

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

Judgment Reserved on August 11, 2014

Judgment Delivered on September 22, 2014

+ **ITA No. 42/2014**

CAREFOUR WC&C INDIA PRIVATE LIMITED Petitioner

Through: Mr. Ajay Vohra, Ms. Kavita Jha,
Mr. Vaibhav Kulkarni, Advocates

versus

DEPUTY COMMISSIONER OF INCOME TAX Respondent

Through: Mr. Rohit Madan, Sr. Standing
Counsel

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The present appeal has been filed by the assessee under Section 260A of the Income Tax Act, 1961 ('Act', in short), challenging the order dated August 16, 2013 passed by the Income Tax Appellate Tribunal (Tribunal, in short) whereby the Tribunal has upheld the order of the Commissioner of Income Tax (Appeals) dated March 02, 2012, affirming the findings of the Assessing Officer in the assessment order dated December 10, 2010. The following question of law was framed on April 15, 2014 for consideration of this Court:

"Did the Tribunal fall into error in holding that the

assessee had not set up its business till 31.03.2008”.

2. Some of the relevant facts are, the assessee company was incorporated on September 19, 2007 under the Companies Act, 1956, to carry on trading activities which primarily included wholesale trading of all kinds of consumer goods durables, articles and products. The year 2008-09 was the first year of assessment. The assessee company filed an E-Return of income for the assessment year 2008-09. The appellant-assessee claimed expenses amounting to Rs.9,03,03,547/- and claimed a business loss of Rs. 8,64,07,610/- after setting off income from other sources amounting to Rs. 38,95,937/-. Show cause notice dated October 21, 2010 was issued to the assessee as to why the business loss claimed may not be disallowed. The case of the appellant-assessee was that the loss had occurred on account of expenses incurred for earning and conducting business in India. The Assessing Officer was of the view that the expenditure incurred was prior to commencement of business as it was not fully set up. Thus expenditure was not allowed as a deduction. Sections 28 to Section 43D of the Act, which relates to the computation of business income were elucidated upon. The Assessing Officer supported his conclusion considering the case of a manufacturing concern, which could be said to be set up only when it was ready for

production. In case of a trader, the Assessing Officer was of the view that the distinction may not be significant once there were stocks to be sold. In other words, according to him, the manufacturing concern is said to be set up only when production gets started and in the case of the trader, when the stocks are available to be sold. In paras 3.1 to 3.3 and 3.5 to 3.7 of the Assessment Order, the following was his conclusion:

“3.1 I have carefully considered the reply submitted by the assessee. Expenditure incurred in respect of any business is deductible from the date of commencement of business but only where it has been set up. The result is that there is plethora of cases on the difference as between the concept of commencement of a business and setting up of a business. Expenditure incurred prior to the setting up of a business is not allowed as deduction. Pre-commencement expenditure may well be a dead loss unless it could be treated as cost of capital assets so as to be entitled for depreciation.

*3.2 Since section 28 to 43D relate to computation of business income, which is carried on by the assessee, it follows that the expenses during the pre-commencement period will not be deductible. Similarly loss incurred during the period cannot also be treated as business loss. It cannot, therefore, be carried forward. It has been so held in *Liquidators of Pursa Ltd. V CIT [1954] 25 ITR 265 (SC)* to the extent to which such expense could be capitalized to the assets, the assessee may well be eligible for depreciation as was found in *Challapalli Sugars Ltd. V CIT [1975] 98 ITR 167 (SC)*. As otherwise such expenses like audit fee would be a dead loss.*

3.3 A business is set up in the case of manufacturing concern, when it is ready for production. In the case

of trader, the distinction may not be significant once there are stocks to be sold. In the case of a professional the fact that the professional qualifies for practice and is ready to entertain clients would entitle him to claim deduction listed or otherwise.

3.4

3.5 As information on the significant of accounting policies, it is clearly mentioned that the assessee is a trader. "Trade" in its primary meaning is the exchanging of goods for goods or goods for money, in its secondary meaning it is repealed activity in the nature of business carried on with a profit motive, the activity being manual or mercantile as distinguished from the liberal arts or learned professions or agriculture as held by Supreme Court in the case of State of Punjab v. Bajaj Electricals Ltd [1968] 70 ITR 730.732 (SC).

3.6 In the audit report against para 28(a) on form 3CD it is clearly mentioned that business has not commenced. When no stock is either available or even has been purchased by the assessee, by no stretch of imagination it can be inferred that the business has been set up and ready to commence its business.

3.7 In view of the above discussion, the reply submitted by the assessee is not acceptable. As no business activities have been carried out as per audit report as discussed above and in view of the various decisions, the expenses claimed as revenue expenditure are not allowed and the loss from business is disallowed and the business income is taken at Nil. For the facts discussed, I am satisfied that the assessee Company has concealed the particulars of its income/submitted wrong particulars of its income, therefore, penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 are initiated on this account."

3. On an appeal before the CIT (Appeals), who, after referring to the main objectives of the business of the assessee company, was of the following view:

“However, it is noticed that the appellant company has not been registered under the Shops and Establishments Act during the relevant period which is one of the essential conditions for setting up of business or for the commencement of business in India. It is further noticed that the appellant company has not established any store from where sale/ purchase or trading of goods could take place. Similarly no warehouse/go down was established during the relevant previous year from where the intended goods for trading could be stored. No vehicle/ transport arrangement was made by the appellant company for the transportation/ delivery/ supply/ distribution of goods. No expenditure was found to be incurred on advertisement/publicity of the new business of the appellant company. It is also noticed that most of the key employees were appointed by the appellant company vide the letters of appointment issued on 1.1.2008. These key employees have given their acceptance for appointment after the end of the relevant previous year. Or reference, the names, designation, date of issue appointment letter and the letter of acceptance by these employees are given below:

Name of the employee	Post	Date of issue of appointment letter	Date of acceptance of
Eric Bouin	Director FMCG	01.01.2008	04.07.2008
Bouzeneth Benauda	Merchandise Director	01.01.2008	16.07.2008
Lyderich Jouvenaux	Business Development Manager	Date 01.01.2008	04.07.2008

Patrice Breuil	Director Hard goods	01.01.2008	04.07.2008
Dominique Coulombel	Fruit & Vegetable Manager	01.01.2008	04.07.2008

It is also noticed that most of the correspondence made with the intended suppliers were made either before the incorporation of the appellant company or after the end of the relevant previous year. In this regard, it is relevant to mention that the appellant company has filed some of the samples of correspondence with the intended suppliers of goods with key employees of the appellant company. From the perusal of the details filed the learned AR, it is noticed that the FMCG director of the appellant company namely, Mr. Bouin, has raised certain queries with Nestle on 12.06.2007 whereas the appellant company itself was incorporated w.e.f. 19.09.2007. Mr. Bouin himself was appointed by the appellant company w.e.f. 01.01.2008. Thus it seems that these correspondence were made even before the incorporation of the appellant company. Similarly, the evidences of correspondence regarding the queries with purchase of goods from the intended suppliers were found to be made in November 2010. It is further seen that the computers and accessories were purchased at the fag end of the assessment year and the number of employees was also not sufficient to commence the business of the appellant company. Under these facts and circumstances, I am unable to believe that the business of the appellant company was established during the relevant previous year in the absence of any store or outlet for the business of trading, ware house/ godowns, transportations, Registration under the Shop and Establishment Act and purchase or sale made during the relevant previous year, the appellant was not in a position to discharge its functions as a wholesale trader. It has been held by the honourable high court in the case of Western India Vegetables Products Ltd vs CIT (26 ITR 151) that there is a distinction between setting up of business and commencement of business. When a business is

established and is ready to commence business, 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. Further in the case of CIT vs Saurashtra Cement and Chemical Industries Ltd. (91 ITR 170) it was held that the word “set up” is equivalent to the word “establishment”, but operation for establishment cannot be equated with the establishment of the unit itself or its setting up. In another case namely, CWT vs Ramraju Surgical Cotton Mills Ltd. (63 ITR 478) it was held that a unit cannot be said to have been set up unless it is ready to discharge the function for which it has been set up. It is only when the unit has been put into such a shape that it can start functioning as a business or as a manufacturing organisation that it can be said that the unit has been set up. Operations for the establishments of a unit from the very nature of expression can only signify step that have to be taken to establish the unit. In the present case it is found that only preliminary enquiries were conducted for the purchase of goods and the purchasers were neither finalized nor any order was placed during the relevant previous year. Therefore, in my opinion, the appellant company was not in a position to commence its business and the business was not fully set up. Since, the business of the appellant company was not set up during the relevant previous year, the expenses incurred on it cannot be allowed as deduction. Therefore, the order of the AO regarding the impugned disallowance of Rs. 8,64,07,610/- is hereby confirmed”.

4. The appellant assessee filed an appeal before the Tribunal. The Tribunal after noting the facts and the position of law was of the view that the business of trader can be said to be set up when the assessee makes a purchase subsequently to owning/leasing of either a shop or warehouse and in the facts of the present case evidently the assessee has not made any purchase or rented any shop premises from where sale

could take place or for that matter rented any house where the purchased goods intended to be sold can be stored. The Tribunal eventually held that it could not be said that the business of the assessee has been set up as is the requirement of proviso to Section 3 of the Income Tax Act.

5. Learned counsel for the appellant-assessee submits that the appellant-assessee has set up its business in the relevant previous year and the same was evidenced by way of (a) correspondence with Indian suppliers, (b) incorporation of the company, (c) hiring of personnel, (d) opening of bank account, (e) registration under Shops and Establishments Act. It is the appellant's case that its business was thus set up during the relevant previous year as the appellant was ready to commence business although actual commencement of business did not take place during that year. The appellant challenged the order of the Tribunal and the Authorities below as being totally perverse as the Authorities below had proceeded on the premise related to actual commencement of business by overlooking the fact that the relevant consideration is whether the business has been set up or not. According to the learned counsel for the appellant, the Tribunal has erred in holding that the business of the trader is set up when such trader makes purchase subsequent to owning/leasing of either a shop or a warehouse and since such requirements were not fulfilled in appellant case, its business could

not be said to have been set up during the relevant previous year.

6. According to learned counsel for the appellant, since incorporation, the appellant company had been undertaking activities relating to planning, meeting with prospective suppliers, marketing/business development in India etc. and for this purpose, the appellant company set up an office and facilities, hired the professional employees and directors, initiated negotiations with suppliers for supply of products etc. During the relevant previous year, the appellant company acquired the leased office premises with effect from October 01, 2007. The appellant company also opened its bank account on October 04, 2007 and incurred routine business expenses such as legal and professional charges, travel and conveyance, meeting and conference, salary and wages etc. During the subject assessment year, the appellant also employed key employees such as IT director, FMCG-director, Merchandise Director, Finance Director, Accountants, other supporting staff etc. capable of rendering business development, marketing and financial support activities in relation to the products proposed to be traded by the appellant company. During the subject assessment year, the appellant company met with a number of key suppliers such as Unilever, Colgate, Rasna, Safal, Nestle, Pepsi, Cadbury etc. to negotiate significant terms of the supply contracts. The appellant

started creating data base of its prospective suppliers or goods in various categories, to establish its operations, the appellant company also purchased sizeable amount of fixed assets such as computers and softwares (Rs.33,77,573), office equipments (Rs.38,64,333), furniture and fittings and leasehold improvements (Rs.92,30,741) etc. which were essential for carrying on the business of the appellant company. In view of these facts, the appellant company claimed that its business was set up from the date of incorporation and its expenses to be allowed as business expenses during the relevant assessment year. Only actual sales and purchase of products did not happen during the subject financial year which is not a necessary condition/activity in order to hold a business was set up.

7. The learned counsel for the assessee has filed a compilation of 15 judgments in support of his contentions, which are as under:

- (i) Western India Vegetable Products Ltd. Vs. CIT, 26 ITR 151*
- (ii) CWT Vs. Ramaraju Surgical Cotton Mills Ltd., 63 ITR 478*
- (iii) CIT Vs. Sarabhai Management Corporation Limited, 192 ITR 151*
- (iv) Sarabhai Management Corporation Ltd. Vs. CIT, 102, ITR 25*
- (v) CIT Vs. Hughes Escorts Communications Ltd., 311 ITR 253*
- (vi) CIT Vs. Whirlpool of India Ltd., 318 ITR 347*
- (vii) CIT Vs. ESPN Software India (P) Ltd., 301 ITR 368*
- (viii) CIT Vs. Sauer Danfoss (P) Ltd., ITA No. 1367/2010*
- (ix) CIT Vs. Aspentech India (P) Ltd., 187 TAXMAN 25*
- (x) CIT Vs. E.Funds International India, 162 TAXMAN 1*
- (xi) CIT Vs. Dhoomketu Builders & Development Pvt. Ltd., 216 TAXMAN 76*

- (xii) CIT Vs. Samsung India Electronics Limited, 356 ITR 354*
(xiii) CIT Vs. Franco Tosi Ingegnaria, 241 ITR 268
(xiv) CIT Vs. Western India Seafood (P) Ltd., 199 ITR 777
(xv) CIT Vs. Saurashtra Cement & Chemicals Industries Ltd., 91 ITR 170

8. On the other hand, Mr. Rohit Madan would support the judgment of the Tribunal and contends that this Court would not like to interfere with the conclusion arrived at by the three authorities. According to him, the main objectives of the assessee company in the Memorandum of Association incorporated to carry on trading activities on wholesale basis in all kinds of consumer goods, durables, articles and products. In terms of the Memorandum of Association, the business of the assessee is of trading on a large scale for which the assessee requires a warehouse to store the commodities. In the absence of such a facility, it cannot be said that the assessee had set up a business as is the requirement of proviso to Section 3 of the Act. According to him, except the correspondence with various potential suppliers, the assessee has not been able to show that the enquires had culminated in supply of material. Incorporation certificate of the company, employment of the personnel towards the end of the previous year were not the relevant considerations to show a set up of the business.

9. Having considered the rival submissions made by the learned counsel for the parties, the question which arises for consideration in the

present appeal is as to when does the assessee is said to have set up its business? It has to be borne in mind that there is a distinction between setting up of a business and commencement of a business. The Bombay High Court in ***Western India Vegetables Products Ltd. vs. CIT [1954] 26 ITR 151*** has examined the concept and noticed the difference between commencement and setting up of a business by observing:-

“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. The Gujarat High Court in a subsequent judgment in the case of ***CIT, Gujarat Vs. M/s. Saurashtra Cement and Chemical Industries Ltd. (1973) 91 ITR 170 (Guj.)***, has held a business is said to have commenced as soon as an essential activity of that business is started.

On the question of setting up, the following observations are relevant:-

“...A business activity consists of three stages: the first stage relates to the activity necessary for the purpose

of acquiring the raw material and establishment of plant and machinery and the second activity comprises the processing and manufacturing by using the raw material and the plants and machinery set up for the purpose and the third category consisted of the marketing thereof. The first in point of time lays the foundation for the second activity and the second activity when completed lays the foundation for the third activity. Therefore, the expenditure incurred for carrying on any of these activities including the first activity is also deductible in computing the profits and gains of the assessee for the relevant year when the activity is undertaken. In Sarabhai Management Corporation Ltd. v. CIT, [1976] 102 ITR 25, the Gujarat High Court took the same view and held that the business commences with the first activity for acquiring by purchase or otherwise, immovable property. There may be an interval between the setting up of the business and the commencement of the business. All expenses incurred during that interval are also permissible for deduction. In CIT v. Sarabhai Management Corporation Ltd., [1991] 192 ITR 151 (SC) the decision of the Gujarat High Court was affirmed and went a step ahead that even the activities at a preparatory stage is also admissible.”

11. On a reading of the above referred quotations, it is clear that it is only after the business is set up, that the expenses incurred in the business can be claimed as permissible deduction under Section 37 of the Act. For commencement of a business, there must be in place some income generating asset or income earning structure. In several cases, there is a gap or an interval between setting up and commencement. When the business is set up, is a mixed question of law and fact and

depends upon the line, nature and character of the business/professional activity. For example, for manufacturing business, purchase of new material or electricity connection may be relevant point to determine setting up but in case of a property dealer, the moment, he puts up a chair and table, or starts talking, his business is set up.

The present assessee was engaged and incorporated for carrying on trading activities in different commodities.

The word 'trade' even though not defined in the Act is used to denote operations of a commercial character by which a trader provides to customer for reward, some kind of goods or services. In other words, when the trader start providing such goods and services, the business is said to have commenced but the same may not hold good for set up of a business, which is a stage before the commencement. To set up a business, the following activities become relevant:-

'Preparation of a business plan; establishment of a business premises; research into the likely markets or profitability of the business; acquiring assets for use in the business; registration as an entity and under the local laws etc.' The said list of activities are not exhaustive and facts of each case need to be considered. Indeed purchase of goods would amount to commencement of business, but before the said act, spade work and efforts to commence have to be undertaken. A trader

before actual purchase would possibly interact and negotiate with manufacturers, landlords, conduct due diligence to identify prospective customers, spread awareness etc. These are all integral part and parcel of the business of a trader. The said activities continue even post first sale/purchase. When first steps are taken by a trader, the business is set up, commencement of purchase and then sales is post set up.

12. There is no dispute about the factual aspect of the expenses incurred by the petitioner. In the present case, the position of the primary objectives of the assessee company is also not in dispute. Before we deal with the respective submissions of the learned counsel for the parties, we note hereunder the relevant dates showing the setting up of a business by the assessee-company as noted from the memo of appeal:

Started correspondence with various Indian suppliers	12.06.2007
Incorporation of company	19.09.2007
Hiring of personnel	w.e.f. 19.09.2007
Opening of bank account	04.10.2007
Registration under Shops and Establishments Act, applied vide Application dated 04.03.2008 and granted vide order dated 05.03.2008	w.e.f. 01.01.2008

In the facts of the present case, we note that the assessee company was incorporated on September 19, 2007. Even before the incorporation, correspondence had been made with well known companies like Nestle,

Cadbury, Nivea India Pvt. Ltd., Pepsi, Coalgate, Uniliver etc. It rented out the office premises in the month of October, 2007. Bank account was opened on October 04, 2007. Employees were also appointed during the said period. TDS deduction for the said employees was also placed on record. Registration under the Shops and Establishment Act was also effected. These activities are the first stage activities which would lay foundation for placing orders for procuring the stock and storing them in a warehouse/shop followed by the third stage of marketing them. Suffice to state for a foreign entity without establishing itself under the local laws, appointing personnel, identifying the prospective manufacturers, clients etc. obtaining storage facilities followed by stock-in-trade, the business of trading cannot commence. The Tribunal missed the point, that the assessee as a prudent trader could not have made purchases without undertaking the aforesaid exercise. The said exercise was a precursor to commencement but post set up. The aforesaid activities demonstrate setting up of the business by the appellant-assessee with a commitment to commence the business. This Court in *ESPN Software India P. Ltd.* (supra) has held as under:-

“Since the assessee has acquired the licence on August 15, 1995, and after getting the licence, the assessee was in a position to start the business, so, under these circumstances, we have no hesitation in holding that the assessee has commenced its business on or after August

15, 1995 and we do not find any infirmity with regard to this finding in the order passed by the Tribunal.”

Nothing barred or prevented the appellant from making first purchase, after necessary legal approvals, but the fact that the appellant wanted to commence actual trading after negotiations with several parties, would not postpone the date when the business was set up.

13. In *CIT vs. ESPN Software India Pvt. Ltd. (supra)*, this Court while dealing with the case where the assessee company was incorporated on August 01, 1995 and had filed its return declaring loss of Rs.3,01,78,033/- by debiting expenses of Rs.2,28,85,749/- relating to the period from August 01, 1995 to March 31, 1996 held that it is a well settled position of law that business is nothing more than a continuous course of activities and for commencement of business all the activities which go to make up the business need not be started simultaneously. As soon as the activity which is the essential activity in the course of carrying on the business is started, the business must be said to have commenced. In the said case it was held that even though incorporated on August 01, 1995, the company had acquired licence to commence its business on August 15, 1995 to distribute in India through Cable Television Systems, Satellite Master Antenna Systems and DTH etc. ESPN channels. The business is said to have commenced as it was on

that day the company was in a position to start the business. Trader has to select products, negotiate with manufacturers etc. and this is an essential and important facet of the activities and business of a trader.

Similarly this Court in *CIT vs. Aspentech India (P) Ltd. [2010] 187 Taxman 25 (Delhi)* had agreed with the ITAT wherein the ITAT has held that for claiming any expenses under Section 37(1) of the Act what is required to be seen is whether the expenses are incurred for the purpose of business or not and such expenses are of not capital in nature and are not expressly disallowable under the other provisions of the Act. The Tribunal had also taken into consideration the fact that the assessee company has achieved turnover of Rs.4 Crores with the help of seven employees which clearly indicates that their efforts made in the year under consideration has shown fruitful result in the succeeding years. The Tribunal had also noted that the expenses have been incurred after setting up of the business. The expenses on staff salary paid by the appellant-assessee were substantial. For a trader, these expenses or deployment of employees at this scale was not necessarily in case business had not been set up.

14. In *Commissioner of Income Tax vs. Sauer Danfoss (P) Ltd. [2012] 22 taxmann.com251 (Delhi)*, the Division Bench of this Court has held as under:-

“3. There are four other issues raised in the present appeal. The first issue relates to the date on which the business of the respondent assessee was set up. The Assessing Officer has held that the business of the respondent assessee was set up on 1st June, 2001. The Assessing Officer, therefore, disallowed expenses to the extent of Rs.19,37,773/-, which include salaries, wages, bonus, staff welfare expenses, recruitment and training etc. for the period prior to 1st June, 2001. Similar expenses have been also disallowed on power and fuel, i.e., electricity and water.

4. On the said aspect/question, we find that the tribunal has dealt with the issue in depth and has recorded several factual findings. We would like to reproduce here paragraph 6 of the order passed by the tribunal, which reads as under:

" We have considered the rival contentions and found from the record that the assessee company was duly incorporated on 5.2.2001 under the Companies Act, 1956. It has also applied for approval to FIPB, and FIPB vide approval dated 24.1.2001 allowed for setting up of business in India for various activities. The assessee set up its business from 1st April, 2001 and was ready to commence its business operation. First director was appointed on 5.2.2001 on the date of incorporation and additional directors were appointed on 10.2.2001. It has taken premises on lease w.e.f. 1.4.2001, the physical possession of which was already taken w.e.f. 15.2.2001. It opened its bank account with Dutche Bank in March first week wherein first remittance was received on 9.2.2001. It is quite clear from these activities of the assessee company that it has set up its business and was ready to commence on 1.4.2001. There is no dispute to the well settled legal proposition that at the point of time, the

assessee is in a complete state of readiness to undertake its activity, it can be said that it has set up its business, the actual commencement of business may be at a later date. The trading business of the assessee was ready to commence upon set up of requisite infrastructure i.e. acquisition of place of business, commencement of hiring of suitable personnel, identifying clients, opening bank account etc. which enabled the assessee to carry out its object clause. ITAT Delhi Bench in the case of Whirlpool of India Ltd.- 19 SOT 293 observed that there may be interregnum(sic) between setting up of business and date of commercial commencement of business, but under the Income Tax Act, all the expenses incurred after the date of setting up of business are to be allowed as a deduction while computing the income u/s 28. The Hon'ble Bench in this case held that where the assessee company has appointed branch manager and regional manager in 1995, paid salaries including PF contribution etc. beginning from November, 1995, its business can be said to be set up from 1.11.1995 i.e. the date on which the company was in a position to commence its business, and not on 1.2.1996 when its bank account was opened. The instant case before us is at a more sound footing where even a bank account was opened prior to 1.4.2001 and the assessee has claimed the expenditure only after it has set up its business which was ready for commencement. Merely because assessee entered into agreement with DHL on 21.5.2001 which was to be operative from 1.6.2001 date on which assessee took over the running business of DHL, it cannot be said that it has set up its business only on 1.6.2001 and not from 1.4.2001. Accordingly, we do not find any merit in the action of the lower authorities for not allowing the expenditure incurred after 1st

April, 2001. The AO is at a liberty to verify that the expenditure to be allowed should be restricted to revenue expenditure. We direct accordingly."

15. In ***Commissioner of Income Tax IV vs. Dhoomketu Builders & Development (P) Ltd.*** [2013] 216 TAXMAN 76/34 *taxmann.com* 18

(*Delhi*), the Division Bench of this Court has held as under:-

"9. The Tribunal has observed that having regard to the business of the assessee, which is the development of real estates, the participation in the tender represents commencement of one activity which would enable the assessee to acquire the land for development. If the assessee is in a position to commence business, that means the business has been set-up. The acts of applying for participation in the tender, the borrowing of monies for interest from the holding company, the deposit of the borrowed monies on the same day with NGEF Ltd. as earnest money were all acts which clearly establish that the business had been set-up. The commencement of real estate business would normally start with the acquisition of land or immoveable property. When an assessee whose business it is to develop real estates, is in a position to perform certain acts towards the acquisition of land, that would clearly show that it is ready to commence business and, as a corollary, that it has already been set-up. The actual acquisition of land is the result of such efforts put in by the assessee; once the land is acquired the assessee may be said to have actually commenced its business which is that of development of real estate. The actual acquisition of the land may be a first step in the commencement of the business, but section 3 of the Act does not speak of commencement of the business, it speaks only of setting-up of the business. When the assessee in the present case was in a position to apply for the tender, borrowed money for

interest albeit from its holding company and deposited the same with NGEF Ltd. on the same day, it shows that the assessee's business had been set-up and it was ready to commence business. The learned senior standing counsel for the revenue would, however, state that till the land is acquired, the business is not set-up. The difficulty in accepting the argument is that an assessee may not be successful in acquiring land for long period of time though he is ready to commence his business in real estate, and that would result in the expenses incurred by him throughout that period not being computed as a loss under the head "business" on the ground that he is yet to set-up his business. That would be an unacceptable position. The other argument of the learned standing counsel for the revenue that the tax auditors of the assessee have themselves pointed out that the assessee is yet to commence its business is also irrelevant because of the distinction between the commencement of the business and setting-up of the same."

16. This Court in ***Commissioner of Income Tax IV vs. Samsung India Electronics Ltd. [2013] 356 ITR 354 (Delhi)*** agreed with the findings of the Tribunal and dismissed the appeal filed by the Revenue.

The relevant finding of the Tribunal is as under:-

"6. In view of the above, the business of the assessee could be said to have been set up on September 3, 1995, as prior to this necessary agreements had been entered into, key personnel had been recruited and the assessee-company had started working necessary infrastructure like office premises, office equipment, etc. and the assessee company was ready to commence trading operation as on the date of incorporation, viz., August 3, 1995. Accordingly, the Assessing Officer is directed allow the revenue expenditure incurred after the setting up of business

which was September 3, 1995, notwithstanding the fact that commercial operations started with effect from October 1, 1995. For the purpose of claiming expenditure incurred thereafter, as revenue expenditure, reliance are placed on the following decisions.”

The aforesaid decisions affirm and reflect the view and findings recorded by us, to justify reversal of the findings of the Tribunal and the authorities.

17. The law being well settled, it may not be necessary to deal with all the judgments relied upon by the appellant. We may only state here that the orders of the authorities below do not indicate that it was the case of the revenue that the assessee has claimed deduction of expenditure, prior to the setting up of business.

We accordingly answer the substantial question of law in favour of the appellant and against the revenue. The order of the Tribunal dated August 16, 2013 is set aside. The appeal is accordingly allowed.

No costs.

(V.KAMESWAR RAO)
JUDGE

(SANJIV KHANNA)
JUDGE

SEPTEMBER 22, 2014/akb