IN THE INCOME TAX APPELLATE TRIBUNAL
"C"BENCH: BANGALORE

BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.92/Bang/2018 & ITA No.1837/Bang/2016
Assessment Year: 2013-14 & 2012-13

Indo Gold Mines Pvt. Ltd. No.15, Golf Course Road Off HAL Airport Road Bengaluru 560 008 **PAN NO :AABCI3718D**	**Vs.**	DCIT Circle-3(1)(1) Bengaluru
APPELLANT		**RESPONDENT**

Appellant by	:	Shri Padamchand Khincha, A.R.
Respondent by	:	Shri Kannan Narayanan, D.R.

Date of Hearing	:	28.06.2021
Date of Pronouncement	:	02.07.2021

O R D E R

PER Bench:-

The assessee has filed these appeals challenging the orders passed by Ld. CIT(A)-3, Bengaluru and they relate to the assessment year 2012-13 and 2013-14. Since the issue urged in these appeals is identical in nature, they were heard together and are being disposed of by this common order, for the sake of convenience. The solitary issue urged in both the years is whether the Ld. CIT(A) was justified in confirming the disallowance of loss claimed by the assessee on the reasoning that the assessee has not set up its business.

2. The facts relating to the issue are stated in brief. The assessee herein is a joint venture company formed with the purpose of undertaking the business of exploration of minerals. The Ld A.R submitted that the assessee company was incorporated in the year 2006. The company was jointly formed by M/s. Indo-Gold Limited, Australia and M/s Metal mining India Pvt. Ltd. The former one is a foreign company and the later one is a domestic company.

3. The assessee has not started commercial production, i.e., extraction of minerals during the years under consideration. However, the assessee had incurred expenditure on employee cost, exploration cost, depreciation and other expenses. The assessee claimed entire expenses as its business loss in both the years under consideration and accordingly sought carry forward of losses. Since the assessee did not generate any revenue and the A.O. took the view that the assessee has not started any activity. The Indian Share holder of the assessee company, viz., M/s Metal mining India P Ltd had obtained reconnaissance license from the Government and the same was not recognized by the AO. Hence, the A.O. took the view that the loss claimed by the assessee cannot be considered as "business loss" and hence it is not eligible to be carried forward. Accordingly, he disallowed the business loss claimed in both the years and accordingly determined the total income as Nil in both the years under consideration.

4. The Ld. CIT(A) agreed with the view with the A.O. that the assessee has not acquired any mining rights and hence, it cannot be said that the company set up its business in these two years. The Ld. CIT(A) placed his reliance on the decision rendered by Bengaluru bench of Tribunal in the case of Kingfisher Training and

Aviation Services Ltd. (2011) 8 ITR (Trib.) 692. Accordingly, the Ld. CIT(A) dismissed the appeals filed by the assessee for both the years under consideration.

5. The Ld. A.R. submitted that the assessee is in the business of exploration of minerals and it will first obtain reconnaissance license from the Government for exploring availability of minerals in a particular area. He submitted that one of the shareholders M/s. Metal Mining India Ltd. had obtained reconnaissance license way back in the year 2005 itself. He submitted that the exploration and extraction minerals is a long process and hence the assessee should be considered as having set up its business, once the office is set up and application for license is filed. The Ld. A.R. further submitted that the assessee has declared loss in the past years also and the return of income filed for those years have been accepted u/s 143(1) of the Act. Only during the two years under consideration, the A.O. has raked up the issue of setting up of business and accordingly, disallowed the claim.

6. The bench pointed out to the Ld. A.R. that there is a specific provision, viz., section 35E of the Act, which deals with the claim for deduction of expenditure on prospecting of certain minerals. The Ld. A.R. submitted that, as per the provisions of sec.35E of the Act, the revenue expenditure incurred by the assessee during the year of commercial production and in any one or more of the 4 years immediately preceding that year shall be amortized for a period of 10 years. Thus the provisions of section 35E of the Act deal with the expenditure incurred upto 4 years immediately preceding the year of commencement of commercial production and not beyond that. He submitted that the assessee could not

commence its commercial production on account of certain litigations till date. Since the years under consideration falls beyond the period of four years mentioned in sec.35E of the Act, the Ld A.R contended that normal provisions of the Act should apply to the years under consideration.

7. The Ld. D.R. supported the order passed by Ld. CIT(A). The Ld. D.R. also placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of ALD Automotive Pvt. Ltd., wherein it was held that when the assessee failed to produce necessary evidence in support of its claim that business was set up and it was ready to commence, expenditure incurred by the assessee prior to setting up of business could not be allowed. The Ld. D.R. submitted that the assessee has not proved that it has set up of the business.

8. We heard the rival contentions and perused the record. As noticed earlier, the provisions of section 35E of the Act deals with the claim for deduction of expenditure incurred on prospecting of minerals. According to this section, all revenue expenditure incurred in the year of commencement of commercial production and within 4 years immediately preceding that year is allowed to be amortized in 10 years. We notice that neither the AO nor the Ld. CIT(A) has examined the applicability of provisions of section 35E of the Act to the facts of the present case. Ld. A.R., however, submitted that the provisions of section 35E of the Act only deals with the expenditure incurred within 4 years prior to the year of commencement of commercial production and it does not deal with the claim beyond preceding 4 years. He submitted that other

provisions of the Income Tax Act should apply in respect of expenditure incurred beyond preceding 4 years.

9. The ld. A.R. has contended that the tax authorities are not correct in law in holding that the assessee has not set up its business. He submitted that the tax authorities have taken the view that the assessee should have commenced commercial production in order to hold that it has set up its business. He submitted that setting up of business and actual commencement of commercial production are two different things and for the purpose of allowing revenue expenditure as deduction, it is enough that the business is set up. He submitted that the activity of exploration and extraction of minerals is a long process and hence the moment the assessee sets up the office and applies for license for undertaking exploration activities, the business should be treated as having been set up.

10. It is well settled proposition of law that "setting up of business" and "commencement of production" are two different activities. Once the business is set up, the assessee would be entitled for deduction of revenue expenses. In case of business relating to "exploration and extraction" of minerals, the activity of exploration of minerals itself is a long process. Once a person identifies the area, where minerals are available, then only the activity of extraction of minerals would start, that too, if it is viable to undertake those activities. Hence generation of revenue, as observed by the tax authorities, should not be the criteria for determining the date of setting up of business. The fact that the generation of revenue would take several years is well recognized in sec.35E of the Act, which provides for amortization of expenses

incurred in previous four years preceding the year of commercial production.

11. We notice from the financial statements that the assessee has employed personnel and has started exploration activities. The reconnaissance license has been obtained by one of the shareholders of the assessee company. Hence, there appears to be merit in the contention of the assessee that it has set up its business. However, the real question is whether the normal provisions of the Act shall apply to the years under consideration in the assessee's case. As observed earlier, the provisions of section 35E of the Act is applicable to facts of the present case, as per which the expenditure incurred within four years prior to the year of commencement of production have to be accumulated and should be amortised in succeeding ten years. Thus, the special provisions of section 35E contemplates accumulation of expenses, i.e., they are not treated as "business loss" as per normal provisions of the Act. Hence the question of "setting up" of business is not relevant for the provisions of sec.35E of the Act.

12. Admittedly, the A.O. has not examined the case of the assessee in terms of section 35E of the Act. However, the Ld A.R submitted that the assessee has not commenced extraction activities and accordingly contended that normal provisions of the Act should apply for the years preceding the "four years period" mentioned in sec.35E of the Act. As per the provisions of the Act, the business loss is allowed to be carried forward only for a period of eight years. For both the years under consideration, the prescribed period of eight years has already elapsed. Hence the claim of the assessee becomes academic. In any case, the question

whether the provisions of sec.35E should apply for the years beyond the prescribed period of four years or normal provisions of the Act should apply appears to be a debatable one.

13. At the time of hearing of cases, the bench proposed to restore the matter to the file of the AO for examining entire issue afresh in terms of sec.35E of the Act. Both the parties agreed to the same. Even if the contention of the assessee that normal provisions of the Act should apply to both the years under consideration is accepted for a moment, considering the fact that the assessee has lost its eligibility to claim for set off of brought forward of losses of both the years under consideration, we are of the view that no useful purpose would be served by remitting the matter to the file of the AO, since it would be only an academic exercise. Hence we leave the entire issue open and we are of the view that they may be considered in an appropriate year by the tax authorities, if it is found necessary. Accordingly, we are of the view that the grounds urged by the assessee in these two years does not require adjudication for the peculiar reasons stated above.

14. In the result, both the appeals filed by the assessee are treated as dismissed for statistical purposes.

Order pronounced in the open court on 2nd July, 2021

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R. Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated 2nd July, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.