

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

INCOME TAX APPEAL NO. 250 OF 2013

Commissioner of Income Tax-4	}	Appellant
versus		
Shri. Manish D. Innani	}	Respondent

Mr. A. R. Malhotra with Mr. N. A. Kazi i/b. Ms.
Padma Divakar for the Appellant.

Mr. Sanjiv M. Shah for the Responent.

**CORAM :- S.C.DHARMADHIKARI &
S.P.DESHMUKH, JJ.
DATED :- JANUARY 9, 2015**

P.C. :-

The Tribunal's order dated 1st August, 2012 in Income Tax Appeal No. 861/Mum/2012 is challenged by the Revenue in this Appeal. The Assessment year is 2008-09.

2) Mr. Malhotra appearing for the Revenue submits that the substantial question of law is that the Tribunal was not justified in allowing the rebate of Rs.1.01 crores under section 88E of the Income Tax Act, 1961 against the rebate of Rs.75.07 lacs allowed by the Assessing Officer.

3) The facts pertaining to this ground and question have been noted in both, the Memo of Appeals before the Commissioner of Income

Tax and the Tribunal as also in this Court. The Assessee is individually engaged in the business of derivative trade in shares and investment. The return of income was filed by the Assessee for the previous year ended on 31st March, 2008. The Assessee declared total income at Rs.5,94,71,620/-. He claimed rebate under section 88E at Rs.1,01,87,300/-. He also furnished the working of disallowance under section 14A during the assessment proceedings. The assessment was completed under section 143(3) of the Income Tax Act, 1961 by order dated 28th December, 2010 determining total income at Rs.27,17,31,090/-.

4) The Assessing Officer made addition and we are concerned in this case with the calculation of the rebate under section 88E of the Income Tax Act, 1961 at Rs.75,07,274/-. The argument of the Assessee before the Commissioner as also the Tribunal was that the rebate in respect of securities transaction tax and admissible under section 88E has not been granted in terms of the section and the entitlement of the Assessee thereunder. The Assessee's representative contended that the deduction under section 88E in accordance with the formula prescribed under sub-section (2) of section 88E does not rule out brought forward loss of Rs.1,62,36,858/- from assessment year 2007-08. That is set off against the income from taxable securities of Rs.4,95,93,132/- earned

during the assessment year 2008-09. It was submitted that the taxable securities transactions, meaning thereby the tax on the securities transactions, which are taxable, will have to be computed on this entire figure. Therefore, the benefit in terms of section 88E ought to be granted in full and there was no warrant for taking into consideration the brought forward loss for the earlier assessment year. The Assessing Officer erroneously took that into account and consideration and reduced the rebate accordingly. The Commissioner dealt with this argument and in para 5.4 held that the Assessing Officer has rightly worked the average rate of tax as per section 88E. He upheld the working by the Assessing Officer and dismissed the Assessee's Appeal.

5) The matter was carried to the Tribunal and in paras 5 and 6 of the Tribunal's order, a reference was made to the decision of the Tribunal in the case of *Oasis Securities Ltd.* in **Income Tax Appeal No. 2534/Mum/2009** for assessment year 2006-07 rendered on 30th September, 2010. The other order relied upon was in the case of *Ashika Stock Broking Ltd.* (**44 SOT 556**).

6) Mr. Malhotra submits that when the Tribunal distinguished its co-ordinate Bench decision in the case of *Oasis Securities Ltd.* (supra), then, the calculations made by the Assessing Officer and his order deserve to be upheld, and there was no scope for allowing partly

the ground, which was raised by the Assessee. He therefore submits that para 7 of the Tribunal's order contains reasons, which cannot be sustained in the light of the clear language of section 88E of the Income Tax Act, 1961. He has faulted the Tribunal for having held that the surplus from share dealing of market segment/future and option segments is not there but there is net income after setting off of losses. He submits that the Tribunal's order contains something which is not subject matter of section 88E of the Income Tax Act, 1961. Consequently, the Appeal be admitted.

7) On the other hand, Mr. Shah appearing for the Respondent would submit that the language of section 88E is clear and unambiguous. It does not warrant any interpretation. Sub-section (1) thereof states that where the total income of the Assessee in a previous years includes any income, chargeable under the head "profit and gains of business or profession" arising from taxable securities transactions, he shall be entitled to a deduction from the amount of income tax on such income arising from such transactions, namely taxable securities transactions and the deduction is to be computed in terms of sub-section (2). Mr. Shah would submit that the Tribunal has done nothing but applied the language of this section and granted the necessary deduction. The Appeal therefore does not raise any substantial question

of law. There was no warrant for bringing down the quantum of the deduction or the figure concerned by relying upon some losses, which have been brought forward by the Assessee from the prior assessment year. Mr. Shah would submit that it is the income from the taxable securities transactions in the previous year relevant to the assessment year, which enables the deduction to be claimed. If it is claimed in that manner and its computation is in terms of sub-section (2) of section 88E, then, the present Appeal does not raise any substantial question of law. The Tribunal's order cannot be said to be erroneous or vitiated by perversity either. He therefore submits that the Appeal be dismissed.

8) The Tribunal had before it a ground relating to rebate in respect of securities transaction tax under section 88E of the Act. The working of the rebate was a matter before the Assessing Officer. The Assessee was asked to submit the working of rebate claimed in respect of securities transaction tax amounting to Rs.1,01,87,300/-. The Assessing Officer found that though the Assessee had applied average rate on income but the average rate was adopted before setting off business loss of earlier years. The assessing Officer held that the total income of the Assessee is Rs.5,94,71,620/-, which includes Rs.3,34,49,474/- (after setting off business loss of Rs.1,62,36,858/- brought forward from the year 2007-08), which is chargeable under the

head “profits and gains of business or profession” arising from taxable securities transactions. He therefore held that the Assessee is entitled to get rebate under section 88E on the income of Rs.3,34,49,474/-, but not on Rs.4,95,93,132.

9) To our mind, all that the Tribunal has done is to take into account the volume of the securities transactions and which were taxable. The total income of the Assessee in the previous year included the income from taxable security transactions. The requirement under sub-section (1) of section 88E on this count was fully satisfied. The only issue was how this deduction and in terms of the provision has to be computed. The Assessing Officer has ignored completely the quantum of income from taxable securities transactions, the tax that is leviable thereon and which has to be deducted in terms of sub-section (2) of section 88E. So long as the stipulation under sub-section (2) is adhered to and followed, namely the amount of income tax on the income arising from the taxable securities transactions referred to in sub-section (1), shall be equal to the amount calculated by applying the average rate of income on such income, the deduction deserves to be granted. Therefore, the clear language of the section has been taken into consideration. The total income in a previous year if includes any income arising from taxable security transactions, then, the Assessee is

entitled to deduction from the amount of income tax on such income arising from such transactions. That is because the income from taxable securities transactions has already been subjected to tax. The security transactions are taxable. Therefore, from the amount of income tax on such income arising from such transactions, the deduction has to be computed and that is an amount equal to the securities transaction tax paid by the Assessee in respect of the taxable securities transactions entered into in the course of his business during that previous year. The proviso contemplates that deduction can be allowed only if the Assessee furnishes, along with the return of income, evidence of payment of securities transaction tax in the prescribed form. There is no dispute before us that the Assessee has complied with the proviso and the second proviso as well, namely that the amount of deduction under this sub-section shall not exceed the amount of income tax on taxable securities transactions computed in the manner provided in sub-section (2). To our mind, the Tribunal committed no error when it corrected the computation or calculation of deduction. There was no warrant in the light of the clear language of this provision then to take into consideration the brought forward losses. It is the taxable securities transaction, the income derived from such taxable securities transactions and they being taxable, the tax paid thereon, which has to be deducted. That is how the section has been understood and applied

to the given facts and circumstances. We do not think that any larger controversy arises for determination and consideration in this Appeal. We are not in agreement with Mr. Malhotra that the decision of the Tribunal's co-ordinate Bench in *Oasis Securities Ltd.* (supra) has been distinguished but still the deduction has been granted. In para 6.1, the Tribunal concluded that the Assessee is entitled to rebate of Rs.1.01 crores under section 88E of the Income Tax Act, 1961 as against the rebate of Rs.75.07 lakhs allowed by the Assessing Officer. The Tribunal may have distinguished its order and decision of the co-ordinate Bench rendered in the case of *Oasis Securities Ltd.* (supra), but, pertinently, it was held that the surplus from share dealing of market/future and option segment may not be there, but there is net income after setting off of losses. There was an over all profit for the assessment year under consideration and the rebate had to be allowed. Before the Assessing Officer or the Commissioner as well, the issue was not as much of admissibility of rebate in terms of section 88E, but the manner of its computation. The deduction has to be computed in the manner specified in sub section (2) of section 88E. We do not think that there is any basis for the argument and in the given facts and circumstances that the average rate was applied on income before setting off business loss of earlier year.

10) In these circumstances and when the income from the

securities transactions is taxable and offered to tax, the deduction insofar as that sum is concerned or quantum has been granted. We do not think that the Tribunal's order can be interfered with. The Tribunal's view is imminently possible in the backdrop of the facts and circumstances peculiar to the Assessee. In any event by sub-section (3) of section 88E it has been clarified that no deduction under section 88E shall be allowable in, or after, the assessment year beginning on the 1st day of April, 2009 i.e. because a deduction which is contemplated by this provision has been now made admissible elsewhere. In these circumstances, the Appeal raises no substantial question of law. It is dismissed. More so when the Tribunal's order has been given effect to by the Assessing Officer. He has followed his view taken in the assessment year 2006-07, which is also following the Tribunal's order. No costs.

(S.P.DESHMUKH, J.)

(S.C.DHARMADHIKARI, J.)