

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI PAWAN SINGH, JM AND SHRI N.K. PRADHAN, AM**

I.T.A. No.1572/Mum/2015 Assessment Year: 2008-09

Lodha Builders Private Limited 412, Floor-4, 17G Vardhman Chamber, Cawasji Patel Road, Horniman Circle, Fort, Mumbai-400 001.	बनाम/ Vs.	ACIT-Circle-6(3),Room No.522; Aayakar Bhavan, M.K. Road, Mumbai-400 020.
स्थायी लेखा सं./PAN : AAACL 1722 F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

I.T.A. No.1748/Mum/2015 Assessment Year: 2008-09

DCIT -CC-7(3),Room No.655;6 th Floor; Aayakar Bhavan, M.K. Road, Mumbai-400 020	बनाम/ Vs.	Lodha Builders Private Limited Fort, Mumbai-400 001.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri Vijay Mehta-AR
प्रत्यर्थी की ओर से/ Respondent by :	Sh. N.S. Jangpangi CIT-DR & Ms. Pooja Swaroop -DR

सुनवाई की तारीख /Date of Hearing : 17/07/2018

घोषणा की तारीख /Date of Pronouncement : 23/07/2018

आदेश / O R D E R

Per Pawan Singh , Judicial Member:

These cross appeals are directed against the order of CIT(A)-48, Mumbai dated 21/01/2015 for assessment year 2008-09. The assessee has raised the following Grounds of appeal :-

"1. Disallowance under section 14A of the Income-tax Act, 1961 ('the Act')

1.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding action of the learned AO in disallowing expenditure of Rs.1,04,58,823 under section 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 ('the Rules'] without appreciating the fact that the Appellant had made investment in the shares of the investee company for obtaining control over the investee company and thereby commercially exploit the land held by the investee company and not with the intention of earning exempt dividend income.

1.2. Without prejudice to the above, on the facts and in circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the learned AO that the provisions for diminish in the value of the investment of Rs. 1,47,00,000 should have been reduced while calculating average of total investments for computing disallowance under section 14A of the Act read with Rule 80 of the Rules.

2. Disallowance under section 40(a)(ia) of the Act

2.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming the disallowance made by learned AO of Rs 9,95,62,263 under section 40(a)(ia) of Act without appreciating the fact that the Appellant cannot be regarded as 'assessee in default' under section 201(1AJ) of the Act to invoke provisions of section 40(a)(ia) given the fact that the recipient has included the said income in its return of income filed under section 139 of the Act and paid the tax on such income and having regard to the amendment introduced in section 40(a)(ia) as well as section 201(1A) of the Act vide Finance Act, 2012.

2.2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding action of the learned AO in not accepting argument of the Appellant that the amendment to the provisions of section 40(a)(ia) clarification in nature having retrospective operation and hence provisions of section 40(a)(ia) of the Act should not be applicable.

The Appellant craves leave to add, amend, delete, rectify, substitute and modify any of the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing the appeal."

The Revenue has raised the following Grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A), erred in directing the assessing officer to exclude the interest

expenses disallowed u/s 40(a)(ia) of the I.T. Act, while computing disallowance u/s 14A r.w.r. 8d.

The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored. .» , _:.

The appellant craves leave to amend 01; alter any ground and/or add new grounds which may be necessary.”

2. ITA No.1572/Mum/2015 (Assessee 's appeal):-

2.1. At the outset of hearing, the Ld. Authorised Representative submits that the Grounds of appeal raised by the assessee are covered in favour of the assessee by a series of decisions of various High Courts and Tribunal. The Ld. AR further submits that during the year the assessee has not earned exempt income, therefore, no disallowance under section 14A is warranted. The Ld. Representative for the assessee also submits that once it is held that no disallowance under section 14A is warranted, the ground of appeal raised by the revenue in its cross appeal would become infructuous. In support of his submission, the Ld. Representative for the assessee relied upon the following :-

1. *Pr.CIT vs. Ballarpur Industries Ltd.(ITA No.51 of 2016 dated 13/10/1016 (BHC);*
2. *Redington India Ltd. vs. Addl.CIT(329 ITR 633)(Mad.);*
3. *Cheminvest Ltd. vs. CIT (378 ITR 33)(Del.); 281 CTR 447 (Del.);*
4. *CIT vs. Shivam Motors (P.) Ltd. (272 CTR 277)(All.);*
5. *CIT vs. Cortech Energy (P) Ltd. (272 CTR 265)(Guj.);*
6. *CIT vs. Lakhani Marketing Incl. (271 CTR 265)(P&H);*
7. *CIT vs. Holcim India (P) Ltd. (272 CTR 282) (Del.);*
8. *CIT vs. Winsome Textile Industries Ltd. (319 ITR 204)(P&H);*
9. *CIT vs. Delite Enterprises (ITA No.110 of 2009 Bom) and*
10. *Vakrangee Ltd. vs. ACIT being ITA No.6988/Mum/2014 dated 10/08/2016*

2.2. On the other hand the CIT-DR after going through the order of authorities below and various case laws relied upon Ld. Representative for the assessee has conceded that Ground of appeal No.1 is covered in favour of the assessee.

2.3. We have considered the rival submissions and have gone through the orders of authorities below. We have also gone through the profit and loss account furnished by the assessee on record. We have noted that during the year under the assessee has not shown any exempt income. The Hon'ble Bombay High Court in case of DCIT vs. Ballarpur Industries Ltd. (supra) held that section 14A would not apply if no exempt income is received or receivable during the relevant previous year. Similar view was taken by the Hon'ble Delhi High Court in case of Cheminvest Ltd. vs. ITO (121 ITD 318)(Del.)(SB) (supra). Considering the factual and legal position, we find that Ground No.1 is covered in favour of the assessee. In the result this ground of appeal is allowed.

3. Ground No.2 raised by the assessee relates to disallowance of interest expenses under section 40(a)(ia). Ld. Representative for the assessee submitted that Ground No.2 of the appeal is also covered in favour of the assessee and against the revenue. In support of his submission Ld. Representative for the assessee relied upon the case of Ansal Landmark Township P. Ltd.(377 ITR 635) (Del.) decision of Mumbai Tribunal in the

case of ACIT vs. M/s. City Gold Investments P.Ltd. (In this appeal, No.4160/Mum/2016 dated 27/06/2018 dtd. 27/06/2018) and the case of ACIT vs. M/s. Hule Construction Pvt. Ltd. (ITA No.14/Pun/2015 dated 21/4/2017). Ld. Representative for the assessee further submitted that second proviso inserted to section 40(a)(ia) w.e.f. 01/04/2013, was declared as retrospective in nature. Therefore, no disallowance under section 40(a)(ia) for non deduction of TDS is warranted against the assessee.

On the other hand, the Ld. Departmental Representative submits that the assessee has not furnished the details of parties against whom payments were made and TDS deducted. In some of the cases deductee is the sister concern.

3.1. We have considered the rival submissions and considered the orders of authorities below. During the assessment the Assessing Officer noted that the assessee has paid interest of Rs.9,95,62,263/-. The assessee was show caused as to why interest amounting to Rs.9,95,62,263/- debited to P&L account be disallowed as no TDS has been paid. The assessee furnished its reply. In the reply the assessee contended that the party to whom interest was paid has already paid taxes on such interest income. Therefore, the assessee has not deducted tax at source on such amount. The contention of the assessee was not accepted by Assessing Officer

holding that person to whom interest was paid does not qualify in any of the exceptions provided under section 194A. The assessee made default by not deducting tax at source. Thus, interest paid of Rs.9,95,62,263/- was disallowed by CIT(A).

3.2. Before the CIT(A) the assessee filed its written submissions. The assessee also contended that when the tax has been paid by deductee by filing return of income, the deductor is discharged from paying any further amount and there cannot be any demand raised by tax authorities to deductor in case deductee has paid taxes due on its income. The assessee also furnished evidence which contained certificate from Chartered Accountant (CA) and other evidences regarding filing of return in respect of payment of interest to whom TDS was not made. On the submission of additional evidence remand report was called from Assessing Officer. The Assessing Officer furnished his remand report dated 26/11/2014. In the remand report the Assessing Officer objected about the admission of additional evidence on the ground that same was not furnished during the assessment. For the submissions of the assessee that the party to whom interest was paid, has already paid tax on such income, which envisaged that the issue was examined by the assessing officer the then.

