

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'B' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri Aby T. Varkey, Judicial Member)

**I.T.A No. 2163/Kol/2016**

Assessment Year: 2012-13

**I.T.A No. 485/Kol/2016**

Assessment Year: 2013-14

**Assistant Commissioner of Income Tax, Circle-5(2), Kolkata.....Appellant**

**M/s. Thiess Mines India Pvt. Ltd.....Respondent**

**PS Srijan Corporate Park**

**1502,15<sup>th</sup> Floor, Tower-1**

**Plot No.2**

**Block EP & GP**

**Sector-V**

**Bidhan Nagar**

**Kolkata - 700091**

**[PAN : AACCT 3570 B]**

**C.O. No. 01/Kol/2017**

Assessment Year: 2012-13

**C.O. No. 53/Kol/2018**

Assessment Year: 2013-14

**M/s. Thiess Mines India Pvt. Ltd.....Appellant**

**PS Srijan Corporate Park**

**1502,15<sup>th</sup> Floor, Tower-1**

**Plot No.2**

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**Bidhan Nagar**

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**[PAN : AACCT 3570 B]**

**Assistant Commissioner of Income Tax, Circle-5(2), Kolkata.....Respondent**

**Appearances by:**

*Shri S.K. Aggarwal, A/R, appeared on behalf of the assessee.*

*Shri Sankar Halder, Addl.CIT, Sr. D/R, appearing on behalf of the Revenue.*

Date of concluding the hearing : November 15<sup>th</sup>, 2018

Date of pronouncing the order : January 9<sup>th</sup>, 2019

**ORDER**

**Per J. Sudhakar Reddy, AM :-**

ITA No. 2163/Kol/2016, is an appeal filed by the revenue directed against the order of the Learned Commissioner of Income Tax (Appeals)-18, Kolkata, (hereinafter the "ld.CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 19/08/2016, for the Assessment Year 2012-13, on the following grounds:-

**“Ground no. 1:** *This ground of appeal is related to the claim for deduction against the expenses incurred by the assessee company during the F.Y. 2011-12.*

**Ground no. 2:** *This ground of appeal is related to adjustment of Carry forward business loss with current year income from other sources.”*

The assessee filed cross-objections on the following grounds:-

*“1. That on the facts and circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) - 18 [Ld. CIT (Appeals)] erred in confirming the disallowance of legal and professional expense amounting to Rs. 10,816,167/- on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.*

*2. That on the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming disallowance of community welfare expense amounting to Rs. 1,232,994/ - on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.*

*3. That on the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming disallowance of salary expense amounting to Rs. 10,825,404/ - on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.*

*4. That the appellant craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or at the hearing of this appeal.”*

ITA No. 485/Kol/2018, is an appeal filed by the revenue directed against the order of the Learned Commissioner of Income Tax (Appeals)-10, Kolkata, (hereinafter the “ld.CIT(A)”), passed u/s. 250 of the Income Tax Act, 1961 (the ‘Act’), dt. 20/12/2017, for the Assessment Year 2013-14, on the following grounds:-

*“1) Ld. CIT(A) has erred in allowing the expenses as revenue expenses incurred prior to setting up of the business.*

*2) The Ld CIT(A) has erred in allowing the interest income from term deposit before setting up of business as revenue receipt and considered as business income.*

*3) That the appellant craves for leave to add, delete, amend or modify any ground before or at the time of appellate proceedings.”*

The assessee filed cross-objections on the following grounds:-

*“1. That on the facts and circumstances of the case, the Ld. Commissioner of Income-tax (Appeals) - 10 [Ld. CIT (Appeals)] erred in confirming the disallowance of legal and professional expense amounting to INR 48,62,842 on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.*

2. That on the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming disallowance of community welfare expense amounting to INR 20,79,412 on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.

3. That on the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming disallowance of environmental expenses amounting to INR 636,758 on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.

4. That on the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming disallowance of project expenses amounting to INR 15,00,000 on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.

5. That on the facts and circumstances of the case, the Ld. CIT (Appeals) erred in confirming disallowance of salary expense amounting to Rs. 1,86,52,900 on the contention that such expenditure was directly attributable to the project related work and hence needs to be capitalised.

6. That the appellant craves leave to add to and/or alter, amend, modify or rescind the grounds hereinabove before or at the hearing of this appeal."

2. There is a delay of 4 days in filing the appeal for Assessment Year 2013-14, by the revenue. After perusing the petition for condonation, we are convinced that the revenue was prevented by sufficient cause from filing this appeal on time. Hence the delay is condoned and appeal admitted.

3. The assessee is a company with an object of carrying on business of providing mining services for prospecting, exploring, operating and working on mines and quarries. The common issue that arises in both the revenue appeals is whether the assessee has set up its business or not. The Assessing Officer was of the view that the assessee has not commenced its business operations. He observed that the assessee has no turnover and has also not held any inventories during the year. Hence he disallowed the expenditure incurred on the ground that it partakes the character of capital expenditure as these were incurred prior to setting up of business. Consequentially, he did not allow intra-head set off of losses. On appeal, the Id. First Appellate Authority observed that the assessee had been awarded a contract by the NTPC. At page 4 of his order held as follows:-

*"I have carefully considered the facts of the case and the submissions of the assessee and the case laws cited by the appellant. I agree with the view of the appellant that its business was set up and the business had also commenced on getting the contract from the NTPC. It is logical that the assessee will first commence its business and only then it would be able to get business. In assessee's case, offices were set up and*

qualified persons were hired and thus its business was set up. Subsequently these persons negotiated a contract with NTPC which was to be executed in the coming years. Thus it is evident that the assessee company had not only set up these its business but it had also commenced its business and the result was the contract from NTPC. Hence, all the expenses exclusively related to the running of the business of the company are revenue in nature and hence allowable. However, so far as NTPC awarded project its concerned, it was still in its pre operational stage. The project awarded by the NTPC not started its business. Hence, all expenses related to the project should have been capitalized. Appellant had capitalized only construction work but claimed other expenses as revenue expenses, which is not correct. Appellant had received 56,00,00,000/- as advance for executing the project. If appellant wants to claim revenue expenditure then on the basis of principle of matching revenue, appellant should also offer Income out of Rs. 56,00,00,000/-. However this has not been done. Hence all expenses related to the project should be capitalized. Assessee can take the benefit of these capitalized expenses in future when the project becomes operational. Perusal of the Profit & Loss A/c and the subsequent details submitted by the appellant shows that the following expenses are exclusively related to the project awarded by the NTPC :

SI No.	Name of party	Nature of service provided	Amount(INR)
1	Gopal Tandon	Consultancy – Retainership fees – Review of contracts entered into by TMIPL with vendors/clients, exchange of correspondences, etc	2,670,000
2	Amarchand & Mangaldas & Suresh A. Shroff & Co.	Legal Advisory services	733,702
3	D.B.Desai & Associates	Consultancy charges on service tax matters	220,000
4	Victor Moses & Co.	Legal Advisory services	68,241
5	R. Ginodia & Co.	Legal Advisory fees paid on account of consultancy provided to settle dispute with sub-contractor	2,900,000
6	HSBC	Financial consultancy – Funding plan of the project	1,854,344
7	Sneh Associates	Consultancy services – Assistance on pursuit of contract by Company	2,369,880
<b>Total</b>			<b>=1,08,16,167</b>

2. Out of the community welfare expenses of Rs. 14,09,708/- it has been seen that Rs. 12,32,994/- has been spent in around the area where mining project was to start.

