IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B" MUMBAI

BEFORE SHRI B.R. MITTAL, JUDICIAL MEMBER

AND

SHRI RAJENDRA, ACCOUNTANT MEMBER

ITA No. 861/Mum/2012
Assessment Year 2008-09

Shri Manish D. Innani C-803, Avon Majesty, Datta Pada Road, Opp. Tata SSL, Borivali (East), Mumbai-400 066 PAN No. AABPI 4219 C	Vs.	ACIT, Range 4(1), 640, 6th floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
(Appellant)		**(Respondent)**

Assessee by	:	Shri Sanjiv M. Shah
Revenue by	:	Shri P. C. Maurya
Date of hearing	:	26-06-2012
Date of pronouncement	:	01-08-2012

ORDER

PER RAJENDRA, A.M.

Following Grounds of Appeal were filed by the assessee challenging the order dtd.12.12.2011 of the CIT(A)-8, Mumbai.

"(1)The learned Commissioner of Income Tax (Appeals) [CIT(A)] erred in substantially confirming the disallowance under Section 14A of the Income Tax Act, 1961 [Act] read with Rule 8D of the Income Tax Rules, 1961 [Rules]

(2)The CIT(A) further erred in this connection in relying on decisions reported as Godrej and Boyce mfg co v. DCIT 328 ITR 81 (Bom) and ITO v. Daga Capital Management 26 SOT 603 (Mum) (SB)

(3) The CIT(A) further erred in this connection in holding that:
a)the Appellant has not maintained separate records for expenses incurred for earning exempt income;
b) the burden is not on the Assessing Officer [AO] to establish nexus of the expenditure with exempt income;

c) the Appellant's contention that Section 14A does not provide for apportionment of expenses is not sustainable;

d) the Appellant has failed to produce any cash flow statement to show that borrowed fund has not been utilized for making investment; and

e) the Appellant's contention that it has incurred no expenditure to earn the exempt income is not acceptable.

(4) The CIT(A) erred in sustaining the computation of the rebate by the AO under Section 88E at Rs.75,07,274/- as against Rs.1,01,87,300/- claimed by the Appellant.

(5) The CIT(A) erred in not disposing ground concerning levy of interest under Sections 234B and 234C.

(6) The Appellant craves leave to add to and/or amend and/or delete and/or modify and/or alter the aforesaid grounds of appeal as and when the occasion demands.

(7) All the aforesaid grounds of appeal are independent, in the alternative and without prejudice to one another."

The assessee, an individual, engaged in the business of trading in derivatives and mutual funds, filed his return of income declaring total income of Rs.5.94 Crores.

2. During the assessment proceeding the AO found that the assessee had shown dividend income of Rs.5,60,809/- which was claimed as exempt. AO found that the assessee had not allocated any expenditure incurred by him towards earning of the tax-exempt-dividend-income. After obtaining explanation from the assessee AO made an addition amounting to Rs.19.34 lakhs u/s.14A r.w.s. 8-D. The assessee preferred an appeal before the First Appellate Authority (FAA). After considering the submissions of the assessee he held that the assessee had not maintained separate accounts of expenses incurred for earning of exempt income, that the assessee had not maintained separate accounts of expenses incurred for earning of exempt income, that assessee had also not maintained any separate records on account of expenditure having been incurred for earning of dividend income, that the appellant had failed to produce any cash flow statement or any other material which could establish that borrowed fund had not been utilised for earning of exempt income, that merely on the basis of balance of own fund and borrowed fund as on the date of the balance sheet it could not be presumed that borrowed fund had not been utilized for earning of exempt income, that the appellant's contention that no expenditure had been incurred to earn exempt income was not acceptable, that the assessee being a share trade undertook transactions of share which subsequently yielded dividend of capital gain and same was exempt, that the expenses including interest and administrative expenses debited to Profit and Loss Account included expenditure incurred for undertaking transactions of shares which yielded exempt income. FAA partly allowed the appeal filed by the assessee.

3. Before us, Authorised Representative(AR) submitted that assessee was a investor in derivatives, that investment was not related to interest, that in earlier years no disallowance was made, that disallowance should not have exceeded the dividend income, that no infirmity was in the working submitted by the assessee was pointed out by the AO. He relied upon the cases of Winsome Textile Industries Ltd.(319ITR204) and Hero Cycles Ltd.(324ITR518). Alternatively, it was submitted that disallowance should be restricted to Rs.2.2 lakhs. Departmental Representative (DR) submitted that AO had rightly invoked Rule 8D, that decisions cited by the AR related to the period prior to AY 2008-09.

4. We have heard both the sides and perused the material available on record. We are of the opinion that while dealing with the issue AO has not considered various factors and has not given any finding about them. Assessee had claimed that borrowed fund of Rs.3.5 Crores were not used for investing in shares, that loans advanced to various persons were not connected with acquisition of shares. We find that these are crucial issues for deciding disallowance u/s. 14 A of the Act. Assesee himself has made an alternate plea that even if disallowance has to be made it has to restricted to certain amount which is much lower than the actual disallowance made by the AO.

Considering the above we are of the opinion that matter should be restored back to AO. He is directed to make fresh calculation after considering the submissions of the assessee.

Ground No.1 is partly allowed.

5. Next ground is related with rebate available u/s. 88E of the Act. During the course of assessment proceedings, the assessee was asked by the AO to submit the working of rebate claimed in respect of securities transaction tax amounting to Rs.1,01,87,300/-. He 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. With regard to rebate claimed u/s.88E of the Act, the AO held as under :

> *"In the instant case, the assessee's total income of Rs.5,94,71,620/- includes only Rs.3,34, 49,474/- (after setting of business loss of Rs.1,62,36,858/- b/f from A.Y. 2007-08) which is chargeable under the head 'profit and gains of business or profession' arising from taxable securities transactions. Therefore, the assessee is entitled to get rebate u/s.88E on the income of Rs.3,34,49,474/- but not on Rs.4,95,93,132/-."*

Adopting an average rate of 21.31%, he held that the assessee was entitled to tax rebate of Rs.75.07 lakhs as against the rebate claimed by the assessee amounting to Rs.1.01 Crores. In the appellate proceeding, the FAA held that AO had rightly worked the average rate of tax as per the provisions of section 88E of the Act.

6. Before us, AR submitted that relief u/s. 88E was available on the income before setting off of losses, that calculation made by the assessee was as per law. He relied upon the case of Ashika Stock Broking Ltd.(44 SOT556).DR submitted that

88E-releif was available after set off of loss of earlier years. He relied upon the decision of Oasis Securities Ltd. delivered by the C Bench of Mumbai ITAT(ITA No.2534/Mum/2009 AY 2006-07 dtd.30.09.2010).

6.1. After considering the rival submissions and perusing the material before us we are of the opinion that the assessee is entitled to rebate Rs.1.01 Crores u/s. 88E of the Act, as against the rebate of Rs.75.07 lakhs-allowed by the AO. Amount to be allowed under this section has to be calculated in background of the provisions of Sec. 87(2) of the Act as discussed in next paragraph.

We have considered the case laws cited before us. In the case of Oasis Securities facts were as under :

During the course of assessment proceedings AO noted that the assessee had income of Rs.1.92 Crores from speculation business in respect of which STT was paid, that said income was set off against brought forward speculation losses leaving no taxable income from security transactions. Considering these facts he held that rebate u/s. 88E was not allowable. FAA upheld the order of the AO. His order was challenged before the Tribunal. After considering the issue at length ITAT held:

> *"14.It is simple and plain that rebate can be allowed only when there is some liability to income tax. If there is no such liability, according to the relevant provisions, the otherwise eligible rebate becomes unavailable. This position can be viewed from another angle also. Section 88,which also falls under part A of the same chapter provides for rebate on life insurance premium and contribution to provident fund etc. Under this section an assessee is entitled to deduction of an amount equal to 20% of the payment of eligible sums subject to Rs. 1 lakh. This rebate is allowable against the amount of income tax on the total income of the assessee. This provision is similar to section 88E, to the extent of providing rebate against the amount of income tax. Take a situation in which albeit the assessee has paid life insurance premium etc., which otherwise entitle him to rebate under section 88E,but there is no income chargeable to tax. In such a case, there is no possibility to allow any rebate notwithstanding the fact that life insurance premium was paid by the assessee on which rebate is otherwise available under section 88E of the income tax act.*
>
> *15.In the final analysis, we approve the view taken by the learned CIT(A) that the amount of STT is not eligible for rebate under section 88E for the reason that there is nil income from the transactions which suffered STT.As no amount of income tax is payable in respect of such transactions, the question of granting any debate under section 88E does not arise. The ground fails."*

Clearly, the facts of the case under consideration are different from the facts of Oasis securities Ltd (supra).

7. In the case of Ashika Stock Broking Ltd. (supra) it was held that once there was a net surplus from share dealing of market segment and future and option segments together and if there was a net profit therefrom the assessee was entitled for

rebate of entire STT. In the case under consideration surplus from share dealing from market segment/ future and option segment is not there, but there is net income after setting off of losses. We are of the opinion that once there was overall profit for the AY under consideration, rebate under section 88E of the Act had to be allowed. Following the order of Ashika (supra) we hold that section 88E does not envisage any restriction for allowing rebate u/s.88E till positive income is filed by the an assessee. We find that while passing the assessment order the AO has not given any finding about applicability or otherwise of Section 87(2) of the Act. We are of the opinion that if the provision of said section are not coming in way to allow the rebate to the assessee, same should be allowed at the rate calculated by the assessee. For this limited purpose we remit the matter back to the file of the AO to decide the issue afresh.

Ground No.2 is partly allowed.

Appeal filed by the assesee stands allowed in part.

Order pronounced in the open court on 1st August, 2012.

Sd/-	Sd/-
(B.R. MITTAL)	**(RAJENDRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai,
Date 1st August, 2012

Roshani

Copy to:

1. Appellant
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR "B" Bench, ITAT, Mumbai
6. Guard File

(True copy)

By Order

Asst. Registrar,
Income Tax Appellate Tribunal,
Mumbai Benches, Mumbai