

THE INCOME TAX APPELLATE TRIBUNAL  
"A" Bench, Mumbai  
Before Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 5351/Mum/2013 (Assessment Year 2005-06)  
I.T.A. No. 3426/Mum/2013 (Assessment Year 2008-09)

DCIT (OSD)-8(1) Room No. 204 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Lok Housing & Construction Ltd. Lok Bhavan, Lok Bharti Complex, Marol Maroshi Road, Andheri (East) Mumbai-400 059.
(Appellant)		(Respondent)

I.T.A. No. 3547/Mum/2013 (Assessment Year 2008-09)  
I.T.A. No. 5110/Mum/2013 (Assessment Year 2005-06)

M/s. Lok Housing & Construction Ltd. Lok Bhavan, Lok Bharti Complex, Marol Maroshi Road, Andheri (East) Mumbai-400 059.	Vs.	DCIT (OSD)-8(1) Room No. 204 Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	None
Department by	Shri Anadi Varma & Shri Satishchandra Rajore
Date of Hearing	6.3.2019
Date of Pronouncement	17.5.2019

ORDER

Per Shamim Yahya (AM) :

These are cross appeals by the assessee and Revenue arising out of orders of learned CIT(A) for A.Y. 2005-06 & 2008-09 respectively. Since issues are connected and appeals were heard together, these are being consolidated for the sake of convenience.

ITA No. 3426/Mum/2013 – Revenue’s appeal for A.Y. 2008-09 :

2. Grounds of appeal read as *under* :-

1. *"On the facts and circumstances of the case, the Ld. CIT(A) has erred in treating the revised return of income filed by the assessee company on 01.01.2009 as a valid return without appreciating the fact that was no 'omission' or 'wrong statement' in the original return filed by the assessee on 29.09.2008 on the basis of sale agreements entered in F.Y. 2006-07 which were subsisting till the end of the relevant previous year"*
  2. *"On the facts and circumstances of the case, the Ld. CIT(A) has erred in holding that there was 'omission' or 'wrong' statement' in the original return of income filed on 29.09.2008 without appreciating that undisputedly the sale agreements were cancelled in December, 2008 i.e. subsequent to the filing of the original return of income."*
  3. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the cancellation of the agreements subsequent to the finalization of the account of the listed assessee company amounted to omission or wrong statement made in the original return of income in terms of S 139(5) of the Act."*
  4. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that all the conditions laid down in the IT. Act, 1961 for allowing deduction u/s 80IB(10) of the Act have been fulfilled by the assessee, ignoring the findings of the Assessing Officer for denying the assessee deduction u/s 80IB (10) of the Act."*
  5. *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the A.O. was not justified in invoking the provisions of section 145(3) of the Act and estimating the sales."*
  6. *The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored.*
3. At the threshold issue in this case is that the assessee is a company engaged in development of real estate and construction. Preliminary issue is that the assessee in its return of income filed u/s. 139(1) did not make any claim for deduction u/s. 80IB. Deduction u/s. 80IB was claimed later on by way of revised return. The Assessing Officer while rejecting assessee's claim u/s. 80IB also referred to the provisions of section 80AC, which provided that deduction such as one claimed u/s. 80IB cannot be allowed to the assessee unless he furnished its return of income for such assessment year on or before the due date specified under section or sub-section (1) of section 139. Since

the assessee did not claim deduction u/s. 80IB in the returned furnished u/s. 139(1) and claimed the same subsequently by way of revised return, the Assessing Officer opined that on the touchstone of provisions of section 80AC, assessee would not be entitled to claim deduction. Learned CIT(A) on this issue agreed with the assessee in as much as he held that the assessee has duly made the claim in the revised return and that in this view of the matter adverse inference against the assessee cannot be claimed. He also referred to the case law from the ITAT in this connection. Against this Revenue is in appeal.

4. We have heard learned Departmental Representative on this issue. None appeared on behalf of the assessee despite several notices. Upon carefully consideration, we find that as per provisions of section 80AC, deduction u/s. 80IB cannot be allowed unless assessee filed return of income u/s. 139(1) on due date. In this case, though the assessee has filed returned of income u/s. 13(1) there was no claim made in this return u/s. 80IB. This claim was made subsequently in revised return filed u/s. 139(5). In this regard we find that on the correct interpretation of section 80AC, assessee's claim is not tenable. In this regard we draw support of Hon'ble Apex Court in the case of Commissioner of Customs Vs. Dilip Kumar & Company and others [Civil Appeal No. 3327 of 2007 vide order dated 30.7.2018 (constitution Bench of Supreme Court)]. In this case, Hon'ble Apex Court has expounded that exemption, notification, provisions should be interpreted strictly and in case ambiguity, benefit of such ambiguity must be interpreted in favour of the Revenue. In the background of the aforesaid discussion and precedent from the constitution Bench of Hon'ble Apex Court, we are of the view that since the assessee has not claimed deduction u/s. 80IB in the return of income u/s. 139(1), subsequent claim for deduction u/s. 80IB filed under revised return is not allowable in law. Accordingly, we set aside the order of learned CIT(A) and restore the order of Assessing Officer on this issue.

5. Other grounds raised by the Revenue in this regard are challenging the merits of various aspect of claim u/s. 80IB decided by learned CIT(A) in favour of the assessee. Since we have already held that assessee's claim was not tenable in as much as it was not claimed in the return of income filed u/s. 139(1) adjudication of other grounds are only on academic interest. Hence, we are not engaging into the same.

ITA No. 3547/Mum/2013 : assessee's appeal for A.Y. 2008-09 :

6. Grounds of appeal read as under :

1. (i) *In the facts and circumstances of the case and in law the learned CIT (Appeals) erred in directing not to allow deduction u/s 80-IB in respect of 6 flats listed by the learned A.O. on page 14 of the assessment order without appreciating the appellants reconciliation of built-up area of each of the above units which the learned A.O. has duly reproduced in para 4 of the assessment order.*

(ii) *In the facts and circumstances of the case and in law the learned CIT (Appeals) erred in directing to allow the deduction on pro-rata basis u/s 80-IB of the I.T. Act 1961.*

2. (i) *In the facts and circumstances of the case and in law the learned CIT (Appeals) erred in confirming the addition of Rs.2,21,73,016/-made u/s. 41(1) on account of waiver of interest by financial institutes.*

(ii) *In the facts and circumstances of the case and in law the learned CIT (Appeal) failed to appreciate the consistent method followed by the appellant in the matter of expenditure on account of interest mainly to financial institutes the allowance of which is subject to provisions of section 43B of the Act.*

(iii) *In the facts and circumstances of the case and in law the learned CIT (Appeal) erred in not appreciating that the fact that the impugned waiver by the financial institutes itself was for non-payment of the same to such institutes and the appellant having consistently added back the same u/s 43B of the Act, the same evidently tantamount as not having been claimed nor allowed by the Department.*

3. (i) *In the facts and circumstances of the case and in law the learned CIT (Appeal) erred in confirming the addition of Rs.8,19,594/- on account of accrual of interest from SBI.*

*(ii) In the facts and circumstances of the case and in law the learned CIT (Appeal) failed to appreciate that it was a bonafide mistake on the part of the appellant in the absence of requisite TDS certificate from the Bank and which bonafide has not been doubted by the Department.*

4. *(i) In the facts and circumstances of the case and in law the learned CIT (Appeal) erred in confirming the addition of Rs.17,76,059/- made u/s 14A of the Act.*

*(ii) In the facts and circumstances of the case and in law the learned CIT (Appeal) ought to have appreciated the appellant's submission to the effect that it had interest free funds available and without bringing on record any material to establish that the investment was made out of interest bearing funds.*

Apropos Ground No. 1 relating to deduction u/s. 80IB.

7. Since we have already held that the assessee was not entitled to deduction u/s. 80IB(10) in the Revenue's appeal as above, this ground raised by the assessee is now liable to be dismissed and the same is dismissed accordingly.

Apropos Ground relating to addition of Rs. 2,21,73,016/- u/s. 41(1)

8. On this issue assessee has received waiver of interest from financial institutions. It was claim by the assessee that the assessee has debited interest to work-in-progress. Since interest was not debited to profit and loss account, it was claimed that no addition u/s. 41(1) is permissible for waiver of interest. However, the Assessing Officer was not satisfied, he made impugned addition.

9. Upon assessee's appeal learned CIT(A) rejected the contention of the assessee and held that since amount has been debited to work-in-progress which was ultimately being taken as the cost, assessee's plea that there is on debit for the interest is not sustainable. Hence he upheld Assessing Officer's action.

10. Against this order assessee has filed appeal before us.

11. In the ground it has been mentioned that the assessee had earlier itself disallowed interest u/s. 43B. Hence, now it is claim that there cannot be any addition us/ 41(1) for the sums which had already been disallowed by the assessee earlier disallowed u/s. 43B. We find that this aspect needs factual verification at the level of Assessing Officer. Further we note that Hon'ble Apex court had occasion to expound upon treatment for waiver of interest in the case of Mahindra and Mahindra. Hence, we remit this issue to the Assessing Officer to consider the issue afresh as above.

Apropos Ground relating to confirmation of addition of Rs. 17,76,059/- made u/s. 14A

12. On this issue it was claim of the assessee that the assessee has sufficient interest free funds to make investment, hence no disallowance should be done u/s. 14A. The authorities below did not accept this. Learned CIT(A) held that Assessing Officer has made disallowance not only on account of interest but also on account of other miscellaneous expenditures. Learned CIT(A) also distinguished the decision relied upon by the assessee on the ground that nexus between the investment and interest free funds has not been shown.

13. Upon careful consideration, we note that this observation of learned CIT(A) is not correct, as per decision of Hon'ble Jurisdictional High Court in the case of Reliance Utilities. No disallowance u/s. 14A qua interest is to be done if interest free funds are sufficient to cover investment which earned exempt income. Hence, we remit this issue to the file of the Assessing Officer to examine this issue afresh in the light of our observation as above.

Apropos ground relating to accrued interest and TDS reconciliation.

14. On this issue Assessing Officer has noted that assessee has received a sum of Rs. 21,66,144/- as interest from SBI but he has shown the same at Rs.

14,39,255/-. In response, the assessee showed TDS certificate for interest of Rs. 8,19,594. As per the Assessing Officer this was not disclosed in the return of income. Assessing Officer further noted that TDS certificate showed credit for TDS of Rs. 1,85,720. The Assessing Officer added this sum to income.

15. Upon assessee's appeal, learned CIT(A) confirmed the same. The assessee has filed this appeal in this regard stating that it was a bonafide mistake.

16. We find that in absence of further details, we do not find any infirmity in the orders of authorities below. Even if it was a mistake by the assessee to not include the same, why upon discovery the same should not be accounted for is not understood. Hence, we uphold the orders of authorities below on this issue.

ITA No. 5110/Mum/2013 - assessee's appeal for A.Y. 2005-06

17. Grounds of appeal read as under :-

1. (i) *In the facts and circumstances of the case and in law the learned CIT (Appeals) erred in upholding re-opening of assessment u/s 147 by the A.O.*

(ii) *In the facts and circumstances of the case and in law the learned CIT (Appeal) failed to appreciate that withdrawing the Writ did not tantamount to reasoning that there was no grievance by the Appellant against the reopening of the assessment as such.*

(iii) *In the facts and circumstances of the case and in law the learned CIT (Appeal) ought to have adjudicated in the first instance, the basic legal ground that there was no failure on the part of the appellant to disclose fully and truly all material facts necessary for its assessment and therefore the A.O.'s very act of initiating action u/s 147 was invalid.*

2. (i) *In the facts and circumstances of the case and in law the learned CIT (Appeal) erred in upholding the addition of Rs.3,10,68,844/- made by the A.O. under the provisions of section 41(1) of the Act.*

(ii) *In the facts and circumstances of the case and in law the learned CIT (Appeal) failed to appreciate that the impugned amount did not fall within the purview of provisions of section 41(1) of the Act and therefore*

the A.O.'s action of bringing the same to tax ought to have been held as wrong and not maintainable.

(iii) In the facts and circumstances of the case and in law the learned CIT (Appeal) erred in coming to conclusion that the impugned amount of settlement was not for default of non-payment of loans but for defaulting hire charges and therefore on revenue count which is clearly in contrast to the facts as brought out by the A.O. on pages 6 and 7 of the assessment order to the effect that same was of capital nature.

3. (i) In the facts and circumstances of the case and in law the learned CIT (Appeals) erred in confirming the addition of Rs.70,28,475/- forming part of total adjustment of Rs.1,06,21,286/- made by the A.O. to book profit u/s 115JB on the ground that the same is of revenue nature disregarding the fact that the impugned amount nevertheless represented merely a refund of excess amount paid to the (Party).

(ii) Without prejudice to the above and in the facts and circumstances of the case and in law the learned CIT (Appeals) erred in not appreciating the "book profits" as defined in Explanation I of Section 115JB of the Act.

ITA No. 5351/Mum/2013 - Revenue's appeal for A.Y. 2005-06

18. Grounds of appeal read as under :-

1. "On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the adjustment/addition of Rs. 35,00,000/- to Book Profit computed u/s. 115JB of the Act, by holding that the write off of the said amount being investment in shares was on capital account and hence could not be added to the Book Profit, without appreciating that the view taken by the Ld. CIT(A) is contrary to the provision of clause(i) of Explanation-1 of Section 115JB, which prescribes that provision for diminution in the value of any asset has to be disallowed and added to the Book Profit."
2. "on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs. 8,53,570/- made on account of accrued interest on the amount deposited by Rajasthan State Electricity Board with Hon'ble Bombay High Court, without appreciating the fact that as the principal amount stood invested with various banks on behalf of the assessee by the Prothonotary & Senior Master of the Hon'ble Bombay High Court, such interest had accrued thereon which constituted the assessee's income of the year under consideration and hence was liable for tax."

Assessee's appeal

Apropos issue of reopening

19. We find that learned CIT(A) has observed that assessee has also filed writ petition before Hon'ble High Court challenging reopening. However, assessee has subsequently withdrawn this writ when the matter came up for hearing. From this learned CIT(A) inferred that assessee has no grievance against the action of the Assessing Officer for reopening the assessment. Hence, learned CIT(A) dismissed assessee's challenge to reopening.

20. We find that learned CIT(A) has not mentioned anything as to why withdrawal of writ petition by the assessee before Hon'ble High Court can lead him to a conclusion that there is no grievance by the assessee. We find that assessee has duly filed appeal before learned CIT(A), learned CIT(A) has to pass a speaking order upon the issue before him. Withdrawal of writ before the Hon High Court cannot be a reason ipso facto for learned CIT(A) to decline to adjudicate or take adverse inference. Hence, in our considered opinion this issue needs to remit to the file of the learned CIT(A) to pass a speaking order on the assessee's challenge to reopening.

Apropos issue of addition u/s. 41(1)

21. On this issue it is noted that the assessee has taken loan for acquiring capital assets from three entities. Amount of loan was adjusted against excess amount paid on settlement/share investment written off etc. Net difference was added by the Assessing Officer as waiver u/s. 41(1).

22. Upon assessee's appeal learned CIT(A) considered entire gamut of submissions and concluded that amount received as one time settlement as default hire charges cannot be held to be in capital account and held to be the income of revenue account.

23. In appeal, assessee has submitted that the Assessing Officer had added the amount on different plea while learned CIT(A) has confirmed the addition that the amount was not for default of non-payment of loan but default in hire charges. We find that there is no reason given as to how the finding of learned

CIT(A) is not correct. Learned CIT(A) has duly empowered to correct error if any in the order of Assessing Officer. Hence, learned CIT(A) has corrected the ground for addition, the same cannot be a reason to challenge his order unless ground taken by learned CIT(A) is proved to be wrong. In these circumstances, we do not find any infirmity in the order of learned CIT(A), we uphold the same.

Apropos issue relating to adjustment in book profit u/s. 115JB :

24. Brief facts on this issue are as under :-

The AO has examined the waiver of the loan amounts and particularly the transaction relating to VLS Finance. In this transaction, the appellant has paid an amount of Rs70,28,475/- over and above the due amount and categorized the same as extra provisions made during the year. Similarly, the write off of the share application money in Mishan Flora India Limited has been shown as diminution in the value of the assets and hence AO added both the amounts to the book profits.

25. Upon assessee's appeal, learned CIT(A) as regards payment of VLS Finance held that since payment was on revenue account the Assessing Officer has correctly adjusted book profit. As regards adjustment for Mishan Flora India Ltd., learned CIT(A) held that since he has held it to be on capital account, adjustment by the Assessing Officer in the book profit cannot be upheld hence, he directed for deletion of the same.

26. Against this order, the Revenue and assessee are in cross appeals before us.

27. Upon carefully consideration we find that as mandated by Hon'ble Apex Court in the case of Apollo Tyres followed by Hon'ble Bombay High Court in several case laws, there is no jurisdiction to the Assessing Officer or assessee to tinker with the book profit shown in audited accounts which has been duly

adopted in annual general meeting. Accordingly we are of the opinion that any adjustment to book profit is not sustainable. We order accordingly.

28. In the result, Revenue appeals are allowed and assessee appeals are partly allowed.

Order has been pronounced in the Court on 17.5.2019.

Sd/-  
(RAMLAL NEGI)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 17/5/2019

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS