

(2007) 07 DEL CK 0006
In the Delhi High Court

Marvel Polymers (P) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Citation : (2007) 165 TAXMAN 618

Hon'ble Judges : Vidya Bhushan Gupta, J; Madan B. Lokur, J

Bench : Division Bench

Judgement

Madan B. Lokur, J.—The assessed is aggrieved by an order dated 4-1 -2004 (since rectified to read 4-1-2005) passed by the Income Tax Appellate Tribunal, Delhi Bench *E" in ITA No. 3770/Delhi/2001 relevant for the assessment year 1998-99.

2. The assessed as per its Memorandum and Articles of Association, was set up to engage itself in the business of manufacture of footwear and footwear parts as well as trading of goods.

3. The assessed claimed some expenditure in the profit and loss account (including depreciation) but the assessing officer disallowed it on the ground that the assessed had not been set up and had not commenced any business activity during the relevant previous year.

4. The assessed preferred an appeal which was allowed by the Commissioner (Appeals) who held that the assessed had commenced its business during the relevant previous year and, Therefore, the assessing officer was directed to allow the expenses, as claimed in the profit and loss account.

5. Against the order passed by the Commissioner, the revenue preferred an appeal to the Income Tax Appellate Tribunal which allowed the appeal and that is how the assessed is before us u/s 260A of the Income Tax Act, 1961.

6. Learned Counsel for the assessed contended that there are several factors which go to show that not only had the assessed been set up but that it had

commenced business during the relevant year. It was submitted that a completion certificate had been obtained for the structure that the assessed had built up; the assessed had obtained an electric connection and excise licence; it was registered with the Director of Industries as a small scale industry; it had been granted a Registration Certificate with the Sales Tax department; it had purchased raw materials and it was registered with the Regional Provident Fund Commissioner.

7. We find that the Tribunal has considered all these facts, including the contentions made on behalf of the revenue by the departmental Representative.

8. It has been found, as a matter of fact, that the only business activity conducted by the assessee, whose principal activity was to manufacture footwear and footwear parts, was to have purchased 84 pairs of shoes/footwear for Rs. 2,660, which were later sold for Rs. 3,127. This was the solitary transaction of purchase and sale of footwear. The assessed appears to have admitted that it was necessary for it to have had at least one transaction for the purposes of registration with the Sales Tax department and that is why this transaction was entered into. Clearly, the solitary transaction by the assessed was not as a part of its trading activity but was for the purposes of getting registration from the Sales Tax department. Reliance, Therefore, cannot be placed by the assessed on this transaction to substantiate its claim of having commenced trading activity.

9. Insofar as the manufacturing activity is concerned, while it is true that the assessed was granted a completion certificate by the Municipal Corporation of Delhi in respect of the structure built by it and was also granted an electric connection but the fact remains that it was granted an excise license only on 31-3-1998; the last day of the relevant previous year. No labour was employed by the assessed prior to this date and its employees were recruited only with effect from 1-4-1998. Registration with the Provident Fund Commissioner was also with effect from 1-4-1998. Clearly, no labour, either skilled or unskilled was available with the assessed for carrying out any manufacturing activity prior to 1-4-1998. Even otherwise, there was nothing on facts to suggest that the assessed had taken any substantive steps which could lead to the inference that the business of the assessed had been set up or had commenced during the relevant previous year.

10. In *CWT v. Ramaraju Surgical Cotton Mills Ltd.* (1967) 68 ITR 478, the Supreme court drew a distinction between "setting up" and "commencement". It was held that "setting up" is a stage anterior to "commencement". The actual functioning of a factory or its going into production is not necessary for concluding that a factory has been set up. The Supreme Court accepted the view that the proper meaning to be assigned to the expression "set up" would be "ready to commence business", that is to say that a unit cannot be said to have been set up unless it is ready to discharge the function for which it was being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that

the unit has been set up. Of course, the Supreme Court was dealing with the Wealth Tax Act, but the principles laid down by it would be equally applicable to the present case.

11. Applying the law laid down by the Supreme Court, it would appear that on paper the factory of the assessed had been "set up" but in actual fact, it would be difficult to accept the proposition that the unit was ready to discharge the function for which it was set up. This is because on the basis of the cumulative facts available on record such as the fact that the excise license was granted only on 31 -3-1998 and employees were recruited only on 1 -4-1998 there was no way that the assessed could be said to have been in such a position that on 31 -3-1998, it was ready to commence its business activity. Even though it may have had an electric connection and had purchased some raw material, there was no one to take advantage of it.

12. The Tribunal has come to the conclusion that the facts of the case are rather peculiar but the total effect of all these fact and the law laid down by the Supreme Court point to the conclusion that it is not possible to entirely agree with the views expressed by learned Counsel for the assessee. The opinion expressed by the Tribunal is a possible view. It is not perverse in the sense that no reasonable person could have reached the conclusion that the Tribunal did in view of the facts of the case, peculiar or not.

13. Under these circumstances, we are of the view that no substantial question of law arises for consideration. The view expressed by the Tribunal may or may not be correct but that by itself does not raise a substantial question of law.

14. Dismissed.