

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

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No.2424/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2010-11)

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आयकर अपील सं./ ITA No.2425/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)

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आयकर अपील सं./ ITA No.2426/Chny/2018
(निर्धारण वर्ष / Assessment Years: 2012-13)

DCIT Corporate Circle-1(2), Chennai.	बनाम / Vs.	M/s. Bhartiya Nabhikiya Vidyut Nigam Ltd. Project Station Building, Bhavani, Kapakkam, Chennai – 603 102.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AACCB-3460-C		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Assessee by	:	Shri Y. Sridhar (C.A) & Ms. B. Revathy (Advocate) – Ld. ARs
प्रत्यर्थी की ओरसे/ Revenue by	:	Shri AR. V Sreenivasan (Addl. CIT) –Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	02-03-2023
घोषणा की तारीख / Date of Pronouncement	:	29-03-2023

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by Revenue for Assessment Years (AYs) 2010-11, 2011-12 & 2012-13 arises out of the common order of learned Commissioner of Income Tax (Appeals)-1, Chennai [CIT(A)] dated 17-05-2018 in the matter of separate assessments framed by Ld.

AO for all these years. The facts as well as issues are stated to be common in all the years.

2. The Ld. Sr. DR, at the outset, relied on the order of this Tribunal in assessee's own case for AY 2013-14 in ITA No.1304/Chny/2018 order dated 11-10-2019, a copy of which has been placed on record.

The relevant findings of the Tribunal are as under: -

7. We heard the rival submissions and perused the material on record. The issues involved in the present case relates to whether assessee had commenced business operations, set up the business which is ready to commence the business. This is a question of fact which requires to be adjudicated with reference to the stage of the setting up the plant. From the perusal of the annual report placed before us, the Statutory Auditors had clearly stated at clause 10 that company had not commenced commercial operations. Similarly from the Directors report, it is clearly mentioned that erection for construction of 500 MWe Prototype Fast Breeder Reactor is in progressing in a healthy state, despite technological challenges of first of its type sodium, cool fast reactor, the construction work has progressed well. This clearly shows that the work is still under progress. These facts would go to show that plant was not setup / ready for commencement of business operations. No doubt, it is settled position of law that when business is set up and ready to commencement of business even though there is no actual productivity, expenditure incurred in intervening period is allowed as expenditure. But in the present case, the facts enumerated above would go to show that business is not ready to commence and the question of allowing the expenditure does not arise. Similarly preliminary expenditure cannot be claimed as deduction u/s 35D of the Act wholly in the year of commencement of business. In the circumstances, the Id. Commissioner of Income Tax (Appeals) had clearly fell in error in holding that expenditures is allowable as deduction. Therefore, we reverse the order of the Id. Commissioner of Income Tax (Appeals) and restore the assessment order.

The Ld. Sr. DR thus submitted that since the assessee has not commenced the business, preliminary expenses could not be allowed as deduction u/s 35D. The Ld. AR, on the other hand, sought distinction in the factual matrix. Having gone through case records and after considering the cited decision of the Tribunal in assessee's own case, the appeals are disposed-off as under.

3. In assessment order for AY 2010-11 passed u/s 143(3) r.w.s. 147 on 31-10-2017, Ld. AO noted that the assessee paid sum of Rs.200.06

Lacs for registering the company. The assessee claimed 1/5th of the expenditure as preliminary expenditure u/s 35D(2)(c)(iii) which was denied by Ld. AO, inter-alia, by relying on the decision of Hon'ble Delhi High Court in the case of **CIT vs. Hindustan Insecticides Ltd. 116 Taxman 406**. Similar deduction was denied in AYs 2011-12 and 2012-13 also. However, Ld. CIT(A) allowed the deduction by observing as under: -

8. The appellant's contentions are considered. It is found that the Assessing officer in assessment years 2010-11 and 2012-13 has disallowed the claim for deduction u/s. 35D(2)(c) (iii) for the reason that the said amount was towards increasing the authorised share capital of the Company and not towards registration of the company. This conclusion of the Assessing officer appears to be factually incorrect as the evidence placed on record clearly shows that the amount of Rs.2 crores paid by the appellant in 2003 at the time of incorporation of the company was towards registration fees only having regard to the size of the share capital of the appellant company. As regards the contention of the Assessing officer that the impugned expenditure is not a revenue expenditure in assessment year 2011-12 concerned, the same is to be rejected as this argument is not relevant for the purpose of considering the claim u/s. 35D(2)(c)(iii). As both the reasons given by the Assessing officer in the three assessment years are not found to be correct, this ground of appeal is allowed for all the three years.

Aggrieved as aforesaid, the revenue is in further appeal before us.

4. We find that the assessee has claimed preliminary expenditure in 5 years starting from AY 2010-11 onwards. The Ld. CIT(A) allowed the deduction in AY 2013-14 which was challenged by revenue before this Tribunal. The co-ordinate bench rendered a finding that the assessee's business was not ready to commence and therefore, the question of allowing the expenditure would not arise. The said expenditure was held to be not allowable u/s 35D also. Since, the appeals before us pertain to prior assessment years, the findings rendered by Tribunal in subsequent year would apply to all the impugned years. We do not find any factual difference in all these years. Therefore, respectfully

following the earlier decision of the Tribunal, we reverse the adjudication of Ld. CIT(A) and restore the assessment framed by Ld. AO in all the years.

5. In the result, all the appeals stand allowed.

Order pronounced on 29th March, 2023.

Sd/-
(MAHAVIR SINGH)
उपअध्यक्ष / VICE PRESIDENT

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

चेन्नई / Chennai; दिनांक / Dated : 29-03-2023
EDN/-

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

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