

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 16 of 2018

=====

NISCHAY FAB PVT LTD.

Versus

INCOME TAX OFFICER,

=====

Appearance:

MR MANISH J SHAH for the PETITIONER(s) No. 1

=====

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 26/02/2018

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Assessee has challenged the judgment of the Income Tax Appellate Tribunal dated 15.11.2017, raising following questions for our consideration:

"(i) Whether on the facts and in the circumstances of the case, the Tribunal is right in law in not allowing total expenditure of Rs.19,26,441/- done by the company by holding that the assessee had not carried on any business in Asst. Year 2011-12 (i.e. F.Y. 2010-11)?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal rightly distinguished Delhi High Court decision in CIT vs. Samsung India Electronics Ltd. - (2013) 356 ITR 354 and Carefour WC & C India P. Ltd. vs. DCIT - (2014) 368 ITR 692 (Del), which it took note of in para 17 of its order?

2. Essentially, issue pertains to allowing an

expenditure of Rs.19.26 lakhs claimed by the assessee by way of expenditure. The Revenue authorities and the Tribunal were of the opinion that during the period relevant to the assessment year 2010-11, the assessee had not commenced its business activities and therefore such prior period expenditure could not be allowed.

3. The assessee is a private limited company and is engaged in the activity of trading in iron and steel. For the assessment year 2011-12, the assessee company had claimed business expenditure of Rs.19.26 lakhs claiming that the business of the assessee had already commenced. Such expenditure principally involved the directors' remuneration and salary and bonus to the staff. The Assessing Officer confronted the assessee with the question that there was no business activity carried on by the company during the said period to which the assessee contended that the company had commenced the business activity of trading in iron and steel during the year under consideration. *"By making market survey, by contacting various customers (retailers)"* and in support of which, letters written to the customers

were produced. The assessee pointed out that letters were also written to the re-rolling mills to inquire about the source for procurement of these items. The assessee contended that actual sales may have taken place in the later year, nevertheless, it cannot be stated that in the current year, the assessee had not carried out any business activity. The assessee placed on record various letters written to the prospective customers and actual subsequent sale and purchase transactions effected during the later year.

4. The Assessing Officer however, was unmoved. He was of the opinion that in absence of any trading activity and generation of any income, there was no question of engaging staff or of paying salary and bonus or incurring heavy expenditure of remuneration to the directors. The Assessing Officer also noted substantial time gap between the so called correspondences with prospective buyers and sellers and the actual transaction which typically ranged between one year and in some cases extended to over two years. The Assessing Officer distinguished the judgments relied upon by the assessee.

5. Commissioner of Income Tax (Appeals) concurred with the view of the Assessing Officer, however, recorded his own observations and reasons. The Tribunal likewise while rejecting the assessee's appeal, recorded further reasons. The Tribunal though granted partial relief to the extent of Rs.4.50 lakhs of directors' remuneration and salary, *inter alia*, on the ground that even to protect the company's corporate structure, such establishment would have to be maintained. The assessee is now before us in this appeal.

6. Learned counsel for the assessee vehemently contended that the Tribunal committed an error in not appreciating the nature of activities carried on by the assessee in proper prospective. To establish commencement of business, it is not necessary to show actual sale or purchase of commodity. The assessee had carried out initial activities which later on fructified into actual sales. It cannot be stated that no business activities were carried on. Heavy reliance was placed on decisions of Delhi High Court in following cases:

(I) In case of **CIT vs. Samsung India Electronics Ltd.** - reported in (2013) 356 ITR 354

(II) In case of **Carrefour WC & C India P. Ltd. vs. DCIT** - reported in (2014) 368 ITR 692 (Del)

7. Question of commencement of business is essentially one of facts, of course to be judged with application of well settled legal principles, on the basis of materials available on record. The two Revenue authorities and Tribunal concurrently held that the business activities had not commenced. In particular, the Assessing Officer in his elaborate order, analyze the materials on record which the assessee placed for his consideration. Primarily, the assessee had carried out market survey and made certain general inquiries about source of the commodity and prospective buyers. As correctly noted by the Assessing Officer, even between the letters written by the assessee to the buyer and seller and annual culmination of any transaction of sale or purchase, there was substantial time gap of over one year in almost every case and in some cases over two years. The Assessing Officer therefore refused to link said letters written by the assessee to the

actual transaction of sale or purchase. He also noted that in absence of any income generation, it was difficult to understand how the staff was paid bonus as claimed by the assessee. The Tribunal further recorded that there was no evidence on record to suggest that the assessee has registered itself as a trading concern or had procured statutory licenses from the State or the local authorities.

8. We are broadly in the agreement with the view expressed by the Revenue authorities and confirmed by the Tribunal. As noted, the assessee claims the correspondence with the prospective buyer and seller as an important evidence to demonstrate that the business activity had commenced. Such evidence was analyzed by the authorities. Primarily, the correspondence was in the nature of market survey. There is nothing on record to suggest that the assessee had actively solicited business and the negotiations in the parlance buyers and sellers were at advance stage or were at any concrete form. There was significant time gap in such correspondences and actual sale and purchase transaction.

9. The decisions of Delhi High Court were based on facts presented before it essentially showing active groundwork of the business of manufacturing or in trading and were distinguishable.

10. In the result, Tax Appeal is dismissed.

(AKIL KURESHI, J.)

(B.N. KARIA, J.)

ANKIT

