

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction
[Income Tax]

ORIGINAL SIDE

ITA 126 of 2011

M/S VIDEO PLAZA

Versus

I.T.OFFICER, WARD 1(4), DURGAPUR

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 13th June, 2016.

Mr. Ananda Sen, Adv.
Mr. Dipak Dey, Adv.

Mr. R. N. Bondhopadhyay, Adv.
Mr. S. B. Saraf, Adv.

The Court : The subject matter of challenge in the appeal is a judgment and order dated 6th August, 2010 by which the learned Income Tax Appellate Tribunal "B" Bench, Kolkata in ITA No.2015/Kol./2009 pertaining to the Assessment Year 2006-07 concurring with the CIT(A) held that "*expenditure towards bank charges of Rs.6,79,331/- related to the new project i.e. restaurant cum hotel project is capital expenditure and would have to be capitalized as assessment year under consideration*".

Challenging the aforesaid order, the assessee has come up in appeal. The appeal was admitted on 10th May, 2011 on the following question of law:

“Whether the learned Tribunal below committed substantial error of law in treating the expenditure towards bank charges of Rs.6,79,331/- as capital expenditure by totally overlooking the fact that it was for the expansion of the selfsame business where common books of account and common bank account are maintained by the assessee for the above expansion.”

We have heard Mr. Sen, learned advocate appearing for the appellant/assessee. He drew our attention to a judgment in the case of *Khimji Visram and Sons (Gujarat) Private Limited vs. Commissioner of Income-Tax*, reported in [1994] 209 ITR 993 [Guj.]. He drew our attention to a passage quoted by the Gujarat High Court from the judgment in the case of *Western India Vegetable Products Ltd. vs. C.I.T.*, which is as follows:

“There is a clear distinction between a person commencing a business and a person setting up a business and for the purpose of the Indian Income-tax Act it is the setting up of the business and not the commencement of the business that is to be considered. It is only after the business is set up that the previous year of that business commences and any expense incurred prior to the setting up of a business would not be a permissible deduction. 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. There may, however, be an interval between the setting up of the business and the commencement of the business and all expenses incurred during that interval would be a permissible deduction.” (emphasis* supplied).

Mr. Sen submitted that the learned Tribunal has refused to allow the expenditure simply on the ground that the hotel was opened on 7th May, 2006, that is to say, after the end of the relevant previous year. That is no doubt true. But, it was for the assessee to adduce evidence to show as to when was the hotel set up. We have asked Mr. Sen to find out if there is any

evidence discussed in any of the three judgments to show that the hotel had been set up in the relevant previous year, but he was unable to do so.

The question for consideration in all cases is as to when was the business set up. Once the business is set up, the expenditure incurred is deductible under Sections 36 and 37 as the case may be. But before the business is set up, the expenditure cannot be admissible for deduction.

He also drew our attention to a judgment of the Apex Court in the case of *CIT vs. Sarabhai Management Corporation Ltd.*, reported in [1991] 192 ITR 151 [SC]. He drew our attention to the following findings of the Apex Court :

“Even if, as submitted by Dr. Gauri Shankar, the first category of activity referred to by the High Court, viz., the acquisition of a property for being let out can be said to be only a preparatory stage (analogous to the acquisition of buildings, plant and machinery in a manufacturing business), the subsequent activities certainly constitute activities in the course of the carrying on of the assessee’s business. It would not be correct, as rightly pointed out by the High Court, to treat the assessee as having commenced its business only when the licensee or lessee occupied the premises or started paying rent.”

This judgment does not help him because in this case acquisition of the property or the period required for acquisition of the property is said to be a period during which revenue expenditure is not deductible. In the case before us, during construction of the hotel it cannot be said that the acquisition of the hotel was completed.

For the aforesaid reasons, we are of the opinion that the view taken by the learned Tribunal does not require any interference. The fact that the assessee was already in business or that the assessee had gone in for expansion of the business by diversifying it, does not alter the situation that the hotel business was a new business undertaken by the assessee.

Any expenditure incurred for that business has to be allowable in accordance with law. That eventuality cannot arise unless the business has actually been set up. Business was admittedly set up on 7th May, 2006 when it started its business, or may be on 6th May, 2006 when it was ready for starting its business.

The question is answered in the negative and in favour of the revenue.

The appeal is dismissed.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)

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