

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI****BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER****AND****SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER****I.T.A. No. 1622/DEL/2014 (A.Y 2009-10)**

M/s. NDTV Studios Ltd. [Now merged with New Delhi Television Limited], 207-Okhla Industrial Estate, Phase - III, New Delhi - 110 020. PAN No. AACCN8617K (ASSEESSEE)	Vs.	Income Tax Officer, Ward : 13 (1), New Delhi. (RESPONDENT)
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Assesseeby :	Shri Tarandeep Singh, Advocate; & Shri Pulkit Verma, Advocate;
Department by:	Shri Amit Shukla, Sr.D.R.;

Date of Hearing	03.08.2022
Date of Pronouncement	10.08.2022

ORDER**PER YOGESH KUMAR U.S., JM**

This appeal is filed by the assessee for assessment year 2009-10 against the order of the Id. Commissioner of Income Tax (Appeals)-XVI, New Delhi [hereinafter referred to CIT (Appeals), dated 29.01.2014.

2. The assessee has raised the following substantive grounds of appeal :-

“1. That on facts and in law, the orders passed by both the Assessing Officer {hereinafter referred to as the “AO”} and the Commissioner of Income Tax (Appeals) {hereinafter referred to as “the CIT(A)”} are bad in law an void ab initio.

2. That on facts and in law the CIT(A) erred in holding that the business of the Assessee was not set up during the previous year relevant to AY 20[^]9-10, and that, it was not in a position to procure business and deliver its services of studio in the year under consideration.

3. That on facts and in law the CIT(A) erred in upholding disallowance of Rs 52,25,161/-- claimed by the Assessee as an allowable business expenditure in the year under consideration.

4. That without prejudice, on facts and in law the CIT(A) erred in not directing the AO to capitalize the expenditure of Rs 52,25,161/- and allow benefit of depreciation allowance on same.”.

3. Brief facts of the case are that the return of income filed declaring income of Rs. 21,03,02,529/- which was processed u/s 143(1) of the Act, subsequently, selected for scrutiny and notices were issued. The assessment proceedings have been initiated against the assessee and the assessee has participated through its representative. The assessment order came to be passed on 17/12/2012 against the assessee by disallowing the claim of Rs. 52,25,161/- made by the assessee as business expenditure.

4. Aggrieved by the assessment order dated 17/12/2012, the assessee has preferred an Appeal before the CIT(A). The Ld.CIT (A) vide order dated 29/01/2014 dismissed the Appeal of the assessee by confirming the order of the Ld. A.O.

5. Aggrieved by the order dated 29/01/2020, the assessee has preferred the present Appeal on the grounds mentioned above.

6. The Ld. Counsel for the assessee vehemently submitted that, the Ld.CIT(A) has erred in holding that the 'business of the assessee was not set up during the previous year relevant to Assessment Year 2009-10 and that it was not in operation to procure business and deliver its service of studio in the year under consideration'. Further submitted that, the Ld.CIT(A) committed an error in upholding the disallowance of Rs. 52,25,161/- claimed by the assessee as an allowable business expenditure for the year under consideration and without prejudice to the same, the Ld. Counsel for the assessee submitted that the Ld.CIT(A) has erred in not directing the A.O to capitalize the expenditure to Rs. 52,25,161/- and allow benefit of depreciation allowances on the same.

7. Per contra, the Ld. DR by relying on the order of Ld. A.O and CIT(A) submitted that the orders of the Lower Authorities are well reasoned, supported by the settled principles of the Law, which requires no interference.

8. We have heard the parties, perused the material on record and gave our thoughtful consideration. The Ld. A.O while framing assessment order held that the 'business of the assessee had not been set up during the year under consideration and all the expenses claimed by the assessee are pre-operative in nature which should have been capitalized. Thus the Ld. A.O held that the expenses claimed by the assessee are not deductible as business expenditure'

and the same has been disallowed. Further the interest income earned by the assessee was assessed as "income from other sources" and same has been brought to tax. In Appeal filed by the Assessee, the Ld. CIT (A) has upheld the said assessment order, which is the order impugned in the present Appeal.

9. The moot question in the present Appeal is to whether the assessee has set up the business during the previous year relevant to y 2009-10 or not. In this regard, the question as to when the business can be said to have been set up is the question of fact which has to be ascertain on the facts and circumstances of each case and considering the nature and type of the particulars business. There cannot be universal test or formal applicable to all the types of business can be laid down.

10. In the present case, the Assessee, for the purpose of setting up the studio on the commercial property got signed the Letter of Intent (LOI) on 04-04-2008 from Indiabulls Properties Pvt. Ltd. From the clause (2) of Letter to Intent (LOI) dated 04.04.2008 between Indiabulls Properties Pvt. Ltd. and New Delhi Television ltd, read with Letter of Novation (LON) dated 11.12.2008 transferring all the rights and liabilities of N'DTV related to LOI to NDTV Studios Ltd., It can be seen that the 7th and 8th floor of Tower 1 of One of Indiabulls Centre was to be handed over by the licensor i.e. Indiabulls to licensee i.e. the Assessee for fit out works on or before 01.05.2008 or the actual date of handover for fit out. The said date is specified as 'fit out commencement date'. Clause 2.1 also says that the building in which the premise is situated is under construction. Fit out period was for 5 months from 'fit out commencement date'. The cl, 2.3 & 2.4 LOI also says that 'License Commencement Date' shall be from the date of occupancy and license fee, car parking fee, maintenance fee shall be paid from the date of occupancy. From the balance sheet it is evident the fit out works, building of

studios and production facilities carried out by the assessee was under progress during the relevant previous year. In the balance sheet expenses of Rs. 6.25 crores on fit out works have been shown under capital work in progress. In the P&L account only interest income of Rs. 21.55 crores and foreign exchange fluctuation of Rs. 10,059/- was credited during the year.

11. Further, for hiring the 7th Floor premise the Assessee had entered into a Leave and License Agreement with Indiabulls Properties Pvt. Ltd. on 05.06.2009. From the Leave and License Agreement dated 05.06.2009 between Indiabulls Properties Pvt. Ltd. as licensor and the Assessee company as licensee, the Assessee was allowed to use and occupy the 7th floor premise of tower 1 Indiabulls Centre on leave and license basis for the period of 60 months w.e.f. 1st April 2009 for a license fee of Rs. 58,96,676/- per month. To sublease the above premise Assessee entered a sublicense agreement with NDTV ltd. on 29.09.2009. As per the Leave and License Agreement dated 29.09.2009 between the Assessee company as sub-licensor and NDTV ltd. as sub-licensee the above 7th floor premise was sub-licensed by the Assessee to NDTV Ltd. w.e.f. 27.04.2009 till 31.03*2010 on a monthly sub-license fee of Rs. 69,36,411/-.”

12. From the above facts, it is clear that the fit out works related to building of Studio and production facilities was under progress during the relevant previous year and the premises area occupied only after completion of fit out work i.e. from 05/06/2009 which can be corroborated with the Leave and License Agreement with India Bulls. Thus, in any stretch of imagination the assessee was not in a position to procure business and delivery its service prior to June, 2009.

13. The identical issue has come up for consideration before the coordinate bench of this Tribunal in the case of DCIT v. Akzo Nobel Car Refinishes India (P.) Ltd. in [2008] 25 SOT 226 (DELHI) have held that:

“12. Section 2(13) provides the definition of expression "business" according to which business includes any trade, commerce manufacture or any adventure or concern in the nature of trade, commerce or manufacture. In various authoritative pronouncements of j Hon'ble Supreme Court and Hon'ble High Courts, meaning and scope of expression "business" has been propounded. It is not necessary to recite and recapitulate of those decisions but on the strength of them, it would be suffice to say that word "business" has a wide import and it means an activity carried on continuously and systematically by a person by the application of his labour and skill with a view to earn an income. Section 13 of the Income-tax Act, 1961 defines "previous year". Previous year means the financial year immediately preceding the assessment year. The proviso appended to this section further contemplates that in case of a business newly set up in the said financial year the previous year shall be the period beginning with the date of setting up of the business. The expression "set up" has not been defined anywhere in the Act. But as it is understood in the common parlance and considered by the 1TAT in *Hindustan Diamond Co. (P.) Ltd.* 's case (*supra*), if an assessee is in a position to deliver the goods means that business is set up. Actual delivery is immaterial. For example if a person wants to carry on the business of transportation the moment he has purchased the vehicle for transporting the goods and arranged the space, then it would indicate that business has been set up, it is immaterial whether he actually transported goods or not. in the present case, the only evidence brought on record by the assessee for demonstrating setting up of the business is that assessee has been incorporating. Its director came to India on 9-12-1997. Had it got order it would have delivered the goods. To our mind, this proposition is not acceptable because carrying out business would

require activities systematically and continuously. The steps shown by the assessee are of preliminary steps in the direction of setting up of the business. There is nothing on the record which can suggest the potentiality and capability of the assessee to deliver the goods or invite the customer for supply of those goods, it was merely incorporated its director was exploring how to carry out the manufacturing activity. He was also exploiting the available market in India, in the next accounting year, assessee was able to arrange office space, residential space for the director and also the space for the goods. The Assessing Officer has considered these lease agreement, etc., and all other relevant activities of the assessee and, thereafter, granted the deduction of expenditure in the next year. Thus, merely on the basis of incorporation of a company it cannot be concluded that business was set up. As observed earlier carrying on a business is a regular and systematic activity. Nothing that sort of facts or circumstances could be brought before us. As far as the decision relied upon by the assessee are concerned, they are distinguishable on facts. In the case of *ESPN Software India (P.) Ltd. (supra)*, learned DR rightly highlighted that assessee got a license for providing ESPN Services and also appointed distributors. On these facts, learned CIT(Appeals) held that business was set up in that case. No such facts are available in the present case. Whether a business has been set up or not is a question of fact which will vary in each case. In the present case, assessee failed to demonstrate either with the direct evidence or with the circumstantial evidence that its business was set up in the accounting period. Whatever has been pointed out, *i.e.*, incorporation of the assessee and appointment of the director are concerned, we are of the view that these two factors are not sufficient to record a finding that business has been set up. In view of the above discussion, the first ground of appeal raised by the assessee is rejected.”

14. The Coordinate bench in the case of Delhi in ITO v. Omni Globe Information IT A No.3465/Del/09 have also considered the similar issue as under:

‘4.7 When we look to the facts of our case, it is clear that although the staff had been recruited, it was not ready for rendering services as the staff had to be trained with the systems. The assessee had not taken premises on rent and, therefore, installation of computer therein had not been done. Therefore, the assessee was not in a position to solicit customer till the end of May, 2004. The advances were received from the parent company but these were used for training the personnel and paying salaries and incidental charges, necessary for setting up the business. Thus, in a nutshell, it is held that a business is set up when it reaches a stage where it is in a position to procure business and not before. However, the expenditure becomes deductible from such stage irrespective of the date of actual receipt of the business. Therefore, it is held that the business had not been set up till the end of May, 2004. Accordingly, the assessee is not entitled to deduction of these expenses. It is held accordingly.’”

The above decisions are squarely applicable to the facts of the present case. Even In the instant case, there is nothing on record which can suggest the potentiality and capability of the assessee to deliver the facilities available in a studio, in the period under consideration.

15. Further the decisions Hotel Alankar Vs. CIT, 133 ITR 866, CIT Vs. ESPN Software (India) (P) Ltd. (2008) 301 ITR 368, CIT Vs. Whirlpool of Inia Ltd, 318 ITR 347 (Del) and CIT Vs. Dhoomketu Builders & Development (P) Ltd. [2013] 34 taxmann.com 18 (Delhi) and other decisions, relied on by the Counsel for the Assessee are misplaced and distinguishable on facts and the same are not applicable to the facts and circumstances of the case. In the case of Hotel Alankar v. CIT (supra) the assessee had acquired the building to carry out the business of boarding and lodging house. In the case of CIT Vs. ESPN Software (India) (P) Limited, (supra) the assessee had obtained a license for providing ESPN Services and appointed distributors. In the case of Whirlpool India Limited, the business was held to have been set up on 01.11.1995 when the

company was ready and in a position to commence its activities by appointing regional managers and branch managers and the computers were acquired and installed. In the case of CIT v. Dhoomketu Builders & Development (P.) Ltd. (supra) it was held that when an assessee whose business is to develop real estates, is able to perform certain acts towards the acquisition of land, that would clearly show that it was ready to commence business and, as a corollary, that it has already been set-up.

16. In the case in hand, it is emerging from the record that the assessee has merely carrying out the fit-out work during the relevant previous year. Further, it is also clear that during the relevant previous year, the assessee is not ready for running the service of Studio and the assessee was not ready and, in a position, to commence its activities. The assessee had also not taken the premises on rent and had not completed the setting up of the facilities for running the studio. Therefore, the assessee was not in a position to solicit customers till the end of May 2009 before the start of Leave and License Agreement 05/06/2009. In view of the above, we have no hesitation to hold that the business had not been set up during the previous year relevant to Assessment Year 2009-10. Further, in our opinion, disallowance made by the A.O which has been confirmed by the Ld.CIT(A) is in order and we do not find any error or legal infirmity the approach of the Lower Authorities. **Accordingly, we dismiss the Assessee's grounds of Appeal No. 1 to 3.**

17. The assessee has also raised Ground No.4 without prejudice to the Grounds No. 1 to 3, contending that the Ld.CIT(A) has committed an error not directing the A.O to capitalize the expenditure and allow the benefit of depreciation allowances on the same. As per the balance sheet of the Assessee, it hadSuo-Moto capitalized the item of expenditure Rs. 6.25 crores as capital work in progress for bringing fixed assets into existence. The

remaining expenses that were not capitalized by the Assessee were debited in the P & L Account.

18. Further, the assessee has not filed any particular before the Authorities bellow to substantiate that the expense debited in the P &L account are incurred for bringing fixed asset into existences. Therefore, the submission of the Ld. Counsel for the assessee that,Ld.CIT(A) has committed an error not directing the A.O to capitalize the expenditure and allow benefit of depreciation allowances on the same is not sustainable. For the above said discussions we do not find merit in the Assessee's Grounds of Appeal No.4. **Accordingly, Assessee's the Grounds of Appeal No.4 is dismissed.**

19. In the result, the Appeal filed by the assessee is dismissed.

Order pronounced in the open court on : **10 /08/2022.**

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated : 10/08/2022

**R.N* Sr. PS*

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(Appeals)

5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI