

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D': NEW DELHI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A. No.5175/Del of 2016  
Assessment Year: 2012-13**

<b>M/s Jaypee Fertilizers Inds. P.Ltd., Sector- 128, Gautam Budh Nagar, Noida. PAN: AACJ3804A (Appellant)</b>	<b>vs</b>	<b>Income-tax Officer, Circle -1, Noida.  (Respondent)</b>
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**Assessee by: Shri V.K. Garg, Advocate  
Department by: Ms Naina Soin Kapil, Sr.DR**

**Date of Hearing: 20.08.2019  
Date of Pronouncement: 13.11.2019**

**ORDER**

**PER NARASIMHA K. CHARY, JM**

The present appeal is filed by the assessee against the order dated 22.06.2016 passed by the learned Commissioner of Income-tax (Appeals)-1, New Delhi ("CIT(A)") for the Asstt. Year 2012-13.

2. Brief facts of the case or that Jaypee Fertilisers and Industries Ltd ("the assessee") was incorporated to carry on the business of fertilisers and urea and all classes and kinds of chemicals including petrochemicals and plastics. For the Assessment Year 2012-13, they have filed return of income on 29/9/2012 declaring a taxable income of Rs.1,14,90,960/-. During the course of assessment proceedings, learned Assessing Officer found that the business of the assessee was not commenced during the

year and treated the declared income of the assessee as other income and disallowed the expenses claimed by the assessee on that ground.

3. Assessee's appeal was dismissed by the Ld. CIT(A) on the ground that in view of the decision of the Hon'ble Apex Court in the case of Tuticorin Alkali Chemicals and Fertilisers Limited vs. CIT (1997) 141 CTR SC 387, the interest derived by the assessee from the investments in the similar business, before the commencement of the business, should be treated to have been earned from other sources. Expenses were also disallowed holding that the expenditure was in respect of preference shares of the assessee company and therefore it is capital in nature.

4. Assessee is, therefore, before us in this appeal submitting that the assessee had commenced its business by making use the strategic investments in companies in furtherance of its main object of carrying on the business of manufacture of a fertiliser directly or by making investments in other companies having similar object and, therefore, it cannot be said that the assessee had not commenced the business during the year. Reliance is placed on the decision reported in Carefour WC and SC India private limited vs. DCIT 368 ITR 692 (del) wherein it was held that mere setup of business is enough for allowance of expenses and is not necessary that the business should have been commenced. It is further submitted by the Ld. AR that the Ld. CIT(A) should have considered the alternative plea of the assessee under section 35 D of the Income Tax Act, 1961 (for short "the Act") in respect of Rs.4,79,80,500/- being the amount of upfront fee paid to bank against preference share capital put option rights and Section 251(1) (a) of the Act does not come in the way of the CIT to consider the additional ground.

5. Ld. DR placed reliance on the orders of the authorities below and stated that the main objective of the assessee company is business of manufacture and trade of fertilisers and urea, the investment activity pleaded by the assessee is a stranger to this activity which amounts to finance activity which does not form part of the manufacture and the trading activity. They further submitted that even otherwise also the company in which the assessee made investments, namely, Duncan industries, had not commenced the business and, therefore, it cannot be said that the assessee had actually commenced the business.

6. We have gone through the record in the light of the submissions made on either side. Assessee had produced the copy of the Memorandum and Articles of Association and also the certificate of incorporation issued on 3/6/2010. The Memorandum of Association of the assessee, vide "MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION" clearly read that to carry on the business, directly or by making investment in other companies having similar objects, including that of manufacturers, fabricators, processors, producers, growers, importers, exporters, years, sellers, distributors, dealers, agents, merchants and concessionaries, refiners and preparers of all classes and kinds of fertilisers and urea and all classes and kinds of chemicals including petrochemicals and plastics and industrial and other preparations rising from are required in the manufacture of any kind of treasures and chemicals and to carry on any operations or processes of mixing granulating different the chemicals or fertilisers.

7. Insofar as the claim of the assessee that they have invested a sum of Rs.460.21 crores in Duncan industries Ltd, Kanpur is concerned, there

does not appear to be any dispute from the Revenue. On the other hand, it is the observation of the learned Assessing Officer that for the revival of sick fertiliser manufacturing unit of Duncans industries Ltd, at Kanpur, the Board of Directors in the meeting held on 5<sup>th</sup> June 2010 decided to make investment in the share capital of JaypeeUttar Bharat Vikas Private Limited which was treated as long-term investment in the company, to the tune of Rs.460.21 crores. It is further noted by the Assessing Officer that from the Annexure to Auditor's Report, it was found that the BIFR vide order dated 16/01/2012 had approved the scheme in which, the assessee company had entered into an arrangement on renovation and up-gradation of existing assets of fertilisers unit of Duncan industries Ltd. to Kanpur Fertiliser and Cements Limited for the same funds in the form of investment in shares capital have been given to Jaypee Uttar Bharat Ltd which in turn had invested the funds in Kanpur Fertilisers Limited.

8. The entire case of the Revenue revolves around the observations of the Assessing Officer that the finance activity of making investment in similar business does not fit in the business of the assessee of manufacture and trade of fertilisers and urea. We are at a loss to understand wherefrom this information is gathered by the learned Assessing Officer. The Revenue cannot prevent the assessee from pursuing the businesses of the choices as incorporated in the Memorandum and Articles of Association. There cannot be any stipulation that the assessee cannot do business both in manufacture and the trade of a fertilisers and urea and at the same time doing the business of finance activity.

9. Be that as it may, as rightly argued by the assessee before the Ld. CIT(A) as well as before us that a company engaged in financial activity can invest its fund in any type of company to earn interest whereas it is not so in the case of the assessee. In case of assessee it is clearly stipulated that the investment is strictly confined in other companies having similar object including that of manufacturers, fabricators so on and so forth. It is not the case of the Revenue that the business of Duncan industries Ltd does not fit in the description given in the “Main objects to be pursued by the company on its incorporation” in the Memorandum of Association of the assessee. Further, it was submitted by the assessee before the Assessing Officer that the investment took place in anticipation of its entrance by the major to a new group company by the name of Kanpur Fertilisers and Cement Limited (KFCL) and the assessee was the proposed strategic investor in the said rehabilitation scheme. In the absence of any rebuttal on this aspect, we do not entertain any doubt that the Duncan industries Ltd was pursuing similar objects as those of the assessee and fits into the description given by the assessee in the Memorandum of Association vide “Main objects to be pursued by the company on its incorporation” and by making such investment the assessee could be said to have commenced the business.

10. In Carefour WC&C India Private Limited vs. Deputy Commissioner of Income-tax, ITA No.42/2014 (order dated 22<sup>nd</sup>September, 2014), Hon’ble Jurisdictional High Court, held that merely because actual sales and purchase of products did not happen during the subject financial year, which is not a necessary condition/activity in order to hold a

business was set up, it cannot be said that business was not setup. It is further held that, -

“For commencement of a business, there must be in place some income generating asset or income earning structure. In several cases, there is a gap or an interval between setting up and commencement. When the business is set up, is a mixed question of law and fact and depends upon the line, nature and character of the business/professional activity. For example, for manufacturing business, purchase of new material or electricity connection may be relevant point to determine setting up but in case of a property dealer, the moment, he puts up a chair and table, or starts talking, his business is set up.

... ..  
 .. it is a well settled position of law that business is nothing more than a continuous course of activities and for commencement of business all the activities which go to make up the business need not be started simultaneously. As soon as the activity which is the essential activity in the course of carrying on the business is started, the business must be said to have commenced.

11. Assessment order clearly reads that the investments emanated from the order of BIFR, which was passed for the revival of Duncan Industries Ltd. It is not as though the Duncan Industries Ltd. is a new concern which has yet to commence business. It is covered by the order of BIFR for the revival of its business. BIFR approved the scheme in which the assessee company had entered into an arrangement on renovation and up-gradations of existing assets of a fertiliser unit of Duncan Industries Ltd. to Kanpur Fertiliser and Cements Ltd. for the same funds in the form of investment in shares capital were given to Jaypee Uttar Bharat Ltd. In the circumstances, it cannot be said that the Duncan Industries Ltd had not started the work till the end of the year. It was a sick industry for the revival of which the BIFR approved the scheme proposed by the assessee.

12. Viewing from any angle, we find it difficult to agree with the authorities below that the assessee did not set up business in the relevant assessment year and, therefore, the income earned by the assessee on the investment has to be treated as income from other sources. We, therefore, direct the Assessing Officer to treat the income from interest as other income, and complete the assessment. In view of this finding, the alternative claim of the assessee under section 35D of the Act becomes academic.

13. Appeal of the assessee is, accordingly, allowed.

Order pronounced in the Open Court on 13<sup>th</sup> November, 2019.

**Sd/-**  
**(PRASHANT MAHARISHI)**  
**ACCOUNTANT MEMBER**  
Dated: 13<sup>th</sup> November, 2019.

**Sd/-**  
**(K.NARASIMHA CHARY)**  
**JUDICIAL MEMBER**

VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

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