



\* **HIGH COURT OF DELHI : NEW DELHI**

**ITA No.516/2007**

% Judgment delivered on: 10<sup>th</sup> March, 2008

Commissioner of Income Tax  
Delhi-IV, New Delhi .....Appellant.

Through: Ms. P.L.Bansal, Adv.

Vs.

ESPN Software India (P) Limited  
Building No.22, Pushp Vihar,  
Community Centre, New Delhi ..... Respondent

Through: Ms. Mahua C. Kalra, Adv.

Coram:

**HON'BLE MR. JUSTICE V.B. GUPTA**

**HON'BLE MR. JUSTICE MADAN B. LOKUR**

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes



**V.B.GUPTA, J. (Oral)**

The short question before us in this appeal is as to whether the Income Tax Appellate Tribunal (for short as 'Tribunal') was right in allowing the deduction of expenditure incurred by the Assessee on or after 15<sup>th</sup> August, 1995 holding that the business has commenced on this very date.

2. Brief facts of this case are that the Assessee Company was incorporated on 1<sup>st</sup> August, 1995 and as such this was the first year for which the Assessee had filed its return declaring a loss at Rs.3,01,78,033/- on 29<sup>th</sup> November, 1996.

3. On 15<sup>th</sup> August, 1995, the Assessee had acquired license from ESPN Inc to sub-license for distribution of ESPN Programming Services in India via Cable Television System, Satellite Master Antenna Systems and Direct to Home via Satellite. By virtue of this license, the Assessee entered into an agreement on 1<sup>st</sup> October, 1995



with M/s. Modi Entertainment Network (P) Limited (MEN) and appointed MEN as its sole distributor for distribution of ESPN Programmes to cable operators, hotels and other DTH subscribers.

4. It was noticed by the Assessing Officer during the course of assessment proceedings that the Assessee did not earn any income except interest of Rs.95,522/-against which it debited expenses of Rs.2,28,85,749/-, relating to the entire period from 1<sup>st</sup> August, 1995 to 31<sup>st</sup> March, 1996. It was claimed by the Assessee that the date of incorporation is to be treated as date of commencement of business and hence all the expenses are to be treated as Revenue expenses.

5. The Assessing Officer held that since the agreement with the parent company to distribute ESPN Services in India was dated 15<sup>th</sup> August, 1995, while agreement with MEN was dated 1<sup>st</sup> October, 1995, therefore it could not be said that before this date, the Assessee had commenced business. The Assessing Officer further noted that even necessary infrastructure i.e. the decoders were purchased



by the Assessee much later for an amount of Rs.8.41 crores and accordingly it was held by the Assessing Officer that the business of the Assessee did not commence during the year and he treated all the expenses debited to Profit & Loss Account as expenses incurred prior to commencement and did not allow the same as revenue expenditure.

6. Aggrieved by this order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) [for short as 'CIT(A)] who held that the business of the Assessee was set up on 15<sup>th</sup> August, 1995 and therefore Assessee was entitled to claim all the expenditure incurred on or before this date including depreciation allowance.

7. Not satisfied with the order passed by the CIT(A), the Revenue preferred an appeal before the Tribunal. The Tribunal vide its impugned order dated 8<sup>th</sup> September, 2006 passed in ITA No.463/Del/02 relevant for the assessment year 1997-1998



dismissed the appeal holding that the assessee has commenced the business on 15<sup>th</sup> August, 1995.

8. Aggrieved by the order of the Tribunal, the Revenue has filed the present appeal.

9. It has been contended by learned counsel for the Revenue that though the Assessee had obtained the license on 15<sup>th</sup> August, 1995, however, it had appointed MEN as sole distributor only on 1<sup>st</sup> October, 1995. Moreover, no business activity of revenue nature was carried out by the Assessee during the year. It is also contended that most of the equipment/infrastructure had arrived in India only in the month of November and December and therefore Assessee was not even in a condition to start business and merely getting incorporation certificate did not mean that the business had commenced.

10. The question which arises for consideration in the present case is as to when the Assessee is said to have commenced his business.



It has to be borne in mind that there is a distinction between setting up of the business and the commencement of the business. What is relevant under the Income Tax Act, 1961 (for short as 'Act') is the setting up of the business and not the commencement of the business.

11. The definition of the previous year as contained in Section 3(1) of the Act, which is relevant for the present case reads as follows:-

**“ 3. “Previous Year” Defined**

For the purposes of this Act, “previous year” means the financial year immediately preceding the assessment year:

Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year.”

12. According to this section, it is “setting up” of the business and not the “commencement of the business” that is to be considered. A



business is commenced as soon as an essential activity of that business is started. Thus, a business commenced with first purchase of stock in trade, the date when the first sale is made is not material in that respect. Similarly, a manufacturer has to undertake several activities in order to bring to produce financial goods and he commences his business as soon as he undertakes first of such activities (*Commissioner of Income Tax vs. Saurashtra Cement and Chemical Industries Ltd. 1973 (91) ITR 170 Gujrat*).

13. It is also well-settled 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 an activity which is the essential activity in the course of carrying on the business is started, the business must be said to have commenced.

14. A finding regarding the date when a business was set up is a finding of fact. Here in the present case, there is a finding of fact



given by two statutory authorities below that Assessee was ready to commence its business on 15<sup>th</sup> August, 1995 when it acquired license to distribute in India through Cable Television Systems, Satellite Master Antenna Systems and DTH etc. The relevant findings of the Tribunal in this regard are as under:-

“The Assessee in the present case as one of its business activity distribution of T.V. programmes in the area of sports, entertainment etc. in furtherance of this objects referred to above it obtained the license from ESPN Inc. to distribute ESPN Channel Services. This was rightly held by the Commissioner of Income Tax (A) to be the point of time when the business of the Assessee has been set up. By virtue of the license it could discharge one of its objects as set out in the Memorandum of association of the company. This was the activity, which was first in point of time and which must necessarily precede all other activities and on this activity being done, the business of the Assessee, would be deemed to have been set up.”

15. Since the Assessee has acquired the license on 15<sup>th</sup> August, 1995, and after getting the license, 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 his business



on or after 15<sup>th</sup> August, 1995 and we do not find any infirmity with regard to this finding in the order passed by the Tribunal.

16. Under these circumstances, no fault can be found with the view taken by the Tribunal. Thus, the order of the Tribunal does not give rise to a question of law, much less a substantial question of law, to fall within the limited purview of Section 260-A of the Act, which is confined to entertaining only such appeals against the order which involves a substantial question of law.

17. Accordingly, the present appeal filed by the Revenue is, hereby, dismissed. .

**(V. B. GUPTA)**  
**JUDGE**

**10<sup>th</sup> March, 2008**  
**rs**

**(MADAN B. LOKUR)**  
**JUDGE**