

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No. 606/Hyd/2017 and CO No. 20/Hyd/2017
Assessment Year: 2008-09**

Income-tax Officer,
Ward – 16(2), Hyderabad.

vs. New Cyberabad City Projects
Pvt. Ltd., Hyderabad.

(Appellant)

PAN – AACCC 8896K
(Respondent/Cross Objector)

Revenue by : Smt. Alka Rajvanshi Jain
Assessee by : Shri B. Ramakrishnan

Date of hearing : 31/07/2018
Date of pronouncement : 03/10/2018

ORDER

PER S. RIFAUR RAHMAN, A.M.:

This appeal filed by the Revenue is directed against the order dated 24/01/2017 of CIT(A) – 4, Hyderabad for AY 2008-09. The assessee also filed CO against the said order of CIT(A).

2. Brief facts of the case are, the assessee company, filed its return of income for AY 2008-09 admitting loss of Rs. 64,10,83,920/-. The AO reopened the case by issue of notice u/s 148. After verifying the information furnished by the assessee against the notices issued by AO, the AO completed the assessment by making addition of Rs. 64,38,02,573 towards disallowance of expenditure and assessed the total income at Rs. 27,10,653/- by observing as under:

"The assessee has not commenced commercial activities. Further, it can be seen that the replies filed by the assessee are contradictory. In the former letter, the assessee itself has stated that interest expenditure has not been claimed for the A.Y. 2007-08 and the same were classified under preoperative expenses. In the latter submissions, knowing well that commercial operations have not been started, the assessee has

made general statements regarding business and Accounting standards.

It may be pertinent to mention here that for the A.Y. 2012-13, also, wherein scrutiny assessment was completed, the assessee has offered only other income comprising of interest and dividend and no business income was offered. Further, on verification in the system, for the subsequent years also (upto A.Y.2015-16) revenue from operations is shown as 'Nil' which goes on to prove that the assessee has not commenced commercial operations. For a moment, if the assessee's argument that "eggs have to be hatched for certain period before they are delivered" is to be considered, there should be some reasonable time. Seven years is too long a gestation period in any line of business.

The assessee should have classified the interest paid and other expenses during the year under preoperative expenses as has been done by itself during the earlier financial year. The assessee has not done so for the current year and went on to claim the expenditure. Under the circumstances, the amount of Rs. 64,38,02,573/- debited in the profit and loss account which comprises of interest of Rs. 63,94,67,045/- and other expenses of Rs. 43,35,528/- is disallowed and added back to the returned income."

3. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A) and submitted, inter-alia, that the moment company was incorporated and the amounts were advanced for the purpose of acquiring and dealing in landed property, the business of the assessee should have been treated as having commenced and interest incurred thereby could not be treated as preoperative. The income shown by the assessee company had to be treated as income from business and necessary benefits or deductions claimed had to be allowed in accordance with law.

4. After considering the submissions of the assessee, the CIT(A) deleted the disallowance made by the AO by observing as under:

"6.1 have carefully considered the assessment order and submissions of the appellant and case laws relied upon by the appellant. The appellant submitted that the company is doing

the business in development of properties and developed both for residential and business purpose and has borrowed funds and acquired the land and its development rights by paying the amount which was apparent from the audited accounts of the appellant. The Assessing officer has not disputed the land purchase and the work in progress disclosed by the appellant. Keeping in view of the nature of the business of the appellant, once the funds were utilized for the purpose of land and the same were accounted for then it should be treated as business was started. Therefore, the Assessing Officer's contention that the business was not started and the business loss was not be allowed was not having any base and so not logical. It was further observed that, the interest under other income disclosed by the appellant was of mainly from interest income on advances to holding companies and subsidiaries. At the same time, it was verified that the unsecured loans of Rs. 100 crores were taken on convertible debentures on which there is no interest charged. Since this income was earned in due course of business activities and not from the bank and hence this interest income not to be taxed as other income as treated by the Assessing Officer. As per Profit and Loss account, the expenses debited by the appellant was of Rs. 64,38,02,573/- which includes interest and finance charges of Rs 63,94,67,045/-. This interest and finance charges further includes earlier year interest of Rs. 9,31,63,045/ - which does not pertain to this assessment year and hence not to be allowed as expenses during this year. Hence, the balance expenses of Rs. 55,06,39,528/- to be allowed as expenses for this year. Hence, the addition made by AO deleted.

5. Aggrieved by the order of CIT(A) the revenue is in appeal before us challenging the deletion of addition made by the AO and assessee filed CO. In the C.O., assessee has challenged the reopening of assessment. That being the case, we heard the Id. AR who made submissions in this regard.

6. Ld. AR submitted that AO reopened the assessment without having tangible material. He submitted that assessee vide letter dated 29/04/2015 requested the AO to furnish the reasons for reopening of the assessment for AY 2008-09. The AO vide letter dated 30/04/2015, communicated the reasons for reopening, which are as under:

"The assessee had claimed a loss of Rs. 64,10,83,920/- for the AY 2008-09. On going through the return of income, it is seen

that the assessee has admitted only other income of Rs. 51,84,711/- during the AY 2008-09 which includes dividend income of Rs. 33,88,409/-. As against this, the assessee has claimed an expenditure to the tune of Rs. 64,29,34,424/- which includes an amount of Rs. 63,94,67,045/-under the head interest. As the assessee has admitted only other income, expenditure is not allowable. Further, the provisions of section 14A of the IT Act are also attracted in the case.

6.1 Ld. AR submitted that the above reasons were extracted by merely referring to the information in the return of income, as such, there is no tangible material in the possession of the AO, which necessitated for the reasons to believe that the income escaped assessment. For this proposition, he relied on the following cases:

1. CIT Vs. Orient Craft Ltd., [2013] 29 Taxmann.com 32 (Delhi)
2. PCIT Vs. Tupperware India Pvt. Ltd. [2013] 65 Taxmann.com 17 (Delhi)
3. CIT Vs. Kelvinator of India Ltd., [2010] 187 Taxman 312 (SC)

7. Ld. DR, on the other hand, submitted that assessee was supplied with reasons for reopening by the AO and the reasons for reopening clearly indicate that there is escapement of income and the reopening was proper. In this process, he relied on the orders of revenue authorities.

8. Considered the rival submissions and material on record. We notice that assessment was completed u/s 143(1) and notice for reopening of assessment was issued after four years of intimation u/s 143(1). Assessee filed a CO challenging the reopening of the assessment beyond the four years and also without any tangible material on record. In this regard, the assessee has relied on the decision in the case of CIT Vs. Orient Craft Ltd. (supra), wherein the Hon'ble Delhi High Court has held as under:

"14. Certain observations made in the decision of Rajesh Jhaveri (supra) are sought to be relied upon by the revenue to point out the difference between an "assessment" and an "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where an "intimation" is issued under

section 143(1) there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under section 148, the proceedings cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it would appear clear that the court reiterated that "so long as the ingredients of section 147 are fulfilled" an intimation issued under section 143(1) can be subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of an intimation is that the assessing officer should have "reason to believe" that income chargeable to tax has escaped assessment. In our opinion, the said expression should apply to an intimation in the same manner and subject to the same interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in *Rajesh Jhaveri (supra)* would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements.

15. In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in *CIT vs. Kelvinator (supra)*. The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147."

The Hon'ble Delhi High Court while delivering the judgment in the case of *PCIT Vs. Tupperware India Pvt. Ltd. (supra)*, confirmed the view taken in the above case of *Orient Craft Ltd. (supra)*.

8.1 In the given case, AO supplied the reasons for reopening of assessment on 30/05/2015 and the reasons recorded were merely extracted from the return of income filed by the assessee, as such, there is no tangible material available with the AO to reopen the assessment. We are inclined to follow the decision of the Hon'ble Delhi High Court in the case of Orient Craft Ltd. (supra) and accordingly, ground raised in the C.O. by the assessee is allowed.

9. Though we have held that the reopening is bad in law in the C.O. filed by the assessee, since the appeal is filed by revenue, we are dealing with the merits of the case as well. Ld. DR submitted that assessee has not commenced commercial activities even in AY 2012-13 also wherein scrutiny assessment was completed and the assessee has offered only other income comprising of interest and dividend income and no business income was offered. It clearly shows that assessee has not commenced the commercial activities. He submitted that even in AY 2015-16, assessee has shown revenue from operation as 'Nil' and it clearly indicates that assessee has not commenced commercial operations. Further, he submitted that assessee itself has not claimed interest expenditure for the AY 2007-08 and the same was classified under preoperative expenses, which shows that assessee has not commenced commercial operations. Therefore, he relied on the orders of revenue authorities and also relied on the decision of Hon'ble High court of AP in the case of CIT Vs. Coromandal Fertilizers Ltd., [2003] 128 Taxman 869 (AP), wherein it was held as under:

"The set up of a business is not the same as commencement of business. It is not necessary for an assessee to claim the benefit of deduction of expenditure and also depreciation and investment rebate on the ground of its commencement of business. It would be enough of the assessee establishes that it has set up a business. In the instant case, it would have been enough for claiming the benefit that the assessee had already set up a business of manufacturing cement.

Quarrying limestone may be an essential raw material for the manufacture of cement - is too remote to be in proximity to the business of manufacture of cement to form the first stage of commencement of the business of manufacture of cement.

It was not the case of the assessee that the plant and machinery had been erected within a short span of time after commencement of the quarrying of limestone. There was no material available on record as to when the plant and machinery for the manufacture of cement had been erected.

What activities constitute commencement of business is a mixed question of fact and law and it has to be decided on the facts of each case. In the instant case, it was not possible to hold that the assessee had set up the business and commenced the manufacture of cement as such.

10. On the other hand, Id. AR submitted that assessee is into real estate business and assessee has commenced commercial activities and set up the business as soon as assessee enters into agreement to purchase the properties. He submitted that a real estate business having a long gestation period and also the current project involved is having a long construction period. Further, he submitted that just because it takes longer period to complete the projects, it does not mean that the set up of operation is not commenced. For this proposition, he relied on the following case laws:

1. Dakshin Shelters P Ld. Vs. DCIT in ITA No. 1983 to 1985/H/2011
2. Pinebridge Investments Capital India P. Ltd. [2016] 70 Taxmann.com 374 (Mumbai – Trib.)
3. Globex Energia P. Ltd., Vs. ACIT [2017] 77 Taxmann.com 203 (Mumbai – Trib.)

11. Considered the rival submissions and perused the material on record. We notice that the coordinate bench of ITAT, Mumbai in the case of Globex Energia P. Ltd. (supra) on the issue of commencement of business/setting up of business, has held as under:

- *Setting up of the business is the crucial event for determining the starting point for allowing the business expenses. Even if the assessee has not been successful in earning the business income, but if the assessee has done requisite preparations and*

if assessee can be said to be in a position to cater to its customers, then it can be said that business is 'set up', and therefore, expenses would become allowable thereafter.

• Various factors depending upon the nature of the business need to be taken into account and properly analysed to decide this fact that whether the assessee was in a position to cater to its customers or not. It was firstly noted from the perusal of the financial statements of the assessee and other documentary evidences that various employees were appointed by the assessee possessing requisite skill to carry out sales orders. Most of the employees had been already appointed in the preceding year. The sales order was received as early as in the beginning of the financial year i.e. 8-4-2009. Office premises were hired, computers, other assets and requisite infrastructure were put in place to enable the assessee to carry on its business and some purchases were also made. It is also noted that expenses incurred by the assessee were of routine nature i.e. salary, audit fee, bank charges, rent, travelling expenses, installation expenses and various other routine administrative expenses. Further, share capital and unsecured loan were received aggregating to Rs. 3.32 crores. The surplus funds were kept in the bank. All the facts put together clearly indicate that the entire infrastructure was put into place to make the assessee ready to cater to its customers. On the top of it, it is also noted that similar expenses were claimed by the assessee in the immediately preceding year which have not been disallowed by the Assessing Officer. However, no income was booked in the profit and loss account since execution of sales orders was not completed during the year. But receipt of income would be essential to determine factum of commencement of income.

• As far as, 'setting-up' of business is concerned, it takes place as soon as the assessee becomes ready to cater to its customers. The expenses shall be allowable from the stage of 'setting up' of the business in view of proviso to section 3 which says that in the case of a business or profession newly set up in a financial year, the previous year shall be the period beginning with the date of setting up of the business and ending with the said financial year. Thus, taking into account all the facts and in the circumstances of the case, it would not be difficult to reach to the conclusion that business of the assessee was 'set up' during the year as the facts strongly indicate that business was duly 'set up' during the year. Under these circumstances, it can be easily said that the assessee had 'set up' its business and therefore, expenses incurred during the year should be allowed as business expenses.

The expenses claimed in the profit and loss account are apparently revenue in nature, and nothing wrong had been pointed out by any of the lower authorities on merits of these expenses. Thus, taking into account all the facts and circumstances of the case, it is held that expenses claimed by the assessee in the return of income are allowable and therefore the Assessing Officer is directed to delete the disallowance.”

11.1 In the present case, assessee is into real estate business. Various courts have held that commercial activities and setting up of the business depends upon the industry to industry. In the case of real estate business, as soon as the assessee commences the activities of buying the land for development, it amounts to set up of the business. In the given case, we notice that assessee has procured huge land for the purpose of development. Therefore, as soon as the assessee procured the land for development, setting up of the business has commenced. Therefore, in our view, assessee has commenced the commercial activity and setting up of business and, hence, the assessee is eligible for claiming revenue expenditure and he can treat the expenditure incurred during the year subsequent to setting up of business, as revenue expenditure relevant for that AY. In the given case, assessee has incurred interest and financial expenditure relating to the business after setting up of the business. Ld. CIT(A) has rightly allowed the interest expenditure relating to the current AY and, therefore, upholding the order of CIT(A), we dismiss the grounds raised by the revenue in this regard.

12. In the result, appeal of the revenue is dismissed and the CO by the assessee is allowed.

Pronounced in the open Court on 3rd October, 2018.

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Hyderabad, Dated: 3rd October, 2018

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- 6) Guard File*