

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANT MEMBER**

**ITA No.4190/Del/2018  
Assessment Year: 2014-15**

<b>DCIT Circle -11 (1) New Delhi</b>	<b>Vs.</b>	<b>HMS Real Estate Pvt. Ltd. 1, AD, Vandhana Building, 11, Tolstoy Marg, New Delhi PAN No.AACCH0745G</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Appellant by</b>	<b>Sh. Anuj Garg, Sr. DR</b>
<b>Respondent by</b>	<b>Ms. Ananya Kapoor, Advocate</b>

<b>Date of hearing</b>	<b>16.03.2023</b>
<b>Date of pronouncement</b>	<b>16.03.2023</b>

**ORDER**

**PER O.P. KANT, AM:**

This appeal by the revenue is directed against order dated 28/03/2018 passed by the Learned Commissioner of income-tax (Appeals)-4, New Delhi [in short the Ld. CIT(A)] for assessment year 2014-15 raising following grounds:

1. *Whether the Ld. CIT(A) has erred on facts and in law in holding that the business or renting of project has been set up,*

*not appreciating that business of renting could not be setup unless the building is complete?*

2. *Whether the Ld. CIT(A) has erred in ignoring the law in deciding the issue of setting up and not considering the decision of Hon'ble Bombay High Court in case of Piem Hotel Pvt. Ltd. 209 ITR 0616; in which in similar circumstances it was held that in hotel business, business is not setup till hotel building is fit for renting?*
3. *Whether the CIT(A) not appreciated the fact that the assessee is far from commencement of business, in which circumstances the IT AT, Mumbai has in case of Shaporji Pallonji Power Co. Ltd. vs ITO 28 DTR 2012 held that business cannot be said to be setup.*
4. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.*

2. Briefly stated facts of the case are that the assessee, is a wholly owned subsidiary of HBT Real Estate Holdings Private Limited, Mauritius. It was engaged in the development and construction of Real Estate Projects in India. During the year under consideration the assessee company was engaged in development of "Sky view Corporate Park, Gurgaon", which was continued from earlier assessment years. The assessee capitalized the expenses which were related directly to the Project Sky View Corporate Park, however, the expenses of Rs.1,62,73,525/- which not directly related to the project or running of the company, were claimed as deduction under the P & L account. The assessee filed return of income for the year under consideration on 30.09.2014 declaring total loss of Rs.1,42,14,868/-. The return was selected

for scrutiny and statutory notices under the Income-tax Act, 1961 (in short “the Act”) were issued and complied with. According to the Assessing Officer (in short the AO), the business of the assessee was not set up and, therefore, the expenses debited in P&L account amounting to Rs.1,62,73,525/- were not eligible for allowing as revenue expenditure u/s. 37(1) of the Act and same should have been capitalized.

3. On further appeal the CIT(A) following the findings of his predecessor in A.Y.2012-13 and 2013-14, allowed the claim of the assessee.

4. Aggrieved with the finding of the Ld. CIT(A), the revenue is in appeal before us by way of raising the grounds as reproduced above.

5. We have heard rival submission of the parties and perused the relevant material on record. We find that the issue in dispute in the case is whether the business of the assessee of Developing “Real Estate Park” was set up in the year under consideration/in prior year or not. The Learned CIT(A) has relied on the findings of his predecessor for A.Y. 2012-13. The relevant findings of the Learned CIT(A) is reproduced above :-

*6.1 I have considered the assessment order and submissions placed on record by the appellant during the appellate proceeding. Facts of the case and issues raised in the ground of appeal are identical to those decided by me in my appellate order dated 19/02/2018 in the appellant's case for A.Y. 2012-13. Appellant's project named skyview corporate Park is still under construction as in evident from audited financial statements of the company. During*

*the year, the appellant transferred Rs.9,23,11,349/- towards capital work in progress and a sum of Rs. 1,87,84,472/- was claimed as revenue. As in the preceding year, this year too, a part of expenses were not capitalized and claimed as revenue in nature on the ground these expenses were general in nature and not specific or direct expenses related to the project.*

*6.2 The AO was of the view that entire expenses should have been capitalized and accordingly disallowed Rs.1,62,73,525/- out of claimed revenue expenditure to the extent of loss under the head business and profession holding the same as capital in nature. Exactly on the same issue, I have decided the matter in favour of the appellate for A.Y. 2012-13 and 2013-14 holding that expenses not directly related to the project being general and necessary to run the business is allowable business expenses once the business is set up.*

*6.3 The concluding paragraphs of my order for A.Y. 2012-13 is being reproduced for ready reference :-*

*"6.7 The only test is whether business has set up. Further, it is not in dispute that appellant had entered into a collaboration agreement in assessment year 2009-10 and therefore, setting up of business cannot be disputed.*

*6.8 I have carefully looked into the legal and factual aspects of the case. The stand of the AO that in absence of any business income, project being incomplete, general expense are disallowable is contrary to well settled legal principles. It is the setting up of business which is relevant for allowing expenses and not the actual commencement of business. The business of the appellant is to earn rental income from commercial mall and construction of mall is essential for that. I find that construction was in full swing which is*

*evident by the fact that capital work in progress as on 31/03/2011 was Rs. 181.92 crores and as on 31/03/2012 at Rs.204.04 crores. A marketing centre has been set up to display projects completed by the group outside India, to market its product through audio visual media and other such activities. Under such factual matrix, it is not possible to infer that appellant's business was not set up.*

6.9 In *ACIT Vs ASF Linsignia SEZ Pvt. Ltd. in ITA No. 6732 & 6733/Del/2014 A.Y. 2010 11 & 2011-12, Delhi Bench 'A' dated 15/09/2017*, it was held that *"the expenses which are not directly linked with the construction activity have been claimed as revenue expenses by the assessee. In our view the assessee has set up its business and the expenditure on revenue account has to be allowed and was rightly allowed by the first appellate authority. It is well settled that expenditure has to be allowed on setting up of the business and there might be a gap between the date on which the business is set up and the date of commencement of the business."*

*In the case of CIT Vs Hughes Escorts Communication [2009] 311 ITR 253, it has been held that the expenses incurred in the previous year, prior to the commencement of the business but after the setting up of its business, which two dates need not be the same, would be deductible as revenue expenses. In this case, while making distinction between the setting up and commencement of a business the Hon'ble Court has relied upon the Bombay High Court in Western India Vegetables Products Ltd. In this case, the Bombay High Court, which was in this case dealing with the corresponding provision of the Indian Income-tax Act, 1922, then explained the distinction between the concepts of 'commencement'<sup>1</sup> and 'setting up' of a business :*

*". . . 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 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)...."*

6.11 *In the case of Sarabhai Management Corpn. Ltd. [1976] 102 ITR 25 (Guj.), the Hon'ble Gujarat High Court has held that the business commences with the first activity for acquiring by purchase or otherwise immovable property. There may be an interval between the setting up of the business and the commencement of the business. All expenses incurred during that interval are also permissible for deduction.*

6.12 *The decision of Hon'ble Gujarat High Court in the case of Sarabhai Management Corpn. Ltd. (supra) has been affirmed by the Hon'ble Supreme Court in the case of CIT v. Sarabhai Management Corpn. Ltd. [1991] 192 ITR 151, where the Hon'ble Supreme Court went a step ahead that even the activities at a preparatory stage are also admissible. It is well settled that all the expenses incurred after the business had been set up are allowable as business deduction under section 37 of the Act. There may be interval between the setting up of the business and the actual commencement of the business but all the expenses incurred during the interval of setting up of the business and the commencement of the business are also permissible for deduction as so held in the above referred decisions.*

*Thus, it is clear that it is now well settled law that, once business is set up expenditure is allowable as business expenditure, as has also been held by another judgment of Jurisdictional High Court in the case of CIT vs. Dhoomketu Builders & Development Pvt. Ltd. 216 Taxmann 76.*

6.14 *As discussed above, there remains no doubt that the appellant's business was set up and the year under assessment*

*falls in the interval between the setting up of business and commencement of business and following the principles established by above discussed judicial decisions on the issue, I am of the view that in the facts and circumstances of the case, AO's order disallowing expenditure of Rs. 1,00,17,151/- claimed as revenue expenditure and capitalizing the same to CWIP is not justified. The said expenditure is held to be allowable as business expenditure u/s 37 of the Act and accordingly, addition of Rs.1,00,17,751/- is deleted. Grounds raised in this regard are therefore allowed."*

6. Before us the Learned Counsel for the assessee has submitted that Tribunal in A.Y.2012-13 has allowed the issue in favour of the assessee. The relevant findings of the Tribunal in ITA No.3289/Del/2018 is reproduced as under :-

*"The CIT(A) has given detailed reasons and the case laws referred by the Ld. DR do not apply in the present case as the facts of those cases are different and the ratio down is also not applicable in the present circumstances. Besides that the Hon'ble Delhi High Court also in case of Dhoomketu Builders and Development Pvt. Ltd. (supra) held that when an assessee whose business it is to develop real estates, is in a position to perform certain acts towards the acquisition of land, that would clearly show that it is ready to commence business and, as a corollary, that it has already been set up. The actual acquisition of land is the result of such efforts put in by the assessee; once the land is acquired the assessee may be said to have actually commenced its business which is that of development of real estate. The actual acquisition of the land may be a first step in the commencement of the business but section 3 of the Act does not speak of commencement of the business, it speaks only of setting up of the business. The ratio*

*laid down in Dhoomketu Builders and Development (supra) is squarely applicable in the present case. Thus, there is no need to interfere with the findings of the CIT(A). Hence, appeal of the Revenue is dismissed.*

*8. In result, the appeal of the Revenue is dismissed.*

7. As the issue in dispute of set up of the business is emanating from the earlier assessment years 2012-13 and 2013-14 which has already been allowed in favour of the assessee by the Tribunal (supra), therefore, respectfully following the findings of the Tribunal (supra), the finding of the Learned CIT(A) of the issue in dispute is upheld. The grounds raised by the revenue are accordingly dismissed.

8. In the result, the appeal of the revenue is dismissed.

***Order pronounced in the open court on 16.03.2023.***

**Sd/-  
(KUL BHARAT)  
JUDICIAL MEMBER**

**Sd/-  
(O.P. KANT)  
ACCOUNTANT MEMBER**

Dated:16.03.2023

\*NEHA\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi