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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ITA 702/2016**
PRINCIPAL COMMISSIONER OF INCOME-TAX-02

..... Appellant
Through : Sh. Dileep Shivpuri, Sr. Standing
Counsel with Sh. Sanjay Kumar, Jr. Standing
Counsel and Sh. Vikrant. A. Maheshwari,
Advocate.

versus

BUSSAN AUTO FINANCE INDIA PVT. LTD. Respondent
Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER
08.11.2016

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1. In this appeal under Section 260A of the Income Tax Act, 1961 [hereafter “the Act”], the Revenue is aggrieved by the order of the Income Tax Appellate Tribunal (ITAT). The assessee was formed in April 2007 with the objective of carrying on business of hire purchase, financing, factoring and leasing of automotive vehicles. Concededly, the assessee had applied for a license as a Non Banking Financial Company (NBFC) which it obtained on 09.04.2008. For AY 2008-09, its assessment declared an income of ₹2,84,56,074/-; later, the assessee filed a revised return, declaring loss of ₹2,68,67,610/-. In the computation of its total income, the Assessing Officer (AO) held that interest income received by the assessee being to the tune of

₹2,84,56,074/- could not be treated as “business income” and that it was income from other services and that deduction from other sources as business income could not be allowed as revenue expenditure since the assessee had not set-up business during the period. Based on this, the claim for set-off was disallowed.

2. The CIT(A), after elaborately discussing all the facts, including the nature of activity and the expenditure incurred by the assessee for the period involved, reversed the AO’s decision and held that the loss was a business loss and that interest income was also business income. On the basis of these findings, income was allowed to be adjusted under Section 71 of the Act. The CIT(A) also reversed the AO’s findings with respect to commencement of business. The Income Tax Appellate Tribunal (ITAT) affirmed the order of the CIT(A). Learned counsel for the Revenue contends that the impugned order is erroneous and contrary to the law declared by the Supreme Court in *Tuticorin Alkali & Chemicals Ltd. v. CIT* 227 ITR 172 as well as *CIT v. Whirlpool of India Limited* 2009 (185) Taxmann 387. It was submitted that the business activity, i.e. NBFC could not by law be said to have started or commenced or being established before the license was even obtained. The license was in fact obtained on 09.04.2008. Therefore, all income derived and expenditure incurred for the period between incorporation of the assessee in April 2007 and the grant of license in April 2008 were income from other sources and other forms of expenditure and have to be so treated. It was also submitted that the benefit of Section 71, therefore, could not be claimed by the assessee in the circumstances of this case.

3. The CIT(A) in the first appellate order discussed the following essential facts:

“5.2 Now, adverting to the case of the appellant company, it is observed that the appellant company was incorporated in India on 23.4.2007 to carry on the business of hire purchase, financing, factoring and leasing in connection with the retail sale of all types of automobile vehicles and to carry on the business of establishing, organizing, managing, promoting, encouraging, conducting, sponsoring, operating, developing, commercializing and providing insurance brokerage services connection with all kinds of automotive vehicles. This company is a closely held company with 32,000,000 equity shares being held by Bussan Automotive Singapore Pte. Ltd, 13,000,000 equity shares being held by AXIS bank Ltd. and the balance 5,000,000 equity share, being by Yamaha Motors Asia Pte. Ltd. During the relevant assessment year, the appellant company raised the share capital of Rs.50,00,00,000/- and deposited in the bank accounts with the schedule banks in India. Subsequently, this amount was utilized for setting up of the business of the appellant company. During the relevant assessment year, the appellant company opened its office on a leased premises after entering into a lease agreement on 7.07.2007 and incurred further expenses for lease hold improvements of Rs.36,81,929/-. The whole time directors and the other officials such as Chief Administrative Officer, Marketing heads, operational heads and various other members of the staff were appointed. The appellant company also under took the job of analyzing the market scenario, testing and implementation for the loan finance system, processing of vendors etc. The appellant company further filed applications to statutory bodies for licenses and obtained the licenses/registration Nos. from various regulatory authorities such as Provident Fund, Income tax, Shop

and Establishment etc. The appellant company also submitted its application before the RBI for grant of licence to start its activity as non banking finance company (NBFC). As per the RBI requirement, a company proposing to set up as NBFC should possess a high ends IT software. The appellant company purchased the required software namely Finn-One for establishing its finance business. Various correspondences were made by the appellant company with the RBI authority to comply its condition for registration as NBFC. As per the RBI approval, the UTI Bank Ltd. invested 26% in the initial paid up share capital of the appellant. Further expenses were also incurred on the purchases of office equipments worth of Rs.15,62,894/-, computers of Rs.62,22,308, software of Rs.1,79,80,247/-, furniture and fixtures of Rs.3,54,836/- and vehicles of Rs.26,97,892/-. Even the AO has not disputed the genuineness of these expenditures”

4. The CIT(A) also noted that the expenditure towards salaries, wages etc. were to the tune of ₹1,87,35,439/- and that administrative and other expenses were to the tune of ₹3,42,24,191/-. It was noted that whether the expenditure could be allowed as business expenditure depended on the date on which the business was set up. On the basis of the above material, it was concluded that the business was indeed set-up some time after 23.04.2007. The AO did note that the license was obtained later but at the same time concluded that it started its business at the end of the relevant previous year. Thereafter, the CIT(A) held that any income could be established as business income if it could be proved that some business activity had taken place during the relevant time. In this context, the CIT(A) took note of *Whirlpool (supra)* which affirmed the ITAT's judgment. In

that case, the availing of a foreign loan and FIPB approval was put forth by the Revenue as the defining moment or point in time when the business is said to have commenced. The Court concluded that those formalities were not statutory and even without foreign loan and equity participation, the assessee could carry out business according to the clause in the Memorandum of Association. Although the obtaining of license is on a slightly higher plain, the fact remains that in this case, there is nothing on record to say that the Memorandum of Association of the assessee company prevented it from earning the income that it did. It is not merely the earning of the income, but also the nature of expenditure incurred which is determinative at least in the facts of this case. The company strove and did all that it could to set-up the infrastructure which ultimately culminated in obtaining the NBFC license. In the process, the expenditure incurred by it had a nexus with the license that it could successfully obtain on 09.04.2008. Having regard to all these facts, this Court is of the opinion that the application of law declared in *Whirlpool (supra)* and the decision in *CIT v. L.G. Electronics (India) Ltd.* 2005 (199) CTR (Del) 205 was unexceptionable.

5. As a result, the second question urged would not arise. As far as other questions urged, i.e. whether the loss could have been allowed at all having regard to the fact that it was claimed in the revised return and not in the original return, we are of the opinion that this cannot be the question of law. The revised return was filed within the time prescribed. In fact, the revised return was finally taken up for assessment.; the orders too were passed on it. In the circumstances,

the very purpose of filing a revised return and making a provision thereof would be defeated if the Revenue's primary contention that the claims should have been made in the original return were to be followed and upheld. No question of law arises in such circumstances. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

NOVEMBER 08, 2016

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