

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

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.2475/Mum/2013
(Assessment year: 2008-09)

M/s Libra Techcon Ltd 805, Hallmark Business Plaza Guru Nanak Hospital Road Bandra (E), Mumbai 400 051 PAN : AABCL0877G	vs	Dy.CIT-1(2), Mumbai
APPELLANT		RESPONDENT

I.T.A No.4480 /Mum/2013
(Assessment year: 2008-09)

Dy.CIT-1(2), Mumbai	vs	M/s Libra Techcon Ltd 805, Hallmark Business Plaza Guru Nanak Hospital Road Bandra (E), Mumbai 400 051
APPELLANT		RESPONDENT

Assessee by	Shri Prakash Jothwani
Revenue by	Shri M.V. Rajguru

Date of hearing	26-07-2018
Date of pronouncement	24-08-2018

ORDER

Per G Manjunatha, AM :

These cross appeals filed by the assessee as well as revenue are directed against the order of CIT(A)-2, Mumbai dated 021-03-2013 and they pertain to AY 2008-09. Since facts are identical and issues are

common, for the sake of convenience, these appeals were heard together and are disposed of by this common order.

2. The brief facts of the case are that the assessee company is engaged in the business of project consultancy services, filed its return of income for AY 2008-09 on 25-09-2008 declaring total income at Rs.6,01,81,774. The case was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, authorized representative of the assessee appeared from time to time and filed various details, as called for. The assessment was completed u/s 143(3) of the Act on 22-12-2010 determining the total income at Rs.23,85,36,030 by making additions towards disallowance of expenditure incurred in relation to exempt income u/s 14A for Rs.14,22,463, disallowance of certain expenses u/s 40(a)(ia) for failure to deduct TDS u/s 194C and 194J of the Income-tax Act, 1961 for Rs.1,56,83,873, disallowance of sponsorship expenses paid to non residents u/s 40(a)(i) for failure to deduct tax at source u/s 195 of the Income-tax Act for Rs.5,20,67,912, disallowance of site services and project commission u/s 40(a)(i) for failure to deduct TDS u/s 195 of the Income-tax Act, 1961 for Rs.6,82,813 and income estimated on advances received of Rs.10,84,97,194.

3. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has challenged

additions made by the AO in respect of disallowance of expenditure incurred in relation to exempt income u/s 14A, disallowance of expenditure u/s 40(a)(ia) and 40(a)(i) for failure to deduct tax under respective sections and determination of income accrued on advances received from project consultancy. The Ld.CIT(A), after considering relevant submissions of the assessee, partly allowed appeal filed by the assessee wherein he has allowed partial relief in respect of disallowance of expenditure incurred in relation to exempt income of Rs.2,15,123 and confirmed balance disallowance of Rs.12,07,340. In respect of disallowance of expenditure incurred on drawings, design and technical assistance, the Ld. CIT(A) has allowed partial relief, wherever the assessee has proved that either TDS provisions is not applicable or TDS provisions are complied with and accordingly, out of total disallowance of Rs.1,56,83,873 sustained addition of Rs.63,15,200 paid to Saudi Designer Engineering Constructions on the ground that although assessee required to deduct TDS u/s 194J failed to deduct such TDS, therefore, the AO was right in disallowing such expenditure for failure to deduct TDS u/s 194J of the I.T. Act, 1961. The Ld.CIT(A), however, deleted other additions made by the AO towards freight charges, packing and forwarding, transportation expenses, clearing and forwarding charges, printing and stationery, advertisement expenses and other charges on the ground that there is no requirement of

deduction of TDS on such payments. Insofar as disallowance of liaisoning services of Rs.5,20,67,912, the Ld.CIT(A), for the reasons stated in his order, directed the AO to make adhoc disallowance of 25% which worked out to Rs.1,29,19,935 and directed the AO to delete balance disallowance of Rs.3,91,48,377. Similarly the Ld.CIT(A) directed the AO to delete estimation of income on advances received from projects on the ground that the assessee is following percentage completion method for recognition of revenue and accordingly recognized revenue of Rs.17.78 crores from projects on the basis of work carried out at project site. Aggrieved by the order of Ld.CIT(A), assessee as well as the revenue are in appeal before us.

4. The first issue that came up for our consideration from assessee's appeal is disallowance of expenditure incurred in relation to exempt income. The facts with regard to the impugned dispute are that during the year under consideration, the assessee has received dividend income of Rs.1,26,05,919 which was claimed exempt u/s 10(34) of the Income-tax Act, 1961. The assessee did not make any disallowance towards expenditure incurred in relation to exempt income. The AO has determined disallowance of expenditure incurred in relation to exempt income towards interest expenses and other expenses by invoking Rule 8D(2)(ii) & 8D(2)(iii) of I.T. Rules, 1962. It is the contention of the assessee that it has not incurred any expenditure towards earning

exempt income, therefore, invoking Rule 8D(2) to disallow such expenditure without arriving at a satisfaction as to how the claim of the assessee with regard to non incurring of expenses is incorrect. The assessee further contended that it has accepted suo moto disallowance of Rs.50,000 before the Ld.CIT(A), however, the Ld.CIT(A) has ignored the claim of the assessee and allowed partial relief towards interest disallowance u/r 8D(2)(ii); but, confirmed addition made by the AO towards disallowance of other expenses.

5. We have heard both the parties and perused the material available on record. The AO has applied provisions of Rule 8D(2)(ii) & 8D(2)(iii) to determine disallowance contemplated u/s 14A of I.T. Act, 1961 in respect of interest expenditure and other administrative expenditure. The assessee has accepted adhoc disallowance of Rs.50,000 considering the nature of investments which yield exempt income without furnishing any working as to how adhoc disallowance of Rs.50,000 is justified considering huge dividend income of Rs.1,26,05,919. Therefore, we are of the considered view that there is no merit in the arguments of the assessee that it has not incurred any expenditure in relation to exempt income, when the assessee has not maintained separate books of account for investment activity and its business transactions. We further observe that when common expenditure are incurred towards business as well as investment

activity, then possibility of certain expenditure attributable to investment services cannot be ruled out. Therefore, keeping in view of the provisions of section 14A r.w.r. 8D(2), we are of the considered view that 5% of exempt income towards expenditure would meet the ends of justice. Accordingly, we direct the AO to make addition of 5% of exempt income towards expenditure incurred in relation to earning of exempt income.

6. The next issue that came up for our consideration from assessee as well as revenue's appeal is disallowance of expenses u/s 40(a)(ia) towards liaisoning charges @25% of such expenses. The AO has made disallowance of Rs.5,20,67,912 towards liaisoning and site services and project commission for the reason that the assessee has failed to deduct TDS u/s 195 of the Income-tax Act, 1961. It is the contention of the assessee that expenditure incurred under the head 'liaisoning services' are paid outside India for the project set up outside India. Therefore, the provisions of section 195 has no application when payment is made outside India towards services rendered outside India. The assessee further contended that it has entered into an agreement with Industrial Development & Promotion Company Ltd, a foreign company having no PE in India for providing project assistance and liaisoning and such services are provided to the assessee during implementation of its projects in Saudi Arabia. Such services has been rendered by the

service provider outside India. Therefore, the question of application of provisions of section 9(1)(vii) of the Income-tax Act, 1961 does not arise and consequently provisions of section 195 has no application for withholding tax on such payments.

7. We have heard both the parties and perused the material available on record. The AO has made addition towards liaisoning and other related expenses incurred in Saudi Arabia without recording any reason as to how such payment made outside India coming within the ambit of provisions of section 195 of the Income-tax Act, 1961. The AO has made addition towards liaisoning and other site charges paid to a service provider, a foreign company in Saudi Arabia for rendering services to the assessee's project located outside India for the reason that entire services are sourced from India and as such, the expenditure is incurred in India. The assessee has not brought anything on record to establish that the income component embedded and accrued to the parties in the transaction with Indian parties is not taxable in India under the I.T. Act, 1961.

8. Having heard both sides, we do not find any merit in the findings of the AO for the reason that on perusal of details filed by the assessee, we find that all payments related to liaisoning and related services has been paid to a non resident company having no PE in India providing local assistance and local liaisoning services to the assessee for its project in

Saudi Arabia. All these payments have been paid outside India for rendering such services to the project located outside India. No part of services has been either rendered or received in India. Therefore, we are of the considered view that the AO was erred in disallowing liaisoning and other services u/s 40(a)(ia) for failure to deduct TDS u/s 195 of the Income-tax Act, 1961. The Ld.CIT(A), after considering relevant facts in principle, accepted that the provisions of TDS is applicable in respect of payment made to Industrial Development & Promotion Company Ltd of Rs.1,29,19,535 has directed the AO to make adhoc disallowance of 25% of the payment on the ground that the bifurcation of expenditure attributable to technical services is not furnished by the assessee. Insofar as payment made to Legane Consultancy Ltd, by considering the agreement entered into between the assessee and Legane Consultancy Ltd and also by following the decision of ITAT Jaipur Bench in the case of JCIT vs Modern Insulators Ltd (2011 140 TTJ 715 (Jaipur) held that once payment has been made outside India to any person for rendering services outside India, then the provisions of section 195 has no application, consequently, disallowance cannot be made u/s 40(a)(i) of the Income-tax Act, 1961. We find that in respect of payment made to Industrial Development & Promotion Company Ltd, the assessee has filed necessary agreements entered into between the parties to prove that no part of services has been

rendered in India or sourced in India, therefore, the question of adhoc disallowance of such payment u/s 40(a)(ia) does not arise. We find that any payment made to a non resident for rendering services in India would come within the provisions of section 195 of the Income-tax Act, 1961. In this case, the payment has been made outside India for rendering services outside India. Therefore, the question of withholding taxes on such payment does not arise, consequently, the question of disallowance of such expenditure u/s 40(a)(ia) also does not arise. The Ld.CIT(A) without appreciating the facts has directed the AO to make adhoc disallowance of 25% of amount paid to Industrial Development & Promotion Company Ltd. Hence, we reverse the finding of Ld.CIT(A) in respect of adhoc disallowance of 25% of liaisoning charges paid to Industrial Development & Promotion Company Ltd and direct the AO to delete addition made u/s 40(a)(ia) of the Act. Insofar as payment made to Legane Consultancy Ltd, the Ld.CIT(A) has recorded categorical finding that payment made to a non resident having no PE in India for services rendered outside India, provisions of section 195 has no application. Consequently, no disallowance could be made u/s 40(a)(ia). We do not find any error in the findings of Ld.CIT(A); hence, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

9. The next issue that came up for our consideration is estimation of

income on advance receipts received from project at Rs.10,84,97,194. The facts with regard to the impugned dispute are that during the year under consideration, the assessee has received advances of Rs.51.66 crores from the project. The assessee has recognized revenue on the basis of percentage completion method by taking into account total advances received from the project. The AO made addition towards income accrued from advances received from the project on the ground that the assessee has not followed percentage completion method to recognize revenue from the project. According to the AO, the assessee company has not complied with the principle laid down in AS-11 to recognize revenue, but followed a method which suits to its convenience to postpone the revenue from the project. Accordingly, he re-worked profit derived from the project by taking 21% of the advance received during the year to make addition of Rs.10,84,97,194. The above profits were computed by the AO by applying the gross profit ratio shown by the assessee company on the completed project shown in the P&L account filed for the year. It is the contention of the assessee that it is following mercantile system of accounting and has been recognizing revenue on proportionate completion of contract basis in accordance with the accounting standard prescribed by Institute of Chartered Accountants of India. This method of accounting has been continuously followed and the same has been accepted by the department in the past. It is further

claimed that revenue can be booked only on project which has been completed and no advance from a client can be taken to revenue. In these circumstances, the AO was not at all justified in adding the advance received from the customers to the income of the assessee by taking into account gross profit ratio of completed projects ignoring the fact that these two projects have not been completed during the year.

10. We have heard both the parties and perused the material available on record. The assessee has recognized revenue from the incomplete projects on proportionate completion method by taking into account percentage of work done in the project. The assessee is following this method of accounting continuously from past several years and the same has been accepted by the department. During the year under consideration, the AO has determined income from the project by taking into account advance received by the assessee from its project on the basis of gross profit declared by the assessee from its completed projects without any change in facts and circumstances. Once the assessee is following a method of accounting which is in accordance with the method prescribed by ICAI for recognition of revenue from the kind of projects the assessee is undertaking and such method has been accepted by the department in the earlier year, there is no reason for the AO to deviate from the method followed by the assessee without any change in facts and circumstances. In this case, the AO has made

addition towards income from the project on advances received without recording any reasons as to how advance received by the assessee forms part of revenue for the current year. The Ld.CIT(A), after considering relevant submissions has rightly deleted addition made by the AO. We do not find any error in the order of the Ld.CIT(A). Hence, we are inclined to uphold the findings of Ld.CIT(A) and reject ground taken by the revenue.

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

Order pronounced in the open court on 24th August, 2018.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 24th August, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai