



ITA No.4465/Mum/2017
M/s. HDFC Education & Development Services Private Limited
Assessment Year-2012-13

आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.4465/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2012-13)

Dy. Commissioner of Income Tax-1(1)(2) 579, Aaykar Bhavan M.K. Road Mumbai-400 020.	बनाम/ Vs.	M/s. HDFC Education & Development Services Private Limited Ramon House, H.T. Parekh Marg Backbay Reclamation Mumbai-400 020.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No.		AACCH-7833-D
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थीकीओरसे/ Appellant by	:	M.Rajan- Ld. DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Madhur Aggarwal- Ld.AR
सुनवाईकीतारीख/ Date of Hearing	:	05/03/2019
घोषणाकीतारीख / Date of Pronouncement	:	13/03/2019

आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member):-

1. Aforesaid appeal by revenue for Assessment Year [in short referred to as 'AY'] 2012-13 contest the order of Ld. Commissioner of Income-Tax



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(Appeals)-2, Mumbai, [in short referred to as 'CIT(A)'], Appeal No. CIT(A)-2/IT-133/2015-16 dated 23/03/2017 on following effective grounds of appeal: -

1. "Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) was right in deleting the disallowance Rs. 1,58,88,554/-disallowed as pre-operative expense,"
2. "Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) was right in holding that assessee was ready to commence its business on date of incorporation itself i.e. 17/11/2011 when the first Board Meeting held on 21/11/2011 resulted only in appointment of chairman & Directors, and discussion on details of Registered office and thereby pointed to the fact that the assessee was not in a position to commence any business activity at that point of time resulting in first invoice being raised only by 20/02/2012."
3. "Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) was right in deleting the disallowance of Rs. 11,29,500/- made u/s 40(a)(ia)for non-deduction of TDS on professional fees u/s 194 J."

2.1 The assessment for impugned AY was framed by Ld. Deputy Commissioner of Income Tax-Circle-1(1)(2), Mumbai [AO] u/s 143(3) on 24/03/2015 wherein the loss of Rs.212.68 Lacs declared by the assessee vide return of income filed on 27/09/2012 was reduced to Rs.42.50 Lacs. As evident from grounds of appeal, the following quantum additions / disallowances are the subject matter of present appeal before us: -

No.	Nature of Addition	Amount Rs. (Rounded Off)
1.	Pre-operative Expenses	Rs.158.88 Lacs
2.	Disallowance u/s 40(a)(ia)	Rs.11.29 Lacs

2.2 Facts qua addition of *pre-operative expenses* are that during assessment proceedings, it transpired that the assessee was incorporated during the impugned AY i.e. on 17/11/2011 and raised first invoice on



20/01/2012. The assessee was promoted by *HDFC* who has incurred *pre-incorporation* as well as *post-incorporation expenses* on behalf of the assessee, which has subsequently been reimbursed by the assessee. The dispute arises in view of the fact that as per assessee's submissions, the business was commenced from 17/11/2011 i.e. from the date of incorporation whereas as per Ld. AO, the date of commencement was to be reckoned from 20/01/2012 i.e. when the first invoice was raised by the assessee. The difference assumes importance in view of the fact that the expenditure incurred before commencement of business were to be considered as *pre-operative expenses* and could not be allowed as revenue expenditure. The Ld. AO, accepting the date of first invoice as commencement of business, opined that the expenditure incurred from the date of incorporation to the date of first invoice could not be considered as business expenses since the assessee was only exploring the business opportunities during that period. Therefore, all such expenditure was to be considered as pre-operative expenditure, being capital in nature and therefore, not allowable as revenue expenditure.

2.3 The second disallowance stem from reimbursement of expenses by the assessee to *HDFC* who incurred various expenses on behalf of the assessee. As per assessee's submissions, appropriate tax at source [TDS] was already deducted by *HDFC* while making the payments to various payee and therefore, the same was not to be deducted again by the assessee while reimbursing the same to the *HDFC*. The expenses post 20/01/2012 and reimbursed by the assessee amounted to Rs.11.29 Lacs



which were disallowed by Ld. AO u/s 40(a)(ia) after rejecting assessee's submissions.

3. The Ld. CIT(A) noted that for allowability of expenses under Income Tax Act, the relevant date would be date on which the business of the assessee could be said to have been set up i.e. ready to commence business as against the date on which the business was actually commenced and there was subtle difference between setting up and commencement of business since the former signifies that the business has crossed the milestone that marks the entry of the business into the territory of taxation under the domestic tax laws. Therefore, as per the settled principles, the set-up of business would be the relevant date to ascertain the nature of expenditure regardless of the factum of actual commencement of business. Further, the business could be said to have been set up when the first step towards initiating operations has been undertaken by the assessee. Reliance was placed, *inter-alia*, on the decision of Hon'ble Bombay High Court rendered in *Western India Vegetable Products Ltd. Vs CIT* [1954 26 ITR 151] while arriving at the said conclusion. The ratio of following decisions was also noted: -

No.	Title	Rendered by	Citation
1.	<i>CIT Vs ESPN Software India P. Ltd.</i>	<i>Hon'ble Delhi High Court</i>	<i>301 ITR 368</i>
2.	<i>CIT VS Ralliwolf Ltd.</i>	<i>Hon'ble Bombay High Court</i>	<i>121 ITR 262</i>
3.	<i>CIT Vs Saurashtra Cement & Chemicals Ind. Ltd.</i>	<i>Hon'ble Gujarat High court</i>	<i>91 ITR 170</i>
4.	<i>Omniglobe Information Tech India P Ltd Vs CIT</i>	<i>Hon'ble Delhi High Court</i>	<i>ITA No 257 of 2012</i>
5.	<i>Styler Ltd P Ltd. Vs JCIT</i>	<i>Pune Tribunal</i>	<i>113 ITD 55</i>



The object of the assessee as contained in the *Memorandum of Association* were also appreciated *qua* the activities carried out by the assessee after its incorporation wherein it transpired that the requisite licenses from *BMC* was in place, professionals were already hired to carry out the objects, business plans were drawn up, first Board Meeting was held to take important decisions and registration under EPF was already obtained by the assessee. Finally, the matter was concluded in assessee's favor by making following observations: -

Having regard to the factual submissions of the appellant as noted above, the nature of education industry and nature of business of the appellant and judicial precedents elaborated above and after considering Hon'ble Bombay High court decision in the case of CIT Vs Ralliwolf Ltd (1980) 121 ITR 262 (BOM) and also having regard to the pre-incorporation background work carried out by HDFC Ltd., it is clear that the appellant was ready to commence its business on the date of incorporation itself viz. 17 November, 2011 i.e. the business of the appellant was set up on that date. Therefore, all the expenses incurred by the appellant post incorporation are allowable as against the expenses allowed by the AO after the date of raising of first invoice. The disallowance made by the AO of Rs.1,58,88,554 is deleted. This ground of appeal is allowed.

Aggrieved, the revenue is in further appeal before us.

4. After careful consideration of impugned order and submissions made by respective representatives, the undisputed fact that emerges is that the assessee had already taken effective step post incorporation to set-up its business. The necessary approvals required to carry out the business was already in place, the business plans were drawn up and the professionals were hired to carry out the business objectives. The important decisions to set-up the business was already taken by the Board of Directors. Therefore, the action of Ld. AO in treating the commencement of business from the



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date of first invoice could not be sustained and therefore, no infirmity could be found in the impugned order. No contrary decisions have been placed on record to controvert the binding judicial precedents as relied upon by first appellate authority. Hence, this ground stands dismissed.

5. So far as the disallowance u/s 40(a)(ia) for Rs.11.29 Lacs is concerned, it has been noted in the impugned order that the amounts were reimbursed by the assessee to *HDFC* without any *mark-up* and secondly, *HDFC* has deducted appropriate tax at source while making these payments on behalf of the assessee. The disallowance has been deleted on the strength of certain decisions of this Tribunal. The revenue is unable to controvert this factual matrix. This being the case, no infirmity could be found in the impugned order.

6. Resultantly, the appeal stands dismissed.

Order pronounced in the open court on 13th March, 2019.

Sd/-
(Saktijit Dey)
न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)
लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 13/03/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent



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3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai