

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI**

**BEFORE SHRI AMIT SHUKLA (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)**

I.T.A. No.2490/Mum/2015
(Assessment Year: 2011-12)

Dy.CIT-3(3)(1), Mumbai	vs	M/s Shapoorji Pallonji Roads Pvt Ltd, 41/44, S.P. Centre Minoo Desai Marg, Mumbai- 400 005
		PAN : AAOCS2457E
(Appellant)		(Respondent)

Appellant by	Shri Omi Wingshen
Respondent by	Shri Mandar Pandandikar

Date of hearing : 16-01-2017
Date of order : 07-02-2017

ORDER

Per ASHWANI TANEJA, AM:

This appeal has been filed by the Revenue against the order of Ld.CIT(A) dated 19-01-2015 passed against the assessment order dated 21-02-2014 u/s 143(3) for AY. 2011-12 on the following grounds:-

"1. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to allow the loss of Rs. 1,05,74,947/ without appreciating the fact that these losses were nothing but arising on account of substantial expenses debited to its Profit and Loss account by the assessee, which were incurred before the commencement of its business."

"Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to allow the loss of Rs. 1,05,74,947/ without appreciating the fact that the expenditures incurred were 'enduring' in nature, which would result into future benefits and treated as 'Preoperative Expenses', and cannot be allowed as Revenue expenditure."

2. The solitary issue raised in this appeal by the Revenue is that the Ld. CIT(A) has erred in deleting the disallowance made by the AO on account of expenses claimed in the P & L Account by treating them as pre-operative expenses on the ground that no revenue has been earned by the assessee during the year.

3. The brief background and facts of the case as culled out from the order of the lower authorities are that during the year under consideration assessee company was engaged in the business of development of infrastructure projects in the field of ports, power and underground mining buildings and developers. It was noted by the AO that assessee had claimed loss of Rs.1,05,94,947 on account of expenses claimed in the P & L Account such as legal and professional fees, professional expenses and similar expenses incurred during the course of business. It was noted by the AO that no income has been earned during the year. Therefore, these expenses should be treated as preoperative in nature and accordingly, he disallowed the entire expenses. During the course of appeal before Ld. CIT(A), exhaustive submissions were made. Relevant portion of the submissions made before Ld. CIT(A) is reproduced below:-

"2.1 The Appellant was incorporated on 30 April 2010. To secure any work in the case of infrastructure projects, bids are required to be submitted. A lot of inputs, both technical and professional, go into the preparation of bid documents. During the year the Appellant had employed personnel and paid salaries to them. It had also incurred tender bidding fees, legal and professional charges, certification charges travelling expenses, etc. It had purchased computers and had claimed depreciation in respect thereof. The

incurring of all these expenses was clearly indicative of the fact that the Appellant had commenced its operations. The fact that no revenue was generated could not be a case for disallowing the expenditure. Further the expenditure related to bids whose outcomes were awaited as at the year end were carried forward as Loans and Advances i.e. they were not debited to the Profit and Loss Account. The Assessing Officer failed to appreciate this fact.

2.2 Thus, there was no question of the expenses being pre-operative in nature. To the extent the expenses related to the bids whose outcomes were awaited as at the year end, the Appellant itself carried forward those amounts as Loans and Advances and did not claim them as expenditure in the Profit and Loss Account.”

The assessee relied upon the following judgements in support of its contention:-

1. Western India Vegetable Products Ltd vs CIT 26 ITR 151 (Bom)
2. CIT vs Sarabhai Management Corporation Ltd 192 ITR 151(SC)
3. Western India Seafood Pvt Ltd (1993) 199 ITR 777 (Guj)

It was further submitted that all the above mentioned cases law down that for being entitled to claim expenses, it is not necessary that business should have commenced. It is sufficient if the business has been set up. The assessee's business was not only set up during Assessment Year 2011-12, it had also commenced during the said year.

4. Thus, the main thrust of the assessee was that business of the assessee was set up and expenses were allowable after setting up of the business even if the business had not actually commenced during the year. Ld. CIT(A) considered the submissions of the assessee and agreed with the same and therefore deleted the disallowance made by the assessee by observing as under:-

“5. I find from the Annual Report of the appellant-company for

2010-11 that "the company (SP Juhi) was incorporated on 25th June, 2010 as a Special Purpose Vehicle to undertake design, engineering, construction, development, finance, operation and maintenance of 4 laning the existing 2 lane section from km. 15.00 (on Jammu Bypass) to km. 67.00 (Udhampur) on NH-1A in the state of Jammu and Kashmir on Build Operate Transfer Annuity basis. SP Juhi has entered into a Concession Agreement with National Highways Authority of India (NHAI), Delhi on 19th July, 2010. The total cost of the said Road Project being implemented by SP Juhi is estimated to be Rs. 2400 Crores."

The appellant-company was incorporated on 30.04.2010. It is wholly owned subsidiary of Shapoorji Pallonji Infrastructure Capital Company Ltd. since incorporation. To secure any work in the case of infrastructure projects, bids are required to be submitted. During the year under consideration, the appellant company had employed personnel and paid salaries to them. It had also incurred tender bidding fees, legal and professional charges, certification charges, travelling expenses, etc. It had purchased computers and claimed depreciation in respect thereof. It is also found that to the extent the expenses related to the bids whose outcomes were awaited at the year end, the appellant itself carried forward those amounts as loans and advances and did not claim them as expenditure in its profit and loss account.

In the case of *Western India Vegetable Products Ltd. vs. CIT (1954) 26 ITR 151*, the Hon'ble Bombay High Court held that when the business was established and was ready to commence business, the business has to be taken as set up and expenses have to be allowed. The relevant extract from the judgment is reproduced below.

"Therefore it is only after the business is set up that the previous year of that business commences and in that previous year the expenses incurred in the business can be claimed as permissible deductions. Any expenses incurred prior to the

setting up of a business would obviously not be permissible deductions because those expenses would be incurred at a point of time when the previous year of the business would not have commenced. We must therefore look at the decision of the Tribunal as really referring to the setting up of the business in the language of Section 2(11) and not expenses connected with the commencement of the business."

The wording in section 2(11) of the old Income Tax Act was similar to the wording in section 3 of the Income Tax Act, 1961. The decision of the Hon'ble Supreme Court in the case of CIT vs. Sarabhai Management Corporation Ltd. (1991) 192 ITR 151 also supports the appellant's stand.

"The main object of assessee was to acquire immovable property and to give it out either on leave and licence basis or on lease. The income-tax authorities and the Appellate Tribunal held that the respondent could not be said to have been ready to commence business prior to May 1, 1965, the date on which it gave on leave and licence basis a part of the building. The Court held as under.

Even if.....the first category of activity referred to by the High Court, viz., the acquisition of a property for being let out can be said to be only a preparatory state (analogous to the acquisition of buildings, plant and machinery in a manufacturing business), the subsequent activities certainly constitute activities in the course of the carrying on of the assessee's business. It would not be correct, as rightly pointed out by the High Court, to treat the assessee as having commenced its business only when the licensee or lessee occupied the premises or started paying rent."

In view of the above, the AO is directed to allow the loss of Rs. 1,05,74,947/- claimed by the appellant."

6. During the course of hearing before us, the Ld. DR relied upon the order of the AO whereas the authorized representative of the assessee relied upon the order of the Ld. CIT(A).

7. We have gone through the orders passed by the lower authorities as well as submissions made before us by both the sides and also judgments relied upon by Ld. CIT(A) while deciding this issue. It is noted that the AO has himself recorded at para 4 of the assessment order that the assessee company was engaged in the business, by observing as under:-

“4. The assessee company is engaged in the business of development of infrastructure Projects in the field of Roads, Ports & Underground mining buildings and developers. After considering the submission of the assessee, the assessment is completed as under:-“

Thus, once, the AO has himself noted this fact that assessee was engaged in the business, then, while deciding the issue of allowability of expenses, he was not expected to record a contradictory finding by treating the expenses claimed by the assessee as preoperative in nature, that too, without giving any reasoning in this regard. Thus, the action of the AO is not sustainable *per se*.

8. In addition to that, we have also examined this issue from legal perspective in the light of the facts of this case. As per our understanding, the expenses are allowable from the date of setting up of the business as would be clear from the perusal of section 3 of the Income-tax Act which defines the term “previous year” as under:-

“3. For the purposes of this Act, “previous year” means the financial year immediately preceding the assessment year:

*Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, **the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source***

of income newly comes into existence and ending with the said financial year.”

9. It would be clear from the reading of the above section that in the case of new business, the previous year commences with the beginning with the date of setting up of the business or profession. Thus, the natural corollary to this would be that expenses incurred in the normal course of business shall be allowable immediately after the date of setting up of the business even if the business is not yet actually commenced and no revenue or income has yet been earned by the assessee. This issue has been clarified on many occasions by many Courts as have been reproduced by the Ld. CIT(A) including the judgment of Hon’ble **Bombay High Court in the case of Western India Vegetable Products Ltd** (supra) as well as judgment of **Hon’ble Supreme Court** in the case of **Sarabhai Management Corporation Ltd (supra)**.

10. In the light of aforesaid legal position, we have gone through the facts of the case brought before us. It is noted from the perusal of the Balance Sheet of the assessee company that in Schedule IX of the Balance Sheet, Significant Accounting Policies and note No.(j) forming part of the accounts have been given. Note No.(j) to the Notes of Account clearly states that the company incurred expenses in connection with bidding projects for various projects. Pending outcome of bidding results, the expenses in relation to such projects were carried forward and were debited as part of **‘advances in connection with projects- bids submitted but not closed out at the year-end’** and thus not claimed in the P & L Account. Thus, these expenses have not been claimed by the assessee itself. In support of this claim, our attention was drawn upon a work-sheet showing that total expenses incurred during the year were to the tune of

Rs. 1,69,27,956/- out of which an aggregate amount Rs 1,20,14,972/- (comprising of various expenses) has been debited to P & L A/c, whereas balance amount of Rs. 49,12,984/- has been debited to the head **‘advances in connection with projects- bids submitted but not closed out at the year-end’**. Thus, in simple words, only those expenses which relate to the year under consideration were debited in the P & L A/c of the year.

11. Further, perusal of the P & L Account reveals that expenses debited in the P & L account are routine expenses incurred during the course of business, for example, salary and wages, staff welfare, interest, legal & professional fee, travelling expenses, development fee and business development, etc. It is not the case of the AO that any of these expenses is of the capital nature. Apparently, all these expenses appear to be revenue expenses. Thus, overall facts of this case indicate that during the year the assessee had come up in a position to cater to its customers if the contracts were awarded to it. Under these circumstances, we find that the Ld. CIT(A) had rightly held that business of the assessee had duly been set up and, therefore, in view of the legal position discussed above, the expenses incurred after the setting up of business are business expenses of the year. Thus, the decision arrived at by the Ld. CIT(A) is based upon the findings which are in accordance with law and facts of this case. Therefore, no interference is called for therein.

12. As a result, appeal filed by the Revenue is hereby dismissed.

Order was pronounced in the open court at the conclusion of hearing.

Sd/-

Sd/-

(AMIT SHUKLA)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 7th February, 2017

Copy to :

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, H-Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES