

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

BEFORE SHRI R.C.SHARMA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 7401/MUM/2013
Assessment Year: 2009-10**

M/s. MAPE Securities Pvt. Ltd. 13/14, 1 st Floor, Nirlon House, Annie Besant Road, Worli, Mumbai- 400 030. PAN: AAECM7039E	Vs.	The JCIT, OSD, 4(3), Room No. 649, 4 th Floor, Aayakar Bhavan, M.K.Road, Mumbai- 400 020.
(Appellant)		(Respondent)

Appellant by : Shri. Siddharth Kumar Shah
Respondent by : Shri. Suman Kumar

Date of Hearing: 05/12/2016
Date of Pronouncement: 14/12/2016

ORDER

PER RAM LAL NEGI, JM

The present appeal has been filed by the assessee against order dated 29/05/2012 passed by the Ld. CIT(Appeals)-8, Mumbai, for the Asst. year 2009-10, whereby the Ld. CIT(A) dismissed the appeal filed by the assessee against assessment order dated 24/11/2011 passed u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. Brief facts which require necessary mention for the purpose of deciding the issues involved in this case are that the assessee company engaged in the business of brokerage in stock and shares, filed its return of income declaring the total loss of Rs. 1,26,79,145/-. During assessment proceedings the A.O noticed that the assessee had written off an amount of Rs. 1,17,65,000/-,

advanced to its subsidiary company, and claimed the same as revenue expenses. Rejecting the plea of the assessee that interest free loan given to subsidiary company to meet its working capital requirement as a measure to commercial expediency should be allowed as expenses, AO added back the said amount to the income of the assessee. Similarly, the assessee had paid Rs. 9,39,695/- towards transaction charges without deducting tax at source u/s 194J. The AO added back the said amount to the income of the assessee disallowing the deduction claimed u/s 40(a)(ia) of the Act and computed the total income of the assessee at Rs. 25550/-. The assessee challenged both the issues before the Ld. CIT(A). The Ld. CIT(A) decided only second issue in favour of the revenue and against the assessee following the ratio laid down by the Hon'ble Bombay High Court in the case of *Kotak Securities Ltd. (ITA No. 3111 of 2009) dated 21/10/2011* in which it has been held that the transaction charges paid by the assessee to the Stock Exchange constitute "fees for technical services" covered u/s 194J of the Act.

3. The assessee filed an application before the Ld. CIT(A) to adjudicate ground No. one of the appeal. Since, no action was taken on the said application despite reminders sent to the Ld. CIT(A), the assessee has preferred the present appeal against the impugned order passed by the Ld. CIT(A) on the following effective grounds:-

"1. The learned CIT(Appeal) has erred in law and fact in affording proper opportunity of being heard to the appellant. The appellant prays that it should be given proper opportunity of being heard.

2. The learned CIT(Appeal) has erred in law and fact in not adjudicating the ground of appeal "Disallowance of loan amounting to Rs. 1,17,65,000/- written off by the Appellant

which was given to its 100% subsidiary company as working capital to carry on its business.”

The appellant prays that the said disallowance of loan written off Rs. 1,17,65,000/- be allowed.

3. The learned CIT(Appeal) has erred in law and fact in upholding the disallowance of transaction charges paid to Exchanges of Rs. 9,39,695/- u/s 40(a)(ia). The appellant cannot be compelled to do the impossible act.

4. The Appellant craves leave to add additional ground of appeal. The assessee erroneously treated loss on sale of shares of 100% subsidiary company as capital loss instead of business loss.”

4. The present appeal has been filed along with an application for condonation of delay of 491 days. The Ld Counsel submitted that the delay was not wilful but has happened due to the circumstances beyond control. In fact, the assessee had preferred the first appeal against assessment order raising two grounds. However, the CIT(A) passed the impugned order deciding only second ground of appeal. Accordingly, the application was filed on 27/06/2012, to rectify the error and adjudicate the first ground of appeal also. Thereafter, another reminder dated 02/08/2012 was sent but of no avail. Hence, the assessee preferred the present appeal after expiry of limitation period. The Ld. Counsel for the assessee further submitted that since the delay was not intentional the same may be condoned in the interest of justice. The Ld. departmental representative on the other hand opposed the application.

5. We have heard the rival submissions. Sub-section 5 of section 253 of the Income Tax Act provides that the Tribunal may admit appeal or permit filing of memorandum of cross objection of respondent after expiry of relevant period of limitation referred to in sub-section 3 and 4 section 253, if the tribunal is satisfied that there was sufficient cause for not presenting it within that

period. Expression “sufficient cause” in this section has also been used in section 5 of Indian Limitation Act, 1961. This expression has come for consideration before the Hon’ble High Courts as well as before the Hon’ble Supreme Court, and the Hon’ble Courts are unanimous in observing that whenever such issue comes for consideration before adjudicating authority, then “sufficient cause” should be considered with justice oriented approach. We deem it appropriate to make reference to the decision of Hon’ble Supreme Court in the case of *Collector Land Acquisition Vs. Mst. Katiji & Others, 1987 AIR 1353*. The relevant part of the judgment reads as under:

1. *Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
2. *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
3. *"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
4. *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*
6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”*

6. In view of the ratio laid down by the Hon’ble Supreme Court in the aforesaid case, we allowed the application of the assessee for condonation of delay and permitted the Ld. Counsel to argue the case on merits holding that

the appellant had been prevented by the sufficient cause from filing the present appeal within the limitation period.

7. At the outset, the Ld. Counsel for the assessee submitted that the assessee was not given proper opportunity of being heard hence the order is bad in law. Second ground pertains to disallowance of loan given by the assessee to its subsidiary as working capital to carry on its business. The Ld. Counsel submitted that since, the Ld. CIT(A) has not adjudicated the issue relating to the disallowance of written off of the loan in question the said issue may be restored to the file of the Ld. CIT(A) for adjudication. So far as ground No 3 of the appeal is concerned, the Ld Counsel pointed out that the Mumbai Bench of the ITAT has decided the identical issue in favour of the assessee in assessee's own case ITA No. 842/M/2012 for the A.Y. 2008-09 vide order dated 24.11.2014. Therefore, the findings of the Ld. CIT(A) on the said issue are liable to be set aside. The Ld. Counsel further submitted that ground No 4 has been taken as additional ground to treat loss on shares of 100% subsidiary company as business loss as the same has been erroneously treated as capital loss.

8. After hearing the Ld. DR, we perused the material placed before us. The first ground of appeal is general in nature and we do not consider it necessary to adjudicate this ground independently. So far as the second ground is concerned, we noticed that the Ld. CIT(A) has not given any finding on the issue relating to disallowance of written off of the loan in question. Hence, in our considered opinion the matter is required to be looked into by the first appellate authority. We, therefore, restore this issue to the file of Ld. CIT(A) for adjudicating the same after giving an opportunity of being heard to the assessee.

9. The third ground pertains to disallowance of transaction charges paid to stock exchanges of Rs. 9,39,695/-. We notice that the co-ordinate Bench has

decided the identical issue in favour of the assessee in assessee's own case for the A.Y. 2008-09 holding as under:-

“We have heard the rival contention and also perused the relevant finding given in the impugned order. The assessee has paid transaction charges to the stock exchange on which TDS was not deducted. Such anon deduction of TDS was based on the fact and belief that in the earlier years also no TDS was deducted and department has accepted this position. This bona fide belief that no TDS is required to be deducted was also based on decisions of ITAT Mumbai Benches, specially in the case of Kotak Securities Ltd. Even the assessing officer has accepted this fact, but has made the disallowance u/s 40(a)(ia) on the ground that the said decision of the Tribunal is subjudice before the Hon'ble High Court. This decision of the Tribunal was reversed only on 21.10.2011, by the Hon'ble High Court, wherein it was held that transaction charges are “fees for technical services”, for which TDS was required to be deducted u/s 194J. The assessee's case before us is that, no disallowance should be made and assessee was under a bona fide belief that no tax was deductible. We find that such a bona fide belief for not deducting the tax in the assessment year in question under such circumstances has been accepted by the Hon'ble High Court in the case of Kotak Securities Ltd.(supra) itself and disallowance made u/s 40(a)(ia) was deleted. The relevant observation and the finding of the Hon'ble High Court on this aspect has given in para 32 of the order, which is reproduced hereunder:-

“However, since both the revenue and the assessee were under the bona fide belief for nearly a decade that tax was not deductible at source on payment of transaction charges, no fault can be found with the assessee in not deducting the tax at source in the assessment year in question consequently disallowance made by the assessing officer under section 40(a)(ia) of the Act in respect of the transaction charges cannot be sustained. We made it clear that we have arrived at the above conclusion in the peculiar facts of the present case, where both the revenue and the assessee right from the insertion of Section 194J in the year 1995 till 2005 proceeded on

the footing that the assessee is not liable to deduct tax at source and in fact immediately after the assessment year in question i.e. from A.Y. 2006-07 the assessee has been deducting tax at source while crediting the transaction charges to the account of the stock exchange.”

Thus on the facts of the present case also, we hold that no disallowance u/s 40(a)(ia) should be made in the present assessment year as the assessee was under a bona fide belief that no tax was deductible, because in the earlier years both the revenue and the assessee had accepted the position that no tax was deductible on the transaction charges. It has been stated before us by the learned counsel that assessee is now deducting tax u/s 194J on transaction charges in the wake of the decision of the Hon’ble High Court. Accordingly, we hold that no disallowance should be made u/s 40(a)(ia) in this year. Thus, assessee’s ground is allowed.”

10. Since, the facts and the issue involved in the present case are identical to the assessee’s own case ITA No. 842/M/2012 for the A.Y. 2008-09 (supra) and the coordinate Bench has already decided the identical issue in favour of the assessee on the ground that non deduction of tax at source was based on the fact and belief that in the earlier years also no tax was deducted and the department had accepted the same. This *bona fide* belief was also based on the decision of ITAT Mumbai Bench which was reversed only on 21.10.2011 by the Hon’ble jurisdictional High Court. The Hon’ble High Court has accepted the plea of *bona fides* of the assessee in non deduction of tax in the case of *Kotak Securities Ltd.* (supra) holding that since both the parties were under the *bona fide* belief, no fault can be found with the assessee in not deducting tax at source during the assessment year in question. Since, the present appeal pertains to the assessment year 2009-10, and the Hon’ble High Court reversed the findings of the coordinate Bench vide order dated 21.10.2011, we respectfully follow the ratio laid down by the Hon’ble High Court in *Kotak*

Securities Ltd. and the decision rendered by the coordinate Bench in the assessee's own case for the assessment year 2008-09 and set aside the findings of the Ld. CIT(A) on this issue and decide this ground of appeal in favour of the assessee.

11. The assessee has taken the fourth ground for the first time before the Tribunal. The assessee has raised this issue to treat the loss on sale of shares of subsidiary company as business loss on the ground that the same has erroneously been treated as capital loss by the assessee. Admittedly, the AO has passed the assessment order on the basis of the facts represented by the assessee and the assessee did not raise this issue even before the CIT(A) during appeal proceedings. Under these circumstances, the assessee cannot raise this issue before the Tribunal. In our considered opinion since this is not a legal ground the same cannot be admitted as an additional ground at this stage. Hence, we dismiss this ground of appeal.

12. In the result the appeal filed by the assessee for Asst. Year 2009-10 is partly allowed.

Order pronounced in the open court 14th December, 2016.

Sd/-
(R.C.SHARMA)

ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 14/12/2016

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
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

Pramila