आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.6687/Mum/2017

(**निर्धारण वर्ष /** Assessment Year : 2013-14)

DCIT 1(2)(2) R.No. 535, 5th floor, Aayakar bhavan, M.K Road, Mumbai-400 020.	**बनाम**/ v.	PPFAS Asset Management Pvt. Ltd., 103, Veena Chambers, 21, Dalal Street, Fort, Mumbai-400 001
स्थायी लेखा सं./PAN: AAGCP1310H		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri. D.G Pansari (DR)
Assessee by:	Shri. Kishor Chaudhari

सुनवाई की तारीख **/Date of Hearing : 14.01.2019**
घोषणा की तारीख **/Date of Pronouncement : 13.03.2019**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by Revenue, being ITA No. 6687/Mum/2017, is directed against appellate order dated 15.09.2017 in Appeal no. CIT(A)-6/IT-42/268/2016-17, passed by learned Commissioner of Income Tax (Appeals)-6, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2013-14, the appellate proceedings had arisen before learned CIT(A) from the assessment order dated 29.02.2016 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2013-14.

2. The grounds of appeal raised by Revenue in Memo of Appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> *" Whether on facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the disallowance of various expenses of Rs.1,99,35,754/- u/s.37(1) of the I.T. Act since the assessee could not commence business without obtaining approval of SEBI and the approval is beyond the purview of the A.Y. under consideration."*
>
> *The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal."*

3. The assessee is an asset management company incorporated on 8th August 2011. It is undisputed that the assessee is required to obtain Securities and Exchange Board of India(hereinafter called "the SEBI") approval for undertaking such business. The solitary question which has arisen in this appeal before us is whether the assessee has set up his business during the impugned assessment year so as to claim deduction of expenses incurred by it as revenue/business expenses keeping in view provisions of Section 37(1) of the 1961 Act r.w.s. 3 of the 1961 Act. The assessee was incorporated on 08th August 2011. The assessee has incurred an expenses of Rs. 1,99,35,754/- during the impugned assessment year which was claimed as an business expense /revenue expenses, as detailed here under:-

Sl. No	Details	Amount (in Rs)
1	Employee Benefit Expenses	12,687,038/-
2	Depreciation and amortization expenses	11,36,166/-
3	Other Expenses	6,1 12,550/-
	Total	19,935,754/-

3.2 The AO observed that the assessee has declared income from interest of Rs. 1,29,75,114/- and Rs. 2,44,479/- from sale of investments , which income were declared by the assessee in its return of income as income from other sources. The AO was of the view that the above expenses can not be allowed as business/revenue expenses on the grounds that the assessee has no business activity as it has not obtained necessary approvals to initiate business activities . The assessee in response to query raised by the AO submitted before the AO as under:

> *" The assessee is a private limited company. The company was incorporated on 08/08/2011. It acts as an investment manager of PPFAS Mutual Fund. PPFAS, the sponsor got an in principal approval to set up a mutual fund on 12/07/2011. SEBI has approved the assessee company to act as an investment manager of mutual funds. The assessee company made an application to SEBI for approval of the mutual fund scheme on 19/12/2012. It received certificate granting registration for mutual fund on 08/04/2013 . Thus, in fact the business was set up and it commenced operations from the date of incorporation." The assessee further submitted that the expenses incurred by the assessee company was in nature of regular administrative expenses like salaries, rent, SEBI registration fees and other regular business expenses. These expenses were incurred for to obtain "a commercial right" , viz. registration from SEBI without which the business of the assessee company could not be carried on."*

The assessee also relied upon the decision of Hon'ble Bombay High Court in the case of Western India Vegetable Products Limited v. CIT reported in (1954) 26 ITR 151(Bom.) to support its contentions.

3.3 The AO rejected the contentions of the assessee and disallowed the expenses claimed by it on the grounds that the business of the assessee was not set up because it was not ready to commence its initial activities during the impugned assessment year. It was observed by the AO that the assessee has received certificate granting registration from SEBI approving scheme of Mutual Fund from 08.04.2013 which enabled it to commence business, which approval

was granted by SEBI after the end of the financial year under consideration without which the assessee could not do its business and hence the aforesaid expenses are not allowable as revenue/business expenses. The AO vide assessment order dated 29.02.2016 passed u/s 143(3) held as under:-

> *" 4.4 The submission of the assessee is considered but not found tenable. The assessee's business was not set up because it was not yet ready to commence its initial activity during the year under consideration. It is noticed that the assessee received certificate granting registration for the mutual fund only on 08/04/2013 without which the assessee could not do business. It can be safely concluded that it was not ready to perform initial activity because certificate from SEBI is imperative for the assessee to start business. In turn, it can be said that as the assessee was not ready to perform initial activity, its business was not even set up*
>
> *4.5 In view of the above, it is established that the assessee's business has not commenced and it has not earned any income from the said business during the year under consideration. When a business is established and is ready to commence business, then it can be said of that business that it is set up. Since it is not yet ready to commence business, it is not set up. In the opinion of the undersigned, the setting up of assesses business would be only subsequent to obtaining necessary approval from SEBI, if at all, and hence, the business of the assessee was not setup till 08-04-2013, Reliance is placed on the following case laws:-*
>
> *1. Mere purchase of raw material and erection of machinery does not amount to commencement of business (K.Sampat Kumar v/s CIT (1986)158 ITR 25 (Mad.)*
>
> *2. CIT v/s Piem hotel (P) Ltd. (1994 116 CTR 401 (Born). Hotel business was held not to be treated as set up unless the hotel building was completed even though banquet hall in the incomplete hotel building was let out.*
>
> *3. The question as to when the business of the assessee had commenced is a question of fact, (Precisim Electricals & Electronics (P) Ltd v/s CIT (1989) 176 ITR 453(MP).*
>
> *4.6 The expenditure relating to business can be allowed as deduction only if business was actually carried on at any time during the previous year. As the assessee has not commenced the business and earned any income from that business during the previous year, the expenses incurred by the assessee are treated as pre-operative expenses. The claim for depreciation*

cannot be allowed either as the assessee had not put the assets into use during the year for the purpose of business. The expenditure incurred before the commencement of the business is to be treated as preliminary expenditure in accordance with Income Tax Act 1961 and the said expenditure cannot be allowed u/s 37(1) of I.T. Act. Therefore the claim of expenses made by the assessee over and above the disallowances already made i.e. Rs 1,99,35,754/-. is disallowed and added back to income from business and profession. Penalty proceedings are initiated u/s 271(1)(c) for furnishing inaccurate particulars of income.

4. Aggrieved by assessment framed by the AO u/s 143(3) of the 1961 Act vide assessment order dated 29.02.2016, the assessee filed first appeal with learned CIT(A) which was allowed by Ld. CIT(A) vide appellate order dated 15.09.2017 , by holding as under:-

" *7. I have carefully considered the facts of the case, discussion of the AO in the impugned order, oral contentions and written submissions of the appellant and material available on record. The AO observing that the appellant company has not commenced and earned any income from business during the previous year, has disallowed the expenditure claimed towards remuneration, rent, rates and taxes, repairs & maintenance and other administrative expenses of Rs.1,99,35,754/ - treating the same to be pre-operative expenses. The AO has relied on the following case laws:*

1. K. Sampat Kumar vs. CIT (1986) 158 ITR 25 (Mad.)

2. CIT vs. Piem Hotels (P) Ltd. 116 CTR 401 (Bom)

3. Precism Electricals & Electronics (P) Ltd. vs CIT (1989) 176 ITR 453 (MP)

7.1 However, the AR of the appellant relies on the following case laws:

(1) Carefor WC & C India Private Limited Versus Deputy Commissioner of Income Tax [2014] 368 ITR 692 (Del). In this case, the assessee company was incorporated on September 19, 2007. 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. 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. The activities demonstrate setting up of the business by the assessee.

(2) GNG Stock Holdings (P.) Ltd. Versus Deputy Commissioner of Income-tax, Circle 12(1), New Delhi [2011 (7) TMI 579 - ITAT, DELHI]; wherein the assessee had made an application to SEBI which was pending. As the assessee had set-up its business, the assessee should be allowed depreciation even though SEBI approval is pending.

(3) Commissioner of Income Tax-5 Versus Jodecaux Advertising India (P) Ltd. [ITA 241/2015], wherein it was held that-

> *"As decided in Western India Vegetables Products Ltd. v. CIT [1954 (3) TMI 59 - BOMBAY HIGH COURT] 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 can be claimed as permissible deductions."*

(4) Commissioner of Income Tax, Delhi-IV, New Delhi vs. ESPN Software India (P) Ltd. [301 ITR 368], wherein it was held that-

> *".....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 commence trading operation as on the date of incorporation viz. August 3,1995. Accordingly, the Assessing Officer is directed to allow the revenue expenditure after the setting up of business which was September 3, 1995, notwithstanding the fact that commercial operations started with effect from October 1, 1995."*

(5) CIT v. Swaraj Engineers Ltd. 171 Taxman 495 - Supreme Court -

> *"One has to see the allowability of expenditure as per the provisions of the Income tax Act. The expenses debited are mainly of revenue nature and it is not necessary that these expenses will be allowable only when there are*

receipts. If the expenses are incurred for the purpose of business, then these are to be allowed."

(6) Guj HC ruling in Saurashtra Cement 91 ITR 170, wherein it was held that the business would commence when the activity which is first in point of time and which must necessarily precede all other activities, is started.

(7) CIT, Delhi-IV, New Delhi vs. ESPN Software India (P) Ltd. wherein it is held that expenses incurred on or after the first activity which must necessarily precede all other activities and on that activity being done, the business of the assessee would be deemed to be have been set up.

7.2 The AO is also of the opinion that the set-up of business is only subsequent to obtaining necessary approval from SEBI. However, the appellant company has offered income from other sources at Rs.1,32,44,671/- and Short term capital gain of Rs.2,44,479/-. The Ld. CIT(A) for the immediately preceding year i.e. A.Y.2012-13 on similar facts of the case of the assessee on the same issue has allowed relief by relying on the judicial decision of Hon'ble ITAT Delhi in the case of Whirlpool of India 114 TTJ 211 wherein it is held that business was set up when director are appointed, regional and branch managers are appointed, their salaries are paid, computers for carrying business are installed. Accordingly and keeping in view the principle of consistency, it is fair to allow the expenditure claimed by the appellant company treating the same as its business was set up.

8. In the result, the appeal is allowed."

5. Now aggrieved by the appellate order dated 15.09.2017 passed by learned CIT(A), the Revenue has filed an appeal before the tribunal. The Ld. DR at the outset submitted that the assessee has received certificate of registration from SEBI on 08.04.2013 which is a date falling after the completion of the relevant financial year before the tribunal and hence business of the assessee was set up after closure of the financial year , thus no expenditure can be allowed as business/revenue expenses keeping in view provisions of Section 3 read with Section 37(1) of the 1961 Act. On the other hand , the Ld. AR of the assessee has relied upon the order of the Mumbai-tribunal in the case of Pinebridge India Private Ltd. v. ACIT, order dated 10.10.2018 in ITA no. 2470/Mum/2011 wherein tribunal held based

on factual matrix of the case that the business was set up on the date of incorporation of the tax-payer company and expenses were allowed as deduction from income as revenue expenses/business expenses from its date of incorporation, and hence it was prayed by learned counsel for the assessee that the appellate order dated 15.09.2017 passed by learned CIT(A) be upheld. The reliance is also placed on decision of Hon'ble Bombay High Court in the case of Western India Vegetable Products Limited v. CIT reported in (1954) 26 ITR 151(Bom.), decision of ITAT, Delhi in the case of Whirlpool of India Limited v. JCIT reported in (2008) 114 TTJ 211(Del.-trib.) and decision of ITAT, Delhi in the case of GNG Stock Holdings Private Limited v. DCIT in ITA no. 913/Del/2011 vide orders dated 22.07.2011.

6. We have considered rival contentions and carefully perused the material on record including cited case laws. We have observed that the assessee is an asset management company to act as an Investment Manager for managing schemes of mutual funds of PPFAS Mutual Fund. The assessee company was incorporated on 08.08.2011 as a Private Limited Company. It acts as an Investment Manager of PPFAS Mutual Fund to manage its schemes . It is undisputed that the assessee is required to obtain SEBI approval for undertaking such business. The PPFAS Mutual Fund , the sponsor got an in principal approval to set up a mutual fund on 12.07.2011. The solitary question which has arisen in this appeal before us is whether the assessee has set up his business during the impugned assessment year so as to claim deduction of expenses incurred by it as revenue/business expenses keeping in view provisions of Section 37(1) of the 1961 Act r.w.s. 3 of the 1961 Act. The assessee has incurred an expenses of Rs. 1,99,35,754/- during the impugned assessment year which was claimed as an business expense /revenue expenses, as detailed here under:-

Sl. No	Details	Amount (in Rs)

1	Employee Benefit Expenses	12,687,038/-
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6.2 The assessee has declared income from interest of Rs. 1,29,75,114/- and Rs. 2,44,479/- from sale of investments , which income were declared by the assessee in its return of income as income from other sources. The AO was of the view that the above expenses cannot be allowed as business/revenue expenses on the grounds that the assessee has no business activity as it has not obtained necessary approvals to initiate business activities till the end of the relevant previous year which approval was granted by SEBI only on 08.04.2013 i.e. after the end of the previous year and hence expenses for the impugned assessment year cannot be allowed. While the learned CIT(A) allowed entire expenses by relying on decision of ITAT Delhi in the case of Whirlpool of India Limited v. JCIT reported in (2008) 19 SOT 593(Del-trib.) and relying on the decision of preceding year in the assessee's own case by learned CIT(A) .As we will see later that both the authorities below have misdirected themselves in arriving at the conclusions .

6.3 Before , we proceed further, it is pertinent to refer here provisions of Section 3 of the 1961 Act, which is reproduced hereunder:

> *"["**Previous year" defined.***
>
> ***3.** 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.]"*

Thus, it is stipulated in the Proviso to Section 3 of the 1961 Act that in the case of 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 come into existence and ending with the said financial year.

6.4 Thus, what is relevant for us in this appeal is to ascertain when the business of the assessee was set up. By catena of several judgments, it is now well settled that the question when a business is said to be set up is dependent on the facts and circumstances of each case and mainly depends upon the nature of the business. It is also well settled by catena of judgments that the expression "setting up" means, as is defined in the Oxford English Dictionary, "to place on foot" or "to establish," and in contradistinction to "commence". The distinction is this that when a business is established and is ready to commence business then 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. But there may be an interregnum, there may be an interval between a business which is set up and a business which is commenced and all expenses incurred after the setting up of the business and before the commencement of the business, all expenses during the interregnum, would be permissible deductions under Section 37(1) of the 1961 Act . (Refer Whirlpool Of India Limited v. JCIT reported in (2008) 19 SOT 593(Del-trib) and Western India Vegetable Products Limited v. CIT reported in (1954) 26 ITR 151(Bom.). Thus, it is very important for us to determine keeping in view factual matrix of the case and nature of the business of the assessee before us as to when its business was set up and ready to commence its operations in contradistinction to actual commencement of business by the assessee.

6.5 The assessee had before learned CIT(A) claimed that SEBI had approved the assessee as an asset management company to act as an investment manager of mutual funds schemes on 17.10.2012(refer CIT(A) page4/para 6- submissions of the assessee before learned CIT(A)) . This relevant and vital fact of approval of the assessee by SEBI on 17.10.2012 as an asset management company to act as an investment manager to manage mutual fund scheme was missed by both the authorities below. Thereafter on 19.12.2012 , the assessee company made an application to SEBI for approval of the mutual fund scheme of PPFAS Mutual Fund. It received certificate from SEBI granting registration for the mutual fund scheme of PPFAS Mutual Fund on 08.04.2013.

6.6 Before we proceed further, it is important to see various statutory provisions which govern the business of the assessee as an asset management company to act as an investment manager for the schemes of Mutual Fund. The asset management company is defined in Regulation 2(d) of Securities and Exchange Board of India (Mutual Funds) Regulations , 1996 , as under :

> ***"Definitions***
>
> *2. In these regulations, unless the context otherwise requires: -*
>
> ***
>
> ***
>
> *(d) "asset management company" means a company formed and registered under the Companies Act, 1956 (1 of 1956) and approved as such by the Board under sub-regulation (2) of regulation 21;"*

Thus , as can be seen from the above definition of an asset management company to be qualified to act as an asset management company , there are twin conditions to be simultaneously fulfilled firstly that the tax- payer company should be registered under the

Companies Act, 1956 and secondly it should be approved as such by SEBI under Sub-regulation (2) of Regulation 21 of Securities and Exchange Board of India (Mutual Funds) Regulations , 1996(hereinafter called " the 1996 Regulations") .

6.6.2. The application for approval to act as an asset management company is to be filed by the applicant with SEBI in accordance with Regulation 19 of the 1996 Regulation in Form No. D. The Regulation 19 of the 1996 Regulation provides as under:

> **"Application by an asset management company**
>
> 19. (1) The application for the approval of the asset management company shall be made in Form D.
>
> (2) The provisions of regulations 5, 6 and 8 shall, so far as may be, apply to the application made under sub-regulation (1) as they apply to the application for registration of a mutual fund."

6.6.3. The Sub-regulation (2) of Regulation 21 of the 1996 Regulation provides for grant of approval by SEBI after considering an application with reference to matters specified in Sub-regulation (1) of Regulation 21 of the 1996 Regulation. The said eligibility criteria for approval of an asset management company by SEBI are reproduced hereunder:

> ***"Eligibility criteria for appointment of asset management company***
>
> *21. (1) For grant of approval of the asset management company the applicant has to fulfil the following: -*
>
> *(a) in case the asset management company is an existing asset management company it has a sound track record, general reputation and fairness in transactions;*
>
> *Explanation: For the purpose of this clause sound track record shall mean the networth and the profitability of the asset management company.*
>
> *[(aa) the asset management company is a fit and proper person.]*
>
> *(b) the directors of the asset management company are persons having adequate professional experience in finance and financial*

services related field and not found guilty of moral turpitude or convicted of any economic offence or violation of any securities laws;

(c) the key personal of the asset management company [have not been found guilty of moral turpitude or convicted of economic offence or violation of securities laws] or worked] for any asset management company or mutual fund or any intermediary [during the period when its] registration has been suspended or cancelled at any time by the Board;

(d) the board of directors of such asset management company has at least fifty percent directors, who are not associate of, or associated in any manner with, the sponsor or any of its subsidiaries or the trustees;

(e) the Chairman of the asset management company is not a trustee of any mutual fund;

(f) the asset management company has a networth of not less than rupees ten crores:

Provided that an asset management company already granted approval under the provisions of Securities and Exchange Board of India (Mutual Funds) Regulations, 1993 shall within a period of twelve months from the date of notification of these regulations increase its networth to rupees ten crores.

[Provided that the period specified in the first proviso may be extended in appropriate cases by the Board upto three years for reasons to be recorded in writing.

Provided further that no new schemes shall be allowed to be launched or managed by such asset management company till the net worth has been raised to Rupees ten crores].

[Explanation: For the purposes of this clause, "net worth" means the aggregate of the paid up capital and free reserves of the asset management company after deducting therefrom miscellaneous expenditure to the extent not written off or adjusted or deferred revenue expenditure, intangible assets and accumulated losses].

(2) The Board may, after considering an application with reference to the matters specified in sub-regulation (1), grant approval to the asset management company."

6.6.4. It is also pertinent to mention here that it is mandatory for sponsor or by the trustee of the Mutual Fund , if so authorised by trust deed to appoint an asset management company to manage

schemes of Mutual Fund, which asset management company is approved under Sub-regulation (2) of Regulation 21 the 1996 Regulations by SEBI . Reference is drawn to Regulation 20 of the 1996 Regulation , which stipulate that it is mandatory to appoint an asset management company by sponsor of Mutual Fund or by the trustee of the Mutual Fund , if so authorised by trust deed, which is reproduced hereunder:

> ***"Appointment of an asset management company***
>
> *20. (1) The sponsor or, if so authorised by the trust deed, the trustee shall, appoint an asset management company, which has been approved by the Board under sub-regulation (2) of regulation 21.*
>
> *(2) The appointment of an asset management company can be terminated by majority of the trustees or by seventy five per cent of the unit-holders of the scheme.*
>
> *(3) Any change in the appointment of the asset management company shall be subject to prior approval of the Board and the unitholders."*

Thus, for every sponsor or the trustee of the Mutual Fund , if so authorised by trust deed , it is mandatory to appoint an asset management company which is approved by SEBI under Sub-regulation(2) of Regulation 21 of the 1996 Regulation to manage schemes of the Mutual Fund.

6.6.5. Regulation 22 of the 1996 Regulation provides for the terms and conditions to be complied with by an asset management company , which are reproduced hereunder:

> ***"Terms and conditions to be complied with***
>
> *22. The approval granted under sub-regulation (2) of regulation 21 shall be subject to the following conditions, namely: -*
>
> > *(a) any director of the asset management company shall not hold the office of the director in another asset management company unless such person is an independent director referred to in clause (d) of sub-regulation (1) of regulation 21 and approval of the board of asset management company of which such person is a director, has been obtained;*

(b) the asset management company shall forthwith inform the Board of any material change in the information or particulars previously furnished, which have a bearing on the approval granted by it;

(c) no appointment of a director of an asset management company shall be made without prior approval of the trustees;

(d) the asset management company undertakes to comply with these regulations;

[(e) no change in the controlling interest of the asset management company shall be made unless, -

(i) prior approval of the trustees and the Board is obtained;

(ii) a written communication about the proposed change is sent to each unitholder and an advertisement is given in one English daily newspaper having nationwide circulation and in a newspaper published in the language of the region where the Head Office of the mutual fund is situated; and

(iii) the unitholders are given an option to exit on the prevailing Net Asset Value without any exit load]

[Provided that in case of an open ended scheme, the consent of the unitholders shall not be necessary if;

(i) the change in control takes place after one year from the date of allotment of units

(ii) the unitholders are informed about the proposed change in the controlling interest of asset management company by sending individual communication and an advertisement is given in one English daily newspaper having nationwide circulation and in a newspaper published in the language of the region where the head office of the mutual fund is situated.

(iii) the unitholders are given an option to exit at the prevailing Net Asset Value without any exit load."

(f) The asset management company shall furnish such information and documents to the trustees as and when required by the trustees."

6.6.6. It is also specified in Regulation 23 of the 1996 Regulation that when eligibility criteria are not met as laid down in Regulation 21 of

the 1996 Regulation, SEBI may reject the application filed by an asset management company. The said Regulation 23 of the 1996 Regulation is reproduced hereunder:

> ***"Procedure where approval is not granted***
>
> *23. Where an application made under regulation 19 for grant of approval does not satisfy the eligibility criteria laid down in regulation 21, the Board may reject the application."*

6.6.7. Regulation 24 of the 1996 Regulation provides restriction on business activities of an asset management company, which are reproduced hereunder:

> ***"Restrictions on business activities of the asset management company***
>
> *24. The asset management company shall*
>
> *(1) not act as a trustee of any mutual fund;*
>
> *(2) not undertake any other business activities except activities in the nature of [portfolio management services] management and advisory services to offshore funds, pension funds, provident funds, venture capital funds, management of insurance funds, financial consultancy and exchange of research on commercial basis if any of such activities are not in conflict with the activities of the mutual fund;*
>
> *Provided that the asset management company may itself or through its subsidiaries undertake such activities if it satisfies the Board that the key personnel of the asset management company, the systems, back office, bank and securities accounts are segregated activity wise and there exist systems to prohibit access to inside information of various activities.*
>
> *Provided further that asset management company shall meet capital adequacy requirements, if any, separately for each such activity and obtain separate approval, if necessary under the relevant regulations.]*
>
> *(3) the asset management company shall not invest in any of its schemes unless full disclosure of its intention to invest has been made in the offer documents [in case of schemes launched after the notification of these regulations.]*
>
> *Provided that an asset management company shall not be entitled to charge any fees on its investment in that scheme."*

6.6.8. Regulation 25 of the 1996 Regulation stipulate obligations of an asset management company . The said Regulation 25 of the 1996 Regulation is reproduced hereunder:

"Asset Management Company and its obligations

25. (1) The asset management company shall take all reasonable steps and exercise due diligence to ensure that the investment of funds pertaining to any scheme is not contrary to the provisions of these regulations and the trust deed.

(2) The asset management company shall exercise due diligence and care in all its investment decisions as would be exercised by other persons engaged in the same business.

(3) The asset management company shall be responsible for the acts of commissions or omissions by its employees or the persons whose services have been procured by the asset management company.

(4) The asset management company shall submit to the trustees quarterly reports of each year on its activities and the compliance with these regulations.

(5) The trustees at the request of the asset management company may terminate the assignment of the asset management company at any time:

Provided that such termination shall become effective only after the trustees have accepted the termination of assignment and communicated their decision in writing to the asset management company.

(6) Notwithstanding anything contained in any contract or agreement or termination, the asset management company or its directors or other officers shall not be absolved of liability to the mutual fund for their acts of commission or omissions, while holding such position or office.

[(6A) The Chief Executive Officer (whatever his designation may be) of the asset management company shall ensure that the mutual fund complies with all the provisions of the regulations and the guidelines or circulars issued in relation thereto from time to time and that the investments made by the fund managers are in the interest of the unit holders and shall also be responsible for the overall risk management function of the mutual fund.

Explanation: For the purpose of this sub-regulation, the words these regulations shall mean and include the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 as amended from time to time.

(6B) The fund manager (whatever the designation may be) shall ensure that the funds of the schemes are invested to achieve the objectives of the scheme and in the interest of the unit holders.]

{(7) (a) An asset management company shall not through any broker associated with the sponsor, purchase or sell securities, which is average of 5% or more of the aggregate purchases and sale of securities made by the mutual fund in all its schemes.

Provided that for the purpose of this sub-regulation, aggregate purchase and sale of securities shall exclude sale and distribution of units issued by the mutual fund.

Provided further that the aforesaid limit of 5% shall apply for a block of any three months.

(b) An asset management company shall not purchase or sell securities through any broker [other than a broker referred to in clause (a) of sub-regulation (7)] which is average of 5% or more of the aggregate purchases and sale of securities made by the mutual fund in all its schemes, unless the asset management company has recorded in writing the justification for exceeding the limit of 5% and reports of all such investments are sent to the trustees on a quarterly basis.

Provided that the aforesaid limit shall apply for a block of three months.}

(8) An asset management company shall not utilise the services of the sponsor or any of its associates, employees or their relatives, for the purpose of any securities transaction and distribution and sale of securities:

Provided that an asset management company may utilise such services if disclosure to that effect is made to the unit holders and the brokerage or commission paid is also disclosed in the half yearly annual accounts of the mutual fund.

[28][Provided further that the mutual funds shall disclose at the time of declaring half-yearly and yearly results;*

(i) any underwriting obligations undertaken by the schemes of the mutual funds with respect to issue of securities associate companies,

(ii) devolvement, if any,

(iii) subscription by the schemes in the issues lead managed by associate companies

(iv) subscription to any issue of equity or debt on private placement basis where the sponsor or its associate companies have acted as arranger or manager].

(9) The asset management company shall file with the trustees the details of transactions in securities by the key personnel of the asset management company in their own name or on behalf of the asset management company and shall also report to the Board, as and when required by the Board.

(10) In case the asset management company enters into any securities transactions with any of its associates a report to that effect shall be sent to the trustees [***] at its next meeting].

(11) In case any company has invested more than 5 per cent of the net asset value of a scheme, the investment made by that scheme or by any other scheme of the same mutual fund in that company or its subsidiaries shall be brought to the notice of the trustees by the asset management company and be disclosed in the half yearly and annual accounts of the respective schemes with justification for such investment [provided the latter investment has been made within one year of the date of the former investment calculated on either side.]

(12) The asset management company shall file with the trustees and the Board

(a) detailed bio-data of all its directors along with their interest in other companies within fifteen days of their appointment; and

(b) any change in the interests of directors every six months.

[(c) a quarterly report to the trustees giving details and adequate justification about the purchase and sale of the securities of the group companies of the sponsor or the asset management company as the case may be, by the mutual fund during the said quarter.]

[(13) Each director of the Asset Management Company shall file the details of his transactions of dealing in securities with the trustees on a quarterly basis in accordance with the guidelines issued by the Board.]

(14) The asset management company shall not appoint any person as key personnel who has been found guilty of any economic offence or involved in violation of securities laws.

(15) The asset management company shall appoint registrars and share transfer agents who are registered with the Board.

Provided if the work relating to the transfer of units is processed in-house, the charges at competitive market rates may be debited to the scheme and for rates higher than the competitive market rates, prior approval of the trustees shall be obtained and reasons for charging higher rates shall be disclosed in the annual accounts.

(16) The asset management company shall abide by the Code of Conduct as specified in the Fifth Schedule.

6.6.9 The Scheme of Mutual Fund shall be launched by asset management company as is provided under Regulation 28 of the 1996 regulation, which provides as under :

> ***"Procedure for launching of schemes***
>
> *28. (1) No scheme shall be launched by the asset management company unless such scheme is approved by the trustees and a copy of the offer document has been filed with the Board.*
>
> *(2) Every mutual fund shall along with the offer document of each scheme pay filing fees as specified in the Second Schedule."*

6.7. Perusal of the above Regulations of the 1996 Regulation clearly reveals that the business of an asset management company is highly regulated business and the taxpayer cannot enter into this business unless the conditions stipulated under relevant regulations of the 1996 Regulation are met both at the time of seeking approval as an asset management company as also on continuing basis thereafter in order to enable it to conduct its business of asset management company which is to be carried on strictly in an regulated and controlled manner as provided in 1996 Regulations , as it is required to be strictly conducted within the framework of conditions and boundaries as laid down in the 1996 Regulations. It is also mandatory requirement for every sponsor of Mutual Fund scheme or the trustee of the Mutual Fund, if so authorised by trust-deed to compulsorily have an asset management company to act as an investment manager to manage mutual fund schemes in accordance with these Regulations. Thus, the assessee company which was registered/incorporated on 08.08.2011 to undertake business as an asset management company to act as an investment manager for PPFAS Mutual Fund could not have commenced its business until it received certificate of approval from SEBI as provided under Sub-regulation (2) of Regulation 21 of the 1996 Regulation which was granted by SEBI only on 17.10.2012 as is emanating from contentions

of the assessee before learned CIT(A) and which vital and relevant fact to adjudicate the matter between rival parties were in-fact missed by both the authorities below. The assessee could not have undertaken business of an asset management company to act as an investment manager to manage schemes of the Mutual funds until it is approved by SEBI under Sub-regulation (2) of Regulation 21 of the 1996 Regulation and it is this date i.e. 17.10.2012 which is the most vital and relevant date to decide the dispute between the rival parties as to when the business of the assessee was set up and ready to commence its business. The said approval to act as an asset management is claimed to have been obtained by the assessee from SEBI on 17.10.2012 , while the certificate for registration for the mutual fund scheme of PPFAS Mutual Fund was granted by SEBI on 08.04.2013 wherein the assessee was to act as an asset management company to manage scheme of PPFAS Mutual Fund. The assessee in-fact could not have actually commenced its business of an asset management company to act as an investment manager to manage scheme of PPFAS Mutual Fund until the scheme of PPFAS Mutual Fund is approved by SEBI which approval was granted by SEBI only on 08.04.2013 and from then onwards its revenue streams could have started but earning of an income is not a relevant criteria to arrive at a decision as to when the business of the assessee was set up and ready to commence business , In-fact the business of the assessee was set up and the assessee was ready to commence its business once it is approved by SEBI to act as an asset management company in accordance with Sub-regulation 2 of Regulation 21 of the 1996 Regulations which approval was granted by SEBI in favour of the assessee on 17.10.2012. This approval of the assesssee by SEBI granted on 17.10.2012 to act as an asset management company is a statutory clearances without which assessee could not have been appointed as an asset management company to act as an investment manager for the scheme of Mutual Fund because otherwise it was hit by doctrine of impossibility and based on factual matrix of the case

and nature of business of the assessee , in our considered view it could be said that the business of the assessee was set up on 17.10.2012 as the assessee was ready to commence its business on 17.10.2012 after receipt of the aforesaid SEBI approval in favour of the assessee to undertake business as an asset management company to act as investment manager of the schemes of Mutual Fund. It is immaterial whether the assessee did not received any income till scheme of the mutual fund was approved by SEBI till 08.04.2013 but since the business of the assessee was set up and ready to commence business on 17.10.2012, the assessee shall be entitled to claim expenses incurred from that date. Sponsors of the Mutual Funds or the trustees as authorised by trust deed are mandatorily required to appoint an approved asset management company to act as an investment manager to manage its mutual funds scheme in terms of Sub-regulation (1) of the Regulation 20 of the 1996 Regulations. There are stiff conditions imposed by 1996 Regulation in terms of Sub-regulation (1) of Regulation 21 and 22 of the 1996 Regulations which needed to be met by an asset management company for getting an approval from SEBI to act as an asset management company. It is also pertinent to mention that merely filing of an application for approval as an asset management company under Regulation 19 of the 1996 Regulations will not entitle the assessee nor it grant any vested rights in favour of the applicant to get an approval under Sub-regulation (2) of Regulation 21 of the 1996 Regulation from SEBI as several stiff criteria's both objective and subjective are to be met by the applicant before the approval is granted by SEBI as laid down in Sub-regulation (1) of Regulation 21 and 22 of the 1996 Regulations , which extends to qualifications and experience of Directors, employees, net worth/capital criteria , declaration that it is a fit and proper person, profitability requirements etc.. Thus, all the steps taken by the assessee prior to the grant of the approval by SEBI as per Sub-regulation (2) of Regulation 21 of the 1996 Regulations such as taking Office on rent, setting up of Infrastructure in the Office, purchasing

Fixed Assets, appointment of qualified and experienced Directors, employing Qualified and Experienced Staff, meeting threshold capital/net worth requirements, incurring administrative expenses, making an application with SEBI for approval as an asset management company in accordance with Regulation 19 of the 1996 Regulations etc. are all preparatory steps undertaken by the assessee in order to set up its business and until the assessee is approved as an asset management company by SEBI in accordance with Sub-regulation (2) of Regulation 21 of the 1996 Regulation, it was not ready to commence its business as it could not have said to have set up its business of an asset management company to act as an investment manager for managing schemes of mutual fund of PPFAS Mutual Fund till aforesaid statutory approval is granted by SEBI vide Sub-regulation (2) of Regulation 21 of the 1996 Regulation in favour of the assessee which was claimed to have been received on 17.10.2012.In the absence of the aforesaid approval by SEBI, doctrine of impossibility will set in and it will be impossible for the assessee to have undertaken business of an asset management company. Thus , PPFAS Mutual Fund could not have appointed assessee as its asset management company to act as investment manager for managing its schemes until this approval under Sub-regulation(2) of Regulation 21 of the 1996 Regulation granted by SEBI is held by the assessee as is mandated under Regulation 2(d) read with Regulation 20 of the 1996 Regulation. The application of the assessee with SEBI in accordance with Sub-regulation (2) of the Regulation 21 of the 1996 Regulation was approved on 17.10.2012. The assessee could be said to have set up its business only on 17.10.2012 when approval was granted by SEBI, then at that stage it could be said that the assessee was ready to commence its business. Once it is so approved by SEBI to act as an asset management company, thereafter PPFAS Mutual Fund could have appointed it as an asset management company to be its investment manager for its Mutual Fund schemes in accordance with the 1996 Regulation which was a mandatory requirement for a Mutual

Fund to appoint an asset management company to be its investment manager for managing Mutual Fund Scheme. Thereafter on 19.12.2012 , the assessee filed an application with SEBI for approval of the mutual fund scheme of PPFAS Mutual Fund which approval was granted by SEBI on 08.04.2013 wherein the assessee was acting as an investment manager of the said scheme in accordance with the Regulation 28 of the 1996 Regulation. Thus, the day when it applied to SEBI on 19.12.2012 for grant of approval of the scheme of PPFAS Mutual Fund in accordance with Regulation 28 of the 1996 Regulation and to act as an investment manager being an asset management company for the said scheme, the assessee was already doing/conducting its normal business activities as an asset management company to act as an investment manager for the Mutual Fund Scheme by filing an application for approval of the scheme of PPFAS Mutual Fund as its business had already been set up and ready to commence its business on 17.10.2012 on receipt of approval from SEBI in accordance with Sub-regulation (2) of Regulation 21 of the 1996 Regulation. The approval granted by SEBI on 17.10.2012 under Sub-regulation (2) of Regulation 21 of the 1996 Regulation was a statutory clearance for the assessee to commence its business as an asset management company and in the absence thereof of the aforesaid approval granted by SEBI on 17.10.2012 , the assessee was never in a position to be appointed as an investment manager being asset management company for managing scheme of the mutual fund keeping in view Regulation 20 of the 1996 Regulation and was hit by doctrine of impossibility . Thus, in our considered view , it is only on 17.10.2012 on receipt of SEBI approval under Sub-regulation (2) of Regulation 21 of the 1996 Regulation, the assessee business was set up and the assessee was ready to commence its business satisfying the mandate of Section 3 of the 1961 Act to claim its expenses as business expenses and it could be said that the previous year shall commence from 17.10.2012 when its business was set up and ready to commence. The assessee would , therefore, be

entitled to claim expenses only with effect from 17.10.2012 when it got approval from SEBI in accordance with Sub-regulation (2) of Regulation 21 of the 1996 Regulations as it is on this date the business of the assessee was set up and was ready to commence its business. So far as period between 17.10.2012 to 08.04.2013 which was interregnum period as the scheme of PPFAS Mutual Fund was only approved by SEBI on 08.04.2013 in accordance with Regulation 28 of the 1996 Regulation wherein the assessee was appointed as an asset management company to act as an investment manager for PPFAS Mutual Fund to manage its scheme, the assessee was conducting its normal business activities as an asset management company which also included seeking approvals for the schemes of Mutual Funds under Regulation 28 of the 1996 Regulation wherein it was acting as an investment manager for the said schemes. No-doubt income/revenue streams for the assessee started after approval of scheme of Mutual Fund by SEBI on 08.04.2013 but all the expenses incurred during interregnum period from 17.10.2012 to 08.04.2013 shall be allowed as the assessee's business was set up and ready to commence its business on 17.10.2012 when it was approved by SEBI under Sub-regulation (2) of Regulation 21 of the 1996 Regulation. On approval from SEBI on 17.10.2012, the assessee was always in a position to commence its business as it had met all the criteria of acting as an asset management company as prescribed under the 1996 Regulations otherwise SEBI would not have granted its approval while actual business commenced when the scheme of mutual fund of PPFAS Mutual Fund was approved by SEBI on 08.04.2013 in terms of Regulation 28 of the 1996 Regulation wherein actual business activities of the assessee to act as an asset management company for PPFAS Mutual Fund commenced. All the expenses incurred in the interregnum between 17.10.2012 when the assessee business was set up and ready to commence its business till actual commencement of its business on 08.04.2013 shall be allowed as normal business expenses provided other conditions for the allowability of those

expenses as provided vide applicable provisions of the 1961 Act are met. Thus, in our considered view , all the expenses incurred by the assessee prior to 17.10.2012 cannot be allowed as business expenses/ revenue expenses because the business of the assessee was only set up on 17.10.2012 when SEBI granted approval to assessee to act as an asset management company in accordance with Sub-regulation (2) of Regulation 21 of the 1996 Regulations, which met the requirements of Section 3 of the 1961 Act wherein it is stipulated that in the case of 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 come into existence and ending with the said financial year.

6.8. Now , we shall advert to the case laws which are cited before us . The assessee referred to decision of ITAT, Delhi in the case of Whirlpool of India Limited v. JCIT reported in (2008) 19 SOT 593(Del.-trib). In this case , the tax-payer company was incorporated on 27.07.1995 , as a financial enterprise. The establishment and the staff were put in place by the end of October 1995 and the tax-payer company was ready to commence its business from 01.11.1995. The foreign loan and FIPB approval for equity investment by foreign parent company was given in January 1996. The Revenue was of the view that when the tax-payer company opened its bank account on 01.02.1996, then only its business was set up. The tribunal held that non opening of the bank account will not impede the conducting of the business by the tax-payer nor these approvals are statutory formalities and even without foreign loan and equity participation , the tax-payer company was in a position to carry out its business in accordance with object clause of Memorandum of Association from November 1995 when it had its own offices , branch and regional managers and staff, computers installed and was ready to commence

its activities, while in the instant case before us, the commencement of business activities by the assessee company as an asset management company hinges on SEBI approval under Sub-regulation (2) of Regulation 21 of the 1996 Regulation which is a statutory clearance without which the assessee was never in a position to commence its business. Thus, the case law relied upon by the assessee is distinguishable as in that case , the commencement of the business was not dependent on any statutory clearances while in the case before us, it hinges on the statutory clearance by SEBI without which there will be impossibility of commencement of the business by the assessee in terms of the 1996 Regulation. The relevant extract of the decision of ITAT, Delhi in the case of Whirlpool of India Limited(supra), is reproduced hereunder:

> *"The assessee in this appeal is a company, incorporated on 27-7-1995 as a financial enterprise, the main objects according to the memorandum of association being to carry on the business of financing all kinds of goods, including consumer goods and consumer durables, machinery, equipment etc., to purchase or finance all kinds of financial instruments such as notes, drafts, bills of exchanges, commercial paper, bill of lading and so on and so forth, to finance private industrial enterprise in India by way of loans or advances and to infuse capital in them and to carry on the business of hire purchase, general finance brokers and bill brokers. The first board meeting was held on 12-8-1995 in which additional directors, executives and auditors were appointed. On 4-9-1995 the company placed orders for purchase of computers and peripherals. During the months of September and October 1995, various key employees such as branch managers, regional managers, consumer finance managers, company secretary and finance manager and accounts manager etc. were appointed. On 30-10-1995, M/s. S.R. Batliboi Consultants P. Ltd. sent their invoice to the company for recruitment charges which were paid by the company through Kelvinator of India Ltd., another company. During the period from 4-1-1996 to 21-1-1996 the assessee applied for approval of the Foreign Investment Promotion Board (FIPB) for investment by Whirlpool Financial Corporation of USA through its wholly-owned subsidiary by name Whirlpool Financial (Mauritius) Ltd., and for the approval of the Reserve Bank of India for receiving foreign exchange loan against future issue of equity. During the period from November 1995 to January 1996 the assessee-company paid salary to the staff and employees through two companies, viz., Kelvinator of India Ltd. and Expo Machinery Ltd. The employees incurred petty expenditure on behalf of the company through imprest amounts sent to them through Kelvinator of India Ltd. A bank account was opened on 1-2-1996 in the*

name of the company and thereafter the expenses were incurred from the same.

2. *For the year ended 31-3-1996 the assessee-company filed its return of income declaring a taxable income of Rs. 94,41,990. While examining the return the Assessing Officer noted that the assessee had claimed expenditure on the footing that the business had been "set up" with effect from 1-11-1995. He took the view, disagreeing from the assessee, that the business can be said to have been "set up" only on 1-2-1996 when the bank account was opened in the assessee's name and therefore only the expenditure incurred thereafter can be allowed as a deduction. He accordingly disallowed the expenditure to the extent of Rs. 12,92,557, being the aggregate of Rs. 6,47,557 incurred by the assessee and Rs. 6,45,000 incurred by Expo Machinery Limited on behalf of the assessee. The view taken by the Assessing Officer having been confirmed by the CIT(A) the assessee is in further appeal before us articulating its claim in the first ground.*

3. *Section 3 of the Income-tax Act defines "previous year" and it says that the first previous year commences from the date of "setting up of the business". It is well-settled that there is a difference between the date of setting up of a business and the date of commencement of the business and this distinction has been brought out by the Bombay High Court in Western India Vegetable Products Ltd. v. CIT [1954] 26 ITR 151 by observing that when a business is established and is ready to commence business then it can be said that it has been "set up" but before it is ready to commence business it is not "set up". There may be an interregnum between the date of setting up of the business and the date of actual commencement of the business but under the Act all expenses incurred after the date of setting up are allowed as a deduction under section 28. This decision has been applied by the Hon'ble Delhi High Court in the case of CIT v. Hughes Escorts Communications Ltd. [2007] 165 Taxman 318 (copy of the judgment filed before us) and it has been held that where the business has been set up, though the same has not been commenced, the expenditure incurred after the date of setting up has to be allowed as a deduction. But the question as to when it can be said that a business is "set up" must largely depend on the facts of each case and the nature of the business. There can be no hard and fast rule by which it can be determined as to when the business was set up. In the judgment of the Bombay High Court cited supra, it was a case of a manufacturing concern. It was held that the business was set up when the first order of purchase of raw material was placed and not when the factory was started (at a later point of time). In CIT v. Sarabhai Sons (P.) Ltd. [1973] 90 ITR 318 the Gujarat High Court was dealing with a company established for the manufacture of scientific instruments. It was held that the purchase of land, placing of orders for machinery and raw materials were merely operations for the setting up of the business and the business was actually set up only when the machinery was installed and the factory was ready to commence business. In Prem*

Conductors (P.) Ltd. v. CIT [1977] 108 ITR 654 the Gujarat High Court held that even securing orders by a manufacturing concern in advance of production can amount to setting up of the business. In CIT v. Sarabhai Management Corpn. Ltd. [1991] 192 ITR 151 the Supreme Court, affirming the view of the Gujarat High Court in Sarabhai Management Corpn. Ltd. v. CIT [1976] 102 ITR 25 held that in the case of a company formed for leasing of property it could not be said that the business was not set up till the first lease took place; the earlier part of the activities, namely, engaging staff, buying the equipment and making the staff familiar with the same are all part of the business and the business can be said to be set up even earlier. A case of marine processing industry was dealt with by the Gujarat High Court in CIT v. Western India Sea Food (P.) Ltd. [1993] 199 ITR 777 [1]. There it was held that the act of acquiring a godown in the month of August in anticipation of the arrival of fish in the waters in the month of October was held to amount to setting up of the business. The Madras High Court was dealing with the case of a company formed for selling property time-share in CIT v. Club Resorts (P.) Ltd. [2006] 287 ITR 552. It was held that the acts of appointing staff for canvassing sales of the property time-shares, renting of office premises etc. amounted to setting up of the business even though the construction of the property was yet to begin. A case of a hotel - hospitality industry - was considered again by the Gujarat High Court in Hotel Alankar v. CIT [1982] 133 ITR 866[2] . While recognizing that the question whether a business is set up or not was essentially one of fact and that it would largely depend upon the facts of each case and the nature of the business, the High Court noted that in the case of a hotel (boarding and lodging house) due weight must be given to the fact that it cannot commence its activities overnight. It was pointed out that the business of boarding and lodging would necessarily comprise of variegated activities commencing from the stage of acquisition of a proper and suitable building making it more suitable for the hotel business, purchasing linen, cutlery, furniture etc., appointing staff of managers, cooks, bearers and ultimately reaching the stage of receiving customers and that it would be de hors commercial sense to hold that one would be reaching the stage of having set up the business only when one reaches the stage of receiving customers. It was ultimately held that where there are several integrated activities to be undertaken serially, one forming the foundation for the other, it can be said that the business was 'set up' when the first of such activities was undertaken. It was ultimately held that the business was set up when the building was acquired and was placed at the disposal of the firm. In ITO v. M. Varadarajan [1989] 30 ITD 414 the Madras Bench of the Tribunal held in the case of a sole-selling agent that his business could be said to have been set up once he obtained the sole-selling agency and it could not be said that it was set up only when he obtained the first business.

4. It may thus be seen that the question when a business may be said to have been set up is dependent on the facts of each case and largely on the nature of the business proposed to be

undertaken. Different considerations may apply depending on whether the business is that of manufacture of a product, or leasing of property, or sole-selling agency or financial business or it is a hospitality industry (such as a hotel) or a service industry (such as financial or marketing services). *The assessee before us is a financial company authorised to advance loans for interest to facilitate customers to purchase consumer durables, though the business is not limited to advancing monies for acquiring consumer durables. We have already referred to the memorandum of association in this regard. The business is not also limited to consumers who propose to buy-products of Kelvinator India Limited or Whirlpool India. In the case of a company engaged in rendering financial services, it is possible to say that the business is set up when the directors are appointed, staff such as regional and branch managers are appointed and their salaries are paid, computers are acquired and installed and the company is ready to commence business. It cannot be said that the business was set up only when the bank account was opened on 1-2-1996 because prior thereto the company, though it did not have a bank account, was incurring the expenditure through Kelvinator India Ltd. or Expo Machinery Ltd. The absence of a bank account cannot impede the setting up of the business. We may advert to the evidence in this behalf. Computers and peripherals were purchased vide order placed on HCL Hewlett Packard Ltd. of Noida on 4-9-1995 and the required end-user certificate was also issued. The total cost of the purchase was Rs. 29.84 lakhs (pages 21-23 of the paper book). Branch managers at Bhopal, Bhubaneswar and Pune were appointed in October 1995 (pages 37-42 of the paper book). Regional managers at Bombay, Calcutta and Gauhati were appointed during the same time (pages 43 to 48 of the paper book). Page 2 of the assessment order shows that the salaries were paid from November 1995 including allowances, bonus, gratuity and contribution to provident and other funds. The amount of such payments have also been given therein and are not reproduced here for the sake of brevity. The office rent of Rs. 17,500 for November and Rs. 25,000 each for December 1995 and January 1996 have also been paid. It is thus clear that the establishment and staff were put in place by the end of October 1995 and the company was ready to commence its business from 1-11-1995. M/s. S.R. Batliboi Consultants Pvt. Ltd. had also submitted their bill dated 30-10-1995 for Rs. 2,91,486 for professional services rendered in connection with recruitment of 19 candidates for the post of accounts manager and incidental expenses.* ***The fact that the foreign loan and FIPB approval for equity investment by the Whirlpool Corporation of USA were given in January 1996 does not mean that the business was not set up before these events. These are not statutory formalities and even without the foreign loan and the equity participation the assessee-company was in a position to carry on the business in accordance with the objects clause of its memorandum of association from November 1995 when it had its own offices, branch and regional managers and staff, computers installed and was ready to commence its activities.*** *The expenses were incurred through Kelvinator and Expo Machinery*

and evidence to this effect is placed at pages 24-31 and at other pages (e.g. Page 52) of the paper book. From the above evidence it is clear that the business was set up from 1-11-1995, by which date the company was ready and in a position to commence its business.

5. *We accordingly hold that the assessee had set up its business on 1-11-1995 and not on 1-2-1996 as claimed by the income-tax authorities. The disallowance of the expenditure made on this basis is deleted and the ground is allowed."*

6.8.2 Thus, as is observed by the tribunal in the case of Whirlpool of India Limited(supra), when the business of the tax-payer was set up depends upon facts and circumstances of each case and it depends upon the nature of business of the tax-payer. In the instant case before us, non granting of approval by SEBI under Sub-regulation (2) of Regulation 21 of the 1996 Regulation directly impede the commencement of business of the assessee as an asset management company and in the absence of the said approval of the SEBI , the doctrine of impossibility will come into play and the assessee will never be in a position to commence its business. The grant of approval by SEBI was on 17.10.2012 which is the relevant date when the business of the assessee before us was set up and it was ready to commence business . The assessee, thus, shall be entitled to claim expenses w.e.f. 17.10.2012 as deduction as business expenses provided other ingredients of allowability of these expenses are met as laid down in the relevant provisions of the 1961 Act. Thus, our decision in the instant case, is in line with the decision of co-ordinate benches of ITAT, Delhi in the case of Whirlpool of India Limited(supra).

6.9 The assessee has also placed reliance on judgment of Hon'ble Bombay High Court in the case of Western India Vegetable Products Ltd. v. CIT reported in (1954) 26 ITR 151 (Bom) wherein Hon'ble Bombay High Court has held that the expenses shall be allowed from the date when the business of the tax-payer was setup and is ready to commence its business , which is consistent with present Income-tax Act, 1961 vide provisions of Section 3 of the 1961 Act. It is held that

the previous year begins from the date of setting up of business in the case of newly set up business or profession . Therefore it is only after the business is set up that the previous year of that business commences from the date of setting up of the business and in that previous year the expenses incurred in the business can be claimed as permissible deductions from the date of setting up of business. Any expenses incurred prior to the setting up of a business would not be permissible deductions because those expenses would be incurred at a point of time when the previous year of the business would not have commenced. Thus, for the tax-payer it is vital and relevant for allowing of the expenses is the setting up of the business when the business is ready to commence its operations and it is not material that the business has actually commenced for allowability of the expenses nor is it material whether it actually received any income or not . It is also held by Hon'ble High Court that in the interregnum period after the setting up of the business when it was ready to commence its business and till business is actually commenced, there could be expenses incurred by the tax-payer which are to be allowed as business expenses albeit the business has not actually commenced. So as we have already held in the instant case before us, the commencement of business depends upon grant of approval by SEBI in favour of the assessee under Sub-regulation (2) of Regulation 21 of the 1996 Regulation which enabled the assessee to be in a position to act as an asset management company , which in the instant case was granted on 17.10.2012. While the actual business will only commence when the scheme of mutual fund is approved by SEBI in accordance with Regulation 28 of the 1996 regulation which in the instant case was approved on 08.04.2013. Thus, the business of the assesssee was set up and ready to commence its business when the approval was granted by SEBI in favour of the assessee on 17.10.2012 under Sub-regulation (2) of Regulation 21 of the 1996 Regulation. Without this approval , the assessee was never in a position to commence its business and it was impeded by doctrine of impossibility of

commencing its business. Thus, our decision in the instant case, is in line with the decision of Hon'ble Jurisdictional High Court in the case of Western India Vegetable Products Limited(supra) with which we are also bound to follow being inferior to Hon'ble High Court. The relevant extract of the decision of Hon'ble Bombay High Court in the case of Western India Vegetable Products Limited(supra) are reproduced hereunder:

> *"Now, it is rather unfortunate that in the order of the Tribunal and also in the question which they themselves have suggested really arises they should have used the expression "commenced" although in fairness to the Tribunal it may be pointed out that the very interesting question which has been debated at the Bar was never urged, argued or even suggested before the Tribunal, and the question that has been raised before us is that there is a distinction and a clear distinction between a person commencing a business and a person setting up a business, and that for the purposes of the Indian law what we have to consider is the setting up of a business and not the commencement of a business.*
>
> *Now, turning to our statute, the deductions claimed are under Section 10(2) and they are in relation to a business and in order that those deductions can be allowed, the business must be carried on by the assessee. In this case it is not disputed that the business was carried on in the relevant previous year which is the financial year 1946-47, but 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 the setting up of the business. Therefore it is only after the business s 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 the setting up of a business would obviously not be permissible deductions because those expenses would be incurred at a point of time when the previous year of the business would not have commenced. We must therefore look at the decision of the Tribunal as really referring to the setting up of the business in the language of Section 2(11) and not expenses connected with the commencement of the business. Mr. Palkhiwalla says that if that be the correct approach, then the Tribunal has misdirected itself in considering the commencement of the business and not the setting up of the business. Let us try and understand whether there is any difference between the two expressions "setting up" and "commenced and if so, what is the difference. It has often been said that the English language does not contain synonyms and every English expression must mean something different, however slight the difference, from any other expression. English language is full of nuances and if possible we must give a different meaning to the*

expression "setting up" from the expression "commenced". Mr. Joshi very strongly relied on a judgment of Mr. Justice Rowlatt reported in Birmingham and District Cattle By-products Co. Ltd. v. Commissioners of Inland Revenue [1919] 12 Tax Cas 92. In that case the assessee company was incorporated on the 20th of June, 1913, and between that date and the 6th of October, 1913, the directors arranged for the erection of works and the purchase of plant and machinery, and entered into agreements relating to the purchase of products to be used in the business and to the sale of finished products. On the 6th of October, 1913, the installation of plant and machinery being completed, the company commenced to receive raw materials for the purpose of manufacture into finished products. For the purposes of excess profits tax a question arose as to the computation of average amount of capital employed by the company during the accounting period and the company contended that it commenced business on the date of its incorporation, viz., on the 20th of June, 1913, and that the pre-war standard should be based on the profits shown by revised accounts for the period 20th June, 1913, to 30th June, 1914, and Mr. Justice Rowlatt held, upholding the view of the Commissioners, that the business of the company had commenced on the 6th of October, 1913. Now, this is indeed a very strong case on facts in support of the Commissioner, because the view taken by Mr. Justice Rowlatt is that everything that had been done by the company before the installation of the plant and machinery was completed was preparatory to the commencement of the business and it was only when the company actually started receiving raw materials for the purpose of manufacture into finished products, the plant and machinery being ready, that it could be said that the assessee company had commenced business, and this is what the learned Judge says at page 97 :

> *"Referring to their minutes having looked round, and having got their machinery and plant, and having also employed their foremen, and having got their works erected and generally got everything ready, then they began to take the raw materials and to turn out their products."*

Therefore if this case were to be applied to the present assessee, then we would be driven to the conclusion that, if anything, the Tribunal has taken a view of the case very favourable to the assessee because on the facts of this case it would seem that the Income-tax Officer was right in holding that the net expenses prior to the 1st of November, 1946, should not be allowed as permissible deductions. That is why it is important to consider whether the expression used in the Indian statute for setting up a business is different from the expression Mr. Justice Rowlatt was considering, viz., "commencing of the business." ***It seems to us, that the expression "setting up" means, as is defined in the Oxford English Dictionary, "to place on foot" or "to establish," and in contradistinction to "commence". The distinction is this that when a business is established and is ready to commence business then 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. But there may be an interregnum, there may be an***

interval between a business which is set up and a business which is commenced ' and all expenses incurred after the setting up of the business and before the commencement of the business, all expenses during the interregnum, would be permissible deductions under Section 10(2). *Now applying that test to the facts here, the company actually commenced business only on the 1st of November 1946, when it purchased a ground-nut oil mill and was in a position to crush ground-nuts and produce oil. But prior to this there was a period when the business could be said to have been set up and the company was ready to commence business, and in the view of the Tribunal one of the main factors was the purchase of raw materials from which an inference could be drawn that the company had set up its business; but that is not the only factor that the Tribunal taken into consideration. The Tribunal has as pointed out in the statement of the case, scrutinised the various details of the expenses given in the order of the Appellate Assistant Commissioner and having scrutinised those expenses the Tribunal has come to the conclusion even on an interpretation more favorable to the assessee than the one we are giving to the expression "setting up" that these expenses do not show that the business was set up prior to the 1st of September, 1946. In our opinion, it would be difficult to say that the decision of the Tribunal is based upon a total absence of any evidence. As we have often said we are not concerned with the sufficiency of evidence on a reference. It is only if there is no evidence which would justify the decision of the Tribunal that a question of law would arise which would invoke our advisory jurisdiction which after all is a very limited jurisdiction.*

We will, therefore redraft the question submitted by the Tribunal as follows: "whether there was evidence before the Tribunal to hold that the assessee company set up its business as from 1st of September, 1946?" and we will answer that in the affirmative. No order as to costs."

6.10 The assessee has also relied upon the decision of coordinate benches of ITAT, Delhi in the case of GNG Stock Holdings Private Ltd., v. DCIT in ITA no. 913/Del/2011 , order dated 22.07.2011. In this case, the taxpayer business was to undertake business of acting as trading and clearing member of the wholesale debt market , capital market and Futures and Options segment of stock exchanges. To achieve this object , the tax-payer filed an application with NSE for trading and clearing membership of the capital markets and futures and options segment of National Stock Exchange and also gave security deposit and collateral security to NSE along with requisite fees. The tribunal after going through several case laws , factual

matrix of the case and nature of the business of the tax-payer held that the business of the tax-payer was set up and ready to commence its business only from the date when provisional registration was granted by NSE for trading membership of capital market and future and option segments, by holding as under:-

> " *20. From these decisions, it is clear that when a business is established and is ready to commence business, then 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. In other words, a business cannot be said to be set up before it is ready to commence. The actual commencement of the business may have some interval from the date when the business was set up, but in order to hold that the business is set up, it is to be seen as to whether it was ready to commence though actual commencement might not have been taken place.*
>
> *21. It is only after the date of setting up of the business that the previous year of the newly set up business would commence, and the expenses incurred prior to the date of setting up of business could not be taken into account for the purposes of determining the profits of a newly set up business.*
>
> *22. We, therefore, have to determine as to when, in the present case, the assessee was ready to commence business so as to say that the assessee's business had actually been set up. In the present case, the assessee shall be entitled to admissible business expenses from the day when the assessee's business could be said to have been set up i.e. from the day when the business was ready to commence and not from the date of actual commencement of the business.*
>
> *23. The assessee's contention that the assessee's business to act as a trading member and clearing member of the wholesale debt market, capital market and futures and options segments of any Stock Exchange had actually been set up as soon as the assessee company was registered as a private limited company under the Companies Act, 1956, is found to be of without any merit inasmuch as mere incorporation of a company under the Companies Act cannot be a sole factor to establish that the company has set up its business on the day of registration itself. The mere registration of the assessee company under the Companies Act, cannot be said to be the first stage relating to the activity of acting as trading members*

and clearing members of the wholesale debt market, capital market and futures and options segments of any stock exchange. The criteria laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Saurashtra Cement & Chemical Inds. Ltd. (supra) and in the case of Sarabhai Management Corp. Ltd. Vs. CIT (supra) does not support this contention of the assessee that the assessee's business had actually been set up merely for the reason that the assessee company was registered as a private limited company under the Companies Act. It is not in dispute that the assessee made application for registration before the National Stock Exchange of India Ltd. for trading membership of capital and future options segments on 15.10.2004 by paying application fee of Rs.10,000/- vide demand draft dated 12.10.2004 payable at Mumbai. ***In order to commence the business of acting as trading membership of capital market and futures options segments, it was necessary on the part of the assessee to get requisite registration from the Stock Exchange. The assessee's application for registration was allowed on provisional basis on and from December 6, 2004.*** *Thereafter, the assessee also made applications before SEBI as well as National Securities Clearing Corporation Ltd. by paying necessary fees and complying with all the requirements. In this case, the first stage relates to the activity of acting as trading members and clearing member of the wholesale debt market, capital market and futures and options segments of any Stock Exchange was to get registration from the Stock Exchange. It is well settled that all the expenses incurred after the business had been set up are allowable as business deduction u/s 37 of the Act. There may be interval between the setting up of the business and the actual commencement of the business but all the expenses incurred during the interval of setting up of the business and the commencement of the business are also permissible for deduction as so held in the above referred decisions. Having regard to the nature of the assessee's business of acting as a trading member and clearing member of the wholesale debt market etc., it can be said that assessee's business was set up as soon as the assessee got registration by the National Stock Exchange for trading membership of capital market and futures options segments inasmuch as the assessee's business was ready to commence on the day when the assessee got provisional registration from the National Stock Exchange. We are, therefore, of the considered view that the expenses incurred on or after 06.12.2004 are permissible for deduction as business expenses and in order to allow*

these expenses as admissible deduction, it is not necessary that the assessee should have earned some income out of such activity or all the three stages referred to by the Hon'ble Gujarat High Court in the above referred decision should have been completed. It is enough that the first stage of the business had started in order to claim the business expenses as admissible deduction. We, therefore, hold that the assessee is entitled to a deduction of admissible business expenses incurred by it on or after 06.12.2004 when the business can be said to have been set up by the assessee. We, therefore, direct the Assessing Officer to quantify the amount of expenses in the light of our decision above and allow the same as per law after examining and verifying the genuineness of the expenses and their admissibility under the provisions of Income-tax Act. The AO shall provide reasonable opportunity of being heard to the assessee while quantifying the amount of business expenses incurred by the assessee on or after 15.10.2004. We order accordingly."

6.10.2 Thus, in the aforesaid case of GNG Stock Holdings Private Limited (supra) , the contention of the tax-payer that it is entitled to claim expenses since incorporation of the tax-payer company was negated/rejected by tribunal and all the expenses incurred by it prior to grant of provisional registration by NSE for trading membership of capital market and future options segment was not allowed and expenses incurred only from the date of grant of provisional registration by NSE were allowed. The tribunal went into facts and circumstances of the case and nature of business of the tax-payer to come to aforesaid conclusion. In the instant case before us, non granting of approval by SEBI under Sub-regulation (2) of Regulation 21 of the 1996 Regulation directly impede the commencement of business of the assessee and in the absence of the said approval of the SEBI , the doctrine of impossibility will come into play and the assessee will never be in a position to commence its business. The grant of approval by SEBI was on 17.10.2012 which is the relevant date when the business of the assessee before us was set up and it was ready to commence business . The assessee, thus, shall be entitled to claim expenses w.e.f. 17.10.2012 as deduction as business expenses provided other ingredients of allowability of these expenses

are met as laid down in the relevant provisions of the 1961 Act. Thus, our decision in the instant case, is in line with the decision of co-ordinate benches of ITAT, Delhi in the case of GNG Stock Holdings Private Limited(supra) .

6.11 The assessee has also relied upon the decision of co-ordinate bench of ITAT, Mumbai in the case of Pinebridge India Private Ltd., v. ACIT in ITA no. 2470/Mum/2011, vide order dated 10.10.2018 , wherein the tribunal based on factual matrix of the case allowed the expenses from the date of incorporation of the said tax-payer company. The issue of grant of statutory approval was not before the tribunal in the said case of Pinebridge. Thus, the said case was decided on its own facts which were before the co-ordinate bench of the tribunal and hence clearly distinguishable .

6.12 The factual matrix and nature of the business in the instant case before us has been duly analysed by us in the preceding para's of this order and detailed reasoning and justification for arriving at the decision is given by us in this order. Thus, we hold that the business of the assessee before us was set up and ready to commence its business on 17.10.2012 when it got approval from SEBI vide Sub-regulation (2) of Regulation 21 of the 1996 Regulation. We, therefore, hold that the assessee is entitled to a deduction of admissible business expenses incurred by it on or after 17.10.2012 when the business can be said to have been set up by the assessee. We, therefore, direct the Assessing Officer to quantify the amount of expenses in the light of our decision above and allow the same as per law after examining and verifying the genuineness of the expenses and their admissibility under the provisions of Income-tax Act which were incurred post 17.10.2012 till the end of the relevant previous year under consideration before us. The AO shall provide reasonable opportunity of being heard to the assessee while quantifying the amount of business expenses incurred by the assessee on or after 17.10.2012 till the end of the relevant previous year under

consideration before us. Since, both the authorities below failed to consider this relevant and vital event of grant of SEBI approval in favour of the assessee on 17.10.2012, we direct the assessee to produce the copy of aforesaid SEBI approval before the AO for necessary verification and records. The appeal of the Revenue is partly allowed as indicated above. We order accordingly

7. In the result, appeal of the Revenue in ITA no. 6687/Mum/2017 for AY 2013-14 is partly allowed as indicated above

Order pronounced in the open court on 13.03.2019.

आदेश की घोषणा खुले न्यायालय में दिनांकः 13.03.2019 को की गई

Sd/-	Sd/-
(PAWAN SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, dated: 13.03.2019

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI