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

% **DECIDED ON: 23rd April, 2015**

+ **ITA 241/2015**

COMMISSIONER OF INCOME TAX-5 Appellant
Through Mr. Rohit Madan, Advocate

versus

JCDECAUX ADVERTISING INDIA (P) LTD. Respondent
Through Mr. Pawan Kunal, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. The Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (for short, 'the ITAT') dated 8th September, 2014 in ITA No. 964/Del/2011. It urges that the direction to deduct ₹3,17,91,180/- (as part of business expenses) is unsustainable, reason being that the assessee has not commenced business operations during the previous year (the assessment year being 2007-08).

2. The assessee was incorporated in April, 2005 to carry on the business of out of home advertisement, consisting of street furniture (i.e. advertising on bus shelters, public utilities, parking

lots etc.) bill boards and transportation (such as advertisement in airports, railway stations etc.). It was awarded its first contract by New Delhi Municipal Corporation (NDMC) in March 2006 for construction of 197 Bus Queue Shelters (BQs) on Build-Operate Transfer (BOT) basis. In terms of the contract, the assessee was required to undertake preliminary investigations, study, design, finance, construct, operate and maintain BQs at its own cost. In consideration, the assessee was allowed to commercially exploit the space allotted in these BQs by displaying advertisements for a period of 15 years. During the said period, the title and other rights were to vest in NDMC. During the year in question, the assessee claimed deduction of ₹18,36,62,148/- towards discharge of its obligations under the NDMC contract. This was of the capital nature. The AO disallowed the claim of ₹18.36 crore by treating it as capital expenditure. The assessee accepted this. The other head of expenditure i.e. one in advertisement in the present case was ₹3,17,91,180/-; it was claimed as deductible. The AO treated the same as revenue expenditure but refused to allow deduction on the ground that the business of the assessee had not commenced and while so concluding, the AO held that the business would commence when the BQs would be ready for providing space for advertisement, being the very reason for which the assessee company entered into an agreement with the NDMC. On appeal, the CIT (Appeals) confirmed the order of the AO. Then it went to ITAT.

3. The ITAT noted that there are three stages in operational business:- (i) setting up; (ii) post setting up but before commencement of business; and (iii) commencement of business and thereafter. It elaborated by stating that setting up of a business refers to a situation when the activities are ready to take off or when the business is ready to discharge the functions for which it is set up. Pre-setting up would mean doing of all the necessary things culminating into the attainment of the stage of ready to discharge functions. In the case of a manufacturing unit, the setting up would mean installing all the necessary machines for manufacture; and pre-setting up would mean the phase during which the place for business is acquired, machinery purchased and then finally installed so that the stage of setting up of business is attained. In the case of a trader, setting up of a business means the stage upto which the place of business is acquired and the things necessary to start trading are done. Similarly, in case of a building contractor, setting up would mean that the contractor has obtained all the necessary tools and equipments for carrying on construction activity.

4. Dealing with the third stage i.e. actual commencement of business, ITAT observed as follows:-

“This stage simply means taking a first step in the doing of the overall income producing activity. In the case of a manufacturing unit, the stage would come when raw material etc. is procured for the start of actual manufacturing. A trader can be said to have commenced his business on purchasing material to be sold to the customers.

Similarly, a building contractor can be said to have commenced his business when he undertakes the actual contract work pursuant to the award of contract. The second stage can be termed normally as a waiting period between the 'ready to start' phase and the actual starting of business. Thus it is evident that the third stage of commencement of business can either coincide with the doing of work in the actual execution of order received from customers for sale or provision of services etc. or even prior to that when the businessman purchases or manufactures the goods for sale, without there being any advance order."

5. It was held that the assessee formally signed the contract with NDMC on 8th March, 2006 which fell in the preceding year. On 30th March, 2006, it entered into a manufacturing agreement with Uttam Sucrotech International Pvt. Ltd. for manufacture and installation of BQs and also made advance payment. In the preceding year, the assessee arranged for credit facility and obtained overdraft limit and also paid a security deposit of Rs. 1 crore to the NDMC. Noting that, according to the authorities below, the business would have commenced only when the BQs are ready for providing space to the assessee for advertisement, the ITAT held that there was a basic fallacy in the appreciation of the concept of setting up of business. It was clarified that in the facts of the present case, when the assessee entered into construction contract and took the first stage of construction, it ought to have commenced its business and then it could not be said that the business was not set up till the constructions undertaken pursuant to the contract goes on.

6. Dealing with the facts of this case, it was held that the assessee was given the contract in the preceding year. Not only that, the assessee started the execution of the contract in the preceding year itself by taking steps such as entering into manufacturing agreement with a third person for manufacture and installation of BQs on making advance payment. The project of NDMC for construction of BQs was not set up but insofar as the assessee is concerned, it had certainly commenced its business with the execution of contract awarded by NDMC. The ITAT held that the authorities below have tagged the setting up of business with the provision of space for advertisement by NDMC. This is certainly a post commencement business stage of the assessee. Such an event would mark the generation of actual income on commencement of business and cannot be construed as the setting up of business. The ITAT was of the opinion that the assessee's business was set up when it prepared itself for undertaking the activity of building BQs on receipt of contract from NDMC. It cannot be in relation to the completion of construction of BQs. As the setting up of the business was over in the preceding year, at the maximum, on entering into manufacturing agreement for manufacture and installation of BQs on 30th March, 2006, it was held that not only the business of the assessee was set up but had also commenced in the instant year. As Section 3 read with Section 4 refers to the starting of previous year from the date of setting up of a new business, the ITAT had no hesitation in holding that the business stood already set up in the preceding year and as

such, there can be no question of canvassing a view that the business would be set up in a subsequent year when BQs would be ready for providing space to the assessee for advertisement.

7. This Court notices that in quoting that as it did, the ITAT relied upon the two judgments of this Court - *Commissioner of Income Tax v. ESPN Software India Pvt. Ltd.* (2009) 184 Taxman 452 (Del); and second, *Commissioner of Income Tax v. Samsung India Electronics Ltd.* (2013) 356 ITR 354 (Del). The latter of these decisions was relied upon in a subsequent ruling in ITA No. 42/2014 *Carefour WC&C India Private Limited v. Deputy Commissioner of Income Tax*, 2014 ITR 392.

8. The Court in *Carefour* crucially observed that activity or exercise which is a prerequisite to the commencement or proposed set up would be treated as that connected with commencement of business. After quoting the observations in *ESPN Software (supra)*, it was held that in the facts of that case, nothing barred the assessee from making the first purchase (that was a case of wholesale business) after necessary legal approvals but the fact that the appellant wanted to commence actual trading after negotiations with other parties would not postpone the date when the business was set up.

9. It is also noted that the Tribunal relied upon the decision of the Bombay High Court in *Western India Vegetables Products Ltd. v. CIT* (1954) 26 ITR 151 wherein the issue was as follows:-

“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 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.”

10. Having regard to the facts of the present case, we are of the opinion that the decision of the ITAT does not call for any interference because it is a plausible view and no substantial question of law arises for consideration.

11. The appeal is, therefore, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

APRIL 23, 2015/sd