

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "A" BENCH NEW DELHI)**

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER

&

SHRI AMIT SHUKLA, JUDICIAL MEMBER

In ITA Nos. 6732 & 6733/Del/2014

Assessment Years: 2010-11 & 2011-12

ACIT, Circle-3(2), New Delhi	Vs.	ASF Insignia SEZ Pvt. Ltd. (Earlier known as Canton Buildwell Pvt. Ltd.), 11, Babar Lane, Bengali Market, New Delhi
(Applicant)		(Respondent)
(PAN: AACCC7148L)		

CO. No. 194/Del/2015

Assessment Year: 2011-12

ASF Insignia SEZ Pvt. Ltd. (Earlier known as Canton Buildwell Pvt. Ltd.), 11, Babar Lane, Bengali Market, New Delhi	Vs.	ACIT, Circle-3(2), New Delhi
(Applicant)		(Respondent)
(PAN: AACCC7148L)		

Revenue by: Shri R.C. Dande, Sr. DR

Assessee by: Ms. Rano Jain, Adovcate
Shri Ashish Goel, CA

Date of hearing	06/09/2017
Date of pronouncement	15/09/2017

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeals and cross objection have been filed by the revenue as well as by the assessee respectively against separate impugned order of even date 10.09.2014, passed by the Ld. CIT (Appeals) –V, New Delhi for the quantum of assessment passed u/s 143(3) for the A.Ys. 2010-11 and 2011-12.

2. Since issues involved in both the years are common arising out of identical set of facts, therefore, they were heard together and are being disposed of by way of this consolidated order.

3. We will take the appeal for the A.Y. 2010-11, wherein the sole issue raised by the revenue reads as under:-

“1. On the facts and in the circumstances of the case, the Ld. CIT (A) has erred on facts and in law:

a) In deleting addition of Rs. 1,89,69,082/- on account of disallowances of business expenses when business has actually not commenced.

b) In allowing b/f business losses and unabsorbed depreciation when business has not commenced.

2. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the course of hearing of the appeal.”

4. The assessee company is engaged in construction of IT SEZ at Gwal Pahari, Faridabad Road, Gurgaon. The company was incorporated in 6.9.2005 and filed its return of income for the first time in the A.Y. 2006-07. During the year consideration assessee

had declared loss of Rs. 76,18,772/-. The Assessing Officer noted that the assessee company has shown loss from its business at Rs. 1,81,35,938/-, as against, it has claimed expenses amounting to Rs. 1,89,63,082/-. The Assessing Officer following the earlier year order for the A.Y. 2009-10 held that similar expenses claimed had been disallowed by the Assessing Officer, for the reason that the assessee had not commenced its business during the relevant accounting period. The assessee's contention on the other hand had been that its operation had started and it had already obtained approval of IT SEZ;, has done fencing and ground leveling work; and had executed appointment of master planner for all these work. It had already spent Rs. 85.59 crore towards capital-in-progress. The expenses claimed were normal business expenditure incurred for the business and corporate set-up. However the Assessing Officer had made the disallowance on the ground that no business activity had been carried out.

5. Before the Learned CIT (Appeals) detailed submissions were made both on factual points and on legal points relying upon various judgments especially in the case of **CIT vs. Hughes Escorts Communications Ltd. 311 ITR 253 (Del)**, wherein the jurisdictional High Court has held that the business of the assessee should be held to have been set up on the date when first step in the business of assessee was taken up. The Learned CIT (Appeals) accepted the assessee's contention after observing and holding as under:-

“The substance of the submission made by the appellant is that the assessee company is engaged in the business of developing/constructing multi-stories as part of the

exclusive SEZ project proposed to be called "ASF Insignia". That the appellant company was incorporated on 6.9.2005 and its first accounting year ended on 31.3.2006, for which a return of income was filed for A.Y.2006-07. Referring to the finding of the AO that the business of the assessee has not commenced since the SEZ project is not ready for sale, the appellant has argued that during AY 2009-10, the company had made appointment of its staff which includes Sr. Vice-President-Commercial. That it had obtained approval of operation of SEZ from the Min. of Commerce, Govt. of India. Referring to the expenses claimed under each of the head the appellant has argued that these expenses are in the nature of business promotion, office maintenance, travelling and salaries etc. which are a reflection of the systematic business activity being carried out. That all the expenses incurred in relation to capital work in progress has been capitalized to the extent of Rs.5,61,32,894/- (page-65 of the paper book). It has also been argued that the observation of the AO that commencement of business cannot be said unless SEZ project is ready for sale and that since there is no business income and therefore no expenditure is incurred, is also legally incorrect. In support of this proposition the appellant has relied on several decisions of the Hon'ble Court including that of CIT vs. Saurashtra Cement(Supra); CIT vs ESPN Software(Supra); CIT vs. Hughes Escorts Communication Ltd. (Supra).

I have carefully gone through the submission of the appellant and considering the facts of the case and the nature of business and the ratio of the decision relied upon by the appellant it is observed that it is an established legal proposition by now that all revenue expenses incurred after the setting up of business and prior to its commencement are an allowable expense. It is observed from the assessment order the AO has proceeded on the concept of commencement of the business which is not in accordance with the decisions relied upon the appellant. That once the first step in the course of various business activities is undertaken the business is deemed to have been set up. From the ratio of the cases relied upon by the appellant as also the following decisions, which are as under:-

(i) *CIT vs L.G.Electronics (I) Ltd. 282ITR 545 (DEL).*

(ii) *Western India Vegetable Products Ltd Vs CIT 26ITR 151 (Bom),*

(Hi) *CIT w Sarabhai Management Corvoration Ltd (1991) 192 ITR 151 (SC),*

(iv) *Hushes Excess Communication Ltd. 213 CTR 45 (Delhi)*

it is seen that the Hon'ble Courts have held that expenditure incurred after the business has been set up may be allowed under section 30 to 37 even if it is incurred before the business has actually commenced and that there is a clear distinction between commencing of business and setting up of business. That there may, however, be an interval between the setting up of the business and commencement of business and all expenses incurred during that interval would be permissible deduction, if otherwise allowable under the I.T. Act.

In this connection, it is also observed that in the preceding Assessment Year 2009-10 too similar disallowance had been made by the AO which has since been allowed by the ld.CIT(A)-VI, New Delhi vide the appellate order dated 5.11.2012. I have gone through the finding of the Id. CIT(A) on the issue and am in agreement with the same. Consequently, in view of the above discussion the expenses for Rs. 1,89,69,082/- is directed to be deleted and the appeal is allowed.”

6. It has been admitted by both the parties that his issue had been decided by the Tribunal in assessee's own case for the A.Y. 2009-10. However the Ld. DR relied upon other ITAT case of **Akzo Nobel Car Refinishes India Pvt. Ltd. (2008) 25 SOT 226 (Delhi).**

7. After considering the rival submissions and on perusal of the impugned order and also the order of the Tribunal in assessee's own case for the A.Y. 2009-10 in ITA No. 770/Del/2013, we find that this

issue has been decided in favour of the assessee after observing and holding as under:-

“6.2. Be it as it may, in the case on hand, the expenses incurred, which have been disallowed by the AO, are in the nature of revenue expenses i.e. business promotion, office maintenance, travelling, salaries etc. The AO was of the view that the assessee has not brought any evidence that it has been carrying on systematic and continuous business activity. The assessee on the other hand submits that it has purchased land, commenced development and has also obtained the required permissions / approvals for the SEZ, promotional activities of the SEZ had commenced and commercial agreement was entered into with Tata Consultancy Service for leasing out the SEZ. We find that the Ministry of Commerce has granted approval to the assessee SEZ on 30th May, 2008. The Govt. Of India has notified this SEZ as "Information technology and information Technology Enabled Services Special Economic Zone" on 17th December, 2007. The expenses which are not directly linked with the construction activity have been claimed as revenue expenses by the assessee. In our view the assessee has set up its business and the expenditure on revenue account has to be allowed and was rightly allowed by the first appellate authority. It is well settled that expenditure has to be allowed on setting up of the business and there might be a gap between the date on which the business is set up and the date of commencement of the business. The contention of the assessee also finds support from the judgments of the High Court in the case of CIT vs. Sarabhai Management Corporation Ltd. 102 ITR 25 (Guj) and CIT vs. Hughes Escorts Communication Ltd. 311 ITR 253 (Del).

6.3. The first appellate authority at para 5.5 held as follows:

"In the present case before me, the appellant company, as stated herein above, has started systematic business activities. It has recruited the various staff and the staff(s) (sic) (are) engaged in carrying on the business activity. Further, it has entered into a commercial agreement with Tata Consultancy Services for leasing out the SEZ which is the business of the appellant company. Thus the facts of this case are different than the case law relied upon by the Assessing Officer of Akzo Nobel Car Refinishes India Private Limited (Supra)"

6.4. Thereafter he relied on the decision of Delhi High Court in the case of *CIT vs. Hughes Escorts Communication Ltd.* 311 ITR 253 and the judgment of the Hon'ble High Court in the case of *CIT vs. ESPN Software India (P) Ltd.* 301 ITR 368 (Del.) and came to the conclusion that the business activity could be said to have been set up on obtaining of the required licence from the authority.

7. On the ground that the assessee has obtained approval of the said special economic zone from the Ministry of Commerce and as the assessee entered into an agreement with TCS for the lease of the SEZ area, is proof of the facts that the assessee has set up his business, the first appellate authority directed the AO to allow the revenue expenditure incurred by the assessee. We find no infirmity in this order of the first appellate authority.”

8. If in the earlier year already finding has been given that business of the assessee has been set up, then consequently in this year it cannot be held that no business has been set up. Thus, the order of the Learned CIT (Appeals) as incorporated above is not only based on correct appreciation of facts but is also in consonance with earlier year's precedence and therefore, the order of the Learned CIT(Appeals) is confirmed.

9. So far as the reliance placed by the Tribunal's decision by the Ld. DR in the case of *Akzo Nobel Car Refinishes India Pvt. Ltd.* (supra), we find that it is distinguishable on facts and moreover when there is precedence in assessee's own case, then same should be followed. Thus, revenues appeal is dismissed.

C.O. No. 194/Del/2015

10. In the cross objection the assessee has raised following grounds of appeal:-

“1. On the facts and circumstances of the case, learned CIT(A) has erred both on facts and in law in not adjudicating the contention of the assessee that the AO has erred in not allowing the benefit of brought forward losses and unabsorbed depreciation of the earlier years.

2. The respondent craves leave to add or alter any grounds of cross objection.

11. It has been admitted by both the parties that it is consequent to the appeal of the revenue, i.e., if assessee's business loss is accepted then that should be allowed to be carried forward as per law. Thus, the Assessing Officer is directed to revise his earlier year assessment order in light of ITAT order and give consequential relief of set off of brought forward loss. Thus the cross objection raised by the assessee is allowed.

12. Thus, in view of the aforesaid findings, the revenue's appeal is dismissed; whereas assessee's cross objection is allowed.

Order pronounced in the open court on 15.09.2017.

**Sd/-
(O.P. KANT)
(ACCOUNTANT MEMBER)**

**Sd/-
(AMIT SHUKLA)
(JUDICIAL MEMBER)**

Dated: 15.09.2017

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Copy forwarded to:

- 1) Appellant
- 2) Respondent

- 3) CIT
- 4) CIT (Appeals)
- 5) DR: ITAT

ASSISTANT REGISTRAR

	Date
Draft dictated on	07.09.2017
Draft placed before author	07.09.2017
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	15 .9.2017
Kept for pronouncement on	15.9.2017
File sent to the Bench Clerk	15.9.2017
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	