3. Following persons were recruited exclusively for the project:

Sl No.	Name	Designation	Amount (INR)
1	Dilip Kumar	General Manager(Projects)	5,273,454
2	U. Ramachandran	Executive Director - Projects	5,072,286
3	Amal Sengupta	Chief – Engineering	479,664
			<b>Total =1,08,25,404</b>

*In view of the above discussion Rs.1,08,16,167/- out of legal and professional expenses, Rs. 12,32,994/- out of community welfare expenses and Rs.1,08,25,404/- out of salary expenses, are held to the capital in nature related to the setting up of the project. Under the circumstances, A.O. is directed to allow other expenses and treat only Rs.2,28,74,565/- as capital in nature, related to NTPC project.*

3.1. We find no infirmity in this order. The submissions of the ld. D/R, that the assessee could have claimed deduction u/s 35D of the Act, is not correct. The assessee is engaged in the business of providing mining services and assisting the mine owners to excavate material. Hence, it is in a service industry and is not mining minerals from its own mines for subsequent sales but only provides service in this regard. It had taken an office on rent at Kolkata, admeasuring 12420 Sq.ft. and further a project office at Hazirabad for effective executing of the project operations. It employs 30 persons for running its business of rendering services and the employees under its pay rolls included geologists, mining engineers and also general managers and project directors etc.

The Hon'ble Delhi High Court in the case of *CIT v. Samsung India Electronics Ltd.* 2013 37 taxmann.com 239 (Del. HC.), approved the following finds of the Tribunal:-

*"4. There is no dispute about the heads mentioned above and that the expenses were actually incurred. The stand of the Revenue is that these expenses are pre setup expenses and they are capital in nature, therefore, they should not be allowed under Section 37 of the Act. The Assessing Officer in the assessment order has recorded that the expenses were incurred before actual business operation started on 1st October, 1995 and in view of judicial pronouncement of the Bombay High Court in Western India Vegetables Products Ltd. v. CIT [1954] 26 ITR 151 and Supreme Court in CWT v. Ramaraju Surgical Cotton Mills Ltd. [1967] 63 ITR 478 and Sarabhai Management Corpn. Ltd. v. CIT [1991] 192 ITR 151 (SC), the same should be disallowed as expenditure. We may only note that the Assessing Officer did not go into the factual matrix applicable to the assessee's case to find out the date of setting up of business. He simply took the date 1st October, 1995 i.e. as the date of start of the actual commercial sale transactions as the relevant date. The CIT (Appeals) confirmed the disallowance after referring to the principles of "setting up of a business" and after examining the case law. He observed that the "date of incorporation" cannot ipso facto be treated as the*

date of setting up of operations as incorporation results in registration of the company but does not necessarily enable it to commence business. Legal requirements like registration under the sales tax etc was required and the assessee had to prove before the Assessing Officer that commercial operations could have been commenced before 1st October, 1995. No such fact was recorded by the Assessing Officer.

5. We have already referred to para 6 of the order passed by the tribunal which records the findings of facts ascertained by the tribunal. We have also noted the heads under which expenses have been claimed. The tribunal in the same order had examined the claim of the assessee, whether expenditure amounting to Rs.18,56,903/- incurred by M/s Reasonable Computer Solutions Pvt. Ltd. and reimbursed by the assessee, could be allowed as revenue expenditure. The said claim was disallowed and the assessee has accepted the said decision.

6. We have examined the factual findings recorded by the tribunal in para 6. The same cannot be categorized as perverse. The tribunal before recording the said findings examined the case law on the subject and has referred to the contentions of the parties on the said issue which have been recorded para 3 onwards. The assessee company was set up to carry on its business of manufacturing and trading in consumer durables. The date of commencement of business was certified as 9th August, 1995, though the date of incorporation was 3rd August, 1995. Tribunal has referred to various facts as to what was required to be done before the first actual sale invoice to a customer was issued. It included recruitment of employees, their training and establishment of showrooms by taking places on rent etc. Advertisements had also been issued and in fact M/s Reasonable Computer Solutions Private Ltd., the joint venture partner on 25th July, 1995 had appointed M/s Mudra Diversified Limited as their Public Relations Consultant for the period 15th August, 1995 onwards.

