

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

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

**आयकर अपील सं. ITA No.206/Chny/2018**  
**(निर्धारण वर्ष / Assessment Year: 2010-11)**

<b>M/s. Renault Nissan Automotive India Private Limited</b> Plot No.1, SIPCOT Industrial Park, Oragadam, Mattur Post, Sriperumbudur-602 015.	<b>बनाम</b> / Vs.	<b>DCIT</b> Company Circle-V(3), Chennai.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. <b>AADCR-7965-B</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी/ <b>Respondent</b> )

अपीलार्थी की ओर से/ <b>Appellant by</b>	:	Shri N.V.Balaji (Advocate)-Ld.AR
प्रत्यर्थी की ओर से/ <b>Respondent by</b>	:	Shri V.Nandakumar (CIT) -Ld.DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	:	25-04-2024
घोषणा की तारीख/ <b>Date of Pronouncement</b>	:	03-06-2024

**आदेश / ORDER**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by assessee for Assessment Year (AY) 2010-11 arises out of the order of learned Commissioner of Income Tax (Appeals)-3, Chennai [CIT(A)] dated 19-09-2022 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143(3) of the Act on 31-03-2014. The grounds raised by the assessee read as under:

1. The order passed by the learned Commissioner of Income-tax (Appeals) ('CIT(A)') under section 250 of the Income-tax Act, 1961 ('the Act') is bad in law and on facts. The detailed grounds of appeal, including the position in the law and facts is set out in the ensuing paragraph.

**2. Disallowance relatn to date of setup - INR 46,06,59 937 and INR 8,71 14,293**

2.1 The learned CIT(A) erred in law and facts by not treating the date of setup as the date on which the previous year commences for a new business or profession.

2.2 The learned CIT(A) erred in law and facts in not considering the date of setup as the date from which all expenditures would be claimable newly setup business.

2.3 The learned CIT(A) erred in law in not appreciating the difference between the date of setup and date of commencement for determining the allowability of expense for assessee's newly setup business.

2.4 The learned CIT(A) has erred in law and facts in considering the date of commencement of commercial production as the date of set up of Powertrain / Engine Manufacturing business.

2.5 The learned CIT(A) erred in law and facts by not treating the assessee to have setup business post completion of trial run as a result of which power trains were subsequently manufactured and exported.

2.6 The learned CIT(A) has erred in law and facts by merely relying on the audit report's disclosure of date of commencement of business in order to determine the allowability of expenses instead of applying the concept of date of set up as envisaged under the Income-tax Act, 1961 and interpreted by various judicial precedents.

2.7 The learned CIT(A) has erred in facts in stating that the assessee could not produce evidence to show that the setup activity was completed on 01 October 2009 while the documents for the same were produced during the course of the hearings before the CIT(A).

2.8 The learned CIT(A) has erred in law in not considering the judicial precedents relied upon by the assessee to state that the assessee has setup business on completion of trial run and all expenses are claimable post this.

2.9 The learned CIT(A) has erred in facts in considering all expenses from 01 April 2009 to 04 February 2010 as pertaining only to Powertrain / Engine Manufacturing business while completely ignoring the fact that the assessee was also undertaking infrastructure and support services from the beginning of the financial year i.e., 01 April 2009.

2.10 The learned CIT(A) has erred in law and facts by not adjudicating the ground wherein the assessee has stated that treatment of an amount of INR 8,71,14,293 in the books of accounts i.e., capitalization of an expenditure incurred in relation to power train in books shall not influence in the treatment of the same for Income-tax purpose.

2.11 The learned CIT(A) has erred in law and facts by not adjudicating the ground wherein it was stated that the learned AO has erred in law and in fact in considering based on surmises and conjectures Production Trial Expenses of INR 6,68,46,676 as capital in nature.

2.12 The learned CIT(A) has erred in law and facts by not adjudicating the ground wherein it was stated that the learned AO has erred in law and in facts by treating the Technical Assistance fee to be capital in nature since the same pertains to installation of plant and machinery based on surmises and conjectures and thereby, disallowing the same.

2.13 It is humbly prayed that 1st October 2009 be treated as the date of Set Up and the disallowances made be deleted.

2.14 The learned CIT(A) has erred in law and facts in not considering assessee's alternate plea to feat manufacturing of power train activity as an extension of the infrastructure support service, undertaken by the assessee from 01 April 2009 thereby, consider the assessee to have been setup from 01 April 2009.

**3. Disallowance relating to depreciation- INR 67,93,84,613**

3.1 The learned CIT(A) erred in law and facts by stating that the assessee had not submitted the bills evidencing claim of additional depreciation on plant and machinery while the same was submitted during the course of the hearing before the learned CIT(A).

3.2 The learned CIT(A) has erred in law and facts in not considering the assessee's submission on / the fact that the assets purchased during the *year* have been put to use for more than 180 days and therefore, is eligible for 100% of the rate of depreciation as applicable.

3.3 The learned CIT(A) in law and facts in not considering that certain assets purchased during the *year* pertain to the infrastructure support services carried on by the assessee from 01 April 2009 and is therefore *eligible* for 100% of the rate of depreciation as applicable.

3.4 It is humbly submitted that the depreciation disallowed be deleted and returned depreciation, including additional depreciation amount be permitted.

**4. Disallowance under section 43B INR 2,77,83,000**

4.1 The learned CIT(A) has erred in law and facts in treating the payment as bonus while the same is only a payment made by the assessee to its employees being in the nature of variable pay forming part of the CTC of the employee.

4.2 The learned CIT(A) has erred in law and facts by merely relying on the disclosure of the amount in the tax audit report and not appreciating the substance of the amount paid by the assessee,

4.3 The learned CIT(A) has erred in not appreciating the fact that the assessee being loss making company cannot make bonus payments and that the payment is only a variable *pay* forming part of the CTC of the employee.

4.3 It is humbly submitted that the disallowance be deleted and claim be permitted.

**5. Additions on account of short term capital gains INR 1,11,31,343**

5.1 The learned CIT(A) has erred in law by not considering FIFO method adopted by the assessee to determine the gains arising out of the sale of investments for Income-tax.

5.2 The learned CIT(A) has erred in law and facts by taxing the differential amount between the gain recorded in the books of accounts to and that offered to tax under the Income-tax.

5.3 It is humbly submitted that the addition be deleted.

As is evident, four issues fall for our consideration viz. (i) Disallowance of expenditure incurred during set-up of business; (ii) Depreciation Disallowance; (iii) Disallowance u/s 43B; (iv) Addition on account of Short-Term Capital Gains.

2. The Ld. AR advanced arguments and placed on record issue-wise chart. Reliance has been placed on various judicial decisions. The Ld. CIT-DR, on the other hand, supported the findings given by lower authorities. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The assessee being resident corporate assessee is stated to be engaged in manufacturing of powertrains. It has started providing infrastructure services to its group companies w.e.f. 01-04-2009. The assessee company was incorporated

on 25-09-2007. During this year, the assessee completed set up of activity of powertrain plant and commenced commercial production on 05-02-2010. The assessee earned service income of Rs.32.09 Crores from its group entity.

### **3. Disallowance relating to set-up of business**

3.1 In the computation of income, the assessee deducted amount of Rs.871.14 Lacs which were termed as 'Powertrain expenses prior to capitalization. The assessee stated that it carried out trial run during September, 2009 and commenced commercial production on 05-02-2010. The Ld. AO opined that the business could be said to have commenced only from the day from which the assessee begins commercial production. Therefore, the expenses incurred up to the date of commercial production were to be disallowed.

3.2 The assessee bolstered its claim by submitting that set-up date for manufacturing segment was taken as 01-10-2009 though commercial production started later on. The assessee commenced trial run in September, 2009. The first engine was produced on 14-09-2009. The powertrain produced products which were exported to Japan. While the expenses of powertrain pertaining to period post set-up and up to the date of commencement of commercial production were capitalized in the books of accounts, the same was treated as tax deductible expenses in accordance with various judicial pronouncements. The depreciation was also claimed on reduced amount. However, Ld. AO rejected the submissions of the assessee, inter-alia, by observing that the assessee imported certain trial parts, assembled them and exported one of few of them for testing purposes. The same do not amount to commencement of production. The transaction did not have any commercial value and

the assessee himself termed the same as trial production only. Therefore, the business had not commenced. In such a case, the expenses incurred up to the date of commercial production were to be capitalized and the same could not be termed as revenue in nature since not incurred for the purpose of running the business. The Ld. AO noted that the total expenses debited to Profit & Loss Account were Rs.165.03 Crores out of which expenses of Rs.46.06 Crores were incurred from 01-04-2009 to 04-02-2010. Therefore, the expenses of Rs.46.06 Crores were disallowed and loss was reduced to that extent. The Ld. AO also disallowed expenses capitalized in the books but claimed in the computation of income for Rs.871.14 Lacs and reduced loss of the assessee to that extent.

3.3 The assessee debited production trial expenses of Rs.668.46 Lacs and Technical assistance fees of Rs.503.56 Lacs. The Ld. AO held that the same were capital in nature. Since entire expenditure of Rs.46.06 Crores pertaining to powertrain business was already disallowed, no separate disallowance was made for the same.

3.4 During appellate proceedings, the assessee reiterated that one round of trial run production of power train was completed on 25-09-2009 and accordingly, date of setup of business was adopted as 01-10-2009 since machinery installed by the assessee was put to use. The relevant date for claiming of expenditure would be date of setup of business. Reliance was placed on various judicial decisions to support the same and the case laws being cited by Ld. AO were distinguished on facts. The cases being relied on by the assessee include the decisions of Chennai Tribunal in Orient Cosmetics Ltd. (74 ITR 135) and the decision in Madras Fertilizers Ltd. (209 ITR 174). Another submission was that

the assessee started rendering infrastructure support service from 01-04-2009 itself and therefore, all expenses incurred in relation to these services as incurred throughout the year were to be allowed. The same were wrongly disallowed.

3.5 The Ld. CIT(A) rejected the arguments of the assessee except the alternative argument that the depreciation was to be allowed on such expenditure. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication on this ground

4. The undisputed fact that emerges is that the assessee has started rendering support services to group entities w.e.f. 01-04-2009. So far as the expenditure incurred in respect of this segment is concerned, there should be no dispute as to the allowability of the same. The expenditure incurred, at whatever point of time during the year, under this segment should have been allowed to the assessee. It appears that the expenditure of Rs.46.06 Crores as incurred by the assessee from 01-04-2009 to 04-02-2010 was revenue in nature and the same was claimed in the Profit & Loss Account as such. All these expenses were with respect to assessee's existing business of rendering of services and therefore, the same could not have been disallowed by Ld. AO. The Ld. AO is directed to verify the same and if the expenses relate to service segment, allow the impugned expenditure to the assessee.

Similarly, there should be no dispute on the expenses incurred after 04-02-2010 since whatever expenditure incurred under any of the two segments would be allowable provided the same was revenue in nature. It is the conclusion of Ld. AO that the business was setup on 05-02-2010. Therefore, Ld. AO is directed to verify and allow the expenditure, under both the segments, post 05-02-2010.

So far as the expenditure of Rs.871.14 Lacs is concerned, the same pertain to powertrain business which has been capitalized in the books of accounts but claimed separately as revenue expenditure in the computation of income. This would be the prime dispute in the appeal.

5. We are of the considered opinion that there is difference between setup of business and commencement of business. Once the business is setup though the same has not actually commenced by generation of revenue, the expenditure incurred after setup of the business would be allowable to the assessee. The term 'previous year' as defined in Section 3 of the Act would mean the financial year immediately preceding the assessment year. However, in the case of newly set-up business, the previous year shall be the period beginning with the date of setting-up of the business. Accordingly, till the time the business is set-up, all the expenses, even if revenue in nature, would have to be capitalized which is the stand of lower authorities in the present case. As a natural corollary, if the business is set-up, the expenditure would be allowable notwithstanding the fact that no business income was earned by the assessee during the year.

6. As per the decision of Hon'ble Bombay High Court in the case of **Western India Vegetable Products v. CIT 26 ITR 151 (Bom.)**, what is to be considered is the set-up of the business and not the commencement of business. Quite clearly, the two-term 'setting-up' and 'commencement of business' carries different connotations. What is to be seen is whether the business is set-up or not whereas actual commencement of business may or may not happen. Once the business is held to be set-up, the deduction of business expenditure would be available to the assessee. When a business is established and is ready

to commence business then it could be said that the business has been set-up. There may be an interval or time gap between the setting-up of the business and the commencement of the business but still all the expenses incurred during that interval would be permissible deductions. The term 'setting up', as per Oxford English Dictionary would mean 'to place on foot' or "to establish" which is in contradistinction to the term 'commence'. The distinction is this that when a business is established and is ready to commence business then it can be said that the business had been set-up. There may be in interregnum or time interval between the setting-up of the business but all expenses incurred during interregnum would be permissible deductions. The relevant observations of Hon'ble Bombay High Court in **Western India Vegetable Products Ltd. (supra)** were as under: -

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 this 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).

On the basis of the above decision, it could be said that when a business is established and is ready to start business it can be said to have been set-up. The business must be put into such a shape that it can start functioning as a business or a manufacturing organization. In case the setting-up of business would require different activities, the assessee could be said to have set-up its business from the date when one of the categories of its business was started and it is not necessary that all the categories of its business activities must start either simultaneously or

that the last stage must start before it can be said that the business was set up. The test to be applied is as to when a businessman would regard a business as being commenced and the approach must be from a common-sense point of view.

7. Applying the aforesaid principles, we find that the assessee has already started rendering support services from 01-04-2009. The powertrain business was under setup. The assessee assembled Plant and Machinery and started trial run during September, 2009. The first engine was produced on 14-09-2009. The trial run production was exported to Japan and therefore, this fact could not be disputed. In such a case, the powertrain business could be said to have been setup during September, 2009 itself and the assessee's approach to adopt the date of commencement as 01-10-2009 could not be faulted with. It could be concluded that though actual production started much later on, the business had already been set-up and the assessee undertook all preliminary steps to commence the business. The gestation period, in the kind of business in which the assessee was engaged, would generally be long and it is quite natural that it would take substantial time to start the actual business operations and generate business income. Quite clearly, without testing trial run production, the assessee could have never been able to commence its business. We are of the considered opinion that the generation of actual business income was not an essential element to allow the business expenditure. What was required to be seen was whether the business had been set-up or not. In view of these observations, we would hold that the assessee was correct in adopting setup date as 01-10-2009 and therefore, the revenue expenditure claimed under powertrain segment post 01-10-2009 would

be allowable to the assessee subject to the verification of the fact that in subsequent years, the assessee has neither claimed the same as revenue expenditure nor claimed depreciation on the same. The Ld. AO would verify necessary computations accordingly. The assessee is directed to furnish requisite details. The corresponding grounds stands allowed for statistical purposes.

## **8. Depreciation Disallowance**

8.1 The assessee claimed depreciation of Rs.40.68 Crores for full year though it started commercial production only from 05-02-2010. Accordingly, Ld. AO proceeded to disallow a portion of the same. The assessee submitted that depreciation was claimed on the basis of assets put to use. Rejecting the same, Ld. AO worked out excess depreciation of Rs.949.58 Lacs. The Ld. AO also disallowed additional depreciation on Plant & machinery for Rs.5844.25 Lacs for want of bills / other details etc. The aggregate depreciation thus disallowed by Ld. AO aggregated to Rs.67.93 Crores.

8.2 During appellate proceedings, the assessee sought time to furnish requisite bills / vouchers. The Ld. CIT(A) confirmed the disallowance since the assessee failed to do so. Aggrieved, the assessee is in further appeal before us.

8.3 Since we have already concurred with the stand of the assessee that the date of setup of business was to be considered as 01-10-2009, the depreciation claimed by the assessee would be allowable on the basis of assets put to use. The additional depreciation has been denied for want of documentary evidences. Therefore, this issue stands restored back to Ld. AO for fresh consideration by accepting date of setup of business as 01-10-2009. The assessee is directed to furnish the

requisite workings and details etc. The corresponding grounds stand allowed for statistical purposes.

### **9. Disallowance u/s 43B**

9.1 As per reporting made by Tax Auditor, it was noted by Ld. AO that certain bonus of Rs.277.83 Lacs remained unpaid as on 31-03-2010. The assessee submitted that the same was variable pay and part of CTC of employees. However, rejecting the same, Ld. AO disallowed the same invoking the provisions of Sec.43B.

9.2 During appellate proceedings, the assessee submitted that the subject payment was in the nature of variable pay calculated as a percentage of fixed pay as part of total remuneration of the employees and dependent on the performance of an individual and not based on the profits of the company. It was also submitted that since the assessee was incurring losses, the subject payment could not be treated as bonus u/s 36(1)(ii). However, the Ld. CIT(A) confirmed the same against which the assessee is in further appeal before us.

9.3 We are of the considered opinion that 36(1)(ii) refers to any sum paid to an employee as bonus for services or commissions for services rendered where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission. The simple test, as per settled legal principle is that had the bonus or commission not been paid, it would have added to the profits or dividend of the company. Thus, the deduction is permissible if the sum paid is bonus or commission for services rendered. In the present case, bonus is payable to employees who have rendered services to the assessee and the same form part of CTC of employees. Therefore, impugned

disallowance, in our considered opinion, is not sustainable. The impugned disallowance, therefore, stand deleted.

**10. Addition on account of Short term Capital Gains.**

10.1 The assessee earned profit of Rs.706.21 Lacs on sale of investments. The assessee offered the same as income from other sources instead of under the head capital gains. It was noted that the assessee offered income of Rs.594.90 Lacs only. Accordingly, the differential of Rs.111.31 Lacs was brought to tax as short term capital gains. The assessee submitted that the surplus arose out of mutual funds and the computation was made on FIFO basis. The gains in the books were computed on weighted average cost method. It was also submitted that mutual funds were in dematerialized form and in such a case, the distinct trail linking every unit to a certificate and its unique distinctive number linking it to subsequent sale would not be available. The same was stated to be in accordance with CBDT Circular No.704 dated 28-04-1995. However, Ld. CIT(A) rejected the arguments of the assessee and upheld the addition.

10.2 We find that the gains on sale of mutual funds have been offered to tax by the assessee under 'income from other sources' and therefore, the assessee is precluded to take benefit of cited circular of CBDT. The assessee, in books of accounts, has followed particular methodology to compute the gains. In our opinion, the same gains should have been offered by the assessee to tax. Therefore, we see no reason to interfere in the impugned order, on this issue. The corresponding grounds stand dismissed.

**Conclusion**

11. The appeal stand partly allowed.

*Order pronounced on 3<sup>rd</sup> June, 2024*

**Sd/-**  
**(MAHAVIR SINGH)**  
उपाध्यक्ष / **VICE PRESIDENT**

**Sd/-**  
**(MANOJ KUMAR AGGARWAL)**  
लेखासदस्य / **ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated :03-06-2024  
DS

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्डफाईल/GF