

(2013) 10 DEL CK 0233

In the Delhi High Court

Case No : Income Tax Appeal No. 41 of 2013

Commissioner of Income Tax: Delhi-I

APPELLANT

Vs

Arcane Developers Pvt. Ltd.

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Income Tax Act, 1961 — Section 10(2), 2(11), 36(1)(iii), 37

Citation : (2013) 9 AD 290 : (2014) 221 TAXMAN 475

Hon'ble Judges : Sanjiv Khanna, J; Sanjeev Sachdeva, J

Bench : Division Bench

Advocate : Abhishek Maratha, for the Appellant;

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—Revenue impugns order dated 22nd June, 2012 in this appeal, which relates to Assessment Year 2007-08. The issue raised is whether interest of Rs. 1,26,64,315/- paid to M/s. Dharti Investments and Holding Limited on loan of Rs. 25 crores could be allowed as expenditure u/s 36(1)(iii) of the Income Tax Act, 1961 (Act, for short) and Rs. 2,32,582/- on account of travel/statutory fees/audit fees etc can be allowed as expenditure u/s 37 of the Act.

2. The Assessing Officer had disallowed the said amounts as expenditure u/s 37/36(1)(iii) on the ground that the business of the assessee had commenced/ was set up on 5th July, 2006. Loan from M/s. Dharti Investments and Holding Limited, it is stated, was taken on 16th May, 2006. Learned counsel relies upon judgment of this Court dated 9th July, 2013 in ITR No. 131/2010, titled Commissioner of Income Tax versus Samsung India Electronics Limited. Our attention was drawn to the fact that Memorandum of Understanding between the respondent and third parties is dated 30th May, 2006 and not 31st March, 2006, as recorded in the impugned order.

3. The respondent-assessee is a company, which was incorporated on 4th

August, 2005. The main objects for incorporation of the company are as under:-

1. To carry on the business as owners builders, colonisers, developers, promoters, proprietors, occupiers, lessors, interior decorators, civil contractors, maintainer of residential, commercial and industrial buildings, colonies, mill's and factory's sheds and buildings, workshop's buildings, hospitals & nursing homes, and to deal in all kinds of immovable properties whether belonging to the Company or not.
2. To undertake and carry on the business of purchasing, selling and developing any type of land or plot whether residential, commercial, industrial, rural or urban that may belong to company or to any other person of whatever nature and, to deal in land or immovable properties of any description or nature on commission basis and for that purpose to make agreements to sell the land of the company or of any body else and to deal in building material electrical and civil materials.
3. To erect and to construct houses, buildings or civil and constructional works of every description on any land of the company or upon any other lands or immovable property and to purchase, take on lease, or otherwise own, hold, occupy, construct, erect, alter, develop, colonies, decorate furnish, pull down, improve, repair, renovate, build, plan, layout, set, transfer, mortgage, charge assign, let out, hire, sublet or sublease all type of lands, plots, buildings, hereditaments, bungalows, quarters, offices, flats, swimming pools, chawls, warehouses, godowns, shops, stables, markets, hotels, and restaurants building, banquet halls, houses, structures, construction, tenements, roads, bridges, land, estates and immovable properties whether freehold or lease hold of any nature and description and where ever situated in way and partly consideration for a gross sum or rent or partly in one in other or any consideration.
4. To act as an agent for purchasing, selling, and letting on hire, land and houses whether multi-storey, commercial land/or residential buildings on commission basis.
5. To consolidate or subdivide, develop, maintain, purchase, sell and letting on hire into farms and sheds and to let out the same on rental or license basis.
6. To acquire, purchase and for the construction of multi-storeyed buildings and to licence the flats therein on suitable terms and conditions and to do the consultancy business in the construction and allied activities.

4. In *Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City*, Bombay High Court had examined the concept and noticed the difference between "commencement" and "setting up" of business and it was 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 u/s 10(2).

5. The aforesaid distinction is relevant when we examine and refer to the definition of "previous year". It is well settled that "date of setting up of business" and "date of commencement of business" may be two separate dates.

6. In the present case, as noticed above, the respondent company was incorporated on 4th August, 2005, i.e., in the last Assessment Year 2006-07. It had entered into a Memorandum of Understanding dated 31st May, 2006 with third parties in respect of a project near Chandigarh, Mohali, Punjab. Subsequently, joint venture agreement dated 5th July, 2006 was executed between the respondent and third parties. The said factual positions are not disputed. Loan of Rs. 25 crores was taken by the respondent-assessee on 16th May, 2006. We do not think that the date of joint venture agreement, i.e., 5th July, 2006 should be and can be as a date of setting up of business. This is the second year of operation and for the earlier year, i.e., Assessment Year 2006-07, return of income was filed on 29th November, 2006 declaring business loss of Rs. 6612/-. Date of setting up of business depends upon facts and the nature of the business. This is the reason why we have referred to the objects for incorporation of the company and the main business activities in which the respondent-assessee was engaged. The first appellate authority examined the whole issue in depth and has pointed out that the Memorandum of Understanding required payments. The respondent-assessee had, therefore, arranged for funds. Memorandum of Understanding is culmination of the negotiations started and undertaken earlier and subsequently fructified on payment by the respondent-assessee into the joint venture agreement. Setting up of business takes place when the business is ready and first steps are taken.

In case of real estate business, the said setting up of business was complete when first steps were taken by the respondent-assessee to look around and negotiate with parties. There can be a gap between setting up and when first steps were taken by the respondent and finalisation of the first written agreement. Business activities of the respondent did not require construction of a factory, machinery etc. Negotiations are required to enter into a written understanding and it is obvious that the loan was taken for business and to proceed further and conclude the deal. The aforesaid facts have been examined and highlighted by the first appellate authority. The said findings of fact have been affirmed by the tribunal. A pragmatic and a practical view has to be taken. No other contention has been raised or argued. Keeping in view the facts founds by the first appellate authority and the tribunal, we do not find any merit in the present appeal. In fact, decision in the case of Samsung India Electronics Limited (supra) does not support the appellant, but supports the findings recorded by the tribunal. The appeal is accordingly dismissed.