**आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 4587/Mum/2013

(**निर्धारण वर्ष /** Assessment Year : 2009-10)

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| Dewanchand Ramsaran Industries Pvt. Ltd., 7/8 B, Trade World, Kamala City, Senapati Bapat Marg, Lower Parel (West), Mumbai – 400 013. | **बनाम**/ v. | Asst. Comm. Of Income Tax – Circle 6(2), Mumbai. |
| स्थायी लेखा सं./PAN : AABCD7193H | | |
| (अपीलार्थी /**Appellant**) | .. | (प्रत्यर्थी / **Respondent**) |

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|---|---|
| Assessee Company by | Ms. Aarti Sathe |
| Revenue by : | Shri B.S. Bist (Sr.DR) |
| | |

सुनवाई की तारीख /**Date of Hearing : 21-01-2016**

घोषणा की तारीख /**Date of Pronouncement : 11-04-2016**

आदेश / O R D E R

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee company, being ITA No. 4587/Mum/2013, is directed against the order dated 04-03-2013 passed by learned Commissioner of Income Tax (Appeals)- 12, Mumbai (hereinafter called "the CIT(A)" ), for the assessment year 2009-10, the appellate proceedings before the CIT(A) arising from the assessment order dated 29-12-2011 passed by the learned assessing officer(hereinafter called "the AO") u/s 143(3) of the Income Tax Act,1961(Hereinafter called "the Act").

2. The grounds raised by the assessee company in the memo of appeal filed with the Tribunal read as under:-

> "1. The learned C.I.T.(Appeals) erred in confirming the Assessing officer's order of treating the expenditure of Rs. 1,87,07,719/- incurred on mobilization of Rigs and interest paid on debenture of Rs. 1,04,71,234/-, totaling to Rs 2,91,78,953/- as capital expenditure. -
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> 2. The learned C.I.T. (Appeals) erred in confirming the Assessing officer's order of not adjusting the amount declared as a additional income of Rs. 1,25,00,000/- as per survey declaration dated 11th February,2010 which was made to cover previous discrepancy if any in books of accounts and /or returned income of the company, relevant to Assessment Year 2009-10, against the addition made of Rs 2,91,78,953/-."

3. The brief facts of the case are that the assessee company is mainly engaged in the business of giving Rigs on hire to Government and Private parties.

4. During course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act, it was observed by the AO that the assessee company has reduced its profit by Rs.3,43,28,180/- and the asessee company was asked to explain the same.

The assessee company replied that these are expenses which the assessee company incurred on mobilization of rig's on which the assessee company has received the mobilization charges from their clients and the mobilization charges received are grouped under the head income from operations and these expenses are not debited to P & L A/c. but are allowable as revenue expenses although the same were capitalized in the books of accounts as per the Companies Act. During the year the assessee company has received mobilization charges of Rs.20,45,82,130/- and has spent am amount of Rs.3,43,28,180/- for mobilization of Rigs. As these expenditures being in the

nature of revenue expenditure, same were treated as revenue expenses while calculating the taxable income of the assessee company. The assessee company relied on the decision of Hon'ble Supreme Court in the case of India Cement Ltd. v. CIT (1966) 60 ITR 52(SC) and CIT v. Lotte India Corporation Ltd. (2007) 290 ITR 248(Mad.) The assessee company submitted that assessee company has wrongly claimed interest amounting to Rs. 52,25,592/ - as interest expenditure though same pertains to the period before the Rigs were put to use and hence same needs to be capitalized as per section 36(1)(ii) of the Act. The assessee company submitted that the same be added back to the total income of the assessee company.

The A.O. observed that the assessee company has not debited the amount of Rs. 3,43,28,180/- to the profit and loss account although the expenditure was incurred , but the same was capitalized in the books of accounts as per the Companies Act and hence the amount which has not been debited to Profit and Loss Account cannot be allowed as deduction while computing income chargeable to tax under the Act . The assessee company has , however, stated that the said expenditure was revenue expenditure under the Act but the assessee company has not been able to explain under which provisions of the Companies Act and the Act this expenditure gets a different treatment and in absence of such explanation, the A.O. held that these expenditure are to be capitalized and the benefit of depreciation is to be granted to the assessee company as under:

Amount to be capitalized : Rs.3,43,28,180/-
less: depreciation@ 15% : Rs. 51.49,227/-
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Rs. 2,91,78,953/-

and addition to the extent of Rs. 2,91,78,953/- was made to the total income of the assessee company by the AO vide assessment order dated 29-12-2011 passed u/s 143(3) of the Act.

5. Aggrieved by the assessment orders dated 29-12-2011 passed by the A.O. u/s 143(3) of the Act, the assessee company filed first appeal before the CIT(A).

6. Before the CIT(A) the assessee company submitted that while making the above mentioned additions, the A.O. has not considered that the assessee company has wrongly capitalized the following expenses on the rigs during the year:-

| Particulars of expenses | Rig 8 | Rig 9 | Rig 10 | Rig 11 | Total |
|---|---|---|---|---|---|
| Insurance charges | 575250 | | | | 575250 |
| Demurrage | 40710 | | | | 40710 |
| Bank charges | 17950 | | 5795 | 4811 | 28556 |
| Travelling expenses | 18810 | | 18810 | 165136 | 202756 |
| Freight charges | 1111643 | 8924719 | 116926 | 1201977 | 11355265 |
| Transport charges | 10544.5 | | 1125061 | 970800 | 3150276 |
| Interest on debenture | | 5235617 | | 5235617 | 10471234 |
| Interest on loan | | 3996041 | | 3996042 | 7992083 |
| Professional fees | | 171000 | | 116050 | 287050 |
| Crane hiring charges | | 225000 | | | 225000 |
| Total | 2818778 | 18552377 | 1266592 | 11690433 | 34328180 |

The assessee company stated the expenses incurred on Rig number 8 and 10 are clearly revenue in nature as these rigs started working in the assessment year 2008-09. It was further submitted that the expenses incurred on the

others are mainly revenue expenses and allowable as revenue expenditure. It was further submitted that interest paid on convertible debenture which were raised by the company for the purpose of business in financial year 2007-08 is fully allowable expenditure for the assessment year 2009-10 as business expenditure. It was further submitted by the assessee company that the A.O. has not considered the fact that during the year under consideration, the assessee company has earned a sum of Rs.20,45,82,130/- towards mobilization charges. Out of the above sum, a sum of Rs.3,07,00,820/- was received for the 1st mobilization of rig number 11 on 17/5/2008 and a sum of Rs. 6,13,20,000/- was received on rig number 9 on 23/6/2008 and accordingly, if the mobilization expenses are to be capitalized the receipts cannot be treated as income. The assessee company further submitted that during the course of survey held on 11.2.2010, the AO has not taken into account that the assessee company had declared an additional sum of RS.1,25,00,000/- as income for the assessment year 2009-10 and accordingly had filed a revised return declaring the said amount as income, against which the Revenue should have allowed benefit of above mentioned amount of Rs.1,25,00,000/-. The assessee company also submitted copies of invoices with respect to rig number 9 and 11 raised to the concerns with whom the transaction had been made to establish that rig number 9 and 11 have become functional.

The CIT(A) after carefully considering the issue observed that the dispute is regarding whether the amount in question is to be treated as capital expenditure or to be allowed as revenue expenses to the assessee company. The CIT(A) observed that as per the A.O., the assessee company had itself capitalized the said expenses and the benefit of the same as revenue expenditure cannot be given to the assessee company. The assessee company on the other hand has stated that even though the said amounts stood capitalized in its books of accounts, the expenses being revenue in nature

would needed to be taken into consideration as such while computing the total taxable income. The CIT(A) noted that the assessee company had offered a sum of Rs. 1,25,00,000/- as additional income in the assessment year 2009-10 during the course of survey proceedings held on the assessee company on 11/2/2010 and accordingly the assessee company had requested for the benefit of the said income be granted to the assessee company by the A.O.

The CIT(A) observed that the assessee company has incurred mobilization charges of rigs which expenditure were rightly capitalized in its books of accounts as no revenue can be earned until mobilization is complete and rigs start operations. The CIT(A) held that entries in the books of accounts are not decisive and does not prevent the assessee company from claiming the expenses as revenue expenses even though the same was capitalized in the books of accounts of the assessee company as the accounting treatment is not conclusive . Further the purposes of Companies Act,1956 and Income Tax Act, 1961 are altogether different. Section 37 of the Act prohibits grant of deduction of expenditure which is of capital nature. But ,the assessee company had not commissioned rigs in the previous year relevant for the assessment years involved . The assessee company contended that the two of its rigs have been commissioned in the assessment year and therefore it cannot be held that the expenses incurred on them are capital in nature in spite of the fact that they were capitalized in the books of accounts. The assessee company submitted copies of invoices for usage of the concerned rigs. It was observed by the CIT(A) that no documentary evidence with respect to the inspection report, trial run report etc. was submitted by the assessee company.The CIT(A) also observed that no documentary evidences was submitted by the assessee company before the AO to establish the allotment of total expenditure capitalized to various rigs. The statement of the assessee company before the A.O. was that the interest amount of Rs.

52,25,592/- is to be capitalized as it relates to the period before the rigs were put in use. However, in the classification done by the assessee company to claim revenue expenses , the CIT(A) observed that the interest expenditure has been allocated to rig number 9 and 11 wherein the assessee company has claimed receipt of mobilization charges and has stated that expenditure on the same should be allowed as revenue expenses as the rigs had started functioning in the assessment year 2008-09. The statements of the assessee company are thus self contradictory. The statement of the assessee company that if these expenses are capitalized the income shown would need to be disregarded is also not acceptable. The assessee company has stated that Rig. Nos.11 & 9 were put in use in the current year. To establish this the assessee company has submitted copies of invoices dt.17.5.2008 & 23.6.2008. However a study of the said invoices shows that the invoices do not mention the Rig used. As per the assessee company's own statement dated 11.2.2010 filed before the A.O. , it had other rigs operational in the year. Therefore, the CIT(A) held that unless the invoices are linked to the rig it cannot be held that the amount received was from the usage of rig which was pending mobilization. As nothing has been submitted to actually establish the mobilization of rigs and commencement of work from it, the claim of the assessee company that expenditure incurred is to be treated as revenue expenses was not acceptable to the CIT(A). In view of all these facts, the CIT(A) accepted the observation of the A.O. that the said expenses would need to be considered as capital. The assessee company as it is seen capitalized the said direct and indirect expenses incurred on mobilisation as it is clear that it relates to the business benefits for the future. The assessee company had itself treated the expenses as capitalized expenses incurred towards the project undertaken as capital work-in-progress and the expenses are incurred for getting the rig ready for use and incurred prior to commencement and was rightly capitalized by the assessee company. The CIT(A) observed that no documentary proof of the mobilization and use of the rigs in the instant year

was submitted or produced by the assessee company. Further, the CIT(A) held that the expenditure was incurred to bring asset or advantage of enduring nature and therefore is to be treated as capital. Pre-commencement expenditure is not tax deductible as they are not tax deductible as they are incurred for setting up operations and not wholly and exclusively incurred in production of income. The CIT(A) held that the assessee company has considered these expenses as pre-operative itself and capitalized and subsequently claimed by the assessee company as revenue expenditure which is not allowable. Accordingly, the CIT(A) confirmed the order of the AO and held that there is no infirmity in the order of the AO treating the entire expenditure incurred for mobilization of rigs amounting to Rs.3,43,28,180/- as capital in nature and adding the same to the income of the assessee company and allowing depreciation thereof , vide orders dated 04-03-2013.

The CIT(A) rejected the alternate plea of the assessee company with respect to not adjusting by the AO of the amount declared as additional income of Rs.1,25,00,000/- during course of survey proceedings against the assessee company u/s 133A of the Act on 11-2-2010 to cover the discrepancies in the books of accounts pertaining to the assessment year 2009-10, against the addition of Rs.2,91,78,953/- made by the AO as the order of the AO did not contained any discussions on this issue as also the AO has made addition regarding capitalization of expenses and not disallowance of expenses. The AO has allowed the capitalization of expenses against which benefit will be available to the assessee company spread over different years by grant of depreciation. The CIT(A) held that the additional income offered for taxation by the assessee company during survey is in the nature of income and it cannot be adjusted against the expenditure capitalized. Thus, the CIT(A) held that there is no infirmity in the order of the AO in computing the total income of the assessee company after taking into consideration the income as declared in revised return of income filed with Revenue which is inclusive of

additional income offered for taxation during survey proceedings u/s 133A of the Act on 11-02-2010 vide orders dated 04-03-2013.

7. Aggrieved by the orders dated 04-03-2013 of the CIT(A), the assessee company is in appeal before the Tribunal.

8. The ld. Counsel for the assessee company submitted that the assessee company is engaged in the business of giving Rigs on chartered hiring to Government and Private parties like ONGC etc who places order on the assessee company. The assessee company has claimed the expenses with respect to the mobilization of rigs to the extent of Rs. 3,43,28,180/- which was not debited to the profit and loss account but was treated as capital expenditure in the books of accounts prepared under the Companies Act , while the same were revenue expenditure as per the Act. The ld counsel submitted that the said expenses included Rs.1.07 crores towards interest on debentures. The ld. Counsel submitted that mobilization income of Rs. 20.46 crores was offered for taxation and mobilization expenses of Rs.3.43 crores incurred by the assessee company is to be allowed as revenue expenditure even if it is capitalized in the books of account. The assessee company is importing rigs which are transferred to the client's site and thereafter are installed at clients site for which expenses have been incurred. The assessee company also incurred expenses for insurance etc. The Revenue has not allowed the same because the same was capitalized in the books of account and has not been debited to the P&L account. The ld counsel submitted that the assessee company's business of importing rigs and giving the same on hire is a continuous business and transportation and other charges incurred for bringing the rigs to site is not a capital expenditure. The ld counsel submitted that the assessee company is in business of hiring of rigs which has commenced and transportation of rigs to client site is not capital expenditure. The ld. Counsel for the assessee company relied on the judicial

decisions (i) CIT v. Triveni Engineering and Industries Limited (2009) 19 DTR 274(Del HC), (ii) India Cements Limited v. CIT 60 ITR 52(SC), (iii) CIT v. Lotte India Corporation Limited (2007) 290 ITR 248(Mad. HC.) (iv) Grasim Industries Ltd v. DCIT (1999) 64 TTJ (Mumbai-trib.) 357 (v) CIT v. Havells India Limited (2012) 352 ITR 376 (Delhi HC), and (vi) CIT v. Relaxo Footwears Limited 293 ITR 0231 (Del. HC). The assessee company also took an alternative plea that an amount of Rs. 1,25,00,000/- which was offered as an additional income as per declaration during survey proceedings on 11-02-2010 u/s 133A of the Act, the benefit / credit should be allowed for the same. The assessee company submitted that the assessee company is in the business of hiring machines for drilling purposes which is a continuous business activity.

9. The ld. D.R., on the other hand, supported the orders of lower authorities and drew our attention to the submission made by the assessee company before the A.O. (copy placed at paper book filed with Tribunal) wherein the assessee company stated that expansion expenses were entirely funded by loan and hence there was huge liability on account of interest as well as principal amount. The ld. D.R. submitted that the assessee company admitted regarding the disallowance of Rs.52,25,592/- towards the interest with respect to the Rig no 9 and 11 which were not put to use , which was rightly disallowed by the AO and confirmed by the CIT(A). The ld Dr further submitted that no credit should be allowed to the assessee company with respect to Rs. 1,25,00,000/- which was declared and offered as additional income during the survey proceedings u/ss 133A on 11-02-2010.

10. Ld AR submitted in the rejoinder that the although assessee company has submitted before the AO that interest of Rs.52,25,292/- is to be capitalized and the same is wrongly claimed as interest expenditure as it pertain to the period prior to the rigs being put to use but the same is

allowable to the assessee company relying on decision of Hon'ble Madras High Court in the case of Lotte India Corporation Limited(supra) and decision of Hon'ble Supreme Court in the case of India Cements Limited v. CIT(supra) as the debentures were raised for the purposes of business and the interest is an allowable expenditure.

11. We have considered the rival contentions and also perused the material available on record including case laws. We have observed that the assessee company is in the business of giving rigs for drilling oil on charter hiring basis to Government and Private parties such as ONGC etc., since preceding year's which is an admitted position by the revenue also. Thus, it is un-disputed and admitted fact that the said business of the assessee company of giving rigs on charter hiring basis to Government and Private parties such as ONGC etc. for oil drilling purposes was a continuing and existing business of the assessee company which was set-up since preceding assessment year's. The assessee company undertook expansion of the very same existing and continuing business of giving rigs on charter hiring basis , from 7 rigs company to 11 rigs company by importing four additional rigs . The assessee company imported these additional 4 rigs and received mobilization charges from its clients during the assessment year with respect to these additional new rigs and the said mobilization charges received by the assessee company were offered for taxation by the assessee company in the return of income filed with the Revenue. It has been stated by the assessee company that rig no. 8 and 10 were working since preceding assessment year 2008-09 . Thus, it is stated that mobilization expenses incurred with respect to rig no 8 and 10 are clearly revenue in nature and are allowable as revenue expenditure as rig no. 8 and 10 are working since preceding assessment year. It is also stated that mobilization expenditure incurred on the other new rigs being 9 and 11 is also revenue in nature and allowable as revenue expenditure. It is further stated that debentures were issued and funds were raised in financial year

2007-08 for the business purposes for acquiring these additional new rigs and interest of Rs.1,04,71,234/- is an allowable revenue expenditure. The assessee company has contended that rig number 8 and 10 were working since assessment year 2008-09 , while with respect to rig no 9 and 11 the first mobilization advance was received of Rs.6,13,20,000/- with respect to rig number 9 on 23-06-2008 and Rs.3,07,00,820/- was received for 1st mobilization of rig number 11 on 17-05-2008 i.e. both these first mobilization advances were received from GSPC during the impugned assessment, and these mobilization advances received were offered for taxation in the return of income filed with the Revenue along with other mobilization charges received by the assessee company in all aggregating to Rs.20,45,82,130/- during the impugned assessment year . The dispute arose as to the assessee company incurring mobilization expenses which were mainly in the nature of freight and transportation charges, demurrage, insurance , travelling, crane hire charges, professional charges and interest expenses , amounting in aggregate to Rs.3,43,81,804/- with respect to rig no 8 , 9 , 10 and 11 , which were capitalized in the books of accounts of the assessee company although the assessee company claimed the same to be revenue expenditure while filing return of income with the Revenue. The assessee company in its business imports rigs and further transfer these rigs for use at client's site for which mobilization charges are incurred till mobilization is complete and rigs getting commissioned and operational at client's site . The assessee company receives charter hiring charges from the clients for rigs chartered hired to the clients for oil drilling by the clients. The business of the assessee company of charter hiring of rigs was admittedly set up in the preceding years and in the same existing and continuing business of charter hiring of rigs, the assessee company undertook expansion of business by additionally importing four new rigs for the purposes of giving these new rigs to the prospective client on charter hiring basis for drilling of oil by the clients. These rigs which are imported are taken to the site of the client and installed and commissioned

there-at and made operational for oil drilling by the client and the assessee company is paid charter hiring charges by the client who have charter hired these rigs for drilling of oil . The assessee company incurs mobilization charges in the interregnum period till the mobilization is completed and the rigs are commissioned and made operational. The rig number 8 and 10 were already operational since preceding assessment year , while first mobilization advance was received during the impugned assessment year with respect to rig number 9 and 11. The reference is drawn to provisions of Section 3 and 4 of the Act which stipulates as under:

*" ["**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.]"*

***"Charge of income-tax.***

***4.** (1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and [subject to the provisions (including provisions for the levy of additional income-tax) of, this Act] in respect of the total income of the previous year [* * *] of every person :*

***Provided*** *that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.*

*(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."*

Section 4 of the Act is a charging section which stipulates that the income shall be charged to tax in respect of the assessment year on prescribed rates in accordance with and subject to provisions of the Act in respect of the total income of the previous year of every person. While previous year is defined to be financial year immediately preceding assessment year and **in 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.** Reference is also drawn to the judgment of Hon'ble Bombay High Court in the case of Western India Vegetable Products Limited v. CIT (1954) 26 ITR 151(Bom.) whereby the Hon'ble Bombay High Court has drawn a distinction between the setting up of business and the commencement of business as under:

*"Now, turning to our statute, the deductions claimed are under Section 10(2) and they are in relation to a business and in order that those deductions can be allowed, the business must be carried on by the assessee. In this case it is not disputed that the business was carried on in the relevant previous year which is the financial year 1946-47, but the*

*important question that has got to be considered is from which date are the expenses of this business to be considered permissible deductions and for that purpose the section that we have got to look to is Section 2(11) and that section defines the "previous year" and for the purpose of a business the previous year begins from the date of the setting up of the business. 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. Mr. Palkhiwalla says that if that be the correct approach, then the Tribunal has misdirected itself in considering the commencement of the business and not the setting up of the business. Let us try and understand whether there is any difference between the two expressions "setting up" and "commenced and if so, what is the difference. It has often been said that the English language does not contain synonyms and every English expression must mean something different, however slight the difference, from any other expression. English language is full of nuances and if possible we must give a different meaning to the expression "setting up" from the expression "commenced". Mr. Joshi very strongly relied on a judgment of Mr. Justice Rowlatt reported in Birmingham and District Cattle By-products Co. Ltd. v. Commissioners of Inland Revenue [1919] 12 Tax Cas 92. In that case the assessee company was incorporated on the 20th of June, 1913, and between that date and the 6th of October, 1913, the directors arranged for the erection of works and the purchase of plant and machinery, and entered into*

*agreements relating to the purchase of products to be used in the business and to the sale of finished products. On the 6th of October, 1913, the installation of plant and machinery being completed, the company commenced to receive raw materials for the purpose of manufacture into finished products. For the purposes of excess profits tax a question arose as to the computation of average amount of capital employed by the company during the accounting period and the company contended that it commenced business on the date of its incorporation, viz., on the 20th of June, 1913, and that the pre-war standard should be based on the profits shown by revised accounts for the period 20th June, 1913, to 30th June, 1914, and Mr. Justice Rowlatt held, upholding the view of the Commissioners, that the business of the company had commenced on the 6th of October, 1913. Now, this is indeed a very strong case on facts in support of the Commissioner, because the view taken by Mr. Justice Rowlatt is that everything that had been done by the company before the installation of the plant and machinery was completed was preparatory to the commencement of the business and it was only when the company actually started receiving raw materials for the purpose of manufacture into finished products, the plant and machinery being ready, that it could be said that the assessee company had commenced business, and this is what the learned Judge says at page 97 :*

*"Referring to their minutes having looked round, and having got their machinery and plant, and having also employed their foremen, and having got their works erected and generally got everything ready, then they began to take the raw materials and to turn out their products."*

*Therefore if this case were to be applied to the present assessee, then we would be driven to the conclusion that, if anything, the Tribunal has taken*

*a view of the case very favourable to the assessee because on the facts of this case it would seem that the Income-tax Officer was right in holding that the net expenses prior to the 1st of November, 1946, should not be allowed as permissible deductions. That is why it is important to consider whether the expression used in the Indian statute for setting up a business is different from the expression Mr. Justice Rowlatt was considering, viz., "commencing of the business." It seems to us, that the expression "setting up" means, as is defined in the Oxford English Dictionary, "to place on foot" or "to establish," and in contradistinction to "commence". The distinction is this that when a business is established and is ready to commence business then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. But there may be an interregnum, there may be an interval between a business which is set up and a business which is commenced ' and all expenses incurred after the setting up of the business and before the commencement of the business, all expenses during the interregnum, would be permissible deductions under Section 10(2). Now applying that test to the facts here, the company actually commenced business only on the 1st of November 1946, when it purchased a ground-nut oil mill and was in a position to crush ground-nuts and produce oil. But prior to this there was a period when the business could be said to have been set up and the company was ready to commence business, and in the view of the Tribunal one of the main factors was the purchase of raw materials from which an inference could be drawn that the company had set up its business; but that is not the only factor that the Tribunal taken into consideration. The Tribunal has as pointed out in the statement of the case, scrutinised the various details of the expenses given in the order of the Appellate Assistant Commissioner and having scrutinised those expenses the Tribunal has come to the conclusin even on an interpretation more favorable to the assessee than the one we are giving to the*

*expression "setting up" that these expenses do not show that the business was set up prior to the 1st of September, 1946. In our opinion, it would be difficult to say that the decision of the Tribunal is based upon a total absence of any evidence. As we have often said we are not concerned with the sufficiency of evidence on a reference. It is only if there is no evidence which would justify the decision of the Tribunal that a question of law would arise which would invoke our advisory jurisdiction which after all is a very limited jurisdiction.*

*We will, therefore redraft the question submitted by the Tribunal as follows: "whether there was evidence before the Tribunal to hold that the assessee company set up its business as from 1st of September, 1946?" and we will answer that in the affirmative. No order as to costs."*

The above decision of Hon'ble Bombay High Court was approved by Hon'ble Supreme Court in the case of CWT v. Ramaraju Surgical Cotton Mills Limited(1967) 63 ITR 478(SC).

Thus, it can be said that when the assessee company acquired these new rigs, these rigs became available for hire from the time these rigs were acquired by the assessee company as the assessee company is in a position to charter hire these newly acquired rigs and these rigs are available and ready to be put to use from the time these rigs are acquired by the assessee company in its continuing and existing business of chartered hiring of rigs , the said existing business of chartered hiring is admittedly already set-up in the earlier years. With the import of these new rigs it cannot be said that the new business is set up or new source of income has come into existence rather it is the same old business of chartered hiring of rigs which is existing and continuing, rather there is an expansion or capacity addition through these newly acquired four rigs in the same business of charter hiring of rigs which was

carried on the assessee company admittedly since earlier year's. The business and source of income of the assessee company is same and continuing i.e. charter hiring of these rigs and in expansion thereof of the same existing and continuing business of chartered hiring of rigs, these additional rigs are acquired by the assessee company and installed at clients site for oil drilling where it is commissioned with completion of mobilization and made operational by commencing the work of drilling oil for the client. Thus, the mobilization expenditure are incurred in connection with newly acquired rigs prior to the completion of mobilization of rigs , commissioning of rigs and rigs becoming operational at client's site. The said mobilization expenditure so disallowed by the authorities below even in the interregnum period before mobilization being completed and the rigs getting commissioned and operational at client site cannot be held to be capital expenditure rather these mobilization expenses with respect to new rigs imported by the assessee company by way of expansion of existing and continuing business of charter hiring of rigs are revenue expenditure in nature keeping in view that the said new rigs are available for charter hire and ready to be put to use once the said rigs are acquired by the assessee company and that the same business of charter hiring of rigs is continuing and no new source of business having been come into existence, as the business or the source of income being charter hiring of the rigs is already set-up by the assessee company admittedly in the preceding year's and is in existence which is a continuous and existing business of the assessee company to import these rigs and to give them on hire to companies for oil drilling purposes, and these mobilization expenses are to be treated as revenue expenditure as these expenses are incurred after the business is being set-up and is not a capital expenditure as the rigs after acquisition are available for hire and ready to be put to use i.e. giving them on charter hire. Thus, these rigs which are imported are ready and available to be put to use being available for charter hiring after acquisition by the assessee company so far as assesssee company

is concerned as the same are available for being given on charter hiring from the time the rigs are acquired by the assessee company and are merely to be moved to and installed at the site of the clients such as ONGC, GSPC etc desirous of taking the same on hire for oil drilling, so that all the mobilization expenses which is in connection with these new rigs till these new rigs mobilization is completed and these rigs are installed at clients site and start commencing drilling of oil for the client is a revenue expenditure and not a capital expenditure. The judgment of Hon'ble Delhi High Court in the case of CIT v. Triveni Engineering and Industries Limited(supra) and CIT v. Relaxo Footwear Limited(supra) relied upon by the assessee company supports the contentions of the assessee company as these new four rigs were acquired as an expansion of the existing business of the assessee company to charter hire the rigs which was admittedly set-up in the earlier years and no new business had been set up with acquisition of these four new rigs nor any new source of income has come to existence as there is a unity of management, control and interlacing in the business of the assessee company , we , therefore, in view of our detailed discussions and reasoning as above hold that the mobilization expenses incurred by the assessee company of Rs.3,43,28,180/- is to be allowed as revenue expenditure.

The interest paid by the assessee company on the borrowings for acquisition of the rigs is toward the business of the assessee company as these new rigs are available for being given on hire and ready to be put to use immediately on their acquisition by the assessee company as per the charter hiring business of the assessee company and is to be allowed as revenue expenditure towards the interest which was paid by the assessee company on borrowings in connection with acquisition of these new rigs and provisions of Section 36(1)(iii) of the Act stood complied with. The decision of Hon'ble Apex Court in the case of India Cements Ltd. (supra) and Hon'ble Madras High Court in the case of Lotte India Corporation Limited(supra)

supports the case of the assessee company. The benefit of interest as revenue expenditure which was paid on the borrowings raised by the assessee company in connection with the acquisition of these new rigs cannot be denied to the assessee company as the same was incurred for acquiring the new rigs for giving on hire and these rigs are ready to be put to use from the time these rigs are acquired by the assessee company and the interest paid in relation to these rigs which are available for being given on hire and in-fact ready to be put to use in the business of charter hiring of the assessee company, is wholly and exclusively incurred for the purposes of the business of the assessee company and is an allowable expenditure as per provisions of the Act. With respect to the interest expenditure of Rs.52,25,592/- submitted by the assessee company to be incurred prior to the said new rigs were being put to use by way of commissioning at client site and becoming operational will also have to be allowed as revenue expenditure, as we have already held that the borrowings made by the assessee company for acquiring rigs is for the purposes of business and is an allowable expenditure, as the rigs after acquisition was available for hire and ready to be put to use so far as business of the assessee company of charter hiring of these rigs is concerned, provisions of Section 36(1)(iii) along with proviso stood complied with. The taxes are to be collected by the authority of law which is mandate of Article 265 of the Constitution of India. Once the expenditure is found to be allowable as revenue expenditure as per provisions of the Income Tax Act,1961, the same are to be allowed as revenue expenditure under the Act and the tax-payer cannot be denied deduction of the said revenue expenditure while computing income chargeable to tax merely because under an erroneous belief the tax-payer has submitted before the authorities that the same is not allowable as revenue expenditure. Article 265 of the Constitution of India reads that "No tax shall be levied or collected except by the authority of law." In terms of the Article 265 of the Constitution, tax can be levied only if it is authorized by law. The Hon'ble Bombay High Court in **Balmukund**

**Acharya vs DCIT, CIT and UOI 310 ITR 310** held that Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.The Hon'ble Bombay High Court in **Nirmala L. Mehta v. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1** held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. Circular No. 14(XL-35) of 1955, dated 11.4.1955, issued by the Central Board of Direct Taxes reads as under:

"Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should –

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

A reading of the circular shows that a duty is cast upon the assessing officer to assist and aid the assessee in the matter of taxation. They are obliged to advise the assessee and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing Officer is to administer the statute with solicitude for public exchequer with an inbuilt idea of fairness to taxpayers.**,** CIT V. Rajesh Jhaveri Stock Brokers (P) Limited: 291 ITR 500 (SC).

It is not material and relevant how the assessee company treated these mobilization expenses in its books of account but what is material and relevant is the allowability of these expenses as revenue expenses as per provisions of the Act . The judgment of Hon'ble Supreme Court in the case of Kedarnath Jute Mfg. Co. Limited v. CIT (1971) 82 ITR 363(SC) and Hon'ble Delhi High Court in the case of CIT v. Triveni Engineering & Industries Limited in (2009) 19 DTR 274(Del. HC) support the contentions of the assessee company in this regards .The taxes are to be collected by the authority of law which is mandate of Article 265 of the Constitution of India.Article 265 of the Constitution of India reads that "No tax shall be levied or collected except by the authority of law." In terms of the Article 265 of the Constitution, tax can be levied only if it is authorized by law. The taxing authority cannot collect or retain tax that is not authorized. Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional. The Hon'ble Bombay High Court in **Balmukund Acharya vs DCIT, CIT and UOI 310 ITR 310** held that Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconception or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected.The Hon'ble Bombay High Court in **Nirmala L. Mehta v. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1** held that there cannot be any

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A reading of the circular shows that a duty is cast upon the assessing officer to assist and aid the assessee in the matter of taxation. They are obliged to advise the assessee and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing Officer is to administer the statute with solicitude for public

exchequer with an inbuilt idea of fairness to taxpayers.**,** CIT V. Rajesh Jhaveri Stock Brokers (P) Limited: 291 ITR 500 (SC).

Once the expenditure is found to be allowable as revenue expenditure as per provisions of the Income Tax Act,1961, the same are to be allowed as revenue expenditure under the Act while computing income chargeable to tax even if the tax-payer has given different treatment in its books of accounts by capitalizing the same in its books of accounts instead of debiting it to the Profit and Loss Account. This is the mandate of the Income Tax Act,1961 which has to be followed as the taxes can only be collected by the authority of law. In our considered view based on our above discussions and reasoning, the addition made by the A.O. and confirmed by the CIT(A) is ordered to be deleted. We order accordingly.

In view of our above decision and discussions allowing the mobilization expenses incurred by the assessee company as an revenue expenditure allowable under the Act as deduction while computing the income chargeable to tax, the alternative plea of the assessee company to allow credit of Rs.1,25,00,000/- being additional income declared during the course of survey proceedings on 11-2-2010 u/s. 133A of the Act has become academic and infructuous and is dismissed.

11. In the result, the appeal filed by the assessee company in ITA N0. 4587/Mum/2013 for the assessment year 2009-10 is allowed.

Order pronounced in the open court on 11th April, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांकः 11-04-2016 को की गई ।

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|---|---|
| Sd/- | sd/- |
| (AMIT SHUKLA) | (RAMIT KOCHAR) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

मुंबई Mumbai; दिनांक Dated **11-04-2016**

व.नि.स./ R.K., Ex. Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "D" Bench
6. गार्ड फाईल / Guard file.

**आदेशानुसार/** BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार** (Dy./Asstt. Registrar)
**आयकर अपीलीय अधिकरण,** मुंबई / **ITAT, Mumbai**