

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "E": NEW DELHI]**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No. 7232/Del/2018
(Assessment Year: 2015-16)

ACIT, Circle : 30 (1), New Delhi.	Vs.	M/s. MSK (JV) S-571, Lower Ground Floor, Greater Kailash – II, New Delhi – 110 048. PAN: AADAM2008E
(Appellant)		(Respondent)

Assessee by :	Shri R. S. Singhvi, C. A.; & Shri Satyajit Goel, C. A.;
Department by:	Shri M. N. Shete, Sr. D.R.;
Date of Hearing :	25/11/2021
Date of pronouncement :	07/12/2021

ORDER

PER AMIT SHUKLA, J. M.

1. This appeal has been filed by the Revenue against the impugned order dated 21.08.2018 passed by the learned Commissioner of Income Tax (Appeals)-10, New Delhi, for assessment year 2015-16.
2. The following grounds of appeal are raised by the Revenue:-

“1. Whether in law & facts and circumstances of the

case, Hon'ble CIT(A) was correct in deleting addition of Rs. 5,06,20,233/- as assessee had not set up its business in terms of section 3 of the Income-tax Act, 1961.

2. Whether in law & facts and circumstances of the case, Hon'ble CIT(A) was correct in holding that business was set up in F.Y. 2014-15, ignoring the fact that no environmental clearance was granted to assessee to carry out business of mining activity.

3. The appellant craves, leave to add, alter or amend any of the grounds of appeal before or during the course of hearing of the appeal.

4. It is prayed that the order of the Ld. CIT(A)-10, New Delhi being contrary to the facts on record and the settled position of law, be set aside and that of the Assessing Officer be restored. “

3. The facts in brief are that the assessee was joint venture entity of three firms to carry on business of mining activity. The assessee had debited expenditure in its profit & loss account amounting to Rs.5,06,20,233/- and no income from mining was shown during the relevant financial year. In response to the show cause notice by the Assessing Officer as to why expenses should not be disallowed, it was submitted and stated as under:-

“The mining work was allotted to the JV w.e.f. 3rd January 2014. The period of lease shall be 12 years and the same shall commence w.e.f. the **date of grant of environmental clearance** by the competent authority **or on expiry of a period of 12 months from the date of third communication** of the highest bidder / issuance of 'letter of intent' **whichever is earlier**. The assessee paid the first

installment of Rs.1,33,91,667/- in the month of January 2015. The assessee filled its return of income on the basis that two installments shall not be paid because **the work was started in the month of July 2015**. Later on the case was filed by the mining department in Hon'ble Punjab and Haryana High Court and the Hon'ble High Court passed an order to deposit the two installments of Rs.1,33,1,667/- each for the month of February and March 2015 with interest. The Hon'ble High Court also ordered that the three installments of R&R charges will also be deposited by the allottee with interest. The assessee revised its return of income on the basis of the order of the Hon'ble High Court.”

4. The ld. Assessing Officer held that since there was no business in the relevant financial year and therefore, the claim by the assessee are pre-operative expenses and which should have been capitalized. Further the period of lease has started in January, 2015 and the assessee has paid the lease rent, but that does not mean that there is any commencement of business activity for claiming the revenue expenditure. Then the assessee has filed fresh detailed explanation, which has been incorporated in the impugned assessment order, stating that business was set up in January, 2015 and mining operation could not be started due to certain environmental clearances, however, assessee was paying the lease rent and paying salaries to employees. Just because no mining activity started, that does not mean that expenditure incurred is capital expenditure. It was further pointed out that in the financial year 2013-14 assessee has itself capitalized such certain pre-operative expenses in nature. However, the ld. Assessing Officer disallowed the entire

expenditure claim holding it that the same is capital in nature.

5. The Id. CIT (Appeals) having considered material on record and various judicial precedents, held that assessee had set up the business and had already obtained the mining lease for which it had made the payment. Further, assessee had also deployed man-power and had incurred expenses relating to business. Therefore, the business was set up and lease expenditure as well as other expenses cannot be disallowed.
6. We have heard both the parties and perused the material placed on record. We find that there is no dispute that the business of the assessee was duly set up in the financial year 2013-14 and it was already allotted the mining work with effect from 3.01.2014. The period of lease for mining was for 12 years and assessee had already hired human resources/ man-power and it had also incurred other expenses relating to business. The assessee had already paid installments of lease rent of Rs.1.34 crores in the month of January, 2015 only and had incurred restoration and environmental charges, paid salary etc. Therefore, we hold that the business of the assessee had already been set up. The provisions of Section 3 provide that the new business should be set up, but it does not mean that there has to be corresponding income. There is distinction between set up and commencement of business. This distinction and principle has been laid down by the Hon'ble jurisdictional High Court in the following cases:-

- (i) CIT Vs. ESPN SOFTWARE INDIA P. LTD. (2008)
301 ITR 368 (Del.);

- (ii) CIT Vs. Samsung India Electronics Ltd. (2013)
356 ITR 354 (Del.);
- (iii) Carefour Wc & C India P. Ltd. Vs. DCIT (2014)
368 ITR 692 (Del.);
- (iv) CIT Vs. Dhoomketu Builder And Development P Ltd.
(2014) 368 ITR 680 (Del.);
- (v) CIT Vs. Axis Pvt. Equity Limited (Bombay High Court)
391 ITR 370;
- (vi) Maruti Insurance Broking Pvt. Ltd. Vs. DCIT
435 ITR 34.

7. Thus, we do not find any merit in the case of the revenue and accordingly, the order of the ld. CIT (Appeals) is confirmed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on : **07/12/2021**.

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated : 07/12/2021.

MEHTA

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1. Appellant;
2. Respondent;
3. CIT

4. CIT (Appeals)

5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	7.12.2021
Date on which the typed draft is placed before the dictating member	7.12.2021
Date on which the typed draft is placed before the other member	7.12.2021
Date on which the approved draft comes to the Sr. PS/ PS	7.12.2021
Date on which the fair order is placed before the dictating member for pronouncement	7.12.2021
Date on which the fair order comes back to the Sr. PS/ PS	7.12.2021
date on which the file goes to the Bench Clerk	7.12.2021
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	