IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 584 OF 2003

Modi Business Centre Pvt. Ltd. ...*Appellant*

-Versus-

DC (IT) Spl. Rg. 19, Bombay ...*Respondent*

Mr. Bharat Raichandani *with Bhagrai Sahu i/b. M/s. UBR Legal, for the Appellant-Assessee.*

Mr. Arjun Gupta, *for Respondent-Revenue.*

CORAM : ALOK ARADHE, CJ. &

SANDEEP V. MARNE, J.

RESERVED ON : 14 AUGUST 2025
PRONOUNCED ON : 21 AUGUST 2025

JUDGMENT : *(Per : Sandeep V. Marne, J.)*

1) By this Appeal filed under Section 260-A of the Income Tax Act, 1961 (**the Act**) the Assessee has challenged order dated 28 January 2003 passed by the Income Tax Appellate Tribunal allowing the appeal filed by the Revenue and setting aside the order passed by the Commissioner of

Income Tax (Appeals) and restoring the order passed by the Assessing Officer. The Appeal pertains to the Assessment Year 1992-93.

2) Brief facts, leading to filing of the Appeal are that the Assessee is a private limited company incorporated on 17 February 1992 under the provisions of the Companies Act, 1956 with the objective of constructing business centres, buildings, houses, premises, etc. and to let on lease the same, in addition to the business of financing. In respect of Assessment Year 1992-93, the Assessee filed return of income declaring income of Rs.5,966/- under the head "business". Return was accompanied by profit and loss account which showed interest receipt of Rs.14,66,825/-, against which deduction of interest of Rs.13,37,225/- on fixed loan, guarantee commission of Rs.1,21,759/- and other sundry expenses were claimed and net profit of Rs.5,966/- was shown. The Assessee had borrowed money on interest from Citibank during the period from 18 February 1992 to 21 March 1992. It was the case of the Assessee before the Assessment Officer that loan from Citibank was not only for expenses for furnishing the building, but the loan agreement provided for disbursal of loan for the purpose of business of the borrower. According to the Assessee, while the main object of the incorporation of the Company was to let out premises on rent, Clause 65 of the Memorandum of

Association **(MoA)** provided for other objects like business of financiers. The Assessee had utilized part of loan secured from Citibank for lending advances to its sister concerns. The Assessee had therefore set off the interest expenditure on monies borrowed from Citibank against the interest income from funds lend to sister concerns.

3) The Assessment Officer while completing the assessment under Section 143(3) of the Act, observed that the Assessee had secured loan of Rs.9,20,08,846/- from Citibank against equitable mortgage by deposit of title deeds of immovable properties belonging to companies under the same management and guaranteed by the Directors of the Assessee-Company. Out of the said loan, amount of Rs.12,62,963/- and Rs.8,15,147/- were incurred for capital advances and pre-operative expenses and the balance amount was advanced to various companies under the same management at interest varying from 21% to 22.5%. The Assessee had shown the interest received from its sister companies of Rs.14,66,825/- in its profit and loss account and claimed expenditure of Rs.13,37,225/- paid to Citibank towards interest on borrowed amount. The Assessing Officer held that the Assessee was not entitled to set off interest receipt against interest expenditure as interest receipt was assessable under head "other sources" without any deduction. It was further held by the Assessing Officer that

business of the Assessee-Company had not commenced during the previous year since no rent had been received from Citibank, with whom Assessee had entered into agreement during the year for leasing out the business centres by name 'Telicom Centre". The Assessing Officer therefore proceeded to bring to tax the interest receipt of Rs.14,66,825/- as income of the Assessee from "other sources" without allowing any deduction whatsoever therefrom.

4) The Assessee filed Appeal before the Commissioner of Income-tax (Appeals) VII, Bombay **[CIT(A)]** challenging the order of the Assessing Officer. The CIT(A) allowed the Appeal preferred by the Assessee holding that since the Assessee was in the process of converting the premises into modern business centre, it could not be said that the business had not yet commenced. CIT(A) further held that arrangement of appointing financier and its temporary utilisation is one composite transaction and therefore the interest received by the Assessee on account of temporary utilisation of loan could not be considered in isolation. CIT(A) held that interest payable by the Assessee ought to have been adjusted against the interest received by it and only balance could be capitalized.

5) The Revenue challenged the order of CIT(A) by filing Appeal being ITA No.9380/M/95 before the Income Tax

Appellate Tribunal **(ITAT)**. By impugned order dated 28 January 2003, the ITAT has allowed the appeal of the Revenue and has reversed the decision of CIT(A). The ITAT has held that the business of the Assessee had not commenced during the relevant Assessment Year. Additionally, it is held that letting monies on interest was not a part of main business of the Assessee. ITAT has therefore held that interest expenditure cannot be adjusted against the interest receipt in the present case. Order passed by the Assessing Officer is accordingly restored by the ITAT. Aggrieved by the order of ITAT, the Assessee has filed the present Appeal.

6) By order dated 26 October 2004 the Appeal has been admitted on following substantial question of law :-

> Whether the Tribunal erred on facts and in law in reversing the order of the CIT(A) by not allowing the set off of interest expenditure against interest income without appreciating that the business of the appellant had commenced in the previous year relevant to AY 1992-93 and that consequently the set off of the interest expenditure ought to have been allowed against the interest income under Section 36(1)(iii) of the Act?

7) Mr. Raichandani, the learned counsel appearing for the Assessee would submit that the impugned order passed by the ITAT reversing the well-considered decision of the CIT(A) is grossly erroneous. That both the findings recorded by the ITAT

of non-commencement of business during relevant assessment year and lending monies on interest not forming part of business activity of the Assessee are perverse. He would submit that the Apex Court in ***Commissioner of Income-tax Versus. Sarabhai Management Corporation Ltd.***[1] has held that the business of acquiring immovable property and giving it on lease amounts to actual starting of the business. That in ***Commissioner of Income-tax Versus. Club Resorts P. Ltd.***[2] the Madras High Court has held that activities of the Assessee including office set up, publicity and construction, showed business readiness and since expenses were revenue in nature, such expenditure are allowable even prior to actual commencement of the business. That in ***Commissioner of Income-tax Versus. E. Funds International India***[3] the Delhi High Court has dealt with a case of setting up of infrastructure for software development and has held that though no income was earned in the relevant period, the efforts taken for setting up infrastructure, hiring the employees, management, marketing, showed that the business had commenced. That in ***Commissioner of Income-tax Versus. L.G. Electronics (India) Limited***[4] the Delhi High Court has held that the expenditure incurred by the Assessee even prior to actual commencement of business are allowable. That in ***Commissioner of Income-tax, Gujarat I Versus. Saurashtra Cement and Chemical***

1 (1991) 192 ITR 151
2 2006 SCC Online Mad 1399
3 [2007] 162 Taxman 1 (Delhi)
4 2005 SCC Online Del 1485

Industries Ltd.[5], Gujarat High Court has construed that the business had commenced even after starting of extraction activity by the Assessee though the final product was not actually extracted or sold. Relying on above judgments, Mr. Raichandani would contend that the finding of the ITAT in the present case that the business had not commenced deserves to be set aside.

8) Mr. Raichandani would further submit that the impugned order has been passed for the Assessment Year 1992-93. However, for Assessment Year 1993-94 same issue has been decided by the ITAT in favour of the Assessee and the appeal filed by the Revenue has been dismissed by the ITAT. That for Assessment Year 1993-94 the Tribunal referred to the objects of the Company under Clause 65 of the MoA as well as Board Resolution dated 18 February 1992 for the purpose of holding that the business of lending money on interest also formed part of main business of the Assessee. That even for subsequent Assessment Year 1994-95 the Assessing Officer held that the work of establishing business centres was completed before the end of financial year corresponding to Assessment Year 1993-94. Hence, there is no doubt that the financier business had actually started in Financial Year corresponding to Assessment Year 1992-93. Mr. Raichandani would rely upon

[5] (1973) 91 ITR 170

judgment of the Apex Court in ***M/s. Radhasoami Satsang, Saomi Bagh, Agra Versus. Commissioner of Income Tax***[6] in support of his contention that principle of *res-judicata* is applicable to assessment proceedings and the findings recorded for Assessment Years 1993-94 and 1994-95 would continue to govern the assessment even for Assessment Year 1992-93. Mr. Raichandani would therefore submit that since Revenue itself has accepted both the aspects of commencement of business as well as activity of lending money on interest to be the part of Assessee's business for the subsequent Assessment Year the order passed by the ITAT deserves to be set aside.

9) The Appeal is opposed by Mr. Gupta, the learned counsel appearing for the Revenue. He would submit that the order passed in respect of Assessment Years 1993-94 and 1994-95 have absolutely no relevance for deciding the claim of the Assessee for Assessment Year 1992-93. That the Company was incorporated on 17 February 1992 and relevant previous year ended on 31 March 1992 and therefore commencement of the two businesses of the Assessee could be said to have commenced during that year. That therefore commencement of the business in subsequent years cannot decide Assessee's claim in respect of Assessment Year 1992-93. That the judgment of the Apex Court in ***M/s. Radhasoami Satsang, Saomi Bagh, Agra***

[6] (1992) 1 SCC 659

(supra) applies to the findings recorded in previous Assessment Year being binding on subsequent assessment, which is not the case in the present Appeal.

10) Mr. Gupta would further submit that the concurrent findings of fact have been recorded by each of the Appellate Authorities and that therefore, the claim of the Assessee cannot be allowed as business expenditure. That the alleged business of the Assessee of financier and mortgagers under Clause 65 of the MoA has been divided into main objective, ancillary objectives and other objectives. That other objectives cannot be treated as main line business object. That therefore it cannot be construed that the Assessee was undertaking activity of financier for running of its business, when only a solitary loan was taken by the Assessee during the year. That Resolution dated 18 February 1992 is produced by the Assessee for the first time before this Court adopting financier as its main object, which was not produced before the Appellate Authority. That the said document appears to be cooked up one and clearly as an afterthought. That it is impermissible to make the business fully functional within one month of incorporation of the Company on 17 February 1992. That the ITAT has rightly held that when there was no specific purpose behind obtaining loan from the Citibank, the loan cannot be treated as the one taken for business purposes. That since loan was without any

specified objective, it cannot be regarded as having been secured for business purposes. That the term 'business' denotes strategical, purposeful and mindful trade with a view to earn profit, which is completely absent in the present case. That the amount secured through loan is disbursed among sister companies and the same cannot be treated as business activity. He would rely upon judgment of Kerala High Court in ***Mathew Joseph Versus. