

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA No. 1073/2008

Reserved on : July 24, 2009

Date of decision : August 19, 2009

COMMISSIONER OF INCOME TAX, DELHI-VI ...Appellant.
Through: Ms. Sonia Mathur, Advocate

VERSUS

WHIRLPOOL OF INDIA LTD.Respondent
Through: Mr. Ajay Vohra, Ms. Kavita Jha &
Mr. Sriram Krishna, Advocates.

CORAM:

HON'BLE MR. JUSTICE A. K. SIKRI

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? yes
3. Whether the judgment should be reported in the Digest? yes

% **JUDGMENT**

VALMIKI J.MEHTA, J.

1. This appeal is against the order of the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT") dated 2.11.2007 whereby the ITAT has deleted the disallowance of expenses prior to 1.02.1996 made by the Assessing Officer and which was confirmed by the CIT(A), on the ground that the assessee's business could be said to have been set up only on 1.2.1996 when the bank account was opened and not prior thereto.

2. The facts of the case are that the assessee company was incorporated on 27.7.1995 as a financial enterprise, with its main objects according to the memorandum of association, to carry on the business of financing of all kinds of goods including consumer goods and consumer durables etc., to purchase or finance all kinds of financial instruments, to finance private industrial enterprise in India by way of loans or advances and so on. The first board meeting was held on 12.08.1995 in which additional directors, executives and auditors were appointed. On 4.9.1995 the company placed orders for purchase of computers and peripherals. During the months of September and October 1995, various key employees such as branch managers, regional managers, consumer finance managers, company secretary and finance manager and accounts manager etc. were appointed. On 30.10.1995, M/s. S.R. Batliboi Consultants P. Ltd. sent their invoice to the company for recruitment charges which were paid by the company through Kelvinator of India Ltd., another company. During the period from 4.1.1996 to 21.1.1996 the assessee applied for approval of the Foreign Investment Promotion Board (FIPB) for investment by Whirlpool Financial Corporation of USA through its wholly-owned subsidiary by name Whirlpool Financial (Mauritius) Ltd., and for the approval of the Reserve Bank of India for receiving foreign exchange loan against future issue of equity. During the period from November 1995 to January 1996, the assessee-company paid salary to the staff and employees through two companies, viz., Kelvinator of India Ltd. and Expo Machinery Ltd. The employees incurred petty expenditure on

behalf of the company through imprest amounts sent to them through Kelvinator of India Ltd. A Bank account was opened on 1.2.1996 in the name of the company and thereafter the expenses were incurred from the same.

3. For the year ended 31.3.1996 the assessee-company filed its return of income declaring a taxable income of Rs. 94,41,990/-. While examining the return the Assessing Officer noted that the assessee had claimed expenditure on the footing that the business had been “set up” with effect from 1.11.1995. He took the view, disagreeing with the assessee, that the business can be said to have “set up” only on 1.2.1996 when the bank account was opened in the assessee’s name and therefore only the expenditure incurred thereafter can be allowed as a deduction. He accordingly disallowed the expenditure to the extent of Rs. 12,92,557/-, being the aggregate of Rs. 6,47,557/- incurred by the assessee and Rs. 6,45,000/- incurred by Expo Machinery Limited on behalf of the assessee. The view taken by the Assessing Officer having been confirmed by the CIT(A) and hence the assessee is in further appeal before us under Section 260A of the Income Tax Act, 1961.

4. On the basis of the aforesaid, the issue which arises is when can the assessee be said to have set up its business. Is the expression “setting up of the business” same as “commencement of business?” The ITAT has held that the expression “setting up of the business in the previous year” as per Section 3 of the Income Tax is different from commencement of the business and has relied

upon the judgments of different courts including of this Court in the case of **CIT Vs. Hughes Escorts Communications Ltd., 311 ITR 253.**

5. This Court in the case of **Hughes Escorts Communications Ltd.** (supra) has clearly held that a business is set up though the same may not have commenced and the expenditure incurred after the date of setting up has to be allowed as a deduction. It was further held that the question as to when the business is set up depends on the facts of each case and the nature of the business and no hard and fast rule can be laid down as to when the business was set up.

6. In view of the above, the following paragraph of the judgment of the ITAT which exhaustively details the facts and the reasons as to why the business is set up not on 1.2.1996 as contended by the Assessing Officer but on 1.11.1995 is reproduced below and with which we concur:

“4. It may thus be seen that the question when a business may be said to have been set up is dependent on the facts of each case and largely on the nature of the business proposed to be undertaken. Different considerations may apply depending on whether the business is that of manufacture of a product, or leading of property, or sole selling agency or financial business or it is a hospitality industry (such as a hotel) or a service industry (such as financial or marketing services). The assessee before us is a financial company authorized to advance loans for interest to facilitate customers to purchase consumer durables, though the business is not limited to advancing monies for acquiring consumer durables. We have already referred to the memorandum of association in this regard. The business is not also limited to consumers who propose to buy products of Kelvinator India Limited or Whirlpool India. In the case of a company engaged in rendering financial services, it is possible to say that the business is set up when the directors are appointed, staff such as regional and branch managers are appointed and their salaries are paid, computers are acquired and installed and the company is ready to commence business. It cannot be said that the business was set up only

when the bank account was opened on 01.02.1996 because prior thereto the company, though it did not have a bank account, was incurring the expenditure through Kelvinator India Ltd or Expo Machinery Ltd. The absence of a bank account cannot impede the setting up of the business. We may advert to the evidence in this behalf. Computers and peripherals were purchased vide order placed on HCL Hewlett Packard Ltd of Noida on 04.09.1995 and the required end-user certificate was also issued. The total cost of the purchase was Rs.29.84 lakhs (pages 21-23 of the paper book). Branch managers at Bhopal, Bhubaneswar and Pune were appointed in October 1995 (pages 37-42 of the paper book). Regional managers at Bombay, Calcutta and Gauhati were appointed during the same time (pages 43 to 48 of the paper book). Page 2 of the assessment order shows that the salaries were paid from November 1995 including allowances, bonus, gratuity and contribution to provident and other funds. The amount of such payments have also been given therein and are not reproduced here for the sake of brevity. The office rent of Rs.17500 for November and Rs.25000 each for December 1995 and January 1996 have also been paid. It is thus clear that the establishment and staff were put in place by the end of October 1995 and the company was ready to commence its business from 01.11.1995. M/s S.R.Batliboi Consultants Pvt Ltd had also submitted their bill dated 30th October 1995 for Rs.2,91,486 for professional services rendered in connection with recruitment of 19 candidates for the post of accounts manager and incidental expenses. The fact that the foreign loan and FIPB approval for equity investment by the Whirlpool Corporation of USA were given in January, 1996 does not mean that the business was not set up before these events. These are not statutory formalities and even without the foreign loan and the equity participation of the assessee-company was in a position to carry on the business in accordance with the objects clause of its memorandum of association from November 1995 when it had its own offices, branch and regional managers and staff, computers installed and was ready to commence its activities. The expenses were incurred through Kelvinator and Expo Machinery and evidence to this effect is placed at pages 24-31 and at other pages (eg. Page 52) of the paper book. From the above evidence it is clear that the business was set up from 01.11.1995, by which date the company was ready and in a position to commence its business.”

7. The counsel for the Revenue has relied upon the decision in the case of **Commissioner of Wealth Tax vs. Ramaraju Surgical Cotton Mills Ltd.** to canvass the proposition that it is only when actual business operation was commenced, a business is set up. We feel that the decision of the Supreme

Court in **Ramaraju Surgical Cotton Mills Ltd.** is not applicable to the facts of the present case because the said judgment was dealing with the provision of Section 5(1)(xxi) of the Wealth Tax Act, 1957 along with its proviso and the language of the main section and the proviso were wholly different. In the proviso, the requirement was specifically of the company commencing operations but in the main section the expression used was different viz. of setting up of the unit. In the light of the relevant provisions, the facts of that case and the claim of the assessee to get the benefit of a deduction, the Supreme Court interpreted the provisions applicable to mean that actual commencement of business was necessary. The facts of the present case are however more in line with the decision of this Court in the case of **Hughes Escorts Communications Ltd.**

8. Accordingly, no substantial question of law arises. The appeal is dismissed.

VALMIKI J.MEHTA, J

A.K. SIKRI, J

August 19, 2009

dkg