

आयकर अपीलीय अधिकरण “जी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No. 6059/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2010-11)

Wondervalue Realty Developers P. Ltd. 505, Ceejay House, Dr. Annie Besant Road, Worli, Mumbai-400 018	बनाम/ Vs.	ITO, Ward 5(3)(4), Aaykar Bhavan, 5 th Floor, New Marine Lines, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACW 8249 C		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Mandar Vaidya
प्रत्यर्थी की ओर से/Respondent by	:	Shri Airiju Jaikaran

सुनवाई की तारीख / Date of Hearing	:	22.6.2016
घोषणा की तारीख / Date of Pronouncement	:	05.10.2016

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-9, Mumbai ('CIT(A)' for short) dated 11.8.2014, partly allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2010-11 vide order dated 25.3.2013.

2. The facts of the case in brief are that the assessee returned income by way of interest on Bank FDRs (Rs.73.50 lacs) as business income, adjusting the administrative expenditure (Rs.31.49 lacs) and depreciation (Rs.17.07 lacs) there-against. The assessee-company was incorporated on 24.9.2008 with the main object to acquire, promote, develop and improve the land and hereditaments and to erect and build flats, houses, shops or other buildings thereon. In view of the Assessing Officer (A.O.), this was not valid. The interest income is on funds deemed surplus for the time being and, accordingly, assessable as 'income from other sources' u/s. 56 of the Act. Reliance was placed by him on *Tuticorin Alkali Chemicals & Fertilizers Ltd. vs. CIT* [1997] 227 ITR 172 (SC) and *CIT vs. L & T Mcneil Ltd.* (1993) 202 ITR 662 (Bom). The claim *qua* administrative expenditure and depreciation was even otherwise inadmissible as the business had not been set up. The assessee's case in this regard, made out with reference to the offer letter from MHADA, i.e., for redevelopment of property, was found not tenable as the same related to the previous year relevant to AY 2012-13. The assessment being confirmed in appeal, the assessee is in second appeal.

3. We have heard the parties, and perused the material on record.

3.1 The first issue before us is the correct head of income as regards the assessment of interest income on bank FDRs. The bank deposits have not been shown to have any nexus with the assessee's business for the interest thereon to be assessed as business income. The same, accordingly, stands rightly assessed u/s. 56.

The law

3.2 As regards the second issue *the question before us is whether the assessee company has set up its business during the relevant year and, if so, when?* The reason is simple: the law, per s. 28(i), brings only the profits or gains - which could well be in a negative sum, of any business or profession carried on by the assessee at any time

during the previous year, to charge of tax under the Act. That is, a business has to be in existence, i.e., established. Further, we formulate the question thus as business has admittedly not been established as at the end of the immediately preceding year, the year of incorporation of the assessee-company. Without doubt, even as observed by the Bench during hearing itself, if it has, merely because no project has been executed (to any extent), much less generating revenue, would not operate to preclude deduction of any expenditure incurred for the purposes of its business by the assessee, i.e., post the establishment thereof (business). The law in the matter is well settled, which we find capsuled in the following observations by the Hon'ble jurisdictional High Court [in *Western India Vegetable Products Ltd. vs. CIT* (1954) 26 ITR 0151 (Bom)]:

‘There is a clear distinction between a person commencing a business and a person setting up a business and for the purposes of the Indian Income-tax Act the setting up of the business and not the commencement of the business that is to be considered. It is only after the business is set up that the previous year of that business commences and any expense incurred prior to the setting up of a business would not be permissible deduction. 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. There may however be an interval between the setting up of the business and the commencement of the business and all expenses incurred during that interval would be permissible deductions.’

In *CIT vs. Ramaraju Surgical Cotton Mills Ltd.* (1967) 63 ITR 0478 (SC), it was held as under:

‘A unit cannot be said to have been set up unless it is ready to discharge the function for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up.’

In *CIT vs. Sarabhai Sons Pvt. Ltd.* (1973) 90 ITR 0318 (Guj), the Hon'ble Court reiterated the same principle. Following *Western India Vegetable Products Ltd.* (supra) and applying *Ramaraju Surgical Cotton Mills Ltd.* (supra), it held on facts as under:

Held, on the facts, that the new business could not be said to be ready to discharge the function for which it was established, name, the manufacture of scientific instruments and communication equipment, until the machinery necessary for the purpose of manufacture was installed. Obtaining land on lease, placing orders for machinery and raw materials were merely operations for the setting up of business. In the present case the business could not be said to be set up until July, 1966, when the machinery had been installed and the factory was ready to commence business. Revenue expenditure incurred before that date would not be a permissible deduction in the assessment for the assessment year 1966-67.’

Noting precedents, it was observed by the Hon'ble jurisdictional High Court in *CIT vs. Industrial Solvents and Chemicals Pvt. Ltd.* [1979] 119 ITR 608 (Bom) that mere installation of the machinery is not sufficient and, further, the fact that the product manufactured was not up to standard was not relevant, i.e., for determining if the business had been established or not. This was again emphasized in *CIT vs. L & T Mcneil Ltd.* (1993) 202 ITR 0662 (Bom), as under: (pg. 663)

‘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, it is not set up. If a question arises as to whether a particular business can be said to have been set up in the relevant assessment year, that question will have to be determined on the facts and circumstances in each case (see pp. 667F, 669E).’

The first question, then, that falls for consideration is when the business can be said to have been set up. As explained, it is only when the company (entity) can discharge the functions for which it (the firm) is established, i.e., is ready to commence business. The apex court applied the principle laid down in *Western India Vegetable Products Ltd.* (supra) in *Ramaraju Surgical Cotton Mills Ltd.* (supra) to decide if in the facts and circumstances of the said case the company's unit could be said to have been set up or, equivalently speaking, established, to answer the question in the negative in-as-much as the manufacture of absorbent cotton wool, for which the unit was being set up, could not take place or be produced. It is only when it could start functioning as a business or a manufacturing organization that the unit could be

said to set up. Prior thereto the processes are preparatory in nature. The hon'ble court in *Bhogilal Menghraj & Co. Pvt. Ltd. vs. CIT* [1979] 119 ITR 968 (Bom) held the business of the assessee-company to have been set up only on the receipt of the power connection and not earlier on the purchase of raw material or even the installation of machinery subsequently, even as clarified by it earlier in *Industrial Solvents & Chemicals Pvt. Ltd.* (supra).

The facts

3.3 Coming to the facts of the case, the assessee has before us, listing the names of the parties from whom various services are claimed to have been availed, also noting along with the nature of those services, placed on record several documents. We observe no finding by the Revenue with regard thereto, even as some of the documents placed on record are dated and, accordingly, the corresponding services appear to be availed, in the following year. The MHADA approval, i.e., for NOC for development of a property, is dated 04.11.2011. The same appears to be in pursuance to a MHADA resolution dated 20.9.2010, while the architect certificate, seeking approval, is given only on 23.12.2010. The Id. AR, on being inquired by the Bench, explained the company to have employed the principal staff in February, 2009. The office premises, as well as, office equipments; furniture and fixture, which are in fact necessary for the user of the office premises itself, stands acquired only during the current year and, as it appears, at the fag-end thereof. Could the assessee function as an organization/establishment in the absence of a functional office premises? Then, again, the nature of the expenditure incurred (outstanding at Rs.3909.08 lacs as at the year-end as against at Rs.76,108/- at its beginning) by the assessee towards project cost, which stands capitalized as development work-in-progress, is relevant, though has not been examined. What would be relevant, as apparent from the facts of the various cited cases, is if the expenditure is preparatory in nature or in the process of execution of a development contract. Is registration or any regulatory approval,

required before any project could be taken up obtained, or even applied. It is the preparedness of the company or its' capability to undertake the project/s and not the actual execution thereof, which could either be by itself or out-sourced, wholly or partly, that is relevant. This is the principal or the focal point with reference to which several aspects have to be examined; all its different acts being geared toward setting up the business of undertaking (re)development work. Again, if some services are to be bought out, viz. architect; project management, etc., the entering into the firm arrangements as well as the capacity to pay them in terms of the relevant agreements would be sufficient. Infrastructure, along with man-power, are the critical resources that a company is to have in place before it could embark on a project, i.e., undertake the business that is being set up and to undertake which it is formed. This is of-course subject to registration or regulatory approvals required for the purpose. The actual undertaking of the project or even the approval thereof (by MHADA) is incidental, which would inure in time and, therefore, not of much import, save of-course where it is critical to the assessee's capacity to undertake it's business. Also relevant would be the cut-off date. This is as the assessee-company has claimed the entire expenditure for the year, i.e., from the beginning of the year, while it may well be that the business stands set-up or can be said to be so during the year, and it is only the expenditure incurred post set-up that is deductible as business expenditure. The assessee has also relied on the decision in the case of *Rajasthan Enterprises P. Ltd. vs. ITO* (in ITA No. 2124/Mum/2013 dated 28.10.2015). The same is based on the decision in the case of *CIT vs. Dhoomketu Builders & Development Pvt. Ltd.* [2013] 216 Taxmann 76 (Del), also relied upon. Our decision is in keeping with the said decision; we having noted the law in the matter as being well settled, so that it is essentially a matter of fact. The Hon'ble Court has in context of real estate development business stated incidents that could be considered as signifying commencement of business. In-as-much as all expenditure, post set-up, is admissible, even the commencement of business, otherwise a positive attribute, would not of much import in this regard. The assessee

has also placed on record some other decisions, which we may not advert to as the issue is principally factual.

4. The matter being factually indeterminate, is, accordingly, restored to the file of the first appellate authority for proper determination consistent with the facts and in accordance with law. The Id. CIT(A) shall decide after hearing both the sides, issuing definite findings of fact. We decide accordingly.

5. In the result, the assessee's is allowed for statistical purposes.

Order pronounced in the open court on October 05, 2016

Sd/-
(Amarjit Singh)

न्यायिक सदस्य / Judicial Member

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 05.10.2016

व.नि.स./Roshani, 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)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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