

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

AND SHRI AMARJIT SINGH, JUDICIAL MEMBER

आयकर अपील सं/ I.T.A. No.3855/Mum/2013

(निर्धारण वर्ष / Assessment Year:2008-09

Reliance Gems & Jewels Ltd., 9 th Floor, Maker Chamber IV, 222, Nariman Point, Mumbai-400 021	बनाम/ Vs.	The DCIT 3(3), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACR 7404C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri F.V. Irani
प्रत्यर्थी की ओर से/ Respondent by:		Shri Vivek Anand Ojha

सुनवाई की तारीख / Date of Hearing :15.10.2015

घोषणा की तारीख /Date of Pronouncement : 28.10.2015

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the Ld. CIT(A)-7, Mumbai dated 19.03.2013 pertaining to Assessment year 2008-09.

2. The sole grievance of the assessee is that the Ld. CIT(A) erred in confirming the disallowance of the claim for deduction u/s. 37((1) in respect of Revenue expenditure incurred during the year amounting to Rs. 87,26,446/-.

3. The assessee is in the business of trading and merchandising of goods and services. Return for the year was electronically filed on 27.9.2008 disclosing loss of Rs. 87,26,445/-. The return was selected for scrutiny assessment and accordingly statutory notices were issued and served upon the assessee.

4. On perusal of the annual account, the Assessing Officer found that the assessee has not started its business therefore the expenditure are not allowable. Vide questionnaire dated 5.4.2010, the assessee was confronted on this issue. In its reply vide letter dated 11.5.2010 the assessee stated that the expenditure is allowable because they are revenue expenditure incurred wholly for the purpose of business, they are not personal expenditure and they are not capital expenditure and therefore eligible for allowance u/s. 37(1) of the Act.

5. The AO rubbished the claim of the assessee and disallowed the entire claim of expenditure. According to the AO, as per the Income Tax Act, the expenses are allowable only when the business has commenced as the business has not commenced therefore the expenditure is not allowable.

6. The assessee carried the matter before the Ld. CIT(A) but without any success.

7. Before us, the Ld. Counsel for the assessee drew our attention to page-10 of the Paper Book and stated that it contains the details of employee-wise salaries alongwith job description and details of tax deducted at source. The Ld. Counsel further drew our attention at page-12 of the Paper Book which contains details of revenue expenses incurred during the year, the said details read as under:

Sr. No.	Description	Amount
1.	Salaries, Wages and Bonus	74,01,305/-
2.	Contribution to PF, Gratuity, ESI, Pension scheme etc.	9,11,647/-
3.	Employee Welfare and other amenities	5,27,133/-
4.	Travelling expenses	2,02,602/-
5.	Professional fees	12,500/-
6.	Communication expenses	1,62,987/-
7.	Printing and Stationery	696/-
8.	Audit fees	12,000/-

8. The Ld. Counsel strongly submitted that the setting up of business is different from commencement of business and the expenditures are allowable on setting up of business. The Ld. Counsel strongly relied upon the decision of the Hon'ble High Court of Delhi in the case of Omniglobe Information Tech India Pvt. Ltd. Vs CIT. It is the say of the Ld. Counsel that a business is said to be set up, the moment employees are recruited for the purpose of the business and therefore any expenditure incurred by the assessee after setting up of the business are allowable u/s. 37(1) of the Act.

9. Per contra, the Ld. Departmental Representative strongly supported the findings of the Revenue authorities. It is the say of the Ld. DR that the decision relied upon by the assessee and other related decisions are all relating to service industries and therefore same cannot be applied on the facts of the case in hand.

10. We have given a thoughtful consideration to the rival submissions and have carefully perused the orders of the authorities below in the light of the documentary evidences brought on record in the form of a Paper Book.

10.1. It would be appropriate in this regard to refer to the proviso to Sec. 3 of the Act, which refers to and defines the term, "previous year" in relation to newly setup business or profession and not with reference to the date of commencement. Sec. 28 of the Act postulates that profit and gains of business or profession carried out at any time during the previous year, shall be taxed under the head "profits and gains of business or profession."

10.2. The undisputed fact is that the assessee has recruited employees for the purpose of its business and as per the details exhibited at page-10 of the Paper Book about 16 employees are for the job of quality assurance. The assessee is in the business of Merchandising of diamonds/gold/jewelleries. Undisputedly, this line of business requires expertise who have proficiency in understanding the carats of diamonds and related jewellery, without such recruitment, it would be a futile exercise to commence the business.

10.3. The Hon'ble High Court of Delhi in the case of Omniglobe Information Tech India Pvt. Ltd. in Income Tax appeal No. 257 of 2012 had the occasion to consider the following substantial question of law:

"Did the Tribunal fall into error in holding that the assessee had setup its business w.e.f. 1.6.2004 and not w.e.f. 1.4.2004, as held in the impugned order."

10.3. In that case, the Hon'ble High Court had to consider the following facts:

“ The Assessing officer as well as the Tribunal have held that the appellant assessee had commenced its operations only from 1.6.2004 i.e. the date on which the appellant assessee entered into “service agreement” with its parent company and, therefore, the expenditure incurred between 1.4.2004 to 31.5.2004 should be capitalized. Tribunal, in its impugned order had also observed that the appellant assessee had entered into a lease agreement and had hired premises as its office, only on 15.6.2005. Commissioner of Income Tax (Appeals), however, had decided the issue/question in favour of the respondent assessee.”

10.4. At para-7 of its order, the Hon'ble High Court observed that :

“As per the case of the appellant-assessee, expenses incurred during the months of April and May, 2004, were on account of training given to the recruited employees. This is clear from the reply given by the appellant/assessee dated 14.11.2007. The issue which arises is, whether the business had been setup as on 1st April, 2004 or was it setup only on 1st June, 2004. There is a distinction between “setting up of business” and “commencement of business”.

10.5. While deciding the issue, the Hon'ble High Court of Delhi elaborately discussed and considered the decision of the Hon'ble High Court of Bombay given in the case of Western India Vegetable Products Ltd. Vs CIT 26 itr 151 (Bom). Further reliance was placed on the decision in the case of CIT Vs E-Funds International India (2007) 162 Taxman 01 (Del) wherein also the issue considered was whether the business was setup the moment the assessee employed 30-40 employees. This claim was accepted by the Hon'ble High Court of Delhi after noticing that the assessee had certain infrastructure facilities at the relevant time.

10.6. Once again the Hon'ble High Court of Delhi had an occasion to consider a similar issue in the case of CIT Vs Hughes Escorts

Communications Ltd (2009) 311 ITR 253 (Delhi) wherein the Hon'ble High Court has held that the moment the assessee purchased VSAT equipment, it should be said that the business has been setup.

10.7. A similar view was taken in the case of Whirlpool of India Ltd 318 ITR 347 wherein the Hon'ble High Court has observed that :

"The business was set up when directors were appointed, staff, such as regional and branch managers were appointed and their salaries were paid. In other words, it can be said that at that time, the company was ready to commence business."

10.8. The Hon'ble High Court of Delhi has considered these decisions in the case of Omniglobe Information Tech India Pvt. Ltd.(supra) and at page-18 of its order, the Hon'ble High Court held as under:

" In view of the aforesaid discussion, we do not think that the reasoning given by the Tribunal and the AO shows that the business of the appellant-assessee had not been setup. The business of the appellant had been setup as the appellant-assessee had acquired the necessary infrastructure from their sister concern, M/s. Agilis, and had also started making payment of salary and wages. This training was given by professional experts under the supervision and control of the appellant-assessee. The moment the said operations were commenced, the business had been setup and the subsequent rendering of service to third parties would be at a later date when the actual services were rendered to the parent/holding company."

11. After considering the facts of the case in hand in the light of the decisions referred to hereinabove, in our considered opinion, upon recruitment of employees, the factum that expenditure under the different heads, as noticed above at para-7 was incurred is indicative that business was set up.

11.1. Therefore in our understanding of the law, the claim of the expenditure is allowable. We, accordingly, set aside the order of the Ld. CIT(A) and direct the AO to allow the claim of expenditure of Rs. 87,26,446/-.

12. In the result, the appeal filed by the assessee is allowed.

13. Before closing, the objection of the Ld. DR that the cases relied upon relate to IT Service Industries does not hold any water because what we have considered is the underlying principle in this decisions.

Order pronounced in the open court on 28th October, 2015

Sd/-

(AMARJIT SINGH)

Sd/-

(N.K. BILLAIYA)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28th October, 2015

व.नि.स./ Rj , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai