

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "A" BENCH, MUMBAI

BEFORE SHRI SHAILENDRA KUMAR YADAV, JUDICIAL
MEMBER,
AND SHRI RAJESH KUMAR, ACCOUNTANT MEMBER.

ITA. No. 2819/Mum/2012
(Assessment Year:2008-09)

Lodha Land Development Private Limited
216, Shah & Nahar Industrial Estate,
Off. Dr. E. Moses Road, Worli,
Mumbai – 400018.

Appellant

Vs.

Addl. CIT,
Circle 6(3), Mumbai

Respondent

PAN: AABCL2223J

अपीलार्थी की ओर से /By Appellant : Shri Vijay Mehta, A.R.

प्रत्यर्थी की ओर से/By Respondent : Shri A. Ramachandran,

CIT D.R.

सुनवाई की तारीख/Date of Hearing :19.11.2015

घोषणा की तारीख/Date of

Pronouncement

:07.12.2015

ORDER

PER RAJESH KUMAR, A.M:

This appeal has been filed by assessee against the order of Commissioner of Income-Tax (Appeals)-38, Mumbai, dated 31.01.2012 for A.Y. 2008-09 on following grounds:

- “1) On the facts and in the circumstances of the case, the learned CIT(Appeals) -38, Mumbai erred in law and in facts in not adjudicating on double disallowance of expenses of Rs.12,15,060/- made under section 40(a)(ia) of the income tax Act, 1961 (‘the Act’) as same had been already disallowed in the computation and it is mentioned in the written submission.*
- 2) On the facts and in the circumstances of the case, the learned CIT(Appeals) -38, Mumbai erred in law and in facts in not adjudicating on double disallowance of expenses of Rs.5,300/- made under section 40(a)(ia) of the income tax Act, 1961 (‘the Act’) as same had been already disallowed in the computation and it is mentioned in the written submission.*
- 3) On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in law and in facts in rejecting claim of your appellant for set-off of brought forward losses of Rs.63,902/- although there is no change in beneficial shareholding consequent to change in shareholding of appellant company.”*

2. Ground no.1 & 2 relate to double disallowance of Rs.12,15,060/- and Rs.5,300/- u/s.40(a)(ia) of the Act.

3. The brief facts of the case are that the assessee company filed its return of income on 19.07.2009 declaring an income of Rs.5,74,28,135/- while filing the return the assessee suo motto disallowed and added back Rs.12,15,060/- on the basis of qualification by the tax auditors of the assessee given in Clause 17(f) of the tax audit report which pertain to non deduction of TDS on audit fees of Rs.2,23,223/-, machinery hire charges

9,71,463/- and testing charges Rs.20,374/-. The expenses disallowed by the assessee are as under:

TABLE A

Sl. No.	Particulars	Amount
1	Audit Fee	2,23,223/-
2	Machinery hire charges	9,71,463/-
3	Testing charges	20,374/-
	Total A.	12,15,060/-
	Brokerage on sale of flat	10,273/-
	Interest on delayed payment of TDS	5,041/-
	Total B.	15,314/-
	Total (A + B)	12,30,374/-

3.1 The Id. A.O. while framing the assessment again disallowed the various expenses on which no TDS was deducted as discussed in para 6 of the assessment order thereby resulting into double disallowance of the same expenses on account of non deduction of TDS amounting to Rs.17,97,259/- and Rs.13,54,417/- are as under:

TABLE B

Sl. No.	Particulars	Amount
1	Audit Fee	2,23,223/-
2	Machinery hire charges	9,71,463/-
3	Testing charges	20,374/-
	Total A.	12,15,060/-
	Item debited to the work in progress	
	Audit Fee	68,913/-
	Machinery hire charges	5,00,450/-
	Testing charges	7,536/-
	Total B.	5,76,899/-
	Machinery hire charges on which TDS not deducted	5,300/-
	Total (A+B+C)	17,97,259/-

TABLE C

Sl. No.	Particulars	Amount
1	Machinery hire charges	13,49,117/-
2	Hire charges on which TDS not deducted	5,300/-
	Total	13,54,417/-

4. The ld. CIT(A) did not allow any relief on account of double deduction of Rs.12,30,374/- as claimed by the assessee and hence, the assessee is in appeal before us.

5. Ld. A.R. submitted before us that the assessee in the computation of income itself disallowed Rs.12,30,374/- on account of non deduction of TDS, whereas, the same amount was again disallowed by the A.O. resulting into double disallowance on account of non deduction of TDS in respect of same expenses and therefore, submitted that the relief may be allowed to assessee on this point by deleting the addition. On the other hand, ld. D.R. relied on the orders passed by authorities below.

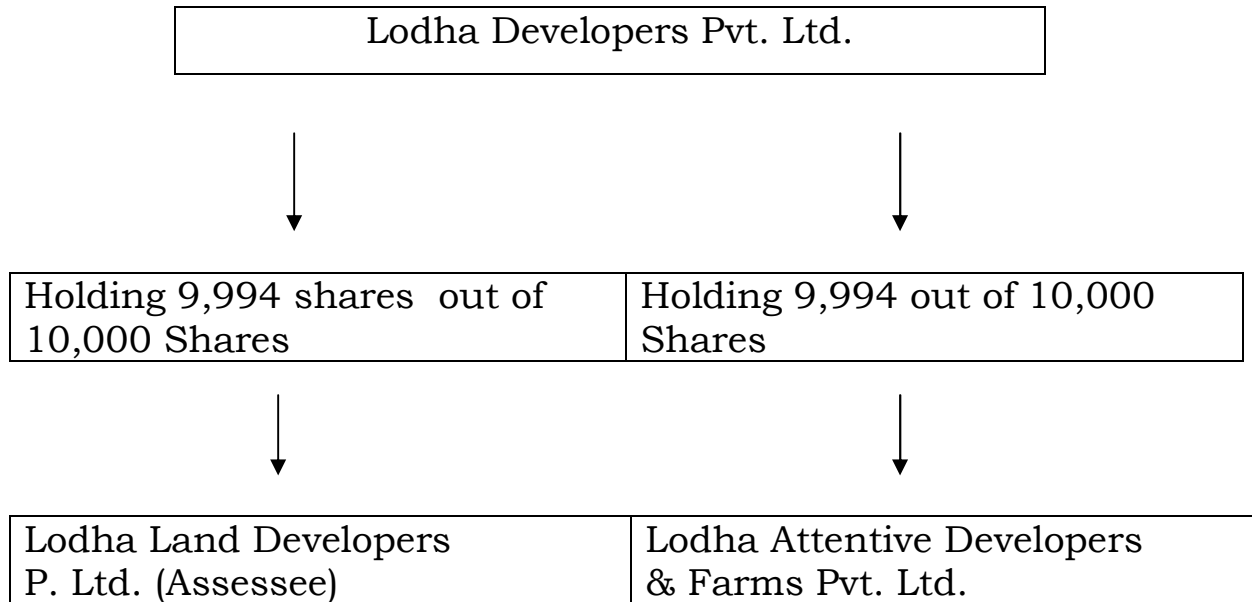
6. We have heard the rival submissions and material on record. We find that the assessee has itself disallowed and added to its income Rs.12,30,374/- while filing the return of income on the basis of note in clause 17(f) of the tax audit report as per Table A (supra). We further note from the comparative statement of disallowance u/s.40(a)(ia) of the Act that the A.O. again disallowed and added Rs.17,97,259/- to the income of assessee as stated in para 6 of the A.O. order, the break up of which is given in Table B (supra). The ld. CIT(A) while disposing of the appeal before him allowed relief in respect of Rs.5,76,899/- as mentioned in Table B (Total B) meaning thereby that double

disallowance in respect of Rs.12,20,360/- (Rs.12,15,060 + 5300) as which stands added to the total income of the assessee suo motto on the basis of tax audit report. On the basis of these facts, it is apparent that the disallowance in respect of Rs.12,20,360/- has been made twice, first by the assessee on his own and secondly by the A.O. We, therefore, delete the disallowance/addition of Rs.12,20,360/- by allowing the ground no.1 & 2 in favour of assessee.

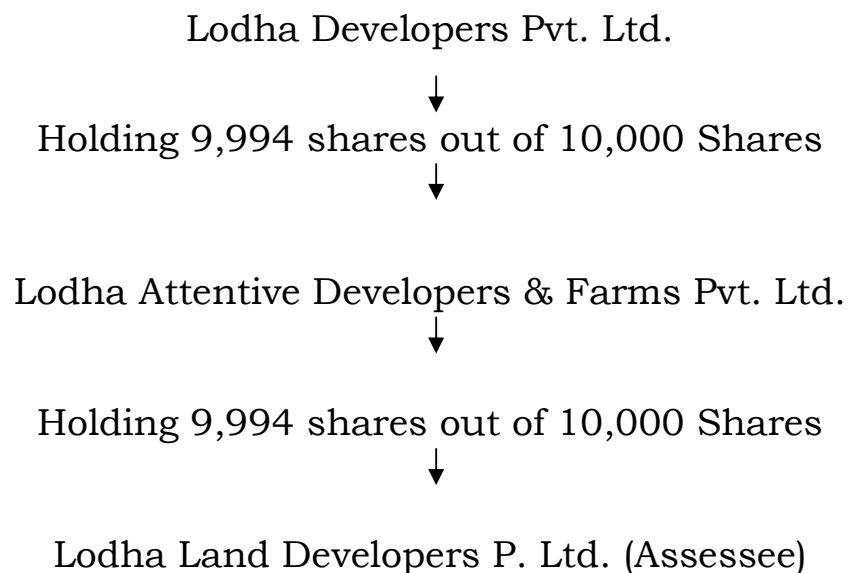
7. The third ground relates to confirmation of rejection of assessee's claim for setting off of brought forward losses of Rs.63,209/- by CIT(A), whereas there is no change in the beneficial shareholding consequent to change in shareholding of the assessee company.

8. The brief facts of the case are that the assessee claimed Rs.63,902/- on account of brought forward losses. The ld. A.O. did not allow the claim by holding that there was a change of more than 51% in the shareholding of the assessee during the previous year and therefore, the losses incurred prior to previous year were not allowed to be carry forward u/s.79 of the Act. The ld. CIT(A) confirmed the stand of the A.O. on this point by holding that the appellant had not submitted the evidences of shareholding patterns as filed before ROC for the year 31.03.2007 and 31.03.2008 in respect of transferor and transferee companies to substantiate that the voting rights in excess of 51% voting power were held by same persons.

8.1 The Id. A.R. submitted before us that there was no change in the beneficial shareholding of the company by filing details of shareholding pattern as on 31.03.2007 before transfer of shares and shareholding pattern after transfer of shares as under:



shareholding pattern after transfer of shares



The Id. A.R. submitted that since the shareholding pattern of the assessee company remained in the same group as is clear from

the above table i.e. before transfer M/s. Lodha Developers P. Ltd. was holding 9,994 shares out of 10,000 shares in each of the company M/s. Lodha Land Developers P. Ltd. (Assessee) and Lodha Attentive Developers & Farms Pvt. Ltd. After the transfer of shareholding pattern the ownership of share holding also remained with Lodha Developers P. Ltd. which was holding 9,994 shares out of 10,000 shares in Lodha Attentive Developers & Farms Pvt. Ltd. and Lodha Attentive Developers & Farms Pvt. Ltd. was holding 9,994 shares out of 10,000 shares in the assessee company. Thus, it is clear that the overall shareholding remained within the group and therefore, the assessee is entitled to claim the set off of the brought forward losses u/s.79 of the Act amounting to Rs.63,902/-. The ld. A.R. placed the reliance on a number of decisions, namely, DCIT vs. Select Holiday Resort P. Ltd., ITAT Bench 'G' Delhi in ITA No.1184/Del/2008, A.Y. 2004-05, which was confirmed by Hon'ble Delhi High Court and reported in (2013) 35 taxmann.com 368 (Delhi), CIT vs. AMCO Power System Ltd. in ITA No.766 of 2009 & Others, order dated 07th October, 2015 and AMCO Power System Ltd. vs. ITO, ITAT, 'B' Bench, Bangalore in ITA No.889/Bang/2007, A.Y. 2003-04.

8.2 We have heard the rival submissions and material on record. We find that shareholding pattern of the assessee company remained in the same group as is clear from the above table i.e. before transfer M/s. Lodha Developers P. Ltd. was holding 9,994 shares out of 10,000 shares in each of the company M/s. Lodha Land Developers P. Ltd. (Assessee) and Lodha Attentive Developers & Farms Pvt. Ltd. After the transfer

of shareholding pattern the ownership of shareholding also remained with Lodha Developers P. Ltd. which was holding 9,994 shares out of 10,000 shares in Lodha Attentive Developers & Farms Pvt. Ltd. and Lodha Attentive Developers & Farms Pvt. Ltd. was holding 9,994 shares out of 10,000 shares in the assessee company. Thus, it is clear that the overall shareholding remained within the group. In the case of DCIT vs. Select Holiday Resort P. Ltd., ITAT Bench 'G' Delhi in ITA No.1184/Del/2008, A.Y. 2004-05, which was confirmed by Hon'ble Delhi High Court and reported in (2013) 35 taxmann.com 368 (Delhi), it was held that there was no change in the management of the company which remained with the same family (set off persons) who was earlier exercising control and therefore Section 79 was not applicable and assessee company is eligible for set off of brought forward losses against the current year income. In this case the holding company of assessee was amalgamated with the assessee company and the shareholder of the holding company were also shareholder of the assessee company and upon amalgamation the same set off individual were allotted share in the assessee company. The said order of the ITAT, Delhi Bench was confirmed by Delhi High Court also as reported in (2013) 35 Taxmann.com 368 (Delhi) and the Hon'ble Court has held that "It is evident that during the earlier period 98% of the assessee's share were held by IIPL the holding company, which was amalgamated with the assessee company. However, after merger of the shareholder of the IIPL continued to be shareholder in the assessee company. Thus, the shareholders beneficially entitled to 98% of the shares continued to be same. In these circumstances, prohibition of carrying forward losses

placed by Section 79 does not operate. The same issue was also come up before Karnataka High Court in the case of CIT vs. AMCO Power System Ltd. in ITA No.766 of 2009 & Others, order dated 07th October, 2015 and the Hon'ble High Court has affirmed the same.

8.3 The case of the assessee is squarely covered by the above decisions and we, therefore, respectfully following the ratio laid down in the above decision, allow the ground no.3 in favour of the assessee. The A.O. is directed accordingly.

9. As a result, appeal filed by assessee is allowed.

Pronounced in the open Court on this the 7th day of December, 2015.

Sd/-
(SHAILENDRA KUMAR YADAV)
JUDICIAL MEMBER

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Mumbai: Dated 07/12/2015

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. □ वेदक / Assessee
3. संबंधित □ यकर □ युक्त / Concerned CIT
4. □ यकर □ युक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, □ यकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

By order/□ देश से,

उप/सहायक पंजीकार,
□ यकर अपीलीय अधिकरण, मुंबई ।