



ITA No.712/Mum/2016
L & T MHI Boilers Pvt.Ltd
Assessment Year-2009-10

आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

श्री सी .नागेंद्र प्रसाद, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI C.N. PRASAD, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./I.T.A. No.712/Mum/2016
(निर्धारणवर्ष / Assessment Year:2009-10)

Deputy Commissioner of Income Tax Circle-2(2)(1) Room No.545, Aaykar Bhavan, M.K.Road, Mumbai-400 020	बनाम/ Vs.	L & T MHI Boilers Private Limited 3 rd Floor, L & T House, N.M.Marg, Ballard Estate, Fort Mumbai-400 098
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.AABCL-2635-C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
Revenue by	:	R.P.Meena, Ld.CIT DR
Assessee by	:	Vijay Mehta, Ld. AR
सुनवाई की तारीख/ Date of Hearing	:	10/07/2018
घोषणा की तारीख / Date of Pronouncement	:	07/09/2018

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [AY] 2009-10 contest the order of the Ld. Commissioner of Income-Tax (Appeals)-5 [CIT(A)], Mumbai, *Appeal No.IT-248/12-13/193/15-16* dated 09/11/2015 by raising the following grounds of appeal.

1. *The order of the CIT(A) is opposed to law and facts of the case.*



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2. *On the facts and circumstances of the case, and in law, the Ld. CIT(A) has erred in allowing the expenses to the tune of Rs.14,67,24,757/- when the business has not been set up.*
3. *On the facts and circumstances of the case an in law, the Ld. CIT(A) has erred in deleting the disallowance made as per Rule 8D(2)(ii), thereby overlooking the crucial fact that this method of calculation has been prescribed by the statute and held as a reasonable method by the Hon'ble Bombay High Court in Godrej & Boyce Mfg. Co. Ltd. 328 ITR 81 (Bom)."*

The assessment for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax-2(2) Mumbai [AO] u/s 143(3) of the Income Tax Act, 1961* on 22/02/2013 wherein the income of the assessee was assessed at Rs.14.73 Lacs under normal provision after certain disallowance as against returned loss of Rs.1452.51 Lacs filed by the assessee on 29/09/2009. The issue involved under appeal is allowability of expenses as claimed by the assessee during impugned AY.

2. From the letter of authority as placed on record by Ld. AR, it appears that the name of the assessee has been changed to *L&T-MHPS Boilers Private Limited*, which has not been brought to the notice of the bench by the respective representatives. Nevertheless, we proceed to adjudicate the issue on merits.

3.1 The assessee being *resident corporate assessee* stated to be engaged in the business of *manufacturing of Super Critical Boilers* reflected certain incomes aggregating to Rs.68 Lacs in the credit side of profit and loss account and claimed an expenditure of Rs.1467.24 Lacs against the same, the details of which has been extracted at *Para No.4.1* of the quantum assessment order. The Ld. AO opined that *other incomes* in the



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shape of *dividend income, sale of investment, deputation fees and sale of assets* were assessable under the head *Income from other sources* and the expenditure against the same could not be allowed to the assessee since it has not actually started earning income from business activity. The assessee defended the same, *inter-alia*, by submitting that it had participated in various bidding for the orders and pursuant to the same, received contracts starting from July, 2009 onwards and therefore, the expenditure was allowable as business expenditure. However, Ld. AO noted that the assessee was in the business of *designing, engineering, manufacturing, erection & commissioning and performance testing of super critical stream generators (boilers) for thermal plants* and also supplying related spares. But it had not actually started earning income from business activity and therefore, the expenditure could not be allowed as business expenditure. Resultantly, the *other income* was treated as *Income from other sources* whereas the business expenditure as claimed by the assessee was not allowed which resulted into determination of income at Rs.14.73 Lacs.

3.2 The Ld. AO also noted that the assessee had made investment of Rs.2302.42 Lacs which called for disallowance u/s 14A. Accordingly, applying Rule 8D, the aggregate disallowance was worked out at Rs.16.64 Lacs which comprised-off of interest disallowance u/r 8D(2)(ii) for Rs.8.38 Lacs and expense disallowance u/r 8D(2)(iii) for Rs.8.26 Lacs. After adjusting the suo-moto disallowance of Rs.2.51 Lacs as offered by the



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assessee u/s 14A, the net addition thus proposed was Rs.14.13 Lacs. Since entire expenditure was already disallowed, separate addition in this respect was not made in the quantum assessment order.

4. Aggrieved, the assessee contested the same with success before Ld. CIT(A) vide impugned order dated 09/11/2015, wherein the matter was concluded in the following manner:-

4. I have considered the appellant's submission and the AO's order. In this case appellant had earned the following as Other Income and claimed following expenses:

Other income earned	
<i>Income from Deputation</i>	<i>Rs.5,39,750</i>
<i>Dividend income from investment</i>	<i>Rs.59,93,497</i>
<i>Profit from Sale of investment</i>	<i>Rs. 2,42,178</i>
<i>Profit from sale of asset</i>	<i>Rs.5,167</i>
<i>Miscellaneous. income</i>	<i>Rs.20,000</i>
<i>Total</i>	<i>Rs.68,00,592/-</i>

Expenses claimed	
<i>Staff expenses</i>	<i>Rs. 4,85,51,010</i>
<i>Sales, administration and other expenses</i>	<i>Rs. 7,28,97,398</i>
<i>Preliminary expenses written off</i>	<i>Rs. 74,00,000</i>
<i>Interest and Brokerage expenses</i>	<i>Rs. 1,16,775</i>
<i>Depreciation</i>	<i>Rs.12,40,937</i>
<i>Amortisation of intangible assets</i>	<i>RS.1,65,18,637</i>
<i>Total</i>	<i>Rs.14,67,24,757</i>

According to AO appellant had offered the income under "income from other sources" and there was no income offered from any business activity. As appellant had failed to offer any income from business activity or started earning any income from business activities, then on this ground AO had disallowed the claim of business expenses of appellant of Rs.14,67,24,457/-. Here this issue comes under the purview of Section 3 of the Income Tax Act which is provided as under:

Section 3:

For the purposes of this Act "Previous Year" means the financial year immediately preceding the assessment year:

Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, the previous



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year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year.

On perusal of above section, it is provided that previous year starts if business or profession was newly set up or source of income newly coming into existence in the said financial year. So according to Section 3, previous year for any income has to be considered the period beginning with setting up of business or the date on which the source of income newly comes into existence. AO in the assessment order had disallowed the claim of the appellant on the ground that appellant was not earning any business income or started earning any business income during the year. Section 3 is examined, not only earning of business income but also if the unit is set-up, then that year's expenses or income has to be allowed. Now, it is to be examined whether the business was set-up in the case of the appellant. The term set-up was examined, set up was interpreted by Supreme Court in CWT vs. Ramaraju Surgical Cotton Mills Ltd. (1967) (63 ITR 478 SC) as "A unit cannot be said to have been set up unless it is ready to discharge the function for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organization that it can be said that the unit has been set up". Here from the above Supreme Court decision it is clear that if any business was put into shape which can start functioning, then it cannot be considered as a setup.

4.1 Now we may consider whether the case comes under the purview of set-up in view of above Supreme Court decision. The appellant's activities were discussed above. The appellant's main activities are - one, bidding of the contract and after that manufacturing of contract awarded. For bidding of the contract appellant has to participate in the activities involved in the bidding such as - Invitation of Tender bid issued by the customer, purchase of tender document, technical and commercial analysis of the bid, preparation of detailed proposal covering technical and commercial aspects, submission of technical and commercial bid, evaluation by customers of bids submitted by the EPC contractors, awarding of contract and activities involved after receipt of the contract are Design and Engineering, Procurement & manufacture of components required, Erection of boiler at site and Commissioning of Boiler at site. Hence, mainly there are two activities, one is for bidding purpose and other is activity after receipt of the contract. Appellant had filed a data regarding participation in following tenders:

Name of the Customer	Produce	Date Bid/Request submission	of	Remark
<i>Andhra Pradesh Power Development Company Ltd.</i>	<i>2 x 800 MW Super Critical Boiler</i>	<i>04.03.2008</i>		<i>-</i>
<i>Jaypee Nilgrie Super Thermal Power Project</i>	<i>2 x 660MW Super Critical Boiler</i>	<i>15.01.2009</i>		<i>Contract awarded</i>
<i>Videocon Group of company</i>	<i>2 x 800 MW Super Critical Boiler</i>	<i>21.08.2008</i>		<i>-</i>
<i>Maharashtra State Power Company</i>	<i>3 x 660 MW Super</i>	<i>26.06.2009</i>		<i>Contract awarded</i>



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Limited, Koradi	Critical Boiler		
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From the above data it is dear that the appellant had participated in bid for Andhra Pradesh Power Development Company. Ltd. on 4.3.2008 on which he submitted the bid, Jaypee Nilgrie Super Thermal Power Project bid was submitted on 15.1.2009, contract was also awarded to the appellant, regarding Videocon Group of company, appellant participated in the bid on 21.8.2008. Out of the four tenders mentioned in the table, for the above three customer's appellant had bid in this financial year and regarding Maharashtra State Power Company Limited bid was submitted on 26.06.2009 and the contract was awarded to the company.

Now it has to be examined whether bidding of the contract and receipt of order will be enough to satisfy the condition for the set-up in order to allow the expenditure to the business expenditure incurred by the appellant. This identical issue was considered by CIT & Anr. VS MFAR Construction Ltd. [48 DTR(Kar) 363] (Karnataka High Court) where it is held as under:

"Setting up of a business may require several factors like investment in building and other permanent structures which cannot be integral part of a business though it could be incidental part of business. If integral part of a business requires expenditure, it would mean without the said integral activity, the main business cannot be proceeded with. Therefore, whenever such expenditure is claimed, the criteria would be what exactly is the nature of business the assessee has undertaken and depending upon the nature of business, one has to see whether such expenditure was spent towards integral part of the business or not. When once it becomes integral part of the business like the case on hand, expenditure towards soil testing, submission of tenders, payment of architect fee etc. would be integral part of the business of the assessee. **If it is integral part, it has to be held as commencement of work and rightly held to be allowable.**"

In the above case and also in the case of CWT vs. Ramaraju Surgical Cotton Mills Ltd.(1967)(63 (TR 478 SC) where it is held that if one activity of business is carried out then it is to be held that business has set-up as business is a continuous activity. In the case of the appellant, appellant had not only recruited the employees also conducted training classes for the employees. Out of the 4 projects which appellant bid, 2 projects were awarded to the appellant, one contract pertained to this assessment year. When we examine the total activities of business of the appellant, there are 2 major activities, submission of bid and manufacture of the item after the contract was awarded to him. Already appellant had carried the activity of bidding and getting contracts. This itself shows appellant has not only started the business but has also set up the business by bidding and obtaining contracts. Hence, in view of the Karnataka High Court decision in CIT & Anr Vs MFAR Construction Ltd.[48DTR(Kar) 360], the appellant is eligible for the business expenditure incurred during the assessment year as appellant's business set-up as required u/s 3 of the I.T. Act. Hence AO's disallowance of business expenditure for Rs,14,67,24,757/- is deleted. This ground of appeal is **allowed**.



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The disallowance u/s 14A for Rs.14.13 Lacs, as proposed by Ld. AO, was deleted by observing that the *Share Capital* of Rs.50 Crores was much more than the investments of Rs.23.02 Crores and therefore, no disallowance was called for in terms of judgment of Hon'ble Bombay High Court rendered in *CIT Vs. Reliance Utilities Power Ltd. [313 ITR 340]* & *CIT Vs. HDFC Bank [366 ITR 505]*. Aggrieved, the revenue is in further appeal before us.

5. The Ld. Departmental Representative [DR], *Shri R.P.Meena*, submitted that their mere participation in the bidding process would not entitle the assessee to claim deduction of expenditure since manufacturing facility was not ready for production during impugned AY. The same has been controverted by Ld. Authorized representative for assessee [AR], *Shri Vijay Mehta*, who supported the stand taken by Ld. first appellate authority.

6.1 We have carefully heard the rival contentions and perused relevant material on record including various judicial pronouncements cited before us. It is undisputed fact that the assessee has not reflected any major income from business activities during the impugned AY except *Income from Deputation* for Rs.5.39 Lacs. However, the earning of the business income, in our opinion, was not a *sine qua non* to enable the assessee to claim the business expenditure as per statutory provisions provided other conditions as envisaged by law were fulfilled by the assessee.



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6.2 Upon perusal of nature of expenses incurred by the assessee, we find that the out of total expenditure of Rs.14.67 Crores, the major expenses pertains to *staff expenses* for Rs.4.85 Crores, *sales, administration & other expenses* for Rs.7.28 Crores and *amortization of intangible assets* for Rs.1.65 Crores which demonstrate that the assessee had already recruited employees during the impugned AY and incurred various administrative and sale expenditure. As rightly noted by Ld. CIT(A), the assessee had participated in three bids during the impugned AY, out of which one bid was successful which is not disputed by the revenue. The aforesaid factor raises a strong pointer in assessee's favor that the assessee was ready with all the necessary infrastructure to deliver the proposed goods / services to the prospective customers. Another noteworthy factor is that this is not the first year of assessee's existence since the documents on record reveal that the assessee had filed return of income for immediately preceding AY 2008-09 also wherein it has, on identical factual matrix, claimed business expenditure in that year and carried forward business losses to the extent of Rs.5.06 Crores, which has not been disputed by the revenue at any point of time so far.

6.3 The various judicial authorities, from time to time, in number of decisions have opined that setting-up of the business is the time when an entity is in a position to render services to its customers. If the entire infrastructure is put in place to commence business then it can safely be concluded that the business has been set-up notwithstanding the fact that



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the actual commencement of the business has not taken place. The Hon'ble Bombay High Court in the landmark case of *Western Indian Vegetables Products Ltd. v. CIT* [1954] 26 ITR 151 aptly explained the distinction between concept of commencement and setting up of business and observed as under:

"It seems to us, that the expression 'setting up' means, as is defined in the Oxford English Dictionary, to place on foot or to establish, and in contradistinction to 'commence'. The distinction is this that when a business is established and is ready to commence business then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. But there may be an interregnum, there may be an interval between a business which is set up and a business which is commenced and all expenses incurred after the setting up of the business and before the commencement of the business, all expenses during the interregnum, would be permissible deductions under section 10(2)"

The ratio of the above decision has been followed by various courts of the country from time to time. The Hon'ble Delhi High Court in *CIT v. L.G. Electronic (India) Ltd.* [282 ITR 545] & *CIT Vs Hughes Escorts Communications Ltd.* [311 ITR 253] & also in *CIT Vs. Dhoomketu Builders and Development P. Ltd.* [368 ITR 680] derived ratio from the above decision. Further, Hon'ble Bombay High Court in *CIT Vs Axis Private Equity Limited* [IT Appeal No. 1204 of 2014 30/01/2017] expressed similar view. The Ld. CIT-DR has relied upon the decision of Hon'ble Calcutta High Court rendered in *Video Plaza Vs. ITO* [81 Taxmann.com 359] & Hon'ble Allahabad High Court rendered in *J.K.Manufacturers Ltd. Vs CIT* [300 ITR 297]. However, we find that the decision of Hon'ble Allahabad High Court was rendered in a situation wherein it was factual finding that the assessee



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did not at all carry out any business during the year under question and therefore distinguishable on facts. Similarly, the decision of Hon'ble Calcutta was rendered in a situation where the assessee was constructing *restaurant cum hotel project* which was not completed during impugned AY and the assessee claimed deduction of *Bank Charges* which were disallowed by the Hon'ble Court and allowed to be capitalized. Be that as the case may be, we are bound by the decision of our jurisdictional High Court as cited above against which no contrary judgment of the same court has been placed by the revenue on record. Therefore, we respectfully follow the same.

6.4 Finally, after careful consideration of overall factual matrix, we find ourselves in agreement with the conclusion reached upon by Ld. CIT(A) and therefore, find no infirmity in the same. This ground of appeal stands dismissed.

7. So far as the disallowance u/s 14A is concerned, the undisputed fact is that assessee's own funds in the shape of *Share Capital* far exceeded the investments made by the assessee and therefore, no interest disallowance was called for against the same in terms of the judgments of Hon'ble Bombay High Court as relied upon by Ld. CIT(A). The assessee has made *suo-moto* expense disallowance of Rs.2.51 Lacs computed @0.5% of average investments considering those investments which have yielded exempt income during the impugned AY. The same is in line with the decision of Delhi Tribunal (Special Bench) rendered in *ACIT Vs. Vireet*



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Investment (P.) Ltd. [82 Taxmann.com 415] and therefore, we find no infirmity in the order of Ld. CIT(A) in deleting the same. This ground of revenue's appeal stands dismissed.

8. In nutshell, the revenue's appeal stand dismissed.

Order pronounced in the open court on 07th September, 2018

Sd/-

(C.N.Prasad)

न्यायिकसदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखासदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 07.09.2018

Sr.PS:-Thirumalesh

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त (अपील)/ The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधिमुंबई ,आयकरअपीलीयअधिकरण ,/ DR, ITAT, Mumbai
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आयकरअपीलीयअधिकरण ,मुंबई / ITAT, Mumbai