6A. In *Western India Vegetables Products Ltd (supra)* Bombay High Court has examined the concept and noticed the difference between "commencement" and "setting up" of a business and, *inter alia*, observed as under:—

*"The important question that has got to be considered is from which date are the expenses of this business to be considered permissible deductions and for that purpose the section that we have got to look to is section 2(11) and that section defines the 'previous year' and for the purpose of a business the previous year begins from the date of setting up of the business. Therefore it is only after the business is set up that the previous year of that business commences and in that previous year the expenses incurred in the business can be claimed as permissible deductions. Any expenses incurred prior to setting up of a business would obviously not be permissible deductions because those expenses would be incurred at a point of time when the previous years of the business would not have commenced.*

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*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)."*

7. The aforesaid distinction is relevant when we examine and refers to the definition of 'previous year'. Following the said judgment, in the case of CIT v. L.G. Electronics (India) Ltd. [\[2006\] 282 ITR 545/\[2005\] 149 Taxman 166 \(Delhi\)](#), it has been observed that the date of setting up of business and date of commencement of business may be two separate dates. This decision in the case of L.G. Electronics(supra) has been followed in CIT v. ESPN Software India (P.) Ltd. [\[2008\] 301 ITR 368/\[2009\] 184 Taxman 452 \(Delhi\)](#) wherein it has been held that a business will "commence" with the first purchase of stock-in-trade and the date on which the first sale is made is immaterial. Similarly, for manufacturing, several activities in order to bring or produce finished products have to be undertaken, but business commences when the first of such activities is taken.

8. In view of the facts found by the tribunal, we do not think that any substantial question of law arises for consideration. Pragmatic and practical view has to be taken. We also record that the Assessing Officer and the first appellate authority did not specifically go into the factual matrix relating to and to ascertain the date of "setting up" of business, though order of the first appellate authority is more detailed and elaborate. Thus, there is nothing to controvert the facts as found and recorded in the impugned order. In view of the factual finding of the Tribunal, Revenue cannot succeed."

4. In the case on hand, the assessee has already set up the basic infrastructure required, in the form of an office having employees with necessary skills. It also obtained a contract from NTPC. On these facts, we uphold the finding of the Id. CIT(A) that the assessee has setup its business. In the result, this issue is adjudicated in favour of the assessee.

5. Ground No. 2, is on the issue of intra head set off.

5.1. We find that this issue has been rightly decided by the Id. CIT(A). He held as follows:-

*"Assessee earned Rs. 3,18,13,497/- as interest income which has been assessed by the A.O. under the head income from other sources. In the assessment order A.O has mentioned that business loss of earlier years cannot be set off against the income from other sources of the current year. However, the perusal of the assessment order shows that the business losses are of current year which can be set off against income from other sources of the current year. After considering the relief given in the proceeding paras, A.O is directed to set off the remaining losses against income from other sources. This ground is allowed."*

5.2. We find no infirmity in the same. In the result both the revenue appeals are dismissed.

6. Coming to the cross-objections, the Id. Counsel for the assessee submitted that he will not be pressing the same. Hence we dismiss both the cross-objections as not pressed.

7. In the result, both the appeals of the revenue and cross-objections by the assessee are dismissed.

***Kolkata, the 9<sup>th</sup> day of January, 2019.***

Sd/-  
**[Aby T. Varkey]**  
 Judicial Member

Dated : 09.01.2019  
 {SC SPS}

Sd/-  
**[J. Sudhakar Reddy]**  
 Accountant Member

*Copy of the order forwarded to:*

**1. M/s. Thiess Mines India Pvt. Ltd**  
**PS Srijan Corporate Park**  
**1502,15<sup>th</sup> Floor, Tower-1**  
**Plot No.2**  
**Block EP & GP**  
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**Bidhan Nagar**  
**Kolkata - 700091**

**2. Assistant Commissioner of Income Tax, Circle-5(2), Kolkata**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy  
 By order

Assistant Registrar  
 ITAT, Kolkata Benches