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

Date of decision: 9th July, 2013

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ITA 131/2010

COMMISSIONER OF INCOME TAX Appellant
Through Ms. Suruchi Aggarwal, sr. standing
counsel.

versus

SAMSUNG INDIA ELECTRONICS LTD. Respondent
Through Mr. Satyen Sethi and Mr. Arta Tarana
Panda, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL)

Revenue by this appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) challenges the findings recorded by the Income Tax Appellate Tribunal in the order dated 28th November, 2008 that the assessee is entitled to claim and set off expenses of Rs.34,95,606/-. It is submitted that the said expense are capital in nature as they are "Set up" expenses. The findings recorded by the tribunal reads as under:-

"6. In view of the above, the business of the assessee could be said to have been set up on 3.9.95 as prior to this necessary agreements had been entered into, key personnel had been

recruited and the assessee company had started working necessary infra structure like office premises, office equipments etc. and the assessee company was ready to commence trading operation as on the date of incorporation viz. 3.8.95. Accordingly, A.O. is directed allow the revenue expenditure incurred after the setting up of business which was 3.9.1995, notwithstanding the fact that commercial operations started w.e.f. 1.10.1995. For the purpose of claiming expenditure incurred thereafter, as revenue expenditure, reliance are placed on the following decisions:
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2. The respondent-assessee is a joint venture company setup under the incorporation agreement dated 28th March, 1995 between Samsung Electronics Co. Ltd. (SEC), Korea and M/s Reasonable Computer Solutions Private Ltd., an Indian company. Respondent-assessee was incorporated on 3rd August, 1995 and certificate of commencement of business is dated 29th August, 1995. Thereafter, respondent-assessee entered into technology licence agreement dated 12th September, 1995 and started its commercial operations on 1st October, 1995.

3. On or after 3rd August, 1995 till 30th September, 1995, the respondent-assessee had incurred the following expenses:-

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I	Recruitment & Training expenses	75,777
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ii	Rent	9,37,007
iii	Printing & Stationery	739
iv	Postage, Telephone, Telex	2,44,082
v	Insurance	24,366
vi	Office Maintenance	5,45,000
vii	Travelling & conveyance	12,90,138
viii	Repairs & Maintenance	24,183
ix	Carriage & Freight	255
x	Advertisement & Sales Promotion	2,44,427
xi	Taxes & Octroi	-
xii	Miscellaneous expenses	1,09,632
Total		34,95,606

4. There is no dispute about the heads mentioned above and that the expenses were actually incurred. The stand of the Revenue is that these expenses are pre setup expenses and they are capital in nature, therefore, they should not be allowed under Section 37 of the Act. The Assessing Officer in the assessment order has recorded that the expenses were incurred before actual business operation started on 1st October, 1995 and in view of

judicial pronouncement of the Bombay High Court in *Western India Vegetables Products Ltd. Vs. CIT*, (1954) 26 ITR 151 and Supreme Court in *CWT Vs. Ramaraju Surgical Cotton Mills Ltd.*, (1967) 63 ITR 478 (SC) and *Sarabhai Managment Corporation Ltd. Vs. CIT*, (1991) 192 ITR 151, the same should be disallowed as expenditure. We may only note that the Assessing Officer did not go into the factual matrix applicable to the assessee's case to find out the date of setting up of business. He simply took the date 1st October, 1995 i.e. as the date of start of the actual commercial sale transactions as the relevant date. The CIT (Appeals) confirmed the disallowance after referring to the principles of "setting up of a business" and after examining the case law. He observed that the "date of incorporation" cannot ipso facto be treated as the date of setting up of operations as incorporation results in registration of the company but does not necessarily enable it to commence business. Legal requirements like registration under the sales tax etc was required and the assessee had to prove before the Assessing Officer that commercial operations could have been commenced before 1st October, 1995. No such fact was recorded by the Assessing Officer.

5. We have already referred to para 6 of the order passed by the tribunal

which records the findings of facts ascertained by the tribunal. We have also noted the heads under which expenses have been claimed. The tribunal in the same order had examined the claim of the assessee, whether expenditure amounting to Rs.18,56,903/- incurred by M/s Reasonable Computer Solutions Pvt. Ltd. and reimbursed by the assessee, could be allowed as revenue expenditure. The said claim was disallowed and the assessee has accepted the said decision.

6. We have examined the factual findings recorded by the tribunal in para 6. The same cannot be categorized as perverse. The tribunal before recording the said findings examined the case law on the subject and has referred to the contentions of the parties on the said issue which have been recorded para 3 onwards. The assessee company was set up to carry on its business of manufacturing and trading in consumer durables. The date of commencement of business was certified as 9th August, 1995, though the date of incorporation was 3rd August, 1995. Tribunal has referred to various facts as to what was required to be done before the first actual sale invoice to a customer was issued. It included recruitment of employees, their training and establishment of showrooms by taking places on rent etc. Advertisements had also been issued and in fact M/s Reasonable Computer

Solutions Private Ltd., the joint venture partner on 25th July, 1995 had appointed M/s Mudra Diversified Limited as their Public Relations Consultant for the period 15th August, 1995 onwards.

6. In *Western India Vegetables Products Ltd v. CIT* (1954) 26 ITR 151 Bombay High Court has examined the concept and noticed the difference between “commencement” and “setting up” of a business and, inter alia, observed as under:-

“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 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 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 years of the business would not have commenced.

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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).”

7. The aforesaid distinction is relevant when we examine and refers to the definition of ‘previous year’. Following the said judgment, in the case of *CIT Vs. L.G. Electronic (India) Ltd.* [2006] 282 ITR 545 (Delhi), it has been observed that the date of setting up of business and date of commencement of business may be two separate dates. This decision in the case of *L.G. Electronics* (supra) has been followed in *CIT Vs. ESPN Software India P. Ltd.*, [2008] 301 ITR 368 (Delhi) wherein it has been held that a business will “commence” with the first purchase of stock-in-trade and the date on which the first sale is made is immaterial. Similarly, for manufacturing, several activities in order to bring or produce finished products have to be undertaken, but business commences when the first of such activities is taken.

8. In view of the facts found by the tribunal, we do not think that any substantial question of law arises for consideration. Pragmatic and practical view has to be taken. We also record that the Assessing Officer and the first appellate authority did not specifically go into the factual matrix relating to

and to ascertain the date of “setting up” of business, though order of the first appellate authority is more detailed and elaborate. Thus, there is nothing to controvert the facts as found and recorded in the impugned order. In view of the factual finding of the Tribunal, Revenue cannot succeed.

9. In view of the aforesaid discussion, the appeal is dismissed with costs of Rs.10,000/-.

SANJIV KHANNA, J

SANJEEV SACHDEVA, J

JULY 09, 2013
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