

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 22.02.2017

PRONOUNCED ON: 27.04.2017

CORAM

THE HONOURABLE MR. JUSTICE HULUVADI G.RAMESH

THE HON'BLE DR.JUSTICE ANITA SUMANTH

T.C. (Appeal) No.668 of 2016

& CMP NO.19083, 19084 of 2016

M/s.Ascendas IT Park Chennai Limited,
NO.7 and 8, 1st Floor,
International Tech Park,
Pinnacle Building, Taramani Road,
Taramani, Chennai-600 113. ... Appellant/Appellant

Versus

The Deputy Commissioner
of Income Tax,
Corporate Circle 1(1),
Chennai-600 034. ... Respondent/Respondent

Appeal under section 260A of the Income Tax Act, 1961 against the order passed by the Income Tax Appellate Tribunal, Chennai 'C' Bench in ITA. No.1256/MDS/2015 dated 04.05.2016 against the order of Commissioner of Income Tax (Appeals)-1, 121, Mahatma Gandhi Road, Nungambakkam, Chennai-34, made in ITA.No.298/08-09/A-1, (New No.IT.A35/CIT(A)-1/2008-09) dated 30.1.2015 for the Assessment year-2005-06 against the order of Deputy Commissioner of Income Tax, Company Circle 1(1) Chennai made in PA/GIR No.AAE CA7979D/AX6-587 dated 12.12.2008 for the Assessment year 2005-2006 for the Assessment year 2005-2006

For Appellant : Mr.N.V.Balaji

For Respondent : Mr.T.Ravi Kumar

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

This Tax Case (Appeal) is filed by the Assessee challenging an order of the Income Tax Appellate Tribunal dated 04.05.2016 in respect of Assessment Year 2004-05.. The following substantial questions of law have been raised for our consideration:

'1. Whether on the facts and circumstances of the case, the Tribunal is right in not appreciating the difference between 'date of set-up of business' as mentioned in Section 3 of the Act for claim of expenditure and 'date of commencement of business' as considered by the Hon'ble Tribunal for denial of claim made by the Company?

2. Whether the Tribunal is right in law in not appreciating the fact that the business can be considered to be set up when the primary activity i.e. acquisition of land takes place and the subsequent business expenditure incurred from thereon is to be allowed as revenue expenditure?

3. Whether on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in holding that interest income earned could not be set off against the business expenditure incurred by the Appellant under the Act?"

2. The matter was listed for admission and notice issued to Sri T.Ravikumar to make his submissions on behalf of the Revenue.

3. By consent of the parties, the matter is taken up for final disposal at the stage of admission. The Appellant is a Company that was incorporated on 3rd November 2012 with several objects inter alia marketing, consultancy, developing, managing and maintaining information technology parks, industrial parks and other projects. The first return of income was filed in terms of the provisions of the Income Tax Act 1961 (in short 'Act') for financial year 2003-04 relevant to assessment year 2004-05 on 25.10.2004 returning business loss of an amount of Rs.5,09,914/-. The return was accepted and intimation under Section 143(1) of the Act issued. The intimation has not been disturbed thereafter and has attained finality as of now. The position that the appellant claimed to have commenced business in the financial year 2003-04 relevant to assessment year 2004-05 was thus within the domain of knowledge of the department. A return of income was filed in respect of assessment year 2005-06 on 29.10.2005 also claiming a loss from business.

4. A notice under Section 148 of the Act was issued on 06.09.2007 and the 'reasons recorded' in terms of Section 148 (2) of the Act duly supplied to the assessee. The basis of the re-assessment was the view of the Assessing Officer that expenditure claimed under the head 'business' ought to be disallowed and capitalised insofar as the same related to a period prior to the commencement of business.

5. He took support of the judgment of the Supreme Court in Tuticorin Alkalis and Fertilisers Ltd. vs. Commissioner of

have objected to the assumption of jurisdiction by the Assessing Officer and participated in the process of re-assessment. Objections were raised on the merits of the disallowance alone. Accordingly, an order of re-assessment came to be made on 12.12.2008 u/s.143 (3) r.w. Section 147 of the Act in line with the proposal to disallow interest on the ground that the appellant had not commenced business. The interest from bank deposits were thus brought to tax under the head 'other sources'.

6. An Appeal was filed before the Commissioner of Income Tax (Appeals) ('CIT(A)' in short) challenging the order of assessment on merits and pointing out that business activity had already commenced and hence the assessment of interest income under the head 'other sources' was incorrect in law. Significantly, the assumption of jurisdiction under Section 147 was not questioned even at this stage. The appeal was dismissed. A further appeal before the Income Tax Appellate Tribunal met with the same fate with the Tribunal upholding the orders of assessment and first appeal and confirming the position that the Assessee had not set up/commenced business.

7. At the stage of admission, the appellant sought to raise additional grounds challenging jurisdiction assumed under section 147 by way of revised substantial questions of law along with supporting grounds. The additional questions sought to be raised are as follows:

1. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the Appellant has not set up or commenced the business and accordingly expenditure incurred are not allowable as business expenditure?

2. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in upholding the order of the Commissioner of Income Tax (Appeals) denying the set off of the loss of the appellant in its business against the interest income, as claimed by the appellant?

3. Whether based on material available before it the Tribunal could have come to the conclusion that the appellant did not set up the business?

4. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the business loss cannot be allowed to be set off against the interest income, since the appellant has not commenced business, while the requirement for computation of business income is only on the profits after the set up of the business?

5. Whether under the facts and circumstances of the case, the reopening of the assessment and the

consequential assessment made under Section 147 by the assessing officer is valid?

8. While questions 1 to 4 addressed issues raised in the original three substantial questions, question No.5 seeks to introduce the issue of re-assessment for the first time before us.

9. A counter has been filed by the Revenue objecting to the additional grounds and substantial questions of law now sought to be raised on the basis that it was wholly belated and an afterthought.

10. Various decisions have been relied upon by both learned counsel in support of their respective stands.

11. The main contention of the appellant is to the effect that the question of jurisdiction goes to the root of the matter and being a legal issue, can be raised at any time in the proceedings. Mr. Balaji, learned counsel appearing for the appellant assessee, would rely on the judgments of the Supreme Court in the case of Jute Corporation of India vs. CIT (1991) 187 ITR 688 (SC) and National Thermal Power Company Ltd. vs. CIT (1998) 229 ITR 383 (SC) to the effect that a legal issue could be raised at any stage in the proceedings, particularly, since it did not involve the production of any new material or evidence in support thereof.

12. Per contra, Mr. Ravikumar would point out that virtually no reason had been given by the appellant justifying the non-raising of the issue relating to re-assessment either at the time of assessment or in two earlier stages of appeal, except to plead inadvertence. The petition praying for admission of additional grounds does not set out any reasons as to why such an issue was not raised earlier. He would thus urge that having not questioned the assumption of jurisdiction earlier, the appellant should not be permitted to do so at this stage, particularly in the absence of any justification for the delay in doing so. In addition, he would argue that the issue of re-assessment does not arise from the order of the Tribunal impugned under Section 260A and the appellant was thus not an 'aggrieved person' in regard to the issue of re-assessment.

13. We have heard the matter at length and perused the material as well as case law placed for our consideration.

14. The question of assumption of jurisdiction is, without doubt, a substantial question of law. However, if one were to note the sequence of events that have transpired in the present case, it is more than apparent that the Assessee never intended to question the assumption of jurisdiction under Section 147 at any stage from the time of assessment or even thereafter. It is only at the stage of admission of the Tax Case (Appeal) that the issue was raised, even then, as an

additional issue. When, from December 2008 the Assessee has accepted and was quite content with the jurisdiction assumed under Section 147, we do not think it fit to permit the Assessee to raise the question now, merely for the asking.

15. The provisions of Section 260 A read with the proviso thereto, no doubt empower the Court to consider any question, even one not raised before it, upon the Court recording its satisfaction that the case 'involves' such an issue. The use of the word 'involves' does not in our view extend to all and every legal issue arising in a case, but only those that the assessee demonstrates, has been contested by it at a stage proximate to the raising of the said issue by the department. Acceptance of jurisdiction without demur at every single stage of the proceeding, assessment and appeals, has to be taken to be final and inviolable.

16. In the facts and circumstances as we have noticed above, we reject the prayer of the appellant to contest the issue of re-opening under Section 147 of the Act raised before us by way of revised substantial question of law.

17. On merits, the sole issue to be decided is whether the appellant has commenced business in financial year 2003-04. The Directors Report annexed with the return of income for August 2004-05 states thus with respect to the activities of the assessee for the period 01.04.2003 - 31.03.2004:

The Company was incorporated on 3rd November 2003 and obtained its commencement of business certificate on 13th January 2004. The company has made an advance toward transfer of land from the other Joint Venture partner M/s.Tamil Nadu Industrial Development Corporation Limited (TIDCO). The Company has awarded Design and Build contract worth INR 86.5 crores to M/s.Tiong Seng Contractors Private Limited, Chennai which is a wholly owned subsidiary of M/s.Tiong Seng Contractors Pte. Ltd.Singapore. M/s.KPK Quantity Surveyors (India) Pvt. Limited, Chennai has been appointed as Quantity Surveyours for the proposed phase 1 development of IT Park at Chennai at the fee of 0.90% of construction cost (excluding service tax & others reimbursable expense). M/s.Ascendas (India) Private Limited has been awarded the Project Management Services Contract for the proposed phase 1 development of IT park at Chennai at the fee of 2% of the project construction cost (excluding) service tax & other reimbursable expenses incurred in connection with this project.

18. The stand of the appellant in the return of income for assessment 2004-05 was that it had commenced business operations and the interest income had been set off against loss from business operations. Form No.1, the return of income reveals an amount of Rs.5,09,914/- as income from business in

the computation of total income. The balance sheet and profit and loss account annexed to the return of income reveals an amount of Rs.31,21,113/- incurred towards operating and administrative expenses. This return has attained finality and has not been re-opened by the Income Tax Department. In fact, at the time of issue of notice under Section 148 in respect of Assessment year 2005-06, on 06.09.2007, the limitation for issue of notice under Section 148 in respect of assessment 2004-05 was still available, being 31.03.2009. The return, indicating the stand of the assessee duly supported by the Directors Report and financials were very much on record, in spite of which the department, for reasons best known to it, chose to allow the same to lie undisturbed. This cannot be looked at as mere inadvertence or over-sight. The assessee has been assessed in the same charge for assessment years 2004-05 and 2005-06 and the issue of intimation under section 143(1) is by the same officer. The Directors Report and the financials in respect of assessment year 2005-06 reveal that the following activities were carried out by the company for the period 01.04.2004-31.03.2005.

Performance of the Company

The Board of AITPCL had, in March 2004, approved the development of phase 1 of the project amounting to 525,000 sq.ft. of Hi-TEch & IT office space. The construction commenced in April 2004 and is slated to be completed for occupation by June 2005. The completion is delayed by about 6 weeks due to cash flow problems faced by the contractor, Tiong Seng Contractors Private Limited. They are expected to complete the project by end June. The quality of construction has been good. The management of IT Park Chennai anticipates that by April 2005, about 150,000 sq.ft. Will be committed and by June atleast 70% to 80% of the building will be leased out.

19. The activities engaged in by the appellant from the 1st of April 2003 till 31st of March 2005 would thus be as follows:

** An advance made towards transfer of land from Tamil Nadu Industrial Development Corporation (TIDCO).

** A contract for designing and building the infrastructure entered into with SION Contractors Private Singapore Limited, Chennai entered into for an amount of Rs.86.5 crores.

** KP Quantity Surveyors India Private Limited, Chennai appointed as Quantity Surveyors for phase 1 of the development of the IT Park at an agreed fee of 90% of the construction cost.

** Award of contract to Indian Private Limited for project management services as part of the development of IT Park at a fee of Rs.2 of the project construction cost.

** Phase 1 of development of the IT Park approved by the Board for construction of 5,20,000 sq.ft. of space.

** Commencement of construction of infrastructure in April 2004 with the projected completion date as June 2005.

** Proposal to lease 1,50,000 sq.ft. by April 2005 and achieve 70-80% lease capacity by June 2005.

20. The question posed, as to whether the Assessee can be said to have 'commenced business' in assessment year 2004-05 has to be seen in the context of the activities enumerated above as well as the provisions of Section 3 and the proviso thereto extracted below:-

'Previous year defined

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. '

21. The Income Tax Act does not define 'set up' of business and thus one would have to construe the date of 'setting up' of the business or the date on which the 'source of income newly comes into existence', as being the initial stage in the chain of events leading to full-fledged business operations. If one were to examine the nature of activities engaged in Financial Year 2003-04 and 2004-05, it seems apparent that the project was at an advanced stage.

22. Useful reference can be made to section 35D(1) of the Act that deals with the amortisation of preliminary expenses. The term 'preliminary expenses' as used in section 35-D and seen in the context of the phrase 'commencement of business', used therein, refers to expenditure incurred prior to such commencement. The term 'preliminary expenses' has been explained in section 35D(2) to mean such expenditure incurred in the preparation of feasibility report, project report, conduct of market survey, engineering services, legal charges for drafting of agreements or drafting of memorandum of articles of association and printing of the same, fees paid to the Registrar of Companies for issue of shares or debentures and other prescribed items of expenditure. Thus, preliminary

expenditure constitutes those expenses incurred at a very nascent stage of activity. The terms 'preliminary' by itself is associated within an exploratory exercise to determine and finalize various initial parameters prior to commencement of business activities. There cannot be, in the light of the myriad forms that business assumes today, a hard and fast rule in this regard.

23. One yardstick that can be adopted is to examine whether the expenditure is solely explorative, incurred merely to set the stage for engaging in business activities or whether the expenditure itself is incurred as part of the activity of business. Business, as defined in Section 2(13) of the Act includes trade, commerce, manufacture or adventure or concern in the nature of trade, commerce or manufacture. The profit earning apparatus of the appellant has been seen to be in place in order to legitimately accept the claim that business has, in fact, commenced or has been 'set up'. The terms 'commencement of business' and 'setting up of business' are used interchangeably in the Act. So too by us, in this decision.

24. We also refer to a decision of this Court in the case of CIT vs. Club Resorts (287 ITR 552) wherein the issue related to the allowability of expenditure incurred by a company carrying on the business of promoting time shares. In that context, the Bench held as follows:

'...The time share resort business involves various stages of development. The first stage was setting up of one or more operating offices from which the sales personnel were sent to solicit customers, which the assessee had already started. The second stage was launching a massive publicity campaign, which the assessee had already been doing. In fact, it had already acquired land and started construction also, which were the subsequent changes. So, both the authorities below had given a finding that the assessee had commenced the business. For the purpose of development of the projects of construction, the assessee had to necessarily maintain regular staff members, on which it had been incurring expenses. The office expenses that had been incurred were clearly of revenue nature. Considering the reasons recorded by the Tribunal and based on the valid materials and evidences, the same does not suffer from any legal infirmity. '

25. The stage wise activities engaged in by the assessee over the relevant previous year indicates that it has traversed beyond the stage of exploratory activity and was, in fact, engaged in activity that was integral to the profit earning apparatus and we hold so.

26. Yet another aspect is that the stand of the assessee for the previous year to the effect that it had already commenced business, was accepted by the department. The fact that such acceptance was only by way of Intimation u/s 143(1) and has not been confirmed under scrutiny, is, in our view, not material for the reasons set out in para 18 of this order. The definition of 'previous year' as extracted earlier is applicable to, and leads to the inference that the assessee had in fact, commenced business in the Financial year 2003-04, Assessment year 2004-05.

27. One cannot countenance a situation where there is a consecutive 'setting-up of business' year after year, which would be the absurd consequence that the stand taken by the department in the present year will lead to.

28. Substantial questions of law 1, 2, 3 as raised in the original memorandum of appeal stand answered in favour of the assessee and against the revenue. Accordingly, this appeal is allowed. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CS)
//True Copy//
Sub Assistant Registrar

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TO

1. The Deputy Commissioner of Income Tax,
Corporate Circle 1(1), Chennai-600 034.

2. Income Tax Appellate Tribunal,
Chennai 'C' Bench, Chennai.

3.The Commissioner of Income Tax, (Appeals)-1,
121, Mahatma Gandhi Road, Nungambakkam, Chennai-34.

4. The Assistant Registrar,
Income Tax Appellate Tribunal,
IIIrd Floor, Rajaji Bhavan,
Besant Nagar, Chennai-90

T.C. (Appeal) No.668 of 2016

SKV(CO)
EU(22/09/2017)