

आयकर अपीलीय अधिकरण 'बी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.831/Chny/2017**
(निर्धारण वर्ष / **Assessment Year: 2009-10**)

DCIT Corporate Circle-5(1), Chennai.	बनाम / Vs.	M/s. Rakindo Kovai Township P. Ltd. No.1, Subbaraya Avenue, C.P. Ramaswamy Road, Alwarpet, Chennai – 600 018.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AADCR-5365-H		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

C.O No.104/Chny/2017
(**Arising in ITA No.831/Chny/2017**)
(निर्धारण वर्ष / **Assessment Year: 2009-10**)

M/s. Rakindo Kovai Township P. Ltd., No.1, Subbaraya Avenue, C.P. Ramaswamy Road, Alwarpet, Chennai – 600 018.	बनाम/ Vs.	DCIT Corporate Circle-5(1), Chennai.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AADCR-5365-H		
(□ पीलार्थी/ Appellant/Cross Objector)	:	(प्रत्यर्थी / Respondent)

For Assessee	:	Shri D.Anand (Advocate)-Ld. AR
For Revenue	:	Shri P. Sajit Kumar (JCIT)-Ld. DR

सुनवाई की तारीख/Date of Hearing	:	10-03-2022
घोषणा की तारीख /Date of Pronouncement	:	05-05-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. The Revenue is in further appeal for Assessment Year (AY) 2009-10 against the order dated 30.12.2016 which is passed by learned Commission of Income Tax (Appeals)-3, Chennai [CIT(A)] in the matter of assessment framed by learned Assessing Officer (AO) u/s 143(3) r.w.s. 147 on 27.03.2015. The assessee, upon receipt of notice of hearing, has preferred cross-objections which challenges the validity of reassessment proceedings.

2. The Registry has noted a delay of 28 days in assessee's cross objections. The condonation of the same has been sought by the assessee on the strength of an affidavit wherein it has been stated that the Tribunal had issued notice of defect in the memorandum of appeal filed by the Department and had advised the Department to rectify the mistake within 10 days of receipt of the defect notice. The assessee was under bona-fide impression that the period of 30 days for filing the cross objection would reckon from the date of rectification of the mistake by the Department and therefore, there was delay in forwarding the papers to the Authorized Representative. Though Ld. DR opposed the condonation, however, keeping in view the principles of natural justice and considering the period of delay, we condone the delay and proceed for adjudication of cross objection on merits.

3. The grounds raised by the Revenue read as under:

1. The order of the Id CIT(A) is contrary to law and facts and circumstances of the case.
2. The Id CIT(A) erred in law in holding that assessee's activities of giving advance and purchase & registration of land, laying of roads, construction of

buildings etc. constitute starting of business activities and accordingly the expenses are allowable as business expenses.

2.1 The Id CIT(A) ought to have noted that assessee has not generated any revenue from its business operations and hence pending accrual of any business income, the expenses are required to be treated as pre-commencement expenses and need to be capitalized and cannot be allowed as a deductible business expenses.

2.2 The Id CIT(A) failed to note that as per the decisions of the Hon'ble Apex Court in the cases of M/s Challapalli Sugars Limited Vs CIT (98 1TR 167) and M/s Tuticorin Alkali Chemicals & Fertilizers Limited Vs CIT, when no business income has been generated, there is no question of assessment of its profit and gains and pre-operative expenses are required to be capitalized and carried forward.

3. The Id CIT(A) erred in law in treating the impugned expenses as allowable business expenses and accordingly directing the AO to adjust the income from other sources as per the provisions of Sec.71(1) and to allow set off of business loss against such income.

3.1 The Id CIT(A) failed to note that as the assessee has not started its business / generated operational income, the business expenses are only to be treated as pre-commencement expenses and capitalized and the interest income out of investment in deposits etc., needs to be taxed separately under the head "Income from other sources" and the business losses cannot be set off against the income from other sources as directed by the CIT(A).

4. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) on this issue may be set aside and that of the Assessing Officer restored.

4. The grounds in assessee's cross objections read as under:

1. The order of the Commissioner of Income tax (Appeals), so far it is prejudicial to the interest of the respondent and cross objector, is contrary to law, facts of the case and material on record.

The Commissioner of Income tax (Appeals) grossly erred in upholding the validity of reopening of assessment under Sec.147 of the Income tax Act.

The Commissioner of Income tax (Appeals) failed to appreciate that in the facts and circumstances of the case the Assessing Officer has not assumed valid jurisdiction to reopen the concluded assessment.

2. The Commissioner of Income tax (Appeals), having been satisfied with the submissions made by the appellant and after analyzing the details available on record arrived at a conscious decision that the Assessing Officer erred in assuming that the appellant had not commenced business and hence the expenses incurred by the appellant would partake the character of pre commencement expenses.

The decision of the Commissioner of Income tax (Appeals) is supported by material on record and hence, in the opinion of the appellant, no interference with the decision by the Tribunal is warranted.

3. For these grounds and such other grounds as may be raised either before or during the course of hearing of the appeal, the respondent prays that the Hon'ble Tribunal may be pleased to pass orders cancelling the decision of the

Commissioner of Income tax (Appeals) with regard to reopening of assessment and dismiss the departmental appeal as devoid of merits and render justice.

As evident, the Revenue is aggrieved by the action of Ld. CIT(A) in concluding that the assessee had started business activities and accordingly, the expenses were allowable as business expenditure. The assessee, in its cross-objections, challenges the validity of assessment proceedings which have been upheld by Ld. CIT(A) in the impugned order.

5. The Ld. DR supported the findings of Ld. AO and submitted that the assessee was engaged in development of SEZ. To Set-up the business in SEZ, the assessee would require approvals from appropriate authorities and only thereafter, the assessee would be able to set up the business. The Ld. DR submitted that no such approval was obtained by the assessee and the assessee merely procured land. Therefore, the assessee had not commenced business activities during the year which would support the findings of Ld. AO that the business expenditure as claimed by the assessee would not be available as deduction. The Ld. AR, on the other hand, submitted that the assessee's main objects had already undergone change and the assessee ventured in to real estate development activities. Those activities were already started by the assessee which is evident from the findings of Ld. CIT(A) in the impugned order. The Ld. AR also assailed the validity of reassessment proceedings by submitting the reopening was based merely on change of opinion. Reliance has been placed on the decision of Hon'ble Supreme Court in the case of **ACIT V/s Marico Ltd. (SLP No.7367/2020 dated 01.06.2020)**. For merits, reliance has been placed on the decision of Hon'ble High Court of Madras in the case of **Daimler India**

Commercial Vehicles Pvt. Ltd. V/s CIT (416 ITR 343). The copy of the decisions have been placed on record.

6. Having heard rival submissions and after going through relevant material on record, our adjudication would be as given in succeeding paragraphs.

Assessment Proceedings

7.1 The assessee being resident corporate assessee is stated to be engaged in development of township and SEZ. However, assessee's main object had undergone change vide fresh certificate of incorporation dated 31.01.2008. As per revised object Clause, the main objects to be pursued by the assessee, inter-alia, include to deal in land, buildings for the purpose of development and for carrying out development activities. In essence, the assessee's main object includes real estate development and construction activities. As per the object clause, the assessee could purchase, hire, lease or exchange or acquire any immovable properties for carrying on the business of developers, builder, realtors, contractors and dealer and to sell or transfer the immovable property whether as a developed or undeveloped plots.

7.2 The regular assessment was framed for the year in scrutiny assessment u/s 143(3) on 29.12.2011 wherein the sole disallowance made by Ld. AO was disallowance u/s 14A and returned loss of Rs.509.40 Lacs was revised to Rs.488.58 Lacs.

7.3 However, subsequently forming a belief that the income escaped assessment, the case was reopened and notice u/s. 148 of the Act was issued on 31.01.2014 which is within 4 years from the end of relevant assessment year. The reasons for reopening were communicated to the assessee and the assessee's objections thereto were rejected. The

reason for reopening the assessment was that pre-commencement expenses should have been capitalized and income earned by the assessee was to be assessed as 'income from other sources'. The assessee, in its objection to reopening, submitted that there being no fresh material to disturb the reasoning arrived at by Ld. AO during regular assessment proceedings, the reopening was not sustainable. However, Ld. AO rejected the same on the ground that the principle of change of opinion would apply where Ld. AO had applied the mind and taken a conscious decision on a particular matter. It will have no application where the assessment order does not address itself to the aspect which forms the basis for reopening of the assessment.

7.4 On merits, the assessee assailed the reliance of Ld. AO on the decision of Hon'ble Apex Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd. However, Ld. AO noted that as per the provisions of Sec.35D, any expenditure incurred by the assessee before commencement of business was to be allowed deduction in a staggered manner. Since the assessee had not commenced the business, all pre-commencement expenses should have been capitalized. Finally, the expenditure was disallowed and interest income of Rs.7.09 Lacs was brought to tax under the head 'income from other sources'.

Appellate Proceedings

8.1 Upon further appeal, Ld. CIT(A) rejected legal grounds of the assessee on the ground that reopening was within 4 years and the issues raised during the reassessment proceedings were not raised in regular assessment. The Ld. AO followed due procedure and reopened the assessment.

8.2 However, on merits, Ld. CIT(A) concurred with assessee's submissions that it had commenced its business activities. It was noted by Ld. CIT(A) that the assessee was engaged into development of integrated feeder township and SEZ on approx. 900 acres of land near Coimbatore. The assessee had undertaken a huge township project and started various activities such as purchase of land, making advances to the parties, laying roads, building construction etc. The assessee was incorporated on 20.03.2007 and became public limited company in September, 2007. In a huge project like the one being undertaken by the assessee revenue generation may take time but the same could not be a reason to construe as to non-commencement of business. The purchase of land was done, advances were given to parties, the land was registered in assessee's name, roads have been laid, buildings have been under construction. All these facts would prove that the assessee has started business activities. Accordingly, Ld. AO was directed to adjust the income and allow carry forward of business losses.

8.3 The aforesaid adjudication has given rise to revenue's appeal before us wherein the revenue assails the adjudication on merits. The assessee, in its cross-objections, assails the validity of reassessment proceedings.

Our findings and Adjudication

9. Since legal grounds urged by the assessee assails the validity of reassessment proceedings, the same are adjudicated first. Upon due consideration of material facts, it could be gathered that the return of income was already scrutinized u/s 143(3) wherein the sole disallowance made by Ld. AO was disallowance u/s 14A. However, subsequently, the case was reopened on the allegation that the assessee had not

commenced its business activities and therefore pre-commencement expenses should have been capitalized. Though the assessment has been reopened within 4 years from end of relevant assessment year, however, after perusal of reasons of reopening, it could be gathered that the reasons have not been formed on the basis of any new tangible / fresh material coming to the possession of Ld. AO. Rather the formation of belief is on the same set of material which was available before Ld. AO during the course of assessment proceedings. The Hon'ble Supreme Court in the case of **Kelvinator of India Ltd. (2010; 320 ITR 561)** held that reasons to believe must be based on new information. The Ld. AO has power to reassess but no power to review. Formation of belief on same set of material would result into review of the order. After 01.04.1989, the assessing officer has power to reopen provided there is tangible material to come to the conclusion that there was escapement of income. Reasons must have live link with the formation of the belief. Relying on this decision, Hon'ble High Court of Bombay in the case of **Marico Ltd. V.s ACIT (WP No.1917 of 2019)** observed that the only condition precedent for exercising the jurisdiction to reopen an assessment is that Ld. AO should have reasonable belief that income chargeable to tax has escaped assessment. This reason to believe should not be on the basis of change of opinion otherwise the power of reassessment would become power of review, which is impermissible. The Hon'ble Court further held that where queries were raised during the assessment proceedings which were responded to by the assessee then the non-discussion of the same or non-rejection of the same would necessarily mean that Ld. AO had formed an opinion accepting the view of the assessee. Thus, when an opinion is formed during regular

assessment proceedings, the same would bar Ld. AO to reopen the same on account of different view. The revenue's SLP against this decision has already been dismissed by Hon'ble Supreme Court on 01.06.2020 (SLP No.7367/2020).