3.2.1. In the rejoinder, the assessee contended that assessment order was passed on 31/12/2010. The assessee had contended that it was specifically brought to the notice of the Assessing Officer that the recipient of the interest has filed their return of income after considering the interest paid by the assessee and paid the taxes thereon. Therefore, no amount can be recovered from the deductor and nor disallowance u/s. 40(a)(ia) can be made. The assessee also contended that as per Finance Act, when the assessee failed to deduct the whole or any part of the tax in accordance with the provisions of Chapter-XVII-B, is not deemed to be an assessee in default under the first proviso of sub section (1) of section 201, then, for the purpose of this sub-clause, it was to be deemed that the assessee had deducted and paid the tax on the sum on the date of furnishing of return of income and no disallowance be made. Similarly, amendment has been made to section 201(1) of the Act, vide Finance act, 2012 as per which the assessee shall not be deemed to be assessee in default in respect of failure to deduct tax if the resident recipient has furnished his return of income u/s. 139 and taken into account such sum of computing income in return of income and paid tax thereon. The assessee also contended that the amendment brought by the Finance Act, 2012 is clarificatory in nature, therefore, will have retrospective effect. Before us, the ld. AR has furnished the copy of details of TDS paid during the relevant period (page-10-11 of the paper book) alongwith receipt of

TDS and copies of return of income of the recipients (Page 22-39 of the paper book). On the other hand the ld. CIT-DR submits that the second proviso to section 40(a)(ia) has been inserted by Finance Act 2012, w.e.f. 1/04/2013. To read it otherwise as submitted by the assessee will go against the statutory provisions. Ld. CIT-DR further submitted that there is no basis to read the provisions as retrospective and clarificatory in absence of explicit enactment of the Parliament. We have noted that ld. CIT-DR has not disputed if the recipient has included tax in their return of interest while filing returns.

3.3. We have considered the rival submission of the parties and have gone through the orders of the authorities below. We have noted the assessee the assessee has specifically contended before the lower authorities that the tax has been paid by deductee by filing return of income, the deductor is discharged from paying any further amount and there cannot be any demand raised by tax authorities to deductor in case deductee has paid taxes due on its income. The assessee also furnished evidence which contained certificate from Chartered Accountant (CA) and other evidences regarding filing of return in respect of payment of interest to whom TDS was not made. The Assessing Officer furnished his remand report dated 26/11/2014. In the remand report the Assessing Officer objected about the admission of additional evidence on the ground that

same was not furnished during the assessment. We have noted that in the remand report the assessing officer has not disputed, if the interest income was not offered by the recipient. In our view there cannot be double taxation of the same income i.e. at the hand of the deductee and the deductor. Once it is brought to the notice of the assessing officer that the recipient has already shown such interest income in their return of income, the assessing officer, should not disallow the same without verifying the claim. The Hon'ble Delhi High Court in the case of Ansal Landmark Township P. Ltd. (supra), held that insertion of second proviso to section 40(a)(ia) is declaratory and curative in nature and has retrospective effect from 01/04/2005 being the date from which sub-clause (ia) of section 40(a) was inserted. Further, the co-ordinate Bench of the Tribunal in the case of City Gold Investments P. Ltd., by following the decision of Hon'ble Delhi High Court in the case of Ansal Landmark Township P. Ltd. (supra), held that second proviso to section 40(a)(ia) is retrospective and is applicable from 01/04/2005.

3.3.1 Considering the factual and legal discussions as referred above no disallowance under section 40(a)(ia) is sustainable when the recipient of interest has already offered by including the interest income in their return of income and paid tax thereon. Therefore, in our view the second proviso of section 40(a)(ia) squarely applies on the facts of the present case.

Therefore, we direct the AO to delete the disallowance after examining whether the recipients have included the interest in their return of income and paid tax thereon. The assessee is directed to file the relevant documents/evidence before the AO. Ground No.2 is allowed for statistical purposes.

4. Appeal filed by the assessee is partly allowed.

5. ITA No.1748/Mum/2015 (Revenue's appeal):

5.1. The sole Ground of appeal raised by the revenue relates to interest expenses disallowed u/s. 40(a)(ia), while computing disallowance u/s. 14A.

5.2. We have noted that while deciding Ground No.1 of the appeal filed by the assessee, we have held that assessee has not earned any exempt income during the relevant period; therefore, no disallowance u/s. 14A is warranted. Considering our finding on Ground No.1 in assessee's appeal, which we have already allowed, the Ground of appeal raised by Revenue has become infructuous.

6. In the result, the appeal of the assessee is partly allowed and appeal filed by the revenue is dismissed.

Order pronounced in the open court on 23rd July, 2018.

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 23/07/2018
Jv.Sr.PS.

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR “ D ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**