IN THE INCOME_TAX APPELLATE TRIBUNAL " B " BENCH, AHMEDABAD

BEFORE SHRI T.K. SHARMA AND SHRI D.C. AGRAWAL.

ITA. No. 615 /Ahd/2005
(Assessment Year: 2001-02)

Madhur Shares & Stock Private Ltd., Madhur Complex, Stadium Circle,Navrangpura, Ahmedabad.	**Vs**	**Assistant Commissioner of Income Tax, Circle-3, 5th Floor, Insurance Bldg., Ashram Road, Ahmedabad.**
(Appellant)		**(Respondent)**

AND

ITA. No. 704 /Ahd/2005
(Assessment Year: 2001-02)

Assistant Commissioner of Income Tax, Circle-3, 5th Floor, Insurance Bldg., Ashram Road, Ahmedabad.	**Vs**	**Madhur Shares & Stock Private Ltd., Madhur Complex, Stadium Circle,Navrangpura, Ahmedabad.**
(Appellant)		**(Respondent)**

PAN: AABCM 5449D

By Assessee	**:**	**Smt. Urvashi Shodhan.**
By Revenue	**:**	**Shri B.S. Gahlot, CIT(DR) with Smt. Neeta Shah, Sr.D.R.**

(आदेश)/ORDER

PER SHRI D.C. AGRAWAL.

These are the two appeals for the assessment year 2001-02 arising from the order of Ld. C.I.T.(A) dated 24-12-2004, one filed by the assessee and the other filed by the Revenue.

2. Since common issues and arguments are involved they are taken up together for the sake of convenience.

3. In the Departmental appeal following grounds are raised :-

1. The CIT(A) has erred in law and on facts in the case in deleting the following additions made by the A.O.

i) Depreciation on membership card of Rs.1,89,844/-
ii) Rs. 4,46,18,417/-allowing as trading loss out of bad debts disallowance of Rs.5,77,44,844/-.
iii) Sundry creditors treated as unexplained cash credits u/s.63 – Rs.14,07,751/-.

2. On the facts and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the Assessing Officer."

4. Whereas in assessee's appeal following grounds are raised :-

1. On the facts and in the circumstances of the case, the assessment completed is not in accordance with law in so far as neither the assessment order nor the demand notice contains the break-up of total sum demanded Rs.98,68,345/-. It deserves to be annulled.

2. Without prejudice, on facts and in the circumstances of the case, the CIT (A) has erred in holding that though the assessee is a stock broker deduction for bad debts of its clients is not allowable u/s. 36(1)(vii) r.w.s. 36(2).

3. Without prejudice, on facts and in the circumstances of the case, the CIT (A) should have held that for a stock broker amounts not recovered from its clients satisfy the condition laid down in section 36(2)(i) and hence they are allowable u/s. 36(1)(vii) of the Act.

4. Without prejudice, on facts and in the circumstances of the case, the CIT(A) has erred in upholding the disallowance of Rs.1,31,36,427/- out of total claim of Rs.5,77,84,844/- by purportedly applying section 28.

5. Without prejudice, on facts and in the circumstances of the case, the CIT (A) has erred in restricting the deduction to Rs.4,46,18,417 while he should have held that the whole sum of Rs. 5,77,44,844 was allowable as deduction even under section 28.

6. Without prejudice, on facts and in the circumstances of the case, the CIT (A) should have held that it was not a fit case for levy of interest u/s. 234A or 234B or u/s.C or u/s. 234D."

5. The facts involved are that assessee is a company registered as share broker with Ahmedabad Stock Exchange. The assessee is carrying on business of share broking, and therefore, declared income from earning brokerage. The assessee-company during the year in question declared a loss of Rs.47,51,790/-

ITA. No.704/Ahd/05. (Revenue's Appeal)

6. The first issue is about allowing depreciation on Membership Card of Stock Exchange. The A.O. mentioned in his order that the assessee acquired membership card right in Ahmedabad Stock Exchange on 26-2-1997 long before 1-4-1998 when amendment in section-32 had taken place to the effect that depreciation will be allowed on know-how, patents, copy-rights, trade marks, licenses, franchises or any other business or commercial rights of similar nature acquired on or after 1st day of April,1998.

According to the A.O. since this right in the form of membership card was acquired prior to 1-4-1998 assessee will not be entitled to depreciation on it. Further, according to the A.O. stock exchange card is not an asset, u/s. 2(e) of Wealth tax Act. It is not franchises, or license, but it is only an identity proof of assessee's membership into the stock exchange.

7. However, the Ld. CIT(A) allowed the claim relying on the decision of Tribunal in the case of V.G. Gajjar & Others in W.T.A.No.07/A/2001 dated 30-9-2004 wherein the Tribunal has held that Stock Exchange Card is a property and an asset u/s. 2(e) of Wealth Tax Act. Further depreciation has been permitted on intangible asset after 1-4-1998. The Ld. C.I.T.(A) mentioned that assessee acquired this card after 1-4-98 and not on 26-2-97. The Ld. C.I.T.(A) has verified this fact from the record of that year and other years from the audited accounts submitted by the assessee. According to the Ld. C.I.T.(A) membership card of Ahmedabad Stock Exchange is granted by Stock Exchange to carry on share transactions at its own in the exchange.

8. We have heard learned D.R. and Ld.A.R. According to Ld. D.R. as per the decision in CIT vs. Techno Shares & Stock Ltd., & Others(2009) 32 DTR 201(Mumbai)/ (2009) 225 CTR-337(Mum.) depreciation will not be admissible on membership card of Stock Exchange. On the other hand Ld. A.R. submitted that once membership card is acquired after 1-4-98 then as per latest decision of ITAT Bombay Bench in Kotak Securities Ltd. vs. Addl. CIT (2009)

318 ITR-80; 268 ITD (ITAT) Mumbai, depreciation on the membership card would be available.

9. After hearing the rival submissions we are of the considered view that depreciation cannot be allowed on the membership card of Stock Exchange. However the ITAT Mumbai Bench in the case of Kotak Securities Ltd., (Supra) has allowed the claim holding it as intangible asset and that the card would fall within the parameter of section 32(1)(ii) of the I.T. Act,1961, it is also held to be a capital asset which confers the right to trade on the floor of the stock exchange, when acquired by the assessee, such right becomes an intangible asset. It has also been so held in Dy. CIT vs. Khandwala Pvt. Ltd., (2009) 309 ITR-80 (08 ITAT Mum.) and also in R.M. Vallippan vs. ACIT (2006) 287 ITR-80 (203) ITAT Chennai Special Bench that membership card/stock exchange is a capital asset.

10. But the latest decision of Hon'ble Bombay High Court in CIT vs. Techno Shares & Stock Ltd. and others (supra) has held that Stock exchange card is neither business or commercial right nor any intellectual property and also not a license therefore, depreciation would not be available on it. Hon'ble Bombay High Court rejected the argument that stock exchange card being capital asset is entitled to depreciation by holding that u/s.32 not all capital assets are entitled to depreciation. As stock exchange card does not fall in any of the categories fixed u/s.32(1)(ii) depreciation thereon would not be admissible. In this regard we refer to the observations in paragraphs 26, 31 to 33 of that Judgement as under:-

"Depreciation under s. 32 is restricted to a class of tangible/intangible assets specifically enumerated therein. All the intangible assets specifically enumerated in s./32(1)(ii) in s. 32(1)(ii) (except the expression 'licences') belong to the class of intellectual properties. The expression 'licences' ins. 32(1)(ii) has to be construed restrictively so as to apply to licences relating to acquisition/user of intellectual property rights, because, firstly, plain reading of s. 32 makes it clear that the depreciation is restricted to the categories of intangible assets specifically enumerated therein and not to all intangible assets. In such a case, construing the expression 'licences' widely so as to cover all types of intangible assets acquired under a licence would amount to enlarging the scope of depreciation. Secondly, the categories of intangible assets specifically enumerated in s. 32(1)(ii) (barring the expression 'licences') are all relatable to intellectual properties. Since the common thread in almost all the expressions used in s. 32(1)(ii) relate to the class of intellectual property rights,it is reasonable to construe that the expression 'licences' in s. 32(1)(ii) relates to the class of intellectual property rights. Thirdly, the rule of noscitur a sociis would apply to the facts of the present case, because, the expression 'licences' in s. 32(1)(ii) is preceded and succeeded by the expressions which are all relatable to intellectual properties and therefore, the expression 'licences' in s. 32(1)(ii) would take colour from those expressions and accordingly apply only to licences relating to intellectual properties. Construing the expression 'licences' in s. 32(1)(ii) widely so as to apply to all types of licences relating to intangible assets would defeat the object of the Act, because, depreciation under s. 32 is intended to a limited category of intangible assets and not to a wider category of intangible assets. Therefore, it is reasonable to construe that the expression 'licences' is used in s. 32(1)(ii) to apply to licences relatable to intellectual properties only and not to all licences. The above reasoning is further fortified by the expression 'any other business or commercial rights of similar nature' used in s. 32(1)(ii). The said expression clearly postulates that the

> business or commercial rights which are not similar to the categories specified in s. 32(1)(ii) are not entitled to depreciation. In other words, the expression business or commercial rights of similar nature' clearly shows that all business or commercial rights are not entitled to depreciation. Therefore, construing the expression 'licences' widely so as to apply to all licences/permissions and all business or commercial rights would be ex facie contrary to express intention of the legislature. Accordingly, the alternative argument of the assesses that the BSE card is a business or commercial right and therefore entitled to depreciation is liable to be rejected, because, what s. 32(1)(ii) contemplates is the business or commercial rights relating to intellectual properties and not all categories of business or commercial rights. Since the BSE card is not a business or commercial right relating to intellectual property rights depreciation cannot be allowed on the BSE card."

Respectfully following above decision we disallow the claim of the assessee, reverse the order of the Ld. C.I.T.(A) and restore the order of A.O. Accordingly, this ground of appeal is allowed.

11. Next ground of appeal is that Ld. CIT(A) has partly allowed the trading loss out of bad debt claim of Rs.5,77,44,844/-. The facts of the case are that assessee has claimed bad debt or in the alternative, trading loss u/s. 28 in respect of the following amounts :-

Sr.No.	Name of the parties.	Amount.
1.	Padmavati Consultancy	34,46,220
2.	Sunita Sanghvi	1,38,35,092
3.	Saikrupa Consultancy	1,30,24,176
4.	Vijay Patel	83,65,513

5.	Archer Share Consultancy	13,00,000
6.	Ashit R. Shah	29,60,691
7.	Others	1,48,13,152
	TOTAL	5,77,44,844

12. The Ld. A.O. did not allow the claim of bad debt holding that assessee is a share broker and conditions laid down u/s. 36(2) are not satisfied. Further according to A.O. assessee failed to prove that it is a trading loss. The assessee claimed that it had filed copies of criminal complaints launched by it for recovery of the dues though in respect of few parties. The details in respect of others were not submitted. The A.O. issued summons u/s.131 against the parties whose details were submitted by the assessee but the replies received were stereotype and in Gujarati but without signature. Therefore, authenticity of the letters so received from the debtors was not established. He accordingly rejected the claim both u/s.36(1)(vii) and section 28.

13. The Ld. C.I.T.(A) held that conditions laid down u/s.36(2) are not satisfied as these debts were never incorporated for working out the profits of the assessee. He relied on the decision of ITAT Ahmedabad Bench in the case of ITO vs. Ashokkumar Lalitkumar reported in 53 ITD page-326. Regarding trading loss the Ld. C.I.T.(A) held that it was on account of failure of the parties to settle the dues etc., with the stock exchange. The assessee had to make the payment to Stock Exchange for avoiding himself being declared as a

defaulter. If the clients on whose behalf the assessee makes the transaction through stock exchange fail to make the payment then it is the responsibility of the broker to clear the dues within the stipulated time. With this object in mind the assessee made the payment and claimed it as trading loss. In order to support the claim, assessee filed letters indicating under what circumstances these amounts were written off. In many cases, assessee has taken legal actions. As the assessee has filed complete details with regard to loss suffered in respect of following parties, the Ld. C.I.T.(A) allowed part of the claim, as under:

Sr.No.	Name of the party.	Amount.
1.	Padmavati Consultancy	34,46,220
2.	Sunita Sanghvi	1,38,35,092
3.	Saikrupa Consultancy.	1,30,24,176
4.	Vijay Patel	83,65,513
5.	Ashit R. Shah.	4,16,31,692

14. The Ld. C.I.T.(A) allowed the claim in respect of some more parties as details were furnished to the circumstances under which money could not be recovered. The confirmation from Ankul Patel indicated that he paid the sum of Rs.10 lacs as full and final settlement of outstanding due and therefore, his balance debt was waived. In case of Shri Suhagbhai Sheth, who was doing the business in the name of his HUF, expired and his liabilities were not accepted by his family members. The assessee was therefore, not in

a position to recover a sum of Rs.14,86,725/- from them. It was claimed as a trading loss. The Ld. C.I.T.(A) accordingly, considered a sum of Rs.4,16,31,692/-, Rs.15 lacs in respect of Ankul Patel and Rs.14,86,725/- in respect of Shri Suhagbhai Sheth as trading loss. Thus, he allowed the claim of Rs. 4,46,18,417/-, whereas remaining claim of Rs.1,31,36,427/- was disallowed.

15. Before us the Ld. D. R submitted that claim cannot be allowed u/s. 36(2) as the amounts in question have not been taken into account while computing the profits of the business. The claim could not be allowed as trading loss because assessee has not effectively proved that it was a loss and that too during the course of business.

16. Against this ld. A.R. submitted that amounts in question were business debts and were written off by the assessee. The brokerage which was charged by the assessee from these clients, was declared in the Profit and loss account. The debts had arisen on account of business activity of the assessee-company and income has been earned by the assessee from such activities which are fully reflected in the P & L account. It is undisputed that Ld. A.R. submitted, debts pertained to clients from whom commission has been earned. The Ld. A,.R. submitted that even if a part of the debt is taken into account while computing income then entire debt is to be allowed. In the case of the present assessee brokerage has been taken into account in the P & L account as income and therefore, related debt should be considered as debt within the meaning of sec. 36(2). The Ld. A.R. referred to the decision of Hon'ble Gujarat High Court in

C.I.T. vs. Abdul Razak & Co., (1982) 136 ITR-825 (Guj.) where commission income earned was declared as income but debts outstanding against them could not be recovered then such non-recovered debts were allowed as business loss. The Ld.A.R. then referred to the decision of Hon'ble Punjab & Haryana High Court in C.I.T. vs. Dayalchand Hardayal (1989) 177 ITR-461(P&H) where assessee, acting as selling agent sold goods on credit on behalf of clients on credit, but could not realize debt from them the amount not so realized was treated as business loss and as admissible deduction. He then referred to the decision of Hon'ble Delhi High Court in C.I,.T. vs. D.S. Bist & Sons (2000) 243 ITR- 179 (Del.) where loss on account of non recovery of business debt was allowed as a trading loss.

