

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी, मुंबई।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'B' MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री जॉसन पी. बोज, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri Jason P. Boaz, Accountant Member**

**ITA No.114/Mum/2013
Assessment Years: 2008-09**

DCIT-1(2), R. No.535, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	बनाम/ Vs.	M/s Morgan Stanley India Securities Pvt. Ltd. Mafatlal House, 3 rd Floor, Backbay Reclamation, Mumbai-400020
(राजस्व /Revenue)		(निर्धारिती / Assessee)
PAN. No. AAACM4048B		

**C.O. NO.215/Mum/2015
(Arising out of ITA No.114/Mum/2013)
Assessment Years: 2008-09**

M/s Morgan Stanley India Securities Pvt. Ltd. Mafatlal House, 3 rd Floor, Backbay Reclamation, Mumbai-400020	बनाम/ Vs.	DCIT-1(2), R. No.535, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
(निर्धारिती / Assessee)		(राजस्व /Revenue)
PAN. No. AAACM4048B		

ITA No.113/Mum/2013
Assessment Years: 2009-10

DCIT-1(2), R. No.535, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	बनाम/ Vs.	M/s Morgan Stanley India Securities Pvt. Ltd. Mafatlal House, 3 rd Floor, Backbay Reclamation, Mumbai-400020
(राजस्व /Revenue)		(निर्धारिती / Assessee)
PAN. No. AAACM4048B		

C.O. NO.216/Mum/2015
(Arising out of ITA No.113/Mum/2013)
Assessment Years: 2009-10

M/s Morgan Stanley India Securities Pvt. Ltd. Mafatlal House, 3 rd Floor, Backbay Reclamation, Mumbai-400020	बनाम/ Vs.	DCIT-1(2), R. No.535, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020
(निर्धारिती / Assessee)		(राजस्व /Revenue)
PAN. No. AAACM4048B		

राजस्व की ओर से / Revenue by	Shri T.A. Khan -DR
निर्धारिती की ओर से / Assessee by	Shri Sunil M. Lala

सुनवाई की तारीख / Date of Hearing :	05/01/2017
आदेश की तारीख /Date of Order:	05/01/2017

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue as well as the assessee is aggrieved by the impugned orders of the Ld. First Appellate Authority, Mumbai, dated 23/10/2012 and 25/10/2012 respectively for Assessment Years 2008-09 and 2009-10. Thus, the

Revenue is in appeal and the assessee has preferred cross objections for the respective Assessment Years.

2. First, we shall take up the appeal of the Revenue for Assessment Year 2008-09 (ITA No.114/Mum/2013), wherein, the only ground raised pertains to holding that section 14A of the Income Tax Act, 1961 (hereinafter the Act) cannot be applied to the expenditure, incurred in relation to tax free dividend income as there was no tax free dividend income was earned/received by the assessee, which is contrary to the decision of the Special Bench of the Tribunal in the case of Cheminvest Ltd. (2009) 121 ITD 318 (Del.)(SB), in which the Bench relied upon the decision from Hon'ble Apex Court in the case of Rajendra Prasad Moody 115 ITR 522 (SC).

2.1. During hearing of this appeal, the ld. DR, Shri T.A. Khan, defended the addition made by the Assessing Officer and thus supported the conclusion arrived at in the assessment order. On the other hand, Shri Sunil M. Lala, ld. counsel for the assessee, contended that section 14A of the Act will not apply where no exempt income is received during the relevant previous year and thus, defended the conclusion arrived at in the impugned order by placing reliance upon various decisions mentioned in the paper book and more specifically the following decisions:-

- i. Cheminvest Ltd. vs CIT (2015) 61 taxman.com 118(Del.)

- ii. SM Energy Teknik and Electronics Ltd. vs DCIT (2015) 61 taxman.com 448 (Mum. ITAT)
- iii. CIT vs Delite Enterprises (ITA No.110 of 2009) (Bom.)
- iv. Quality Engineering and Software technologies Ltd. vs DCIT(2015) 152 ITD 320 (Bang.) and
- v. Anriya Project Management Services Pvt. Ltd. vs DCIT TS-99-ITAT-2015 (Bang.)

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is a holding company of Morgan Stanley India Company Pvt. Ltd., engaged, inter-alia, in providing investment research advisory support, consultancy services to Morgan Stanley Group Companies on a cost plus basis. For Assessment Year 2008-09, the assessee filed return of income electronically on 23/09/2008, declaring income of Rs.16,21,74,980/-. The case of the assessee was selected for scrutiny, therefore, notices u/s 143(2) and 142(1) of the Act were issued to the assessee. During the year, the assessee made investments of Rs.1771,91,93,415/- in various group companies and did not earn any income which did not form part of its total income. During assessment proceedings, the ld. Assessing Officer show-caused as to why disallowance may not be made u/s 14A of the Act r.w.r. 8D of the Income Tax Rules 1962 (hereinafter the Rules), should not be made. In reply,

the assessee filed detailed submissions, in support of its claim, by explaining that no disallowance can be made u/s 14A of the Act r.w.r 8D of the Rules. However, the ld. Assessing Officer while framing the assessment u/s 143(3) of the Act on 20/12/2011 made disallowance of Rs.4,55,99,525/-.

2.3. The assessee felt aggrieved and thus filed appeal before the Ld. Commissioner of Income Tax (Appeal), challenging the disallowance made u/s 14A of the Act r.w.r 8D of the Rules, by claiming that assessee did not earn any exempt income, during the year and thus no disallowance is warranted u/s 14A r.w.r-8D. After considering the factual matrix and the case laws, relied upon by the assessee, the disallowance, made by the Assessing Officer, was deleted. The Revenue is aggrieved and is in appeal before this Tribunal.

2.4. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, the ld. DR did not controvert the claim of the assessee that no exempt income was earned by the assessee, which does not form part of the total income, thus, we find force in the argument of the ld. counsel for the assessee and the conclusion of the Ld. Commissioner of Income Tax (Appeal), as in the present case, the assessee has not earned any tax free income, hence the provision of

section 14A of the Act, will not be applicable. The ratio laid down in ACIT Lafarge India Holding Pvt. Ltd. (19 SOT 121) (Mum. Trib.), Winsome Textiles Industries Ltd. (319 ITR 204)(P & H) supports our view. It is noted that the ld. Assessing Officer disallowed one half percent of the investment, which works out to Rs.4,55,99,525/- u/s 14A of the Act, r.w.r 8D of the Rules. The investments were claimed to be made out of owned funds and there was no borrowing by the assessee and further the assessee made investment in group companies as a strategic investment. As claimed by the assessee, the assessee made suo-moto disallowance of Rs.35,44,521/- and the assessee earned Rs.42,27,384/-, whereas, the Assessing Officer made disallowance of Rs.69,70,878/-. It is also noted the administrative and support service expenses incurred on behalf of group companies were recovered from them at cost and the recovery was reflected under the head other income in Schedule-J of profit & loss account/computation of income. As mentioned earlier, suo-moto disallowance was made by the assessee. The assessee has also disallowed the entire administrative expenses while computing the total income and there is uncontroverted finding in the impugned order that no expenses were claimed as deduction in computation of total income, thus, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal). It is also noted that the disallowance was made by the ld. Assessing Officer, based upon the decision of the Special Bench of the Tribunal in the case of Cheminvest Ltd. (2009) 121 ITD

318(Del.)(SB), which has been reversed by Hon'ble High Court in (2015) 61 taxman.com 118 (Del.) by following CIT vs Holcim India P. Ltd. (2015) 57 taxman.com 28 (Del.)(Para-19) and distinguished the decision in Maxopp Investment Ltd. vs CIT (2012) 347 ITR 272 (Del.). The Hon'ble High Court held that section 14A of the Act will not apply where no exempt income is received or receivable during the relevant previous year. The assessee has made strategic investment in the group companies and no exempt income was earned by the assessee during the relevant assessment year. The Hon'ble Bombay High Court in CIT vs Delite Enterprises (ITA No.110 of 2009), order dated 26/02/2009 dismissed the appeal of the Revenue. The case of the assessee further find support from the decision of the Tribunal in SM Energy Technik and Electronics Ltd. vs DCIT (2015) 61 taxman.com 448 (Mum.), Quality Engineering and Software Technologies Ltd. vs DCIT (2015) 152 ITD 320 (Bang.) and Anriya Project Management Services Pvt. Ltd. vs DCIT (TS-99-ITAT-2015)(Bang.). Considering the totality of facts and the judicial pronouncements, discussed hereinabove, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal). It is affirmed, resulting into dismissal of appeal of the Revenue.

3. Now, we shall take up the appeal of the Revenue for Assessment Year 2009-10(ITA No.113/Mum/2013), wherein, the direction to the Assessing Officer to delete the

disallowance of Rs.69,70,878/- made u/s 14A r.w.r 8D of the Rules has been challenged. The ld. DR contended that the Ld. Commissioner of Income Tax (Appeal) did not consider the decision in M/s Godrej and Boyce Mfg. Ltd. (2010) 328 ITR 80 (Bom.). On the other hand, the ld. counsel for the assessee, conclusion arrived at in the impugned order.

3.1. We have considered the rival submissions and perused the material available on record. It is noted that the Ld. Assessing Officer, while making the disallowance of Rs.69,70,878/- invoked the provision of section 14A of the Act r.w.r.-8D(2)(iii) of the Rules. We find that the assessee has not claimed any administrative expenses, as deduction, in its computation of income and the expenses of Rs.69,70,878/- were met out from the group companies, which were recovered from them and showed as other income. The assessee has not claimed any expenses as deduction, thus, there is no question of any disallowance u/s 14A of the Act. It is also noted that, as claimed by the assessee, in respect of investment in group companies, the assessee has not received any dividend income and these investments were made in earlier Financial Years out of owned funds and thus the assessee has not incurred any expenditure in relation to the investment in group companies. In the light of the foregoing discussion, while disposing of the appeal for Assessment Year 2008-09, the decision of Hon'ble Punjab & Haryana High Court in Hero

Cycles Ltd. (ITA No.331 of 2009), Walfort Shares & Stock Brokers Ltd. vs Income Tax Officer (2008) 326 ITR 1 (SC), Yatish Trading Co. Ltd. vs ACIT (2011) 122 ITD 237 (Mum. Trib.), we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), we affirmed the same. This appeal of the Revenue is also dismissed.

4. Now, we shall take up the Cross objection of the assessee (C.O. No.215 & 216/Mum/2015). The ld. counsel for the assessee pointed out that the assessee electronically filed the return on 23/09/2008, declaring total income of Rs.16,21,74,980/-. The case was selected for scrutiny and the ld. Assessing Officer made disallowances without appreciating that the assessee has not earned any income which form part of the total income and further the assessee has not claimed any deduction. It was explained that the cross objections are based upon the decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd. It was explained that the cross objections can be filed within 30 days from the date of the receipt of the notice of appeal, whereas, the notice was received on 03rd November, 2015. It was pointed out that the assessee was not provided with the grounds of appeal filed by the Revenue, thus, there is a reasonable cause of delay. The assessee has moved application for condonation of delay, supported by an affidavit, on the reasoning/explanation contained therein. On the other hand, the ld. DR contended the delay may not

be condoned as the assessee has to explain the reasons of delay of each day.

4.1. We have considered the rival submissions and perused the material available on record. In view of the assertions made by the ld. respective counsel, so far as, condonation of delay is concerned, no doubt filing of an appeal/cross objection, is a right granted under the statute to the assessee/department and is not an automatic privilege, therefore, the assessee is expected to be vigilant in adhering to the manner and mode in which the appeals/cross objections are to be filed in terms of the relevant provisions of the Act. Nevertheless, a liberal approach has to be adopted by the appellate authorities, where delay has occurred for *bona-fide* reasons on the part of the assessee or the Revenue in filing the appeals. In matters concerning the filing of appeals, in exercise of the statutory right, a refusal to condoned the delay can result in a meritorious matter being thrown out at the threshold, which may lead to miscarriage of justice. The judiciary is respected not on account of its power to legalize in justice on technical grounds but because it is capable of removing injustice and is expected to do so.

4.2. The Hon'ble Apex Court in a celebrated decision in Collector, Land Acquisition vs Mst. Katiji & Ors. 167 ITR 471 opined that when technical consideration and substantial justice are pitted against each other, the courts are expected to further the cause of substantial justice. This

is for the reason that an opposing party, in a dispute, cannot have a vested right in injustice being done because of a non-deliberate delay. Therefore, it follows that while considering matters relating to the condonation of delay, judicious and liberal approach is to be adopted. If sufficient cause is found to exist, which is bona-fide one, and not due to negligence of the assessee, the delay needs to be condoned in such cases. The expression 'sufficient cause' is adequately elastic to enable the courts to apply law in a meaningful manner, which sub-serves the end of justice- that being the life purpose of the existence of the institution of the courts. When substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred. The Hon'ble Apex Court in *Vedabhai vs Santaram* 253 ITR 798 observed that inordinate delay calls for cautious approach. This means that there should be no malafide or dilatory tactics. Sufficient cause should receive liberal construction to advance substantial justice. The Hon'ble Apex Court in 167 ITR 471 observed as under:-

"3. The legislature has conferred the power to condone delay by enacting section 51 of the Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on de merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose

of the existence of the institution of courts. It is common knowledge that this court has been making a justifiably liberal approach in matters instituted in this court. But the message does not appear to have percolated down to all the others courts in the hierarchy.”

4.3. Furthermore, the Hon'ble Supreme Court in the case of Vedabai Alia Vaijayanatabai Baburao Patil vs. Shantaram Baburao Patil 253 ITR 798 held that the court has to exercise the discretion on the facts of each case keeping in mind that in construing the expression 'sufficient cause', the principle of advancing substantial justice is of prime importance. The court held that the expression "sufficient cause" should receive liberal construction.

4.4. The decision of the Tribunal in People Infocom Private Ltd. v/s CIT (ITA No.210/Mum/2013) order dated 19/05/2016, M/s Neutron Services Centre Pvt. Ltd vs ITO (ITA No.1180/Mum/2012) order dated 18/02/2016, Shri Saidatta Coop-. Credit Society Ltd. v/s ITO (ITA No.2379/Mum/2015) order dated 15/01/2016 and Mr. Nikunj Barot (Prop. Enigma) vs ITO (ITA No.4887/Mum/2015) order dated 06/01/2016, wherein, substantial delay was condoned, supports the case of the present assessee. Having made the aforesaid observation and various decisions discussed hereinabove, including from Hon'ble Apex Court, the circumstances narrated by the assessee, wherein, he has stated the reasons which caused the delay, therefore, the delay is condoned.

5. So far as, the merits of the cross objections are concerned, the ld. counsel for the assessee fairly agreed that if the appeals of the Revenue are dismissed, then the cross objections of the assessee will become in-fructuous. Since, we have dismissed the appeals of the Revenue, affirming the stand of the Ld. Commissioner of Income Tax (Appeal), therefore, both the cross objections has remained for academic interest only, consequently, dismissed as in-fructuous.

Finally, the appeals of the Revenue are dismissed and cross objections of the assessee are dismissed as in-fructuous.

This order was pronounced in the open court in the presence of the ld. representative from both sides at the conclusion of the hearing on 05/01/2017.

Sd/-

(Jason P. Boaz)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 05/01/2017

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,

ITAT, Mumbai

6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai