

M/S. Techno Shares & Stocks Ltd vs Commissioner Of Income Tax-Iv on 9 September, 2010

Equivalent citations: 2010 AIR SCW 6066, 2010 (9) SCC 410, (2010) 327 ITR 323, (2010) 9 SCALE 251

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Bench: K.S. Radhakrishnan, S. H. Kapadia

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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS.7780-7781 OF 2010
(Arising out of SLP(C) Nos. 4053-4054 of 2010)

M/s Techno Shares & Stocks Ltd. Appellant(s)

Versus

The Commissioner of Income Tax IVRespondent(s)

With

Civil Appeal No.7782 of 2010 @ S.L.P. (C) No.34944 of 2009,
Civil Appeal Nos.7783-7785 of 2010 @ S.L.P. (C) Nos.10452-10454 of 2010,
Civil Appeal Nos.7786-7788 of 2010 @ S.L.P. (C) Nos.11514-11516 of 2010,
Civil Appeal No.7789 of 2010 @ S.L.P. (C) No.11518 of 2010,
Civil Appeal Nos.7790-7791 of 2010 @ S.L.P. (C) Nos.11520-11521 of 2010,
Civil Appeal No.7792 of 2010 @ S.L.P. (C) No.11523 of 2010
and
Civil Appeal Nos.7793-7794 of 2010 @ S.L.P. (C) Nos.11524-11525 of 2010
Civil Appeal Nos.7795-7798 of 2010 @ S.L.P. (C) Nos.4373-4376 of 2010
Civil Appeal Nos.7799-7802 of 2010 @ S.L.P. (C) Nos.4407-4410 of 2010
Civil Appeal Nos.7803-7804 of 2010 @ S.L.P. (C) Nos.5033-5034 of 2010
Civil Appeal No.7805 of 2010 @ S.L.P. (C) No.5153 of 2010
Civil Appeal Nos.7806-7809 of 2010 @ S.L.P. (C) Nos.5266-5269 of 2010

Civil Appeal Nos.7810-7812 of 2010 @ S.L.P. (C) Nos.5302-5304 of 2010

Civil Appeal Nos.7813-7814 of 2010 @ S.L.P. (C) Nos.5541-5542 of 2010

Civil Appeal Nos.7815-7816 of 2010 @ S.L.P. (C) Nos.5581-5582 of 2010

Civil Appeal Nos.7817-7818 of 2010 @ S.L.P. (C) Nos.5656-

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5657 of 2010

Civil Appeal Nos.7819-7822 of 2010 @ S.L.P. (C) Nos.6093-6096 of 2010

Civil Appeal Nos.7823-7824 of 2010 @ S.L.P. (C) Nos.6149-6150 of 2010

Civil Appeal Nos.7825-7827 of 2010 @ S.L.P. (C) Nos.6151-6153 of 2010

Civil Appeal No.7828 of 2010 @ S.L.P. (C) No.6661 of 2010

Civil Appeal Nos.7829-7830 of 2010 @ S.L.P. (C) Nos.6664-6665 of 2010

Civil Appeal No.7831 of 2010 @ S.L.P. (C) No.6666 of 2010

Civil Appeal No.7832 of 2010 @ S.L.P. (C) No.6667 of 2010

Civil Appeal Nos.7833-7835 of 2010 @ S.L.P. (C) Nos.6668-6670 of 2010

Civil Appeal Nos.7836-7839 of 2010 @ S.L.P. (C) Nos.6672-6675 of 2010

Civil Appeal Nos.7840-7842 of 2010 @ S.L.P. (C) Nos.6676-6678 of 2010

Civil Appeal Nos.7843-7844 of 2010 @ S.L.P. (C) Nos.6681-6682 of 2010

Civil Appeal No.7845 of 2010 @ S.L.P. (C) No.6683 of 2010

Civil Appeal No.7846 of 2010 @ S.L.P. (C) No.7861 of 2010

Civil Appeal Nos.7847-7848 of 2010 @ S.L.P. (C) Nos.8223-8224 of 2010

Civil Appeal No.7849 of 2010 @ S.L.P. (C) No.9503 of 2010

Civil Appeal No.7850 of 2010 @ S.L.P. (C) No.9688 of 2010

Civil Appeal No.7851 of 2010 @ S.L.P. (C) No.9854 of 2010

Civil Appeal No.7852 of 2010 @ S.L.P. (C) No.9855 of 2010

Civil Appeal Nos.7853-7855 of 2010 @ S.L.P. (C) Nos.16258-16260 of 2010

Civil Appeal Nos.7856-7858 of 2010 @ S.L.P. (C) Nos.6707-6709 of 2010

Civil Appeal Nos.7859-7861 of 2010 @ S.L.P. (C) Nos.6843-6845 of 2010

Civil Appeal Nos.7862-7864 of 2010 @ S.L.P. (C) Nos.8672-8674 of 2010

Civil Appeal Nos.7865-7866 of 2010 @ S.L.P. (C) Nos.7003-7004 of 2010

Civil Appeal Nos.7867-7870 of 2010 @ S.L.P. (C) Nos.7206-7209 of 2010

Civil Appeal No.7871 of 2010 @ S.L.P. (C) No.7210 of 2010

Civil Appeal No.7872 of 2010 @ S.L.P. (C) No.7211 of 2010

Civil Appeal Nos.7873-7875 of 2010 @ S.L.P. (C) Nos.7258-7260 of 2010

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Civil Appeal No.7879 of 2010 @ S.L.P. (C) No.7309 of 2010
Civil Appeal No.7880 of 2010 @ S.L.P. (C) No.7350 of 2010
Civil Appeal Nos.7881-7882 of 2010 @ S.L.P. (C) Nos.7386-
7387 of 2010
Civil Appeal Nos.7883-7884 of 2010 @ S.L.P. (C) Nos.8679-
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Civil Appeal Nos.7885-7886 of 2010 @ S.L.P. (C) Nos.8681-
8682 of 2010
Civil Appeal Nos.7887-7889 of 2010 @ S.L.P. (C) Nos.7823-
7825 of 2010
Civil Appeal No.7890 of 2010 @ S.L.P. (C) No.7536 of 2010
Civil Appeal Nos.7891-7892 of 2010 @ S.L.P. (C) Nos.8676-
8677 of 2010

J U D G M E N T

S.H. KAPADIA, CJI

1. Leave granted.

2. In this batch of cases the question which arises for determination is: whether BSE Membership Card can be considered an intangible asset for the purpose of depreciation under Section 32(1)(ii) of the Income Tax Act, 1961 (for short "the 1961 Act")?

Facts in M/s Techno Shares & Stocks Ltd. [Lead matter]

3. In this case, we are concerned with the Assessment Years 1999-2000, 2000-2001, 2001-2002 and 2002-2003. The assessee company filed its Return of income for the Assessment Year 1999-2000 disclosing a loss of Rs. 10,77,276/-. The return was processed under Section 143(1) on November 8, 2000. The case stood reopened under Section 147 and Notice u/s 148 stood issued to the assessee on 16.7.2002. The assessee filed its return of income under protest. The assessee filed its return of income pursuant to the Notice u/s 148 once again declaring loss of Rs. 10,77,276/-, the same as was in the original return of income. The main reason for reopening of assessment under Section 147 was the claim of depreciation by the assessee on BSE membership card amounting to Rs. 23,65,000/-. The claim of depreciation of the assessee was based on Section 32(1)(ii) which stood inserted by Finance (No. 2) Act, 1998 w.e.f. 1.4.1999. However, the said Section deals with claim for depreciation of items acquired on or after 1.4.1998. The assessee claimed before the A.O. that the BSE membership card is a "licence" or "business or commercial right of similar nature" u/s 32(1)(ii) and is, therefore, an intangible asset eligible for depreciation u/s 32(1)(ii) which submission was not accepted by the A.O. It was held that membership is only a personal permission which is non-transferable and which does not devolve automatically on legal heirs and, therefore, it is not a privately owned asset. That, there is no ownership of an asset and that what ultimately can be sold is only a Right to Nomination. Further, according to the A.O., in the case of BSE membership, there is

no obsolescence, wear and tear or diminution in value by its use, hence, the assessee was not entitled to claim depreciation u/s 32(1)(ii). This decision of the A.O. stood affirmed by C.I.T. (A) in the appeal filed by the assessee.

4. Aggrieved by the said decision of CIT (A), the assessee carried the matter in appeal to the Tribunal which took the view that since the assessee had acquired a right to trade on the floor of BSE through the membership card, it was not entitled to depreciation u/s 32(1)(ii) of the 1961 Act. That, the said Card is a capital asset through which right to trade on the floor of BSE is acquired and since it is intangible asset the said assessee was entitled to depreciation u/s 32(1)(ii).

5. Against the said decision, the Department carried the matter in appeal to the High Court which came to the conclusion, following certain decisions of this Court, that the BSE membership card is only a personal privilege granted to a member to trade in shares on the floor of the Stock Exchange; that, such a privilege cannot be equated with the expression "licence" or "any other business or commercial rights of similar nature" u/s 32(1)(ii); that, there is a difference between acquiring a know-how, patent, copyright or trademark and acquiring a licence to use such know-how, patent, copyright, trademark or franchise; that the expression "business or commercial rights of similar nature" in Section 32(1)(ii) of the 1961 Act would take its colour from the preceding words, namely, know-how, patent, copyright, trademark and franchise which belong to a class of intellectual property rights and applying the rule of ejusdem generis, the High Court held that the expression "licence" as well as the expression "business and commercial rights of similar nature" in Section 32(1)(ii) of the 1961 Act are referable to IPRs such as know-how, patent, copyright, trademark and franchise and since the BSE membership card does not fall in any of the above categories, the claim for depreciation was not admissible on the BSE membership card acquired by the assessee u/s 32(1)(ii). Consequently, the appeals filed by the Department stood allowed, hence, these civil appeals.

Importance of BSE:

6. BSE is recognized by the Government of India under Securities Contracts (Regulation) Act, 1956. Approximately 70000 deals are executed on a daily basis. There are about 3500 companies which are listed on BSE. The market capitalization of the BSE is Rs. 5 trillion. The main aim and object of the BSE is to provide a market place for the purchase and sale of securities. It aims to promote, develop and maintain a well regulated market for dealing in securities and to safeguard the interests of the members and the investing public having dealings in the Exchange. It helps industrial development of the country through resources mobilization. It is set up to establish and promote "just practices" in securities transactions. In November, 1996, the BSE constituted a Trade Guarantee Scheme under which all trades carried out on online trading are guaranteed by the clearing house of BSE. Similarly, a depository has been set up as a joint venture between BSE and Bank of India etc. BSE has introduced trading also in fixed income securities to give impetus to trading in debentures and corporate debt instruments to increase trading in Government owned securities. Question arising in the Present Matters:

7. Is depreciation allowable on the cost of a Stock Exchange Membership Card under Section 32(1)(ii) of the Income Tax Act, 1961, which was enacted and inserted by Finance (No. 2) Act, 1998?

Answer to the above Question:

8. To answer the above question, we need to quote hereinbelow certain relevant provisions of the 1961 Act:

2. In this Act, unless the context otherwise requires,--

(14)"capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include--

(i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession ;

(ii) personal effects, that is to say, movable property (including wearing apparel and furniture, but excluding jewellery) held for personal use by the assessee or any member of his family dependent on him.

Depreciation.

32. (1) In respect of depreciation of--

(i) ..

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed--

Explanation 3.- For the purposes of this sub- section, the expressions "assets" and "block of assets" shall mean-

(a) tangible assets, being buildings, machinery, plant or furniture;

(b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

9. We also quote hereinbelow relevant Rules of Bombay Stock Exchange Limited as they stood at the relevant time:

"Membership a Personal Privilege

5. The membership shall constitute a personal permission from the Exchange to exercise the rights and privileges attached thereto subject to the Rules, Bye-laws and Regulations of the Exchange.

Right of Membership Inalienable

6. A member shall not assign, mortgage, pledge, hypothecate or charge his right of membership or any rights or privileges attached thereto and no such attempted assignment, mortgage, pledge, hypothecation or charge shall be effective as against the Exchange for any purpose nor shall any right or interest in any membership other than the personal right or interest of the member therein be recognized by the Exchange. The Governing Board shall expel any member of the Exchange who acts or attempts to act in violation of the provisions of this Rule.

Right of Nomination

7. Subject to the provisions of these Rules a member shall have the right of nomination which shall be personal and non- transferable.

Right of Nomination of Deceased or Defaulter Member

9. On the death or default of a member his right of nomination shall cease and vest in the Exchange.

Forfeited or Lapsed Right of Membership

10. When a right of membership is forfeited to or vest in the Exchange under any Rule, Bye-law or Regulation of the Exchange for the time being in force it shall belong absolutely to the Exchange free of all rights, claims or interest of such member or any person claiming through such member and the Governing Board shall be entitled to deal with or dispose of such right of membership as it may think fit.

Nomination by Member

11(a) A member of not less than three

years' standing who desires to resign may nominate a person eligible under these Rules, for admission to membership of the Exchange as a candidate for admission in his place:

Provided that a member of less than three years' standing who desires to resign may with the sanction of the Governing Board nominate his own son eligible under these Rules for admission to membership of the Exchange as a candidate for admission in his place;

Provided further that the Governing Board may, at its absolute discretion and in exceptional cases and for cogent reasons to be recorded in writing, permit by a special resolution, a member of less than three years' standing, who desires to resign, to nominate a person as a candidate for admission in his place, subject to such terms and conditions as the Governing Board may in its absolute discretion think fit to impose.

*** ** Nomination in Case of Deceased Member

(b) The legal representatives of a deceased member or his heirs or the persons mentioned in Appendix C to these Rules may with the sanction of the Governing Board nominate any person eligible under these Rules for admission to membership of the Exchange as a candidate for admission in the place of the deceased member. In considering such nomination the Governing Board shall be guided so far as practicable by the instructions set out in Appendix C to these Rules.

Nomination in case of Defaulter

(c) The forfeited right of membership of a defaulter shall be restored to him if he be re-admitted as a member within six months from the date of default but if an application by a defaulter for re-

admission be rejected by the Governing Board or if no such application be made within six months of the declaration of default the Governing Board may at any time exercise the right of nomination in respect of such membership.

Dues and Claims

15. The Governing Board shall not approve a nomination unless the nominating member or in the case of a deceased member his legal representatives or heirs or the persons mentioned in Appendix C to these Rules or any other person on his behalf shall have paid and satisfied in full.

Dues of the Exchange

(i) Such subscriptions, debts, fines, fees, charges and other monies as shall have been determined by the Governing Board to be due to the Exchange or the Clearing House by the nominating or deceased member; and Liabilities relating to Contracts

(ii) Such debts, liabilities, obligations and claims arising out of any contracts made by such member subject to the Rules, Bye-laws and Regulations of the Exchange as shall have been admitted by the Governing Board; and

(iii) all amounts due or payable by the nominating or deceased member to the Trade Guarantee Fund.

Allocation in Order of Priority

16. (1) When as provided in these Rules the Governing Board has exercised the right of nomination in respect of a membership vesting in the Exchange the consideration received therefor shall be applied to the following purposes and in the following order of priority, namely-

Dues of Exchange and Clearing House

(i) first - the payment of such subscriptions, debts, fines, fees, charges and other monies as shall have been determined by the Governing Board to be due to the Exchange, to the Clearing House or to the Trade Guarantee Fund by the former member whose right of membership vests in the Exchange.

Liabilities relating to Contracts

(ii) second-the payment of such debts, liabilities, obligations and claims arising out of any contracts made by such former member subject to the Rules, Bye-laws and Regulations of the Exchange as shall have been admitted by the Governing Board:

Provided that if the amount available be insufficient to pay and satisfy all such debts, liabilities, obligations and claims in full they shall be paid and satisfied pro rata, and Surplus

(iii) third - the payment of the surplus, if any, to the funds of the Exchange: provided that the exchange in general meeting may at its absolute discretion direct that such surplus be disposed of or applied in such other manner as it may deem fit.

(2) The provisions of clause (1) of this Rule shall not apply in cases where the Governing Board has exercised the right of nomination in respect of a membership which has vested in the Exchange upon a member having been declared a defaulter on or subsequent to such date as the Governing Board may specify in this behalf.

Application of Consideration 16A When the Governing Board has exercised the right of nomination in respect of a membership which has vested in the Exchange upon a member having been declared a defaulter on or subsequent to the date to be specified by the Governing Board as referred to in clause (2) of Rule 16, the consideration received therefor shall be paid by the Governing Board to the Defaulters' Committee to be applied for the purposes and in the order of priority specified in the Bye-laws and the Regulations of the Exchange.

10. We also quote hereinbelow Bye-law 400 of BSE, which reads as under:

"Application of Defaulters' Assets and Other Amounts

400. Subject to the provisions of Bye-law 398, the Defaulters' Committee shall realise and apply all the money, rights and assets of the defaulter which have vested in or

which have been received by the Defaulters' Committee (other than the amount paid by the Governing Board to the Defaulters' Committee pursuant to Rule 16A in respect of the consideration received by the Governing Board for exercising the right of nomination in respect of the defaulter's erstwhile right of membership) and all other assets and money of the defaulter in the Exchange or the market including the money and securities receivable by him from any other member, money and securities of the defaulter lying with the Clearing House or the Exchange, credit balances lying in the Clearing House, security deposits, any bank guarantees furnished on behalf of the defaulter, fixed deposit receipts discharged or assigned to or in favour of the Exchange, Base / Additional Capital deposited with the Exchange by the defaulter, any security created or agreed to be created by the defaulter or any other person in favour of the Exchange or the Defaulters' Committee for the obligations of the defaulter to the following purposes and in the following order of priority , viz.:-

- (i) First - to make any payments required to be made under Bye-law 391 and 394;
- (ii) Second - the payment of such subscriptions, debts, fines, fees, charges and other money as shall have been determined by the Defaulters' Committee to be due to the Securities and Exchange Board of India, to the Exchange or to the Clearing House by the defaulter;
- (iii) Third - the rectification or replacement of or compensation for any bad deliveries made by or on behalf of the defaulter to any other member in the settlement in which the defaulter has been declared a defaulter or in any prior or subsequent settlement (unless the Governing Board has otherwise determined in respect of such settlement or settlements under Bye-law 394) provided the conditions of Bye-law 153 and all other applicable Rules, Bye-Laws and Regulations and instructions of the Governing Board are complied with;
- (iv) Fourth - the balance, if any, shall be paid into the Fund to the extent of the money paid out of the Fund (other than payments made out of Members' refundable contributions) and not recovered by the Fund and the interest payable by the defaulter to the Fund in respect thereof;
- (v) Fifth - the balance, if any, shall be paid into the Fund to the extent of the money paid out of the Fund out of the refundable contributions of members (other than the refundable contribution of the defaulter) and not recovered by the Fund and the interest payable by the defaulter to the Fund in respect thereof;
- (vi) Sixth - subject to the Rules, Bye-Laws and Regulation of the Exchange, including in particular Bye-Law 343, the balance, if any, shall be applied by the Defaulters' Committee for the payment of such unpaid outstandings, debts, liabilities, obligations and claims to or of members of the Exchange arising out of any contracts made by the defaulter with such members subject to the Rules, Bye-laws and

Regulations of the Exchange as shall have been admitted by the Defaulters' Committee;

provided that if the amount available be insufficient to pay and satisfy all such debts, liabilities, obligations and claims in full they shall be paid and satisfied pro rata;

(vii) Seventh - subject to the Rules, Bye-Laws and Regulation of the Exchange, including in particular Bye-Law 343, the balance, if any, shall be applied by the Defaulters' Committee for the payment of such unpaid debts, liabilities, obligations and claims to or of the defaulter's constituents arising out of any contracts made by such defaulter subject to the Rules, Bye-laws and Regulations of the Exchange as shall have been admitted by the Governing Board; provided that if the amount available be insufficient to pay and satisfy all such debts, liabilities, obligations and claims in full they shall be paid and satisfied pro rata;

(viii) Eighth - the balance, if any, shall be paid into the Exchange's Customers' Protection Fund to the extent of any and all amounts paid out of the Customers' Protection Fund towards the obligations or liabilities of the defaulter and interest thereon at the rate of 2.5% per month (or such other rate as the Governing Board may specify) from the date of payment out of the Customers' Protection Fund to the date of repayment to the Fund; and

(ix) Ninth - the surplus, if any, shall be paid to the defaulter.

Clarification: It is clarified that this Bye-law 400 does not apply to the amount paid by the Governing Board to the Defaulters' Committee pursuant to Rule 16A in respect of the consideration received by the Governing Board for exercising the right of nomination in respect of the defaulter's erstwhile right of membership as the same does not belong to the defaulter and the defaulter has no claim, right, title or interest therein."

11. At the outset we wish to clarify that our present judgment is confined to the Rules and Bye-laws of BSE, as they stood during the relevant assessment years.

12. Section 32 of the 1961 Act provides for a deduction of allowance being made in respect of depreciation of building, machinery, plant or furniture, being a tangible asset. Vide Finance (No.2) Act, 1998, the Parliament thought it fit to extend the benefit of depreciation also to intangible assets enumerated in Section 32(1)(ii) in respect of know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after 1st April, 1998. In the lead matter, the assessee bought the membership card of BSE for Rs. 95 lakhs. In the case of M/s. HDFC Securities Ltd. v. The Commissioner of Income Tax-4 (Civil Appeal arising out of SLP (C) Nos. 5656-5657 of 2010), the assessee bought the membership card of BSE for Rs. 2.80 crores.

13. Appellant before us claims that the membership card enables him to trade on the floor of BSE and, consequently, it is a business or commercial right in the nature of a licence under Section 32(1)(ii). On the other hand, it is the case of the Department that membership is a personal

privilege; that it is not an asset; that it is not owned by the assessee, therefore, the claim of the assessee for depreciation was not admissible under Section 32(1)(ii).

14. To decide the above controversy, we need to examine the Rules of BSE.

15. Rule 5, quoted above, states that membership shall constitute a personal permission from the Exchange to exercise the rights and privileges attached thereto. Rule 6 inter alia states that membership shall not be alienable. Rule 7 confers right of nomination on the member of the Exchange. However, that Rule clarifies that although a member has a right of nomination, such right shall be personal and non-transferable. Rule 9 inter alia states that on the demise or default of a member the said right of nomination shall cease and vest in the Exchange. Rule 10 refers to forfeited or lapsed right of membership. It inter alia states that when a right of membership is forfeited to or when such right vests in the Exchange under any Rule or Bye-law, it shall belong absolutely to the Exchange free of all rights, claims or interests of such member or any person claiming through such member and the Governing Board alone shall be entitled to deal with or dispose of such right of membership as it may think fit. Rule 15 inter alia states that the Governing Board shall not approve a nomination unless the nominating member or in the case of a deceased member his legal representatives satisfy in full all dues of the Exchange; all liabilities relating to contracts and all amounts due and payable to the Trade Guarantee Fund. Rule 16 deals with allocation in the Order of Priority. It inter alia states that when the Board has exercised the right of nomination in respect of a membership vesting in the Exchange the consideration received thereof shall be applied to the specified purposes.

16. On reading Rules 5 to 10 it becomes clear that the right of nomination is conferred on the member of the Exchange; that, the said right shall cease and vest in the Exchange when his membership gets forfeited to the Exchange; that on such forfeiture the right of membership gets vested in the Exchange and on such vesting the Exchange has the right to deal with it as it may think fit. That, on forfeiture even the right of nomination vests in the Exchange. Thus, a non-defaulting continuing member owns the right of nomination with respect to the membership of the Exchange till his right of membership is forfeited to the Exchange.

17. The question which we are required to examine is - whether the right of nomination in the non-defaulting continuing member comes within the expression "business or commercial right of similar nature" in Section 32(1)(ii) of the 1961 Act?

18. On the analysis of the Rules of BSE, it is clear that the right of membership (including right of nomination) gets vested in the Exchange on the demise/ default committed by the member; that, on such forfeiture and vesting in the Exchange the same gets disposed of by inviting offers and the consideration received thereof is used to liquidate the dues owed by the former/ defaulting member to the Exchange, Clearing House, etc. [see Rule 16 and Bye-law 400]. It is this right of membership which allows the non-defaulting member to participate in the trading session on the floor of the Exchange. Thus, the said membership right is a "business or commercial right"

conferred by the Rules of BSE on the non-defaulting continuing member.

19. The next question is - whether the membership right could be said to be owned by the assessee and used for the business purpose in terms of Section 32(1)(ii). Our answer is in the affirmative for the reason that the Rules and the Bye-laws analysed hereinabove indicate that the right of membership (including the right of nomination) vests in the Exchange only when a member commits default. Otherwise, he continues to participate in the trading session on the floor of the Exchange; that he continues to deal with other members of the Exchange and even has the right to nominate subject to compliance of the Rules. Moreover, by virtue of Explanation 3 to Section 32(1)(ii) the commercial or business right which is similar to a "licence" or "franchise" is declared to be an intangible asset. Moreover, under Rule 5 membership is a personal permission from the Exchange which is nothing but a "licence" which enables the member to exercise rights and privileges attached thereto. It is this licence which enables the member to trade on the floor of the Exchange and to participate in the trading session on the floor of the Exchange. It is this licence which enables the member to access the market. Therefore, the right of membership, which includes right of nomination, is a "licence" or "akin to a licence" which is one of the items which falls in Section 32(1)(ii) of the 1961 Act. The right to participate in the market has an economic and money value. It is an expense incurred by the assessee which satisfies the test of being a "licence" or "any other business or commercial right of similar nature" in terms of Section 32(1)(ii).

20. Since heavy reliance is placed by the Department on the judgments of this Court in the following cases, we need to discuss those judgments and clarify the position in law:

(i) Vinay Bubna v. Stock Exchange, Mumbai [(1999) 6 SCC 215]

(ii) Stock Exchange, Ahmedabad v. Assistant Commissioner of Income-Tax [(2001) 248 ITR 209]

21. In the case of Vinay Bubna (supra), one Yogesh Mehta who was a member of BSE was declared a defaulter by the Exchange. An amount of Rs. 21.81 crores was due and payable by the defaulter to Vinay Bubna who had moved the Bombay High Court by way of an arbitration petition against Yogesh Mehta (defaulter). In the said proceedings, an application was filed for appointing a court receiver. The High Court did not grant to Vinay Bubna any relief in respect of the membership card of the defaulter - member. In the said proceedings, Rule 16 was challenged on the ground that membership of BSE was an asset of the share-broker and on its sale from the proceedings thereof payment should be made to creditors like Vinay Bubna and proceeds should not be allowed to be distributed by BSE in the manner indicated by Rule 16. On behalf of the Stock Exchange, it was submitted that after respondent No. 3, Yogesh Mehta stood declared to be a defaulter he ceased to be the member of the Stock Exchange whereupon his rights of membership vested in the Exchange free of all rights, claims and interests and, therefore, the Exchange was at liberty to invite applications from other persons and to admit anyone who offers to pay the highest amount. It was argued that the said proceeds so received did not belong to the ex-member and the order of priority contained in Rule 16 was just and fair and was not illegal, wrong or arbitrary. The contention of the Stock Exchange was accepted by this Court observing that when the defaulting member is expelled from the Exchange no interest in his membership card remains in himself and none can pass to his assignee. It was held that once the membership ceases to be an asset of the share-broker the

question of Rule 16 being contrary to the insolvency law does not arise. In our view, the judgment in Vinay Bubna's case supports our reasoning in this case. The judgment in Vinay Bubna's case clearly indicates that it was a case dealing with the rights of a defaulting non-continuing member. The judgment in Vinay Bubna's case clearly indicates that membership card is an asset of a non-defaulting continuing member. However, the membership card ceases to be an asset only when the member commits a default in which event the card vests in the Exchange free from all encumbrances and once it so vests in the Exchange then the Exchange is free to allocate the consideration in the order of priority indicated by Rule 16.

22. In the case of Stock Exchange, Ahmedabad (supra), the question which arose for determination was whether after the demise of a stock-broker could he be declared a defaulter by the Exchange? In that case the facts were as follows. Ahmedabad Stock Exchange (ASE) admitted Rajesh Shah as its member on 19th February, 1988. He died on 7th February, 1994. On February 12, 1994, his legal representatives wrote to the Stock Exchange that they were unable to meet the liabilities of the deceased. Thereafter, the Governing Board of ASE passed a resolution on 12th February, 1994 declaring Rajesh Shah, the deceased member, as a "deemed defaulter". By the said resolution, the Board resolved that the membership rights of the deceased member who was declared to be a deemed defaulter should vest in the Stock Exchange and the said membership rights be disposed of by inviting offers within a minimum floor price of Rs. 25 lakhs. It is the said declaration dated 12th February, 1994 by which Rajesh Shah was declared to be a deemed defaulter came to be challenged. Another interesting fact which needs to be mentioned was that on 15th February, 1994 a provisional attachment order was passed under Section 281B of the 1961 Act in respect of the membership card in the name of Rajesh Shah. On 16th February, 1994, the Stock Exchange issued advertisement inviting claims from member creditors to lodge their claims within 30 days. They invited offers for purchase of membership also within the minimum floor price of Rs. 25 lakhs. On 5th December, 1994, ASE passed a resolution disposing of the membership right of the deceased in favour of UTI Security Ltd. for Rs. 27 lakhs. However, a garnishee notice was issued by the Department under Section 226(3) of the 1961 Act in the sum of Rs. 12.25 lakhs. That notice was addressed to the Executive Director of the Stock Exchange by the Department. Under the said circumstances, ASE filed a writ petition in the High Court challenging the orders of provisional attachment as well as the garnishee notice. The question for determination which arose in the said judgment was as to the nature of the rights of the deceased or his legal representatives in the membership card. It was held by this Court, after examining the Rules and the Bye-laws, that the right of nomination which earlier vested in Rajesh Shah stood vested in the Exchange under the Rules when he committed default. On default, that right vested in the Stock Exchange absolutely and, therefore, the consideration received by the Stock Exchange of Rs. 27 lakhs from UTI Security Ltd. could not be attached by the Income Tax Department because on vesting, such right of nomination belonged to the Exchange absolutely.

23. For the afore-stated reasons, we are of the view that both the afore-stated judgments support the reasoning given by us hereinabove.

24. Before concluding, we wish to clarify that our present judgment is strictly confined to the right of membership conferred upon the member under the BSE membership card during the relevant assessment years. We hold that the said right of membership is a "business or commercial right"

which gives a non-defaulting continuing member a right to access the Exchange and to participate therein and in that sense it is a licence or akin to licence in terms of Section 32(1)(ii) of the 1961 Act. That, such a right vests in the Exchange only on default/ demise in terms of the Rules and Bye-laws of BSE, as they stood at the relevant time. Our judgment should not be understood to mean that every business or commercial right would constitute a "licence" or a "franchise" in terms of Section 32(1)(ii) of the 1961 Act.

Conclusion

25. We answer the question at page 6 in the affirmative by holding that on the facts and circumstances of these cases the Tribunal was right in holding that depreciation was allowable on the cost of the membership card under Section 32(1)(ii) of the 1961 Act. Accordingly, the impugned judgment(s) of the Bombay High Court is set aside and the appeal(s) filed by the nominated non-defaulting continuing member stands allowed with no order as to costs.

.....CJI (S. H. Kapadia)J. (K.S. Radhakrishnan) New Delhi;

September 09, 2010