17. We have considered the rival submissions and perused the material on record. For claiming deduction u/s. 36(1)(vii) as bad debt one condition to be satisfied is that amount should be written off in the books of the assessee by debiting P & L account and secondly, such amount or part thereof should be taken into account for computing income of the previous year or any earlier year. There are divergent views as to whether debt recoverable from clients would be considered as taken into account in P & L account for computing income of the assessee if only brokerage received from such client is only credited in the P & L account. One view is that only to the extent debt is taken into account as income in the P & L account and is not found recoverable subsequently or has become bad debt, and is written off could be claimed as deduction u/s. 36(1)(vii). In other

words, as per this view what is offered for tax in a previous year and subsequently becomes bad, only to that extent assessee can get deduction, if written off in the books. From this point of view other part of the debt which is not taken into account in the P & L account in an earlier year could not be allowed as deduction even if written off. The interpretation of the word “part of ” occurring in s.36(2) means that deduction shall be allowed only to that extent and only of that part which is taken into account in computing the income of the assessee. In nutshell, what is offered for tax alone can be allowed as deduction if written off and not more.

18. The latest view is that if part of the debt is taken into account as income then whole of the amount of debt can be subsequently allowed as deduction if written off. In other words, if a sum of Rs.100 is taken into account as income in an earlier year out of bad debt of Rs.1 crore and subsequently one crore is written off in a later year then deduction of Rs.1 crore can be allowed as deduction. Howsoever strange it may appear, but this later view is followed by Hon’ble Delhi High Court in C.I.T. vs. Bonanza Portfolio Ltd., (2010) 320 ITR-178 (Del) and in CIT v/s. D. B. India Securities (2009) 318 ITR-26 Del.), Hon’ble Delhi High Court in Bonanza Portfolio Ltd., held as under :-

Commissioner of Income-tax v. Bonanza Portfolio Ltd. [2010] 320 ITR 0178- [Delhi High Court]

The assessee was in the business of share broking. It purchased the shares in question on behalf of one of its clients and against the purchase of the shares, it paid the money. The brokerage received by the assessee was

shown as income in his books of account of the immediate previous year. Since the balance amount to the extent of Rs. 50,30,491 could not be received from the client on whose behalf the shares were purchased the assessee during the year wrote off the sum as bad debt. Admittedly, the amount could not be recovered and became bad. The Assessing Officer disallowed the claim of bad debt on the ground that the conditions for allowability of the amount as bad debt as stipulated in section 36(1)(vii) read with (2) were not satisfied. This was confirmed by the Commissioner (Appeals). The Tribunal held that the claim of bad debt should have been allowed by the Assessing Officer as conditions stipulated in section 36(1)(vii) and (2) had been satisfied. On appeal :
Held, dismissing the appeal, that the money receivable from the client had to be treated as bad and since it became bad it was rightly considered as bad debt and claimed as such by the assessee in the books of account. Since the brokerage payable by the client was a part of the debt and that debt had been taken into account in the computation of the income, the conditions stipulated in section 36(1)(vii) and (2) stood satisfied.

19. In the case of share broker the loss has been held allowable as bad debt even though only brokerage has been credited to P & L account. It has been so held by Ahmedabad Bench in Cannon Capital & Finance Ltd., vs. ACIT in ITA.No.1119A/05 for A..Y. 2001-02 / ITA.1447/Ahd/05 D-Bench dated 7-11-2008.

20. In the latest Judgement given by ITAT Bombay Bench in Kotak Securities Ltd. vs. Addl. CIT (2009) 318 ITR (A.T.) 0268. It has been held that loss occurred to a share broker on account of non recovery of dues from the clients would be an allowable as a business loss u/s. 28. In this regard we refer to the head-notes from that Judgement as under :-

Kotak Securities Ltd. v. **Additional Commissioner of Income-tax [2009] 318 ITR (A.T.) 0268- [Income-tax Appellate Tribunal--Mumbai]**

The assessee was a broker who was engaged in buying and selling securities on behalf of its clients. The Assessing Officer refused to allow the claim of the assessee for deduction on account of bad debt written off amounting to Rs. 45,31,150 for the reason that the sum written off as bad debt was not taken into account in computing the income of the assessee in the previous year or earlier previous year. The assessee made an alternative claim under section 28 on the basis that this loss was incidental to its business and should be allowed as revenue expenditure. This claim was also rejected by the Assessing Officer. The Commissioner (Appeals) confirmed the disallowance. On appeal :
Held, allowing the appeal, that the amount which was written off as bad debt had been shown as income of the earlier previous year and, therefore, the claim for deduction of bad debt should be allowed under section 36(1)(vii) as a bad debt. The requirement of establishing that the debts had become bad was not necessary. Thus, the Assessing Officer was directed to allow the deduction of the sum of Rs. 13,34,216 as bad debt written off. There was no dispute that the remaining sum of Rs. 31,96,935 written off was losses incurred in the course of the business of the assessee. The details of individual items of debts written off showed that they related to several clients of the- assessee and the amount written off in each case ranged from Rs. 2 to Rs.10,000. In the case of a very few customers larger sums were written off. The loss that arose on account of such write off was allowable under section 28. These were incidental to the business of the assessee and going by the quantum of loss written off in individual cases, the wisdom of the assessee in writing them off as bad and irrecoverable, considering the cost of litigation, etc., was bona fide and the plea of irrecoverability should be accepted. Therefore, the claim was allowable under section 28.

21. In view of the above a loss occurred to the share broker on account of non recovery of dues from the clients would be allowable as deduction u/s. 28 if such debt has occurred during the course of the business. It is undisputed fact that in the present case the amounts written off by the assessee were the dues of the clients with

whom assessee had carried out business transaction of sale and purchase of shares.

22. A Share broker as such never trades any shares on his own behalf. He is concerned only with the brokerage accrued on the transactions of sale and purchase carried out by him on behalf of his clients. When the transaction is completed, the share broker is entitled to the brokerage which is credited in the P & L account and debited to the clients account. A share broker also stands guarantor to the Stock Exchange about the payment of the dues by his clients on purchase of shares through him. He also ensures delivery of script to the purchaser. The liability arise to the share broker for payment of the dues on behalf of the client on the date when transaction of sale or purchase of shares is finalized. The liability on account of non delivery of the shares or bad delivery would arise on the date of the settlement of the dues. In case the client does not make the payment of the dues or delays the payment the broker makes payments from his own coffers. It reserves the right to recover the same from the client. Similarly, when there is a bad delivery or non delivery he compensates the client from his own account and debits the other party who is a defaulter due to non delivery or bad delivery. In other words, a broker has to face two defaults of liability; one that accrues to him on the date when sale and purchase takes place. He is liable to make the payment to the seller through stock exchange. He may recover the dues from the purchaser i.e. his client on whose behalf he made purchases at the same time or subsequently depending upon his business terms. Another liability

accrues is on account of bad delivery or non delivery that accrues to him on the date of settlement. When assessee broker arranges purchase for his clients, his right to receive brokerage accrues on that very day and the same is taken into account in the P & L account. From this point of view of the condition under sub-section (2) of Sec.36 would be satisfied. The client is debited by two amounts one is amount of brokerage and other is the amount for which shares are purchased. The two are merged together and would apparently form part of the same transaction. Thus, when brokerage is credited in the P & L account by the assessee-broker then it could be said that entire amount is debited to the account of the client that is purchase price of the shares and brokerage together is taken into account while computing the income of the assessee. The words used in section 36(2) “no such deduction shall be allowed unless such debt or part thereof has been taken into account in computing income of the assessee of the previous year or of an earlier previous year….” would be deemed to be fulfilled if part of the debt i.e. brokerage is taken into account while computing income of the assessee. Thus, the words “debt or part thereof “ could be interpreted to mean that brokerage credited in P & L account would represent the whole of the debt i.e. the sale price and brokerage together debited in client’s account and for which deduction is claimed. Thus, where total debt debited in the account of the client is inclusive of brokerage then brokerage being part of the total debt having been taken into account in computing the income, would satisfy the provisions of sec. 36(2) and therefore, when assessee writes off such debt then he would be entitled for deduction u/s. 36(1)(vii). Similar view has been taken by the Tribunal

in G.R.Pandya Share Broker Ltd., vs. ITO (2008) 26 SOT 431 (Mum.). Hon'ble Delhi High Court in CIT vs. D.B. India Securities (2009) 318 ITR-26 (Del) has also taken similar view.

23 Further, the transaction entered into by a share broker i.e. clients can be find a parallel in the transactions carried out by commission agent. A commission agent either buys goods or sales the goods on behalf of the principals. When he acts as commission agent for sale of goods, he advances the amount to his principal and adjust the sale proceeds against such advances. When he acts as a commission agent for buying the goods he purchases the goods for supply to his principal from his funds. The principal is debited and when he is reimbursed by his principal of supply of his goods, then the principals are credited with the amount of reimbursement. The commission agent debits the principal by the amount of commission charged by him. Then the amount of commission alone is credited in the P & L account in the books of the commission agent. Thus where amount recoverable from any principal could not be recovered and assessee claim such irrecoverable debt as business loss, Hon'ble Gujarat High Court in CIT vs. Abdul Razak & Co.,(supra) held it to be allowable trading loss u/s. 28(1). Similarly, where an assessee sold goods of D (a client of the assessee) on credit to H (another client) and thereby debit balances in the account of H in the books of the assessee which could not be recovered, and were claimed as bad debt then same were held as allowable as business loss because loss had occurred during the course of business transactions. It was so held in CIT vs. Dayalchand Hardayal (1989) 177 ITR-461(P&H).

Thus, wherever there are business relationship between assessee and his clients and money advanced to the client on account of commercial relationship could not be recovered then it was held as an allowable business loss. It was considered incidental to carrying on of business. This view was taken by Hon'ble Mumbai High Court in the case of **Commissioner of Income-tax v. Investa Industrial Corporation Ltd. [1979] 119 ITR 0380- [Bombay High Court].**

24. In view of the above, we hold that once commission/brokerage is credited in the P & L account of the assessee and entire debit balance including principal and brokerage is found irrecoverable and is written off in the books by the assessee the same can be allowed as bad debt. In view of this claim of the assessee is allowable u/s. 36(1)(vii).

25. Notwithstanding the amount claimed as bad debt would be allowable as a trading loss u/s. 28 because any loss if occurred to the assessee during the course of business would be allowed as deduction. It is not disputed that assessee is a share broker, it had entered into transaction with the clients for sale and purchase of shares, charged brokerage from them and debited their accounts with the amount of brokerage as well as sum for which they had placed orders for purchase of shares.

26. The Ld. A.O. in full and Ld. CIT(A) in part has disallowed the claim of trading loss on the ground that some of the parties have not confirmed the transaction with the assessee or where-abouts of some

parties was not given by the assessee. In our view disallowance of the claim of trading loss on this account will not be proper unless the finding about the non-genuineness of the transaction is given. Once the transactions are apparently carried out in the normal course of the business and they are not held as non-genuine, then non recoverability of such debts would squarely be a trading loss. When after lapse of time certain clients are not traceable or that some of the clients have expired and their legal heirs refused to accept the liability then amount is clearly not recoverable. It would become a trading loss and therefore, an allowable deduction. It is only in cases where debts have not occurred in normal course of business or transactions are found to be not genuine, then claim can be disallowed. Therefore, in absence of any material to this effect transactions done in the past in the normal course of business like any other business transactions should be treated as genuine and therefore on account of their non recoverability, the claim of trading loss should be allowed as deduction. In view of this entire loss of Rs.5,77,44,844/- is allowable deduction u/s. 28 as business loss. As a result the ground raised by the revenue is dismissed. Whereas the ground raised by the assessee in this regard is allowed.

27. The third ground in departmental appeal is about deleting the addition made by the A.O. u/s. 68 in respect of unexplained cash credits of Rs.14,07,751/-.The A.O. during the course of assessment proceedings the A.O. found credits in the name of Ms Bharti D. Vakil for Rs.12,12,751/- under the name of D.C. Vakil for Rs.1,95,000/-

.When summons were issued to these parties they declined to have any transaction with the assessee broker in following terms :-

> " Please note that I have not entered into any transaction with Madhur Shares & Stocks (P) Ltd. If any such transactions are made, it should have been made in my name by Mr. Ramesh N. Parikh from the bank account of MMCB, the cheque book of which was given under bonafide, to him by me. I do not have any information of such transactions."

28. The A.O. confronted this reply to the assessee. In response thereto, the assessee produced confirmation letters written by D.C. Vakil confirming the credit balance. But the A.O. noted that it pertains to F.Y. 1999-00. The A.O. did not rely on the Xerox copy of these confirmations and made the addition u/s. 68.

29. The ld. C.I.T.(A) noticed that similar type of additions were made in the A.Y. 2000-01 which was deleted by the Ld. C.I.T.(A). In fact according to Ld. C.I.T.(A) these two persons namely B.D. Vakil and D.C. Vakil had given signed cheque book to one Shri Ramesh N. Parikh who issued these cheques to the assessee and assessee had credited money in the account of B.D.Vakil & D.C. Vakil as money had come from their bank accounts. Once the source of funds are explained as coming out from third party then addition could not be made u/s.68 in the hands of the assessee.

30. Before us the Ld. D.R. submitted that when cheques are issued by Shri R.N. Parikh or by the assessee himself is not material. If the creditors are not knowing that their accounts are used for laundering the money and they deny to have any credit balance with the

assessee, then it cannot be said that nature and source of credits appearing the books of the assessee in the names of the creditors are explained.

31. Against this Ld. A.R. submitted that whether money is paid by B.D.Vakil and D.C. Vakil or by Shri Ramesh N. Parikh, so far as the assessee is concerned, money is found explained as coming out of the accounts of these two persons. May be that Shri R.N. Parikh is using the account of these two persons as benami account but for that matter assessee cannot be penalized.

32. We have considered rival submissions and perused the material on record. In our considered view the logic given by Ld. C.I.T.(A) and by Ld. A.R. in respect of this addition is not sound. The onus lying on the assessee to prove the nature and source of the credit is not discharged if the creditors in whose names amount is standing in the books of the assessee denied to have any knowledge of such credits. It is for the assessee to bring to the A.O. Shri R.N. Parikh and furnish necessary evidence that in fact, it was he who was using the accounts of the two persons and paying the money to the assessee on their behalf. It is not known whether Shri R.N. Parikh is a dummy for assessee or a dummy for B.D.Vakil or D.C. Vakil. Onus lying on the assessee is not discharged without proving that Shri R.N. Parikh was a Benami or dummy for the two creditors. He could very well be a benami for the assessee. Unless material to discharge this onus is submitted, it cannot be said that nature and source of credits

is proved. In view of this, we hold that Ld. C.I.T.(A) was not justified in deleting the addition. This addition is accordingly restored.

33. As a result, appeal filed by the Revenue is partly allowed.

ITA.No.704/Ahd/05 (Assessee's appeal)

34. Ground No.1 is not pressed and is therefore, rejected.

35. Ground No.2,3, 4 & 5 relates to the claim u/s. 36(1)(vii), 36(2) and in the alternative u/s. 28. As per the discussion in Departmental appeal entire claim of Rs.5,77,44,844/- is allowed. Therefore, these three grounds are allowed in favour of the assesseee.

36. Ground No.6 relates to charging of interest u/s. 234A, 234B, 234C and 234D. Charging of interest is consequential and therefore rejected.

37. Ground No.7 is general in nature is therefore rejected.

38. As a result appeal filed by the assessee is partly allowed.

39. As a result appeal of the assessee as well as of Revenue both are partly allowed.

Order pronounced in Open Court on 31-05-2010.

Sd/-	Sd/-
(T. K. SHARMA)	(D.C. AGRAWAL)
JUDICIALMEMBER	ACCOUNTANT MEMBER.

Ahmedabad.

Dated:31/05/2010.
S.A.Patki.

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT(Appeals)-
4. The CIT concerned.
5. The DR.,ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad.