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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 1295/2011

CIT ..... Appellant  
Through Mr. Anupam Tripathi & Ms.  
Anusha Singh, Advocates.

versus

BONANZA PORTFOLIO LTD. .... Respondent  
Through Ms. Rani Kiyala, Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MR. JUSTICE R.V.EASWAR**

% **ORDER**  
**23.12.2011**

**CM Nos. 22913-22914/2011**

These are applications for condonation of delay 44 days in filing and 140 days in refiling of the appeal. Learned counsel for the respondent-assessee, who is present on advance notice, states that she has no objection in case the delay are condoned. In view of the statement made, we condone the delay in filing and re-filing of the appeal.

The applications are disposed of.

**ITA No. 1295/2011**

Revenue has impugned the order dated 29<sup>th</sup> October,



2010 passed by the Income Tax Appellate Tribunal (tribunal, for short) in the case of M/s Bonanza Portfolio Limited relating to assessment year 2005-06 on two grounds:

- (i) Rs.1,19,79,000/- paid as SEBI registration fee has been wrongly allowed as an expense in the year in question as it relates to assessment year 2002-03.
- (ii) Section 40(a)(ia) read with Section 200 of the Act was applicable to payments made to the Stock Exchange towards exchange charges, depository charges and connectivity charges of Rs.33,64,926/-, Rs.78,70,660/- and Rs.74,82,611/- respectively. The aforesaid expenses were disallowed for failure to deduct tax at source (TDS, for short).

2. With regard to payment of SEBI registration charges, the tribunal has noticed the past history, including the litigation and the challenge made by share brokers to the said levy. Thereafter, the SEBI came out with a scheme called Securities and Exchange Board of India (Interest, Liability, Regularization) Scheme, 2004, which was announced on 15<sup>th</sup> July, 2004. As per the said scheme, the member-share brokers were given concession towards interest etc. on payment to SEBI. The tribunal has held that the aforesaid levy was a statutory levy and



covered by Section 43B of the Act. Similar view has been taken by the tribunal in several other cases.

3. Learned counsel for the Revenue has not been able to point out whether the said decisions of the tribunal were challenged. It is, however, stated that the appeal was preferred in the case of ***CIT Vs. BLB Limited***, for assessment year 2005-06. However, he is not able to point out the status and outcome of the said appeal.

4. We have examined the decision of the Supreme Court in ***B.S.E. Brokers' Forum, Bombay and Others versus Securities and Exchange Board of India and Others***, (2001) 3 SCC 482. It is apparent from the said judgment that the petitioners therein had challenged levy of fee under the Securities and Exchange Board of India (Stock Brokers and sub-Brokers) Regulations, 1992. The brokers had challenged validity of regulation 10 read with Schedule III. SEBI was established by an ordinance passed in 1992 and thereafter Securities and Exchange Board of India Act, 1992 was enacted. The brokers registered with various stock exchanges were called upon to pay registration fee levied and imposed by SEBI under the authority and powers conferred by the Regulation. This was challenged on the ground of being ex facie illegal and



void being ultra vires of the Act and the Rules. The challenge was repelled, inter alia, recording as under:-

“21. In reply, on behalf of the Board, it is contended that though the demand is termed as registration fees, as a matter of fact, the fee that is collected is a combination of a regulatory fee as well as registration fee as contemplated under Sections 11(2)(k) and 12 of the Act respectively. They also point out that, as a matter of fact, the collection from this levy is credited to a fund created under Section 14 of the Act and the amount from the said fund is utilised only towards the expenses incurred by the Board in performing its duties mandated under the Act. It is further contended that the mere fact that Forms ‘A’ and ‘D’ are referable to Section 12(2) only, ipso facto does not make the demand a registration fee simpliciter.

22. It is, no doubt, true that a perusal of Forms ‘A’ and ‘D’ shows that these forms are issued pursuant to the requirements of Regulations 3 and 6 and Section 12(2) of the Act which, however, does not by itself determine the nature of the fee in question. It is a well-established principle in law that so long as the impugned power is traceable to the statute concerned, mere omission or error in reciting the correct provision of law does not denude the power of the authority from taking statutory action so long as its action is legitimately traceable to a statutory power governing such action. In such cases, this Court will always rely upon Section 114 III. (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the courts will uphold such State action. See *Peerless General Finance and*



*Investment Co. Ltd. v. Reserve Bank of India* and *Union of India v. Tulsiram Patel*. Applying the said principles to the facts of this case, we notice that the Board has the necessary competence to collect the fees for the purpose of carrying out the mandates under Section 11(2)(k) of the Act and also the power to collect the registration fee under Section 12(2) of the Act. Therefore, in our opinion, the Board has the necessary authority to collect a cumulative fee both for the purpose of regulating the activities contemplated under Section 11 of the Act as also for the purpose of registration under Section 12(2) of the Act, and the fee levied is both regulatory and registration fee leviable under Sections 11(2)(k) and 12(2) of the Act.”

5. The petitioners therein also contended that the fee could be imposed only if the SEBI was rendering services to the contributories. The said contention was rejected by the Supreme Court.

6. In the light of the aforesaid decision, we do not understand why and on what grounds the Revenue has contended that Section 43B is not applicable. It is accepted and admitted that the fee in question was paid to SEBI during the period relevant to the assessment year in question. The Assessing Officer while making the said disallowance has not noticed and examined the character and nature of the levy, which was imposed and paid by the respondent assessee to SEBI. Without examining the



same, the Assessing Officer simply held that when an assessee maintains accounts of mercantile system the expenditure must relate to that year. In so holding, he overlooked that Section 43B itself provided that ~~the~~<sup>the</sup> deduction for a statutory fee would be allowed only in the year in which the fee was actually paid by the assessee "irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him". In view of the aforesaid position, we do not find any merit in the first ground and the issue raised by the Revenue.

7. With regard to the disallowance under Section 40(a)(ia), the Assessing Officer while making the said addition had recorded as under:

"The reply of the assessee has been considered but is not accepted because of the following reason. The amount paid by the assessee to the exchange as exchange charges is to access the services provided by the respective exchange as well as due to contractual obligations on the assessee as per the terms and conditions laid down in the law. Further, the amount paid to the depository participants as depository charges are for accessing the servers/v-sat lines as well as for receiving technical and professional services from the depository participants. Looking into the nature of these expenses, it is clear that they fall under the ambit of section 194C/194J for the purpose of TDS. Further the BSE in its fax to the



assessee dtd.04.12.2007 have advised brokers to deduct TDS on future payments to the exchange. Thus the BSE management also believes that the members should deduct TDS and if read with the fact that there is no change in the provisions of the Act with reference to the deduction of TDS, the assessee was definitely liable to deduct TDS which is not the case here. Hence, the assessee was supposed to deduct TDS on these payments which was not deducted. It is also relevant to mention here that some of the brokers assessed in the circle have, suo moto, deducted TDS on such payments and deposited to the credit of the Central Govt. Hence, in light of above discussion, I disallow expenses of exchange charges of Rs.33,64,926/- depositary charges of Rs.1,59,45,239/- and, connectivity charges of Rs.74,82,611/- claimed as an expense due to non deduction of TDS on these payments under Section 40(a) (ia) r.w.s. 194C/194J of the IT Act and add back to the total income of the assessee.”

8. It is noticeable from the aforesaid order that the Assessing Officer did not examine what is the nature and character of the payment in the form of exchange charges, depositary charges and connectivity charges. He did not examine the contract or the rule and regulation under which the said payments were made. This was the minimum requirement which the Assessing Officer should have undertaken before disallowing the said expenses. This is factual discussion about the nature and



character of the said payments was necessary and required before disallowance on the ground of non-deduction of TDS. The Assessing Officer had invoked both Section 194C/194J, at the same time without noticing or expressing any firm opinion.

9. ITAT in the impugned order has referred to the conflicting views and legal opinion which was prevalent at that time on whether or not TDS was liable and should be deducted.

10. We have not examined and gone into the nature and character of the said payments/charges as the relevant facts and particulars have not been discussed by the Assessing Officer in the assessment order. In view of lack of discussion by the Assessing Officer and examination of relevant facts by him, we do not see any reason to interfere with the order passed by the tribunal.

11. Accordingly, the present appeal is dismissed. No costs.

  
SANJIV KHANNA, J.

  
R.V. EASWAR, J.

DECEMBER 23, 2011  
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