10. Upon perusal of regular assessment order dated 29.12.2011 as framed u/s 143(3), it could be observed that Ld. AO had asked for various details which were duly responded to by the assessee. The Ld. AO, after considering the same, chose to make disallowance u/s 14A and accepted all the other particulars filed by the assessee. Subsequently, the case has been reopened on same set of material as available before Ld. AO. Evidently no fresh tangible material has come to the possession of Ld. AO subsequent to conclusion of regular assessment proceedings. Under such factual matrix, the ratio of cited decisions, as enumerated in preceding paragraphs, is squarely applicable to the facts of the case. Therefore, we would hold that reassessment proceedings were nothing but based on mere change of opinion which is impermissible. The assessment is set-aside as without jurisdiction. The assessee's cross-objections stands allowed.

11. So far as the merits of the case are concerned, it could be seen that the assessee was incorporated on 20.03.2007 and became public limited company in September, 2007. Initially the assessee was engaged in development of SEZ. However, the object of the assessee had undergone change w.e.f. 31.01.2008. As per revised object Clause, the main objects to be pursued by the assessee are to deal in land, buildings for the purpose of development and for carrying out development activities. In essence, the assessee's main object includes real estate development and construction activities. As per the object clause, the

assessee could purchase, hire, lease or exchange or acquire any immovable properties for carrying on the business of developers, builder, realtors, contractors and dealer and to sell or transfer the immovable property whether as a developed or undeveloped plots. It has already been noted by Ld. CIT(A) that the assessee was engaged into development of integrated feeder township and SEZ on approx. 900 acres of land near Coimbatore. The assessee had already started various activities such as purchase of land, making advances to the parties, laying roads, building construction etc. In a huge project like the one being undertaken by the assessee revenue generation may take time but the same could be a reason to construe as to non-commencement of business. The purchase of land was done, advances were given to parties, the land was registered in assessee's name, roads have been laid, buildings have been under construction. All these facts would prove that the assessee has started business activities. All these findings remain undisputed before us. Therefore, it could be seen that the assessee had already initiated certain activities towards fulfillment of its objectives and already procured land which would be very vital to start real estate development. Therefore, the conclusion that the assessee had commenced business could not be said to be perverse in any manner. The cited decision of Hon'ble High Court of Madras in the case of **Daimler India Commercial Vehicles Pvt. Ltd. V/s CIT (416 ITR 343)** also support the case of the assessee. In this case, the Hon'ble Court, after referring to catena of decisions, held that where the assessee had commenced activities relating to designing of commercial vehicles and related products R&D, buying and selling of parts and was in the process of construction of factory building for manufacture of commercial

vehicles, then it could be said that the business of the assessee had been set up in the previous assessment year. Therefore, the Tribunal erred in holding that merely because the manufacturing and sale of the vehicle did not take place, the business of the assessee has not been set up. The manufacturing activity of the assessee was a part of the composite business activities of the assessee and the same had not commenced because the construction of the building and installation of plant and machinery was in progress. Accordingly, Hon'ble Court confirmed the first appellate order. The ratio of this decision is applicable to the merits of the case. Therefore, we would concur with adjudication on merits, in the impugned order. The revenue's appeal stands dismissed.

12. Finally, the assessee's cross-objection stands allowed whereas the revenue's appeal stand dismissed.

Order pronounced on 05th May, 2022.

Sd/-
(V. DURGA RAO)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई / Chennai; दिनांक / Dated : 05-05-2022.
EDN/-

आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF