

**आयकर अपीलीय अधिकरण 'सी' न्यायपीठ चेन्नई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"C" BENCH, CHENNAI**

**माननीय श्री महावीर सिंह, उपाध्यक्ष एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**  
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ **ITA No.5523/Mum/2010**  
(निर्धारण वर्ष / **Assessment Year: 2006-07**)

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| <b>ACIT</b><br>Range 10(1),<br>Mumbai.                       | <b>बनाम</b><br>/ Vs. | <b>M/s. Fullerton Enterprises Pvt. Ltd</b><br>(now merged with Fullerton India Credit Co. Ltd.)<br>5 <sup>th</sup> & 6 <sup>th</sup> Floor, B Wingm Supreme IT Park<br>Supreme City, Powai<br>Mumbai - 400 076. |
| स्थायी लेखा सं./जीआइ आर सं./ <b>PAN/GIR No. AAFCA-3474-Q</b> |                      |   |
| (□ पीलार्थी/ <b>Appellant</b> )                              | :                    | (प्रत्यर्थी / <b>Respondent</b> )   |

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| अपीलार्थी की ओरसे/ <b>Appellant by</b>   | : | Shri GSD Babu (Advocate) – Ld. AR              |
| प्रत्यर्थी की ओरसे/ <b>Respondent by</b> | : | Ms. R. Helen Ruby Jesintha (Addl. CIT) –Ld. DR |

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| सुनवाई की तारीख/<br><b>Date of Hearing</b>       | : | 14-02-2022 |
| घोषणा की तारीख /<br><b>Date of Pronouncement</b> | : | 21-02-2022 |

**आदेश / O R D E R**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by Revenue for Assessment Year (AY) 2006-07 arises out of the order of learned Commissioner of Income Tax (Appeals)-21, Mumbai [CIT(A)] dated 26-04-2010 in the matter of assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) of the Act on 16-12-2008. The grounds raised by the revenue read as under:

1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in allowing the assessee's claim of expenses without appreciating the fact that assessee's claim that its business was set in the month of August, 2005 was not

tenable as assessee was not capable to render the services at that point of time or any point of time thereafter till 31.03.2006.

2. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in allowing the assessee's claim of expenses without appreciating the fact that the assessee's business had not been set up on 31.03.2006 as assessee had not obtained the statutory registrations without which the assessee was not capable to render the services.

3. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in allowing the assessee's claim of depreciation without appreciating the fact that the asset on which depreciation was claimed should be put to use for the purpose of business during the year by the owner of the said asset and since there was no business activity, the asset could not have been put to use for the purpose of business.

As evident, the revenue is aggrieved by allowance of business expenses by first appellate authority in the impugned order. The same were disallowed by Ld. AO in the assessment order on the ground that the assessee's business had not commenced during the year.

2. Having heard rival submission and after going through the orders of lower authorities, our adjudication would be as given in succeeding paragraphs.

3.1 The assessee being resident corporate assessee stated to be engaged in Market Research services was assessed for the year u/s 143(3) on 16-12-2008. Upon perusal of financial statements, it transpired that the assessee earned interest on Bank Deposits for Rs.15.67 Lacs and other income of Rs.6.80 Lacs but net loss was reflected at Rs.1121.80 Lacs. In the Schedule to the Accounts, it was mentioned that the company had set-up the business and ready for commencement but did not have any income from operations. The only source of income was interest on bank deposits and usage charges. On the basis of the same, it was alleged by Ld. AO that the business had not commenced and no business activity was carried out by the assessee during the

year. Accordingly, Ld. AO proceeded to disallow the various business expenditure as claimed by the assessee during the year.

3.2 The assessee defended the same, inter-alia, by submitting that it was incorporated with the objective of providing advisory and consultancy services to financial companies selling financial products as well as to retail customers etc. It also highlighted the sequence of various activities undertaken towards setting-up of the business. Though the first contract was signed by the assessee in May, 2006, however, the business was already set-up in August, 2005 when the assessee hired the managerial personnel and established necessary infrastructure to render the services. From August, 2005 onwards, the assessee incurred operating expenses of Rs.1076.01 Lacs which were revenue in nature and incurred wholly and exclusively for the purpose of business. It was also submitted that when a business is established and ready to start the business, it could be said to have been set-up. The business must be put into such shape that it could start functioning as a business. The term 'set-up' would mean 'ready to commence business.'

3.3 However, Ld. AO noted that registration under Value Added Tax (VAT) was obtained by the assessee as late as on 30-03-2007. The perusal of expenditure would show that the assessee was in the process of setting-up of business which culminated only on obtaining statutory registrations. The expenses on leased lines were incurred as late in the month of February 2006. Therefore, the business expenditure, as claimed by the assessee, could not be allowed as revenue expenditure. Alternatively, the depreciation of Rs.53.47 Lacs as claimed by the assessee would not be allowable since to make the said claim, the asset should have been put to use for the purpose of business. Since, there

was no business activity, the assets could not be said to have been put to use for the purpose of business. It was also observed by Ld. AO that though the Computer systems and software were claimed to have been put to use prior to 30.09.2005, the additions to leasehold premises was made after 01.10.2006. The lease agreements were entered on 01.10.2005 & 18.11.2005 and therefore, to say that the computer and software were put to use before 30.09.2005 was not tenable. Accordingly, the income earned by the assessee would not be assessable as 'Business income' since the business was not set-up. Finally, the income of Rs.22.47 Lacs was considered as 'Income from other sources' and business expenditure was disallowed.

4. During appellate proceedings the assessee reiterated that the business was already set up during August, 2005. The Ld. AO failed to appreciate that the assessee's nature of business was such that it would not require registration under VAT laws to commence the business. The VAT registration was obtained for levying VAT on usage charges recovered for sharing the common facilities. Since the assessee was engaged in rendering services, it would require registration with the Service Tax Authorities. However, the registration could be obtained by the service-provider within a period of 30 days from the date of providing the services. The assessee also submitted that leased line expenses were first incurred in the month of November, 2005 which was evidenced by the invoices. It was also submitted that during initial months, the assessee operated from a business center which included all such facilities. The necessary evidences in this regard were already furnished to Ld. AO during the course of assessment proceedings. Reliance was placed on various judicial decision, notable amongst the same was the

decision of Hon'ble High Court of Bombay in **Western India Vegetable Products Ltd. (26 ITR 151)**. The assessee also pointed out other factors which would indicate that the business had already set-up during the year and the expenditure were allowable u/s 37(1) of the Act.

5. The Ld. CIT(A) noted that the AO's conclusion was based only on Auditor's Remarks in the Audit Report. However, in the Audit Report, it was mentioned that the assessee had set-up business and was ready for commencement. The allowance of expenses after setting-up of business would not depend on inflow / earning of the income by the assessee. After setting-up of business, income may or may not be earned by the assessee. In assessee's case, managerial personnel were already appointed and the necessary infrastructure was created by the assessee to render services. The assessee had commenced negotiations with prospective parties. Therefore, the business was set-up and ready to commence business as soon as managerial personnel were appointed and infrastructure was created to render the services. The details would also show that the assessee started incurring expenses from the month of August, 2005 and when an expenditure of Rs.39.52 Lacs was incurred on salaries and allowances. This expenditure increased substantially during the subsequent months. Without setting up business, no prudent business would start incurring the expenditure. In the assessee's line of business, the most important input was expert and qualified personnel. Thus the maximum amount of expenditure would necessarily be for salaries and allowances. By creating the infrastructure and by hiring the personnel, the assessee was capable to render the services. The assessee also filed correspondences etc. in support of the fact that negotiations were carried out with prospective customers. Further, the

assessee would not require registration under VAT to set-up or commence business. Thus the expenditure as well as depreciation would be allowable expenditure. Aggrieved, the revenue is in further appeal before us.

### **Our findings and Adjudication**

6. After due consideration of material facts, it could be gathered that the assessee was engaged into rendering advisory and consultancy services. For the same, the most important resource would be qualified and expert personnel. Form the enumeration of facts, it emerges that the assessee had hired the qualified personnel during the year and incurred expenditure of Rs.39.52 Lacs in the month of August, 2005 which in subsequent months, rose substantially. The necessary infrastructure was put into place and the assessee was ready to commence the business. For the said purpose, the assessee had already acquired computer systems and software and capitalized the same as fixed assets. The correspondences made by the assessee would establish that it was in the process of negotiating with prospective customers. Therefore, on the basis of all these facts it could be said that that business had been set-up and the assessee was ready to commence the business. Pertinently, the assessee would not require registration under VAT but it was into rendering of services and hence, would require registration under Service Tax Act. However, even this registration could have been obtained by the assessee within 30 days of actual rendering of the services.

7. We find that Hon'ble Bombay High Court in **Western India Vegetable Products Ltd. (26 ITR 151)** aptly explained the distinction

between the concept of commencement and setting up of business and observed as under: -

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).

8. This decision has subsequently been considered by Hon'ble High Court of Madras in **Daimler India Commercial Vehicles (P.) Ltd. V/s DCIT (107 Taxmann.com 243)**. In this decision, Hon'ble Court, after considering various judicial pronouncements, noted as under: -

**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.

9. On the basis of the above, it could be said that business could be said to have been set-up 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. What is required to be seen is whether one of the essential activities for carrying on of the business of the assessee company as a whole was or was not commenced. When a business is established and is ready to commence, then it can be said that business has been set up. The business would be set up when the necessary infrastructure was acquired by the assessee and the assessee started paying salaries and allowance of the experts.

10. In view of the foregoing, we concur with the findings of learned first appellate authority in the impugned order. Accordingly, we hold that the assessee's business had been set-up during the year and the expenses including depreciation, as claimed by the assessee, were an allowable expenditure. We order so.

11. The appeal stand dismissed in terms of our above order.

Order pronounced on 21<sup>st</sup> February, 2022

**Sd/-**  
**(MAHAVIR SINGH)**  
**उपाध्यक्ष / VICE PRESIDENT**

**Sd/-**  
**(MANOJ KUMAR AGGARWAL)**  
**लेखक सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 21-02-2022

EDN/-

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

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF