was computed at ₹1,33,19,379/- .

2.2 Aggrieved by the order of assessment dated 12.12.2012 for A.Y. 2010-11, the assessee preferred an appeal before the CIT(A)-8, Mumbai. The learned CIT(A) dismissed the assessee's appeal vide the impugned order dated 10.12.2013.

3. Aggrieved by the order of the CIT(A)-8, Mumbai dated 10.12.2013 for A.Y. 2010-11, the assessee has preferred this appeal raising the following grounds: -

- "1. The Ld. CIT(Appeals)-8 has erred in confirming the disallowance of an amount of Rs. 4,90,318/- u/s 14A of the I.T. Act made by the Ld. Assessing Officer. This disallowance is against the law and facts of the case and may please be deleted.*
- 2. The Ld. CIT(Appeals)-8 has erred in confirming the disallowance of an amount of Rs.9,18,509/- u/s 40(a)(ia) of the Act made by the Ld. Assessing Officer for non-deduction of TDS by the appellant for payment made to the stock exchanges. This disallowance is against the law and facts of the case and may please be deleted.*
- 3. The Ld. CIT(Appeals)-8 has erred in dismissing the ground as infructuous whereby the Ld. Assessing Officer had erred in computing an amount of Rs.14,60,000/- as Deemed Dividend u/s 2(22)( e) of the Act purportedly to be disallowed in the hands of Virta Trade and Agencies Pvt. Ltd. This computation by the Ld. Assessing Officer may please be deleted.*
- 4. The Appellant craves leave to add, amend, modify or alter the ground at the time of hearing."*

The effective ground of appeal are at Sr.Nos. 1 to 3 (supra).

4. **Ground No. 1: Disallowance under section 14A r.w.s. Rule 8D**

4.1 In this ground, the assessee contends that the learned CIT(A) erred in confirming the disallowance of ₹4,90,318/- under section 14A r.w. Rule 8D of the I.T. Rules. It is submitted by the learned counsel for the assessee that the very same issue of disallowance under section 14A r.w. Rule 8d was before a Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2009-10 and the Coordinate Bench in its order in ITA 966/Mum/2013 dated 19.03.2015 had restored the matter to the file of the Assessing Officer (AO) to re-work the disallowance, if any, thereunder

after taking into consideration the assessee's contention that no such disallowance should have been made by the AO since its investments are entirely in group concerns which are foreign entities, the income from which investments are taxable as income of the assessee. It is submitted that the factual situation being the same in the year under consideration, the matter of re-working the disallowance under section 14A r.w. Rule 8D be restored back to the file of the AO for verification of assessee's claim.

4.2 Per contra, the learned D.R. for Revenue placed reliance on the orders of the authorities below.

4.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. In this year, the assessee has earned dividend income of Rs.15,60,000/-. The AO computed the disallowance under section 14A r.w. Rule 8D(2)(iii) of the Act at Rs.4,90,318/-; only with respect to expenses which will be the amount equal to  $\frac{1}{2}\%$  of the average value of investment, income from which does not form part of the total income, as appearing in the Balance Sheet of the assessee as on the first and last day of the previous year under consideration. According to the learned A.R., the assessee had made certain strategic investments in shares of group concerns which are foreign entities, the income from which are exigible to tax as income of the assessee, i.e. First Global (UK) Ltd. and FG Market Inc. and submitted that to this extent at least, the investments therein should be excluded from the total investments while computing the disallowance under section 14A r.w. Rule 8D of the I.T. Rules.

4.3.2 We find that the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2009-10 in its order in ITA No. 966/Mum/2013 dated 19.03.2015 has restored this issue to the file of the AO for verification of the assessee's similar contentions holding as under at para 4 thereof: -

*"4. We have heard both the parties and their contentions have carefully been considered. The calculation prescribed under Rule 8D itself describe that basis of calculation will be  $\frac{1}{2}\%$  of the average of the value of investment, income from which does not or shall not form part of total income. Therefore, the investment out of which income is*

*taxable, cannot be included for the purpose of computation of disallowance. In this view of the situation, we restore this issue to the file of AO with a direction to verify such contention of the assessee and grant appropriate relief. This ground is considered to be partly allowed for statistical purposes in the manner aforesaid.”*

4.3.3 Following the decision of the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2009-10 (supra), we set aside the order of the learned CIT(A) and restore the issue of re-working the disallowance under section 14A r.w. Rule 8D of the I.T. Rules, to the file of the AO to verify the contention of the assessee that the investments made by it in group concerns, foreign entities, the income of which is exigible to tax be excluded while computing the disallowance under Rule 8D(2)(iii), which is in respect ½% of the average value of investment, the income of which does not form part of total income. We hold and direct accordingly. Ground No. 1 of assessee's appeal is treated as partly allowed for statistical purposes as indicated above.

#### **5. Ground No. 2 – Disallowance under section 40(a)(ia)**

5.1 In this ground, the assessee assails the order of the learned CIT(A) in confirming the disallowance of ₹9,18,509/- under section 40(a)(ia) of the Act made by the AO for non-deduction of tax by the assessee for transaction charges payments made to Stock Exchanges, i.e. BSE and NSE. The learned counsel for the assessee submitted that this issue is now settled in favour of the assessee by the decision of the Hon'ble Apex Court in the case of CIT vs. Kotak Securities Ltd. (2016) 383 ITR 1 (SC), wherein it was held that transaction charges paid to BSE, etc. by its members are not 'technical services' rendered, but the nature of such payments are for facilities provided by the Stock Exchange and therefore no TDS on such payments would be deductible under section 194C or 194J of the Act.

5.2 Per contra, the learned D.R. supported the impugned order of the learned CIT(A) on this issue.

5.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. The facts of the matter on this issue are that in the period under

consideration, the assessee paid transaction charges amounting to ₹9,18,509/- to BSE and NSE. The authorities below following the decision of the Hon'ble Bombay High Court in the case of Kotak Securities Ltd. (ITA No. 3111 of 2009) held that the assessee was liable to deduct tax at source while crediting the transaction charges to the account of the Stock Exchange and failure to do so called for the said payment to be disallowed under section 40(a)(ia) of the Act. We find that this very issue was up for consideration before the Hon'ble Apex Court in the case of Kotak Securities Ltd. (2016) 383 ITR 1 (SC) and the Hon'ble Apex Court held that transaction charges paid to Bombay Stock Exchange by its members are not for technical services rendered but are payments made for facilities provided by the Stock Exchange and therefore no TDS was deductible on such payments under section 194J/194C of the Act. In its order at paras 8 to 10, the Hon'ble Apex Court has held as under: -

*"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."*

5.3.2 Respectfully following the decision of the Hon'ble Apex Court in the case of Kotak Securities Ltd. (2016) 383 ITR 1 (SC), we hold that the transaction charges of ₹9,18,509/- paid by the assessee to BSE and NSE as a member is in the nature of payments made for facilities provided by the Stock Exchange and therefore no TDS on such payment would be deductible under section 194C/194J of the Act. The orders of the authorities below making disallowance under section 40(a)(ia) for non-

deduction of tax on such payment of transaction charges are accordingly reversed. Consequently, ground No. 2 of the assessee's appeal is allowed.

6. **Ground No. 3 – Deemed Dividend under section 2(22)(3)**

6.1 This ground No. 3 was not pressed by the learned counsel for the assessee and therefore this ground is dismissed as not pressed.

7. In the result, the assessee's appeal for A.Y. 2010-11 is partly allowed.

Order pronounced in the open court on 5<sup>th</sup> October, 2016.

Sd/-  
**(Sandeep Gosain)**  
**Judicial Member**

Sd/-  
**(Jason P. Boaz)**  
**Accountant Member**

Mumbai, Dated: 5<sup>th</sup> October, 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.