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

% **DECIDED ON: 28.02.2014**

+ ITA 84/2014
CM APPL.3914/2014

COMMISSIONER OF INCOME TAX CIRCLE 18(1) Appellant
Through: Mr. Rohit Madan, Sr. Standing Counsel
with Mr. Akash Vajpai, Advocate.

versus

M/S URBAN MASS TRANSIT LTD. Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

CM APPL.3914/2014 (condonation of delay)

In the facts and circumstances of the case, delay is condoned.
Application stands allowed.

ITA 84/2014

1. The Revenue claims to be aggrieved by an order of the Income Tax Appellate Tribunal (ITAT) made in two appeals preferred by the assessee - M/s Urban Mass Transit Ltd., for the assessment year 2007-08.
2. The assessee, a public limited company, was a joint venture enterprise of the Central Government, the State of Andhra Pradesh



and the State Transport Service Operator and Infrastructure Leasing and Financial Services Ltd. It was set up in the financial year 1993-94 to undertake comprehensive mobility studies and consultancy to the State Government and local bodies, aimed at restructuring and reforming public transport delivery system. It received an advance for equity to the extent of ₹7 Crores from the Central Government and started its business in the year 1994. The amounts given by the Central Government were deployed in investments. There is no dispute that the corresponding income was taxed in the earlier assessment years. The Central Government insisted for return of its contribution of the share application during the financial year 2006-07 (assessment year 2007-08) and as a result the assessee repaid the amount together with the interest earned from the investments. The interest so paid was ₹4,42,11,258/- during the said financial year along with the principal sum of ₹7 Crores.

3. During the assessment year 2006-07, the assessee had issued a work order to M/s Wilbur Smith Associates for consultancy relating to its main activity i.e. in respect of creation of data on mobility services for generating clientele and paid professional fee which was considered to be preliminary expenses by the Assessing Officer. He, therefore, substantially disallowed it and brought it to tax in terms of Section 35D.

4. The assessee's return for AY 2007-08 reported a loss of ₹3,46,38,360/-. This was rejected by the Assessing Officer who re-computed the taxable income at ₹64,04,523/- refusing the assessee's claim for deduction of the professional fee paid to Wilbur Smith



Associates and the interest paid over to the Central Government as business expenditure, on the ground that the assessee did not carry on business in the relevant accounting year and did not earn revenues by utilising the services of Wilbur Smith Associates. The assessee preferred an appeal and relied upon the various documents including its Memorandum of Association, the terms of MOU with regard to the arrangement with the Central Government etc. Its contentions were rejected by the CIT (A). In these circumstances, it approached the ITAT which ultimately allowed the appeal.

5. The Revenue contends that the Assessing Officer's order allowing only 1/12th of the interest u/s 35D was justified given the circumstances; it was submitted that having regard to the circumstances, the AO's conclusion that the assessee had not commenced its business and, therefore, the amounts were not deductible was correct in law. It was next contended that the AO had noticed that apart from interest income, the assessee had not earned any other amount. The only activity of the assessee was investing ₹7 Crore fund and enjoying the interest. In these circumstances, urged the counsel, the treatment of the amount as "income from other sources" in the manner done by the AO was justified and it could not have been treated as business income. In support of this, it was urged that there was no material to show that the assessee had conducted any business till the assessment year and that it had to only make some payments in 2001 at the request of the Central Government. Learned counsel emphasized that whatever income was earned was for the subsequent years and could not have been the basis for



concluding that the assessee was entitled to treat this amount as income from business.

6. The ITAT's findings to the extent they are relevant are extracted below: -

“7.2. After carefully consideration and in the given facts and circumstances, we are inclined to hold that assessee's business commenced from 1994-95 itself which was followed by a lull in the intervening periods. This does not mean cessation of the assessee's business, in view of the above facts. In any case, looking from any angle, it has to be held that assessee's business of consultancy was set up in this year as substantial revenue is earned in next 2 years. Therefore, we are inclined to allow the claim of the assessee by holding that assessee's business was commenced and alternatively relying on the setting up of business as held in cases of MI Hughes Escorts Communications Ltd. (supra); and Whirlpool of India Ltd. (supra).

7.3. Now coming to the ld. DR's objection the assessee should have made a provision in 2001 itself in its books of a/c, assessee has contended that it as looking for efforts with the government to retain its equity. However, finding that it was reluctant, it felt desirable that the amount is refunded along with returns as claimed by the government. Assessee cannot be held to be wrong as in this proposition avenging government would have proved very costly to the assessee's existence and its reputation. Therefore, assessee refunded the amount along with the returns thereon. Assessee has also demonstrated that looking at the right conduct of assessee, Central government has subsequently approved funds to it and many projects including Delhi have been obtained subsequently. Thus, the assessee' action is guarded by business prudence and expediency. If the assessee was making efforts to reconcile with the government, accrual based entries in the books of account would have enabled the government to ask the assessee to refund its amount forthwith having recognized in the books of account. This may have been counter productive for assessee.



In view of these facts, we do not find any merit in the objection of the ld. DR.

“7.4. Now the question will arise whether the entire amount of returns can be allowed to assessee in this year as business expenditure or not. The government has claimed it to be 'return', however, for the sake of convenience the amount has been spread over into 12 years on the logic that the returns are for amount utilized by the assessee for 12 years. The amount was by way of application for shares and due to non allotment for what-ever reasons, the government and assessee ultimately agreed to treat it as advance eligible for a compensation thereon termed as 'return'. We have already viewed that not returning the amount to government would have cost the assessee its business prospectus and its title over the business by way of withdrawing the joint venture etc. In these circumstances, the assessee in order to protect its business interest and business propriety refunded the amount which can be termed as compensation, return; interest or by whatever name. Its accrual, crystallization and finalization is relatable to this year, in view thereof, we hold that the amount of return is allowable to the assessee in this year as business expenditure. Since we have held that assessee 's business has already commenced the entire amount paid to M/s Wilbur Smith Associates is to be allowed to the assessee being professional fee for consultancy services. In view thereof, the grounds of the assessee are allowed.”

7. The findings of fact by the Tribunal that the assessee's business of consultancy was set up in 1994-95 and that it earned substantial revenue for the next two years cannot be disputed - we noticed that this finding was arrived at after considering the materials including the additional evidence adduced before it. In these circumstances, this Court is of the opinion that the formulation of law by this Court in *Commissioner of Income Tax v. M/s. Hughes Escorts*



Communications Ltd., 311 ITR 253 and *CIT v. Whirlpool of India Ltd.*, 318 ITR 347 applies squarely to the facts of this case. So far as the submissions with regard to the amounts paid to M/s Wilbur Smith Associates - which is sought to be added back - is concerned, once the Tribunal was of the opinion that business had commenced on account of the substantial income earned by the assessee after two years of its setting up, the view taken by the Tribunal cannot be faulted.

8. For the above reasons, the Court is of the opinion that no substantial question of law is arises for consideration.

9. The appeal is, therefore, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

FEBRUARY 28, 2014
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