

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI C. N. PRASAD, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA No. 4135/Del/2017
(Assessment Year: 2012-13)

DCIT,
Circle-11(2),
New Delhi

Vs. Hindustan Thermal EPC
Company Pvt. Ltd,
616A, (16A, Sixth Floor),
Devika Tower, Nehru Place,
New Delhi
(Respondent)

(Appellant)

PAN: AADCD7323D

Assessee by : Shri Satyen Sethi, Adv
Shri A. T. Panda, Adv
Revenue by: Shri Sandip Kumar Mishra, Sr. DR

Date of Hearing 08/01/2024
Date of pronouncement 12/01/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.4135/Del/2017 for AY 2012-13, arises out of the order of the Commissioner of Income Tax (Appeals)-33, New Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No. 274/16-17 dated 22.03.2017 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 30.03.2015 by the Assessing Officer, DCIT, Circle-17(1), New Delhi (hereinafter referred to as 'Id. AO').
2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the disallowance of expenses of Rs 6,37,09,173/- in the facts and circumstances of the case.
3. We have heard the rival submissions and perused the materials available on record. The assessee is engaged in the business of 'construction work'

relating to power projects and the year under consideration is the first year of business. The assessee declared business income of Rs 10,38,018/- towards 'Erection and Testing Services rendered'; purchase of inventory during the year of Rs 46,87,125/- and the same shown as closing stock of inventory; employee benefit expenses of Rs 3,85,80,590/-; project management expenses of Rs 2,74,47,299/- apart from certain administrative expenses. The assessee declared net loss of Rs 6,51,44,188/- as per books of accounts. While filing the return of income, the assessee suo moto disallowed a sum of Rs 35,46,449/- in the computation of income and declared net loss of Rs 6,37,09,173/-. The Id. AO observed that the income earned by the assessee was derived from a related party and majority of the expenses incurred were spent towards related party. Hence he concluded that the expenditure claimed by the assessee is not commensurate with the business income declared by the assessee and accordingly proceeded to disallow the net business loss of Rs 6,37,01,973/- (excess of expenditure over income) in the assessment.

4. The Id. CIT(A) on examination of the financial statements observed that major expenditure was towards employee benefit cost and accordingly called for month wise summary of salary and list of employees from the assessee, which were duly furnished as per the directions of the Id. CIT(A). The Id. CIT(A) having examined the said details recorded the following findings:-

a) As on 31.3.2012, the assessee had 46 employees, out of which 43 employees received their first salary in the month of November 2011 i.e. after the assessee entered into contract with MB Power Ltd in September 2011.

b) In the business of construction of Thermal Power Project, there is bound to be gestation period. It was unreasonable to expect earning of revenue within few months of signing of the contract.

c) In respect of other expenses' of Rs 2,97,09,635/-, the Id. CIT(A) has recorded the finding that a sum of Rs 55,65,136/- was paid to

Lahmeyer International (India) Pvt Ltd for Project consultancy. The balance of Rs 2,18,28,163/- was paid to Moser Baer Projects Pvt Ltd towards shared resources project management expenses and the same was recognized as revenue by the Holding Company on which service tax was also paid.

d) The assessee has not claimed any expenditure on rent, utilities or routine office expenses.

e) Stores and Spares of Rs 46,87,125/- purchased during the year were not claimed as deduction but were carried as inventories for the same were not utilized during the year.

5. We find that the Id. AO had relied on the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd reported in 225 ITR 802 (SC) to conclude that the assessee ought to have spread the incurrence of expenditure over the period of the contract as revenues were sought to be earned by the assessee in the future years. It is pertinent to note that in that case, it was the assessee who had sought for amortization of expenditure over different years and hence the Hon'ble Supreme Court allowed the same. Once an expenditure is of revenue nature, it is allowable in the year of incurrence and there is no concept of deferred revenue expenditure under the provisions of the Act except as specifically provided u/s 35AB, 35ABB etc. This aspect has been duly clarified by the Hon'ble Supreme Court in the case of Taparia Tools Ltd vs JCIT reported in 372 ITR 605 (SC) reversing the view of Hon'ble Bombay High Court. We also find that the assessee had also furnished the data of revenues earned in future years together with profit / loss thereon before the Id. CIT(A) as under:-

| Assessment Year | Revenue | Profit / loss |
|-----------------|--------------|-----------------|
| 2012-13 | 10,38,018 | (-) 6,51,44,188 |
| 2013-14 | 25,83,73,312 | (-) 2,97,93,169 |
| 2014-15 | 93,71,37,364 | 49,42,277 |
| 2015-16 | 99,31,00,916 | 49,97,271 |

6. The Id. DR before us vehemently argued that the Id. CIT(A) had duly examined the details of employee benefit expenses based on details filed by the assessee before him as additional evidences and the Id. AO was not given any opportunity to examine the same. This resulted in violation of provisions of Rule 46A of the Income Tax Rules. In this regard, we find that the details of employee benefit costs were furnished by the assessee before the Id. CIT(A), based on the directions of the Id. CIT(A) as per section 250(4) of the Act and we hold that the same cannot be construed as violation of provisions of Rule 46A of the Income Tax Rules. Either way, the entire books of accounts were duly furnished before the Id. AO and when the Id. AO chose not to examine a particular expenditure and when the same had been examined by the Id. CIT(A), the revenue before this forum cannot raise an objection that the Id. AO was not given any opportunity to examine the same. Hence the objection raised by the revenue in this regard is dismissed.

7. Yet another objection raised by the Id. DR before us is that the Id. CIT(A) having held that the expenditure incurred by the assessee are pre-operative expenditure, ought to have allowed the same to be capitalized to the cost of project instead of allowing them as revenue expenditure. We are unable to comprehend ourselves to accept to this proposition due to following reasons:-

a) First of all, the Id. AO had disallowed the expenditure only on the limited ground that expenditure claimed is not commensurate with the income offered by the assessee. It was never the case of the Id. AO that no business income was offered by the assessee. Hence the Id. DR before us cannot improve the case of the Id. AO in the second appellate proceedings.

b) The business income had been duly offered by the assessee towards 'Erection and Testing Services rendered' during the year. Hence the business had duly commenced during the year and assessee is entitled for claiming deduction towards revenue expenditure.

8. In view of the aforesaid observations, we hold that the Id. CIT(A) was duly justified in granting relief to the assessee and hence we do not deem it fit to interfere in his order. Accordingly, the grounds raised by the revenue are dismissed.

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

Order pronounced in the open court on 12/01/2024.

-Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated:12/01/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi