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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2019

Judgment Reserved On
25.06.2019

Judgment Pronounced On
05.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal No.958 of 2018
and
C.M.P.No.22651 of 2018

Daimler India Commercial Vehicles (P) Ltd.,
SIPCOR Industrial Growth, Oragadam,
Mathur Post, Kancheepuram-602 105.
[PAN AABCF1590N]

.. Appellant

-vs-

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

.. Respondent

APPEAL under Section 260A of the Income-tax Act, 1961 against the order dated 31.05.2018 on the file of the Income Tax Appellate Tribunal 'A' Bench, Chennai, in I.T.A.No.563/Chny/2017 for the assessment year 2010-11 against the order dated 28.02.14 passed by the Asst.Commissioner of Income Tax, Company Circle-1 (4), Chennai for brevity,"AO") u/s.143(3) of the Income Tax Act 1961 (for brevity the Act) for the Assessment Year 2010-11 (PAN No.AABCF 1590N)

For Appellant : Mr.Ajay Vohra,
Senior Counsel
assisted by Mr.N.P.Vijaykumar

For Respondent : Ms.R.Hemalatha,
Senior Standing Counsel

JUDGMENT

T.S.SIVAGNANAM, J.

This appeal filed by the assessee under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), is



directed against the order dated 31.05.2018 passed by the Income-tax Appellate Tribunal 'A' Bench, Chennai ("the Tribunal", for brevity) in I.T.A.No.563/Chny/2017 for the assessment year 2010-11.

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2.The appeal was admitted on 21.12.2018, on the following substantial questions of law:-

"i. Whether the Tribunal erred in law in exceeding in its jurisdiction while holding that the business of the appellant was not set up, which was not even the case of the Assessing Officer/Revenue Department?

ii. Whether the Tribunal erred in law in holding that the business of the appellant was not set up despite uncontroverted material/facts available on record to establish that the appellant's business had already commenced?

iii. Whether the Tribunal erred in law in disputing set up of business of the appellant during the relevant year, which fact stands accepted/finalized in the preceding year? and

iv. Whether, on the facts and circumstances of the case, the order of the Tribunal is perverse being passed without considering the contemporaneous material available on record?"

3.The assessee filed its return of income for the assessment year under consideration (2010-11), on 29.09.2010, declaring an income of Rs.NIL. The return was processed under Section 143(1) of the Act. Upon the case being selected for scrutiny, notice under Section 143(2) of the Act was issued on 15.09.2011. The assessee through its authorised representative appeared before the Assessing Officer and filed details which were called for.

4.In this appeal, we are concerned about the disallowance of expenses as made by the Assessing Officer while completing the assessment under Section 143(3) of the Act by order dated 28.02.2014. The Assessing Officer pointed out that it is seen from the financials and other documents submitted by the assessee that they have not yet started commercial operations, that is, manufacture and sale of commercial activities and that the assessee is involved only in activities towards setting up of its facility and operation with support of its group companies.

5.It was further stated that the assessee is in the process of registering and executing lease deed in respect of land measuring 379.75 acres allotted by SIPCOT at Oragadam. After referring to the show cause notice dated 05.12.2013, the



Assessing Officer stated that the above facts will clearly show that the assessee has not commenced its commercial operations and this fact is also reflected in the order of the Transfer Pricing Officer (TPO) dated 20.11.2013. Therefore, the Assessing Officer held that since the income from the main activity has not commenced, the corresponding expenditure is not allowable. The assessee was therefore, called upon to show cause as to why the expenditure under the head "operating expenses, financial expenses and depreciation" should not be disallowed. The assessee submitted their reply dated 08.01.2014 in which, the assessee stated that they have started its R&D activities, being one of the main activities, by setting up of R&D Centre by entering into an agreement with M/s.Ricardo, UK Ltd., and M/s.Magna Powertrain-Engineering Centre Steyr GmbH & Co KG. Upon considering the reply given by the assessee, the Assessing Officer stated that R&D is one of the activities of the company, the main revenue generating activity and the purpose of entering into joint venture with Hero Group of India is to design, manufacture and sell commercial vehicles in Indian domestic Markets and such activity has not commenced so far. It is further stated that the assessee's main source of income are interest income, dividend income, gain on foreign exchange etc., and not by way of commercial activities.

6.Referring to the decision of the Delhi Bench of the Tribunal in the case of Citi Financial Consumer Finance India Ltd., vs. Department of Income Tax, I.T.A.Nos.2687, 2688 and 5191/Del/2010, dated 26.03.2010 it was stated that expenditure incurred prior to commencement of business is capital expenditure. Reference was also made to the decision of the Delhi Tribunal in the case of ITO vs. Omni Global Information Technologies India P Ltd., I.T.A.No.1380/Del/2016, dated 15.04.2019. Reference was also made to the order passed by the TPO dated 20.11.2013 stating that the assessee did not commence commercial production of manufacture and sale of commercial vehicles and on activities towards setting up of its facilities and its operations for which it received support for its group companies. It was stated that the assessee has not rebutted the said observation made by the TPO.

7.In the light of the above, the Assessing Officer disallowed the expenditure incurred by the assessee under the head "operating expenses, financial expenses and depreciation".

8.Aggrieved by such order, the assessee filed appeal before the Commissioner of Income-tax (Appeals)-1, Chennai ("the CIT (A)", for brevity) in I.T.A.No.100/14-15 (New No.I.T.A13/CIT(A)-1/2014-15). Assailing the order passed by the Assessing Officer, the assessee contended that the business was already set up considering that prior to the year under consideration



and further during the relevant year, activities in pursuance of the objects set out in the Memorandum of Association have commenced. It was stated that design and development of commercial vehicles suited to the Indian Market; Research and Development activities; Sourcing of components for sale in domestic/global market; Construction of manufacturing facility for undertaking manufacture of commercial vehicles were all commenced which will go to show that the business was already set up.

9.It was further submitted that for the aforementioned purposes, the assessee obtained design from Ricardo and Magna; engaged key personnel under its various departments as disclosed in the Director's report; entered into various agreements such as technical engineering agreements, technical services, technology licenses and foreign collaboration agreements; engaged in the activity of identifying, evaluating and nominating local component suppliers for manufacture of trucks and buses; developed prototypes in collaboration with Ricardo and Magna, which were tested extensively for the suitability for the Indian market; developed its track facility for trucks; secured lease of the premises from SIPCOT for setting up of the manufacturing unit; obtained permission from the Electricity Board and from the Regional Transport Officer for road testing activity; and obtained factory licence from the Inspectorate of Factories. Thus, the assessee contended that they had commenced to perform activities relating to the four objectives as contained in the Memorandum of Association of the assessee company. The assessee produced documents to controvert the finding of the Assessing Officer that activities relating to design and manufacture had not commenced.

10.It was further contended that the assessee had already commenced bundle of activities in consonance with the objects specified in the Memorandum of Understanding and manufacturing activity is a part of the composite business activity which was not commenced, since construction of factory building and installation of plant and machinery was under process during the year under consideration. Thus, it was the assessee's contention that although manufacturing activity per-se did not commence, the activities essential to manufacturing, comprising of development of prototype vehicle, testing all these vehicles, identification of suppliers had been undertaken in the assessment year 2009-10 itself.

11.It was further submitted that on the above basis, considering that the business of the assessee had been set up and had already commenced, they prepared profit and loss account for the relevant previous year, i.e., 01.04.2009 to 31.03.2010, relevant to the assessment year under consideration and claimed



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the following expenditure:-

(i) Operating Expenses	:	Rs.19,39,47,503/-
(ii) Financial Expenses	:	Rs. 1,46,26,492/-
(iii) Depreciation	:	Rs. 46,19,716/-

Total	:	Rs.21,31,93,711/-

12.It was stated that the aforementioned expenses related to and have been incurred wholly and exclusively for purposes of business of the assessee and such expenses have no connection with the plant under erection for which, expenses incurred have been separately capitalized under the head "capital work in progress". To support their stand, reference was made to the accounting policies forming part of audited accounts. Further, it was stated that the expenditure related to construction of manufacturing facility was capitalized as part of work in progress forming part of audited accounts and no depreciation on the same has been claimed during the year under consideration as evident from Note-4 on 'Fixed Assets' to the financial statements regarding fixed assets schedule wherein, it has been stated that depreciation amounting to Rs.3,21,58,904/- (previous year: Rs.11,497,931/-) on assets used for the construction of the asset/project has been capitalized to the "capital work in progress".

13.The assessee referred to Schedules 14 and 15 of the audited actual accounts for the year ended 31.03.2013 and also the computation of income for the assessment year 2013-14 showing claim of depreciation on the above amount of capitalization. Thus, the assessee contended that the fact that other business activities of the assessee were set up, expenses claimed by the assessee are clearly allowable as business expenditure.

14.The assessee referred to the manner in which the Assessing Officer computed loss under the head "profit and gains of business or profession" wherein the Assessing Officer taxed the assessee under certain items and reduced certain items which makes it evidently clear that the Assessing Officer has accepted the computation of income under the aforesaid head except for disallowance of operating expenses, financial expenses and depreciation debited to the profit and loss account.

15.The CIT(A) by order dated 19.12.2016, allowed the assessee's appeal. The CIT(A) noted that the assessee had two limbs of business activity; first relating to setting up of manufacturing facility for commercial and heavy vehicles; and second business relating to import and sale of readymade light and commercial vehicles. It was pointed out that in the case of



manufacturing, the assessee was engaged in designing, manufacturing and selling of light, medium and heavy duty commercial purposes and for such purposes, it would source components from Daimler Global Facilities and also undertakes in-house research and development for new products towards supporting its manufacturing activity. The CIT(A) held that the assessee had already commenced activities relating to design and also the pre-activities essential for commencement of manufacture in the assessment year 2009-10 itself and therefore, held that the finding of the Assessing Officer on this ground is not based on facts on record.

16. Further, it was pointed out that assuming the findings of the Assessing that the assessee has not commenced its commercial activity of manufacture and sale, the expenditure relating to construction of manufacture facility and activities relating to research and development have been capitalised as a part of "capital work in progress". On facts, the CIT(A) found that none of the expenditure debited to P&L account are towards setting up of the manufacturing facility and they relate to other business activity listed in the Memorandum of Association.

17. Reference was also made to the certificate of commencement of business issued by the Registrar of Companies dated 18.12.2007, which entitles the assessee to carry on its business activities as outlined in the Memorandum of Association. It was pointed out that the Assessing Officer has accepted the computation of income under the head "profits and gains of business or profession" except for disallowance of operating expenses, financial expenses and depreciation debited to the profit and loss account and allowed the carry-forward of loss and therefore, after allowing the loss to be carried forward, the Assessing Officer is not correct in holding that the assessee has not commenced commercial operations. Accordingly, the CIT(A) held that the disallowance was held to be not sustainable, but allowable under Section 37(1) of the Act and the Assessing Officer was directed to delete the disallowance.

18. The Revenue, being aggrieved by the order passed by the CIT(A), filed appeal before the Tribunal in I.T.A.No.563/Chny/2017. The appeal was allowed by order dated 31.05.2018, which is impugned before us. The Tribunal referred to the Director's report of the assessee for the relevant previous year and held that the assessee was yet to start commercial production and no revenue was generated by it. Further, it held that there is no identifiable item shown in the profit and loss account or in the capitalised expenditure which can substantiate the claim of any R&D activity. Neither has any revenue been generated from R&D activities and the fact of the



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matter is that the assessee has just completed the process of registering the lease of the land and started set up of its plant in such land during the relevant previous year. The sale on bus effected by the assessee was held not to substantiate the claim of the assessee that its business was set up.

19. With regard to the various decisions cited by the assessee, the Tribunal referred to two of the decisions and held that none of the judgments would further the case of the assessee. Accordingly, the appeal filed by the Revenue was allowed.

20. Mr. Ajay Vohra, learned Senior Counsel for Mr. N.P. Vijaykumar, learned counsel for the assessee after elaborately referring to the factual details including the audited financial statement of the assessee in the year ending 31.03.2010 along with the Director's report, relevant to the assessment year under consideration; Memorandum of Association of the assessee; certificate of incorporation, dated 10.12.2007; certificate of commencement of business, dated 18.12.2007; technical engineering and service agreements with Mercedes-Benz Project Consult GmbH for production, planning and logistics, dated 01.04.2008; licensing agreements, dated 01.04.2018; approval from Foreign Investment Promotion Board, dated 04.04.2008; certificate of Foreign Inward Remittance from UTI Bank, dated 17.04.2008; letter of Intent received from Ricardo, dated 09.06.2008; vehicles specification book for HDT project provided by M/s. Magna Powertrain-Engineering Centre Steyr GmbH & Co KG, dated 17.07.2008; lease deed with GJ & Co regarding premises for Preliminary Development and Research Centre, dated 01.10.2008; land allotment letter issued by SIPCOT, dated 17.10.2008 for a period of 99 years; purchase order issued to Ricardo for development of LDMT vehicle (prototype), dated 05.11.2008; purchase order issued to Magna for development of HDT (prototype), dated 08.11.2008; report on joint assessment of prototypes carried out by the assessee and Ricardo UK, dated 19.03.2009; purchase order issued by Daimler AG Procurement Trucks & Buses for local procurement of components by the assessee, dated 30.04.2009; letter issued by the assessee to supplier (M/s. Bharat Forge Limited), dated 20.08.2009; licence issued by the Inspector of Factories, dated 18.11.2009; inauguration of test track facility on 15.03.2010; and test report on the results of testing activity undertaken on prototypes for the HDT trucks, dated 30.03.2010, submitted that the business of the assessee was already set up and although manufacturing activity did not commence, still the activities essential for undertaking manufacture of commercial vehicles comprising of development of prototype vehicles, testing these vehicles, identification of suppliers, nomination of suppliers, etc., had all been done which will go to show that the business



of the assessee had been set up.

21. It is submitted that the Tribunal exceeded in its jurisdiction in holding that the business of the assessee was not set up which was not even the case of the Assessing Officer. It is submitted that the Assessing Officer held that the assessee has not commenced commercial production, that is, manufacture and sale of vehicles and therefore, the expenses debited to the profit and loss account were not allowable. Nowhere, the Assessing Officer stated that the business of the assessee was not set up and that the provisions relating to computation of income under Section 28 read with Section 3 of the Act was not applicable, more particularly, when the Assessing Officer had computed loss of Rs.19,28,26,321/- under the said head. Further, it is submitted that the Tribunal exceeded its jurisdiction to take away the benefit granted by the Assessing Officer when it asserts the business loss. In support of such contention, reliance was placed on the decisions in Mcorp Global (P.) Ltd., vs. CIT, [2009] 309 ITR 434 (SC); Sanmar Speciality Chemicals Ltd., vs. Income-tax Officer, Company Ward VI(1) Chennai, [2018] 93 taxmann.com 330 (Madras).

22. The learned Senior Counsel referred to the findings recorded by the CIT(A) regarding the setting up of business and submitted that the Tribunal erred in reversing the finding of the CIT(A) by brushing aside vital facts. Further, it submitted that all deductions which were made by the Assessing Officer were in terms of Sections 30 to 43D which will go to show that the Assessing Officer himself accepted that the business of the assessee is already set up. Thus, the Tribunal erred in making out a new case which was never the case of the Assessing Officer.

23. The learned Senior Counsel referred to the assessment order for the assessment year 2009-10 and submitted that the Assessing Officer never disputed that the business of the assessee was never set up and there can be no two dates with regard to the setting up of business. It is further submitted that under Section 28 of the Act, there is an aggregation of all activities of the assessee to compute the profits and gains of business. It is, thus, the submission of the learned Senior Counsel, the date of setting up of the business of the assessee having attained finality for the assessment year 2009-10, cannot change in a later year. Further, it is submitted that commercial production, that is, manufacture of sale of vehicles is not relevant for determining as to whether an assessee has set up his business or not.

24. The learned Senior Counsel referred to the key events/activities undertaken by the assessee, since it is



incorporation up to the end of the relevant previous year 2009-10, i.e., assessment year 2010-11 which have been referred to in paragraph 2.11 of the memorandum of grounds of appeal wherein, the date, event/activity, brief description of the activity/supporting documents have been given and page numbers indicated. Further, it is submitted that though the principles of res judicata do not apply to income tax proceedings, principles of consistency will cover income tax proceedings and referred to the decision in Shasun Chemicals & Drugs Ltd., vs. CIT, (2016) 388 ITR 1 (SC).

25. Referring to Section 3 of the Act, it is submitted that the same provides for while "previous year" generally means the financial year immediately preceding the assessment year, in the case of a business or profession newly set up, the period beginning with the date of setting up of business or profession shall be the previous year. Thus, it is submitted that computation of income under the head "profit and gains of business or profession" is to be made from the date the business is set up and there is a clear distinction between 'commencement of a business' and 'setting up of a business' and Section 3 refers to the latter date. It was submitted that for income tax purposes, the setting up of business and not the commencement of business is to be considered and business can be said to have been set up when it is ready to discharge the function for which it was set up and the actual commencement of revenue generating activity does not have any bearing for determining the date of set up of business.

26. In support of the above submissions, the learned counsel relied on the decisions in Western India Vegetable Products Ltd., vs. CIT, [1954] 26 ITR 151 (Bombay);

Prem Conductors (P.) Ltd., vs. CIT, [1977] 180 ITR 654 (Gujarat);

CIT vs. Ralliwolf Ltd., [1980] 121 ITR 262 (Bombay);

CIT vs. Franco Tosi Ingegneria, [2000] 241 ITR 268 (Madras);

CIT vs. Club Resorts P. Ltd., [2006] 287 ITR 552 (Madras);

CIT vs. Hughes Escorts Communications Ltd., [2009] 311 ITR 253 (Delhi);

CIT vs. Dhoomketu Builders and Development P. Ltd., [2014] 368 ITR 680 (Delhi);

Carefour WC & C India P. Ltd., vs. Deputy Commissioner of Income-tax, [2014] 368 ITR 692 (Delhi);

Omniglobe Information Tech India P. Ltd., vs. CIT, [2014] 369 ITR 1 (Delhi); and

Indian Railway Stations Development Corporation Ltd., vs. Pr. Commissioner of Income Tax-IV, W.P.(C) No.6782/2018, dated 26.03.2019 (Delhi).



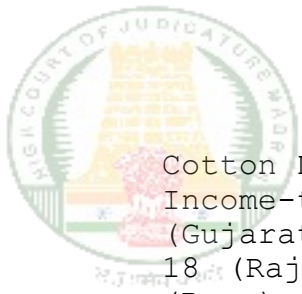
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27. The learned Senior Counsel while reiterating the sequence of events, which had taken place prior to the year under consideration and during the relevant year submitted that activities of the company had commenced and the business activity of the assessee company are bundle of activities, the expenses was allowable as deduction. To explain the meaning of composite business and allowability of expenses, reliance was placed on the decision in Setabganj Sugar Mills Ltd., vs. CIT, [1961] 41 ITR 272 (SC); CIT vs. Prithvi Insurance Co. Ltd., [1967] 63 ITR 632 (SC); Produce Exchange Corporation Ltd., vs. CIT, [1970] 77 ITR 739 (SC); Veecumsees vs. CIT, [1996] 220 ITR 185 (SC); CIT vs. Monnet Industries Ltd., [2011] 332 ITR 627 (Delhi), which was affirmed by the Hon'ble Supreme Court in an appeal filed by the Revenue in [2012] 25 taxmann. Com 236 (SC); and the decision in Chemplast Sanmar Ltd., vs. Assistant Commissioner of Income-Tax, [2019] 412 ITR 323 (Madras).

28. On the above submissions, the learned Senior Counsel prayed for allowing the appeal and answering the substantial questions of law in favour of the assessee.

29. Ms. R. Hemalatha, learned Senior Standing Counsel for the Revenue raised a preliminary objection to the maintainability of this appeal. It is her submission that the assessee has filed a petition for rectification before the Tribunal under Section 254 (2) of the Act and the petition is still pending before the Tribunal and the assessee cannot avail parallel remedies for the same relief. The learned counsel referred to the certificate of incorporation and fresh certificate of incorporation of change of name and the certificate for commencement of business and submitted that the said certificate only states that the assessee is entitled to commence business and therefore, cannot be treated as a conclusive date of commencement of business. The learned counsel referred to the assessment order dated 28.02.2014 and submitted that the assessee was in the process of registering and executing the lease deed for procuring land for setting up of the industry and therefore, the Assessing Officer was fully right in disallowing the expenses under the three heads. Further, when the land for setting up of the factory was not completed, the question of the assessee's business being set up does not arise.

30. Further, it is submitted that the TPO also has recorded that the assessee has not commenced commercial operation of manufacture and sale which was not rebutted by the assessee. It is further submitted that for setting up of the business, the basic requirement is to secure the land which itself was not done by the assessee and therefore, the order passed by the Tribunal is proper. To support her contention, the learned counsel relied on the decisions in CIT vs. Ramaraju Surgical



Cotton Mills Ltd., [1967] 63 ITR 478 (SC); Addl. Commissioner of Income-tax vs. Speciality Paper Ltd., [1982] 133 ITR 879 (Gujarat) (App.); CIT vs. Instrumentation Ltd., [1993] 70 Taxman 18 (Raj.); CIT vs. Piem Hotel (P.) Ltd., [1994] 73 Taxman 295 (Bom.); and ALD Automotive (P.) Ltd., [2018] 91 taxmann. Com 475 (Bombay).

31. With the above submissions, the learned Senior Standing Counsel prayed for sustaining the order of the Tribunal.

32. Ms. R. Hemalatha, raised a preliminary objection with regard to the maintainability of the appeal. It is her submission that the assessee has filed a petition under Section 254(2) of the Act before the Tribunal seeking to rectify the order passed by the Tribunal and for the same relief, the present appeal has been filed and the assessee cannot pursue parallel remedies.

33. To be noted that the power under Section 254(2) of the Act is a power given to rectify errors. The scope of the said power is no longer res integra and by now, is well settled. The present appeal is under Section 260A of the Act wherein, the Court on being prima facie satisfied that there are substantial questions of law to be decided, has admitted the appeal, vide order dated 21.12.2018. In such circumstances, the pendency of a petition for rectification under Section 254(2) can have no impact on this appeal.

34. Accordingly, we hold that this appeal is maintainable.

35. The Assessing Officer while completing the assessment under Section 143(3) of the Act by order dated 28.02.2014, disallowed the operating expenses, financial expenses and depreciation. The reason assigned by the Assessing Officer is that the commercial operation of manufacture and sale of commercial vehicles has not been commenced so far and therefore, the expenditure incurred by the assessee under the aforementioned three heads cannot be allowed.

36. Mr. Ajay Vohra, learned Senior Counsel is right in his submission that there was no dispute raised by the Assessing Officer with regard to the date on which the assessee had set up its business. This date stood concluded in the previous assessment year 2009-10. The assessee carried the matter by way of appeal to the CIT(A) contenting that as per the objections set out in the Memorandum of Association, the assessee company had been incorporated for design and development of commercial vehicles suited to the Indian Market; research and development activities; sourcing of components for sale in domestic/global market and construction of manufacturing facility for



undertaking manufacture of commercial vehicles. Thus, the four activities mentioned in the Memorandum of Association was stated to be a bundle of activities of the assessee company. The assessee substantiated the activities which it had commenced under the aforementioned four activities by producing necessary documents. This has been clearly set out in a tabulated form in paragraph 9.1 of the order passed by the CIT(A). Considering these facts, the CIT(A) held that the assessee was incorporated to carry out composite business encompassing multiple lines of activity of which manufacturing of commercial vehicles was one line of activity and it is a matter of record that the assessee had already commenced bundle of activities in consonance with the objects specified in the Memorandum of Association.

37. With regard to the manufacturing activity, the CIT(A) found that it is part of the composite business activities of the assessee and this was not commenced, as the construction of the factory building, installation of plant and machinery was under progress. Further, the CIT(A) noted that the expenditure related to construction of the manufacturing facility was capitalised as part of the "capital work in progress" forming part of the audited accounts and no depreciation on the same was claimed during the year under consideration, but claim was made only for the assessment year 2013-14 on the amount capitalised. Further, the CIT(A) noted that the Assessing Officer in his order had accepted the computation of income under the head "profits and gains of business" except for the disallowance of expenditure under the aforementioned three heads. Therefore, it held that the Assessing Officer is not correct in holding that the assessee has not commenced commercial operations and accordingly, allowed the appeal. However, the Tribunal after referring to the Director's report for the relevant previous year, held that it does not substantiate the claim of the assessee that its business was set up.

38. As pointed out earlier, the Assessing Officer at no point of time, disputed the date on which the business of the assessee was set up. The only dispute raised by the Assessing Officer was that the assessee has not commenced its commercial activity, viz., manufacture and sale of vehicles. Thus, the Tribunal proceeded on basis, which is prejudicial to the assessee in the sense what was not the subject matter of dispute before the Assessing Officer has been raised by the Tribunal for the first time. In other words, the benefit which accrued to the assessee not only in the assessment year under consideration, but also the earlier assessment year 2009-10 has been taken away by the Tribunal. The question is whether this can be done. The definite answer to this question is an emphatic no.

39. We are supported by the decision in the case of MCorp



Global (P.) Ltd. (supra), wherein the Apex Court referred to its earlier decision in Hukumchand Mills Ltd., vs. CIT, [1967] 63 ITR 232 (SC), wherein it was held that under Section 33(4) of the Act (equivalent to Section 254(1) of the Act), the Tribunal was not authorized to take back the benefit granted to the assessee by the Assessing Officer and that the Tribunal has no power to enhance the assessment.

40. This Court in Sanmar Speciality Chemicals Ltd. (supra), after referring to the decisions in Hukumchand Mills Ltd. (supra), MCorp Global (P.) Ltd. (supra) and Fidelity Shares & Securities Ltd., vs. Dy. CIT, [2017] 390 ITR 268 (Guj.), held that the Tribunal has no power under the Act to enhance the assessment in an appeal. Thus, the Tribunal committed an error in venturing into an issue which was never an issue before the Assessing Officer and unsettling the date on which the business of the assessee was set up and as the Tribunal has no jurisdiction to do so and the said finding has necessarily to be set aside.

41. Accordingly, the first and third substantial questions of law are answered in favour of the assessee.

42. Next we move on to consider as to what would connote "setting up of business" and "commencement of business" under the provisions of the Act and the distinction between both.

43. In Western India Vegetable Products Ltd. (supra), it was pointed out that there is a clear distinction between a person commencing a business and a person setting up a business for the purposes of the Indian Income-tax Act (Act XI of 1922), the setting up of the business and not the commencement of the business is to be considered. It was held 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. Further, it was held that there may be an interval between the setting up of the business and the commencement of the business and all its expenses incurred during that interval would be permissible as deductions. In the said case, the company actually commenced business only on 1st November, 1946 when it purchased the groundnut oil mills, but prior to this date, there was a period when the business could be said to have been set up and the company was ready to commence business and that there was evidence before the Tribunal to hold that the assessee company set up its business as from 1st September, 1946.

44. In Prem Conductors (P.) Ltd. (supra), the Court held that the assessee can be said to have set up its business from the date when one of the categories of its business activity is 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. In the said case, the assessee had started securing orders well in advance of the date on which it actually started production of aluminium conductors and this was held to be a factor to determine that the assessee had set up its business. Further, the activity of acquiring raw material was held to be part of business activity of a manufacturing unit because unless the raw materials are ready, production cannot start and unless production are started, the goods cannot be actually sold. It was pointed out that one has to bear in mind that the test is of commonsense and what in the eye of a business can be said to be the commencement of the business. It was further pointed out that one business activity may precede the other and what is required to be seen is whether one of the essential activities for the carrying on of the business of the assessee company as a whole was or was not commenced.

45. In *Ralliwolf Ltd.* (supra), the Court referred to the Oxford English Dictionary meaning for the expression "setting up" and held that the distinction is that when a business is established and is ready to commence, then it can be said that business that it is set up.

46. In *Hughes Escorts Communications Ltd.* (supra), the assessee carried on business of satellite business communications for which an equipment is used. The said equipment can be used only after establishing, maintaining and using the communication facilities on a licence from the Department of Telecommunications (DoT). The assessee therein made an application to the DoT for grant of such licence and a licence agreement was entered into and even prior to that the assessee placed a purchase order for purchase of the equipments from USA. In the return of income, the assessee claimed expenditure, which was rejected by the Assessing Officer on the ground that the assessee had begun receiving the satellite signals only in the month of February, 1995 and further installation was completed only on 05.03.1995 and it can be said that the business of the assessee had been set up only in March, 1995 and not earlier. Dismissing the appeal of the Revenue, the Court held that the business of an assessee involved different activities in which the first step was to purchase the equipments for which purchase order was placed in July, 1995, application to DoT for licence was made and the signals were received after the equipment was installed in the premises of the customer and in such circumstances, the business of the assessee was held to have been set up in July, 1994 when they placed the purchase order for the equipments and expenses would be deductible as revenue expenses.



47. In Omniglobe Information Tech India P. Ltd. (supra), it was held that the assessee's business was set up when they acquired necessary infrastructure from its sister concern and also started making payment of salary and wages and giving training by professional experts under the supervision and control of the assessee.

48. In Dhoomketu Builders and Development P. Ltd. (supra), the assessee was in the business of real estate development and had obtained loan from its holding company, participated in a tender notified by the Official Liquidator of the Karnataka High Court for sale of a piece of land. The assessee, however, was not successful in producing the land and the earnest money was returned to it. On the amount borrowed from its holding company, the assessee was liable to pay interest and the assessee claimed the difference between the interest received and the interest paid as loss under the head "business". This was rejected by the Assessing Officer. The Court confirmed the order passed by the Tribunal which held that for the development of real estate, participation in the tender represented commencement of one activity which would enable the assessee for acquiring the land for development and the assessee was in a position to commence business and that meant that the business had been set up.

49. In Carefour WC & C India P. Ltd. (supra), the assessee company was incorporated on 19.09.2007 and even before incorporation, it corresponded with well known companies, which rented out office premises upon a bank account in October, 2007, employees were also appointed during the relevant years, tax deducted at source, registration under the Shops and Establishments Act was also effected and these activities were the first stage activities which would lay the foundation for placing orders for procuring the stock and storing them in a warehouse undertaken by the assessee was a precursor to commencement but post-set up and the activities demonstrated that setting up of the business by the assessee with a commitment to commence the business. Therefore, the order of the Assessing Officer disallowing the business loss was held to be not justified.

50. In Franco Tosi Ingegneria (supra), the assessee, a non-resident company secured a letter of intent from Neyveli Lignite Corporation on 13.04.1981 for carrying out certain works to establish a project office and to commence activities in India from that date. However, it secured the approval of the Reserve Bank of India for establishing its project office only, subsequently. It obtained registration under the Companies Act subsequent to 13.04.1981 and in such scenario, the Income-tax Officer disallowed the expenditure incurred for the period prior



to October 1, 1981, on the ground that during that period, the permission of the Reserve Bank of India was not in force. The Court held that the assessee had, in fact, commenced operations on April, 13 1981 and incurred expenditure and the expenditure so incurred was pursuant to the letter of intent granted to it by Neyveli Lignite Corporation and the assessee is, therefore, entitled to regard the expenditure so incurred, as the expenditure incurred by its during the previous year relevant to the assessment year 1981-82.

51. In Club Resorts P. Ltd. (supra), the assessee was in the business of promoting time share units at places of tourist interest. The question was whether the expenditure incurred on maintenance of staff, etc., could be treated as a business expenditure. The Court affirmed the view of the Tribunal and held that there are various stages; the first of which being to set up one or more operating offices from which sales personnel were to be sent to solicit customers which were already started by the assessee; and the second stage was launching a massive publicity campaign, which the assessee had already been doing, it had already acquired land and started construction, which were the subsequent changes. Accordingly, it held that the office expenses that had been incurred were clearly revenue in nature.

52. The above decisions clearly set out the legal position. In terms of the Memorandum of Association of the assessee, it was incorporated for a bundle of activities, viz., designing, manufacturing, distributing, selling, source of after sales engineering services and research and development of commercial vehicles and related products and components for domestic Indian and Overseas Market.

53. The CIT(A) has taken note of the entire factual matrix, analysed various activities, which were shown by the assessee, to have commenced during the previous year relevant to the assessment year under consideration. We fully endorse the view taken by the CIT(A) in holding that the assessee had commenced, performed activities relating to designing of commercial vehicles and related products R&D, buying and selling of parts and in the process of construction of factory building for manufacture of commercial vehicles. Thus, the test laid down in the aforementioned decisions if applied to the facts of the case, we have no hesitation to hold that the business of the assessee had been set up in the previous assessment year for which the assessment had been completed by the Assessing Officer. Therefore, the Tribunal erred in holding that merely because the manufacturing and sale of the vehicle did not take place, the business of the assessee has not been set up. The manufacturing activity of the assessee is a part of the



composite business activities of the assessee and this was not commenced because, the construction of the building and installation of plant and machinery was in progress.

54. Ms. R. Hemalatha placed reliance on Ramaraju Surgical Cotton Mills Ltd. (supra). We may point out that the said decision arose under the provisions of the Wealth Tax Act and the test to be applied therein is quite different and distinct from the test which we are required to apply in the present case and therefore, the said decision does not render any assistance to the case of the Revenue.

55. In Speciality Paper Ltd. (supra), the relief was denied to the assessee company, as they were holding trial production and having their plant and machinery being tested to ascertain the quantity and quality of the production so satisfactory. This was held to not satisfy the test that the assessee was ready to go in the business of production. In any event, the decision is clearly distinguishable on facts.

56. In Instrumentation Ltd. (supra), the assessee was denied relief, as the assessee failed to prove that the expenditure incurred was directly related to the orders booked for the new unit as alleged before the Tribunal.

57. Similarly, the decision in ALD Automotive (P.) Ltd. (supra), was also a case where the assessee failed to produce necessary evidence in support of his claim that business was set up and it was ready to commence.

58. Therefore, the decisions cited by the Revenue are clearly distinguishable on facts and does not assist the case of the Revenue.

59. Earlier, while approving the findings of the CIT(A), we held that the assessee is in a composite business or in other words, it has a bucket of business activities, which have been clearly spelt out in the Memorandum of Association. Sufficient proof has been filed by the assessee before the Assessing Officer as well as the CIT(A) to establish that several of its activities have already commenced except for manufacturing and sale of commercial vehicles, which can be done only after the construction is completed and the plant and machinery is installed. What would connote composite business?

60. In Setabganj Sugar Mills Ltd. (supra), it was held that a variety of matters bearing on the unity of the business have to be investigated, such as unity of control and management, conduct of the business through the same agency, the inter-relation of the business, the employment of same capital, the



maintenance of common books of account, employment of same staff to run the business, the nature of the different transactions, the possibility of one being closed without affecting the texture of the other and so forth.

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61. In *Prithvi Insurance Co. Ltd.* (supra), the assessee company carried on business of insurance, life and general. The assessee suffered loss in the life insurance section and made profit in the general insurance section. The loss suffered in the life insurance section was allowed by the revenue authorities to be carried forward and set off under Section 24 (2) of the 1922 Act, against profits from the general insurance section in the subsequent years. However, in one of the assessment years, the Income-tax Officer held that the life insurance business and the general insurance business carried on by the company were distinct and separate and the loss carried forward from the previous year in respect of life insurance business could not be set off under Section 24(2) of the 1922 Act against the profit of the general insurance business. The Apex Court held that the life insurance business and general insurance business constituted the same business within the meaning of Section 24(2) of the 1922 Act, as the company was entitled to carry on life insurance business and general insurance business under its Memorandum of Association and the businesses were attended to by the branch managers and agents without any distinction. There was one common administrative organization and the expenses incurred in connection with the business were common.

62. In *Produce Exchange Corporation Ltd.* (supra), the Hon'ble Supreme court applied the test laid down in *Prithvi Insurance Co. Ltd.* (supra) and held that in the said case there was a common management and other lines of businesses, unity of trading organisation, common employees, common administration, a common fund and a common place of business.

63. In *Veecumsees* (supra), the Court found that the business carried on by the assessee as jeweller and in running the cinema theatre, etc., was composite.

64. In *Monnet Industries Ltd.*, (Delhi), the assessee was granted relief by taking note of the fact that there was a common board of Directors controlling both the plants, viz., Ferro-alloys Manufacturing Plant and Sugar Plant. Funds of the two plants were common. There was intermingling and interlacing of funds even though the two plants were geographically located at different sites, yet marketing of final products was carried out under the supervision and control of same set of executives at head office. The finding of the Tribunal, which held that sugar plant was a mere extension of existing business of ferro-



alloys plant and therefore, interest paid on funds borrowed for purpose of setting up of sugar plant was allowable under section 36(1)(iii) of the Act was affirmed.

65. In Chemplast Sanmar Ltd. (supra), the assessee was in the business of manufacture of poly vinyl chloride, caustic soda and shipping. For the assessment year 2000-01, the Assessing Officer disallowed the expenditure incurred by the assessee on account of a textile project which it had later abandoned. The Assessing Officer held that the textile project which the assessee intended to start, being a totally new project distinguished from the manufacture of poly vinyl chloride and caustic soda and the business of shipping, in which the assessee was currently engaged, the entire expenditure had to be treated as capital expenditure. The CIT(A) and the Tribunal confirmed the finding. This Court, while allowing the appeal, held that the proper test to be applied was not the nature of new line of business which was commenced by the assessee, but unity of control, management and common fund and if they are with the assessee, then it is no matter as to whether a totally different line of business is started by the assessee.

66. The above decisions have been referred to by us to ascertain the meaning of composite business and allowability of expenses. A new line of business was also treated to be a composite business when it is established that there is a unity of control and management and common fund apart from other features. The unity of control, management, etc., of the assessee in respect of each of its activity has not been disputed by the Revenue. In such circumstances, the assessee on showing that it has commenced several of its activities in the bunch of activities for which it was incorporated would definitely qualify for deduction of the expenditure incurred by it under the head operating expenses, financial expenses and depreciation.

67. For the reasons stated by us above, the Assessing Officer committed an error in disallowing the expenses. The Tribunal went on to decide an issue which was never disputed by the Assessing Officer, viz., as to whether the business of the assessee was set up or not. As held by us earlier, the Tribunal cannot take away the benefit given to the assessee by the Assessing Officer and therefore, the order of the Tribunal is without jurisdiction.

68. For all the above reasons, the second and third substantial questions of law are also answered in favour of the assessee.



69. In the result, the appeal is allowed and the substantial questions of law are answered in favour of the assessee. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Deputy Commissioner of Income-tax,
Company circle I(4), Chennai.
2. The Commissioner of Income Tax (Appeals)-1,
121, Mahatma Gandhi Road, Chennai-600 034.
3. The Income Tax Appellate Tribunal 'A' Bench, Chennai.

+1cc to Mr.N.P.Vijay Kumar, Advocate, SR.No.56250
+1cc to Mr.T.Ravi Kumar, Advocate, SR.No.56231

T.C.A.No.958 of 2018

Kak(22/08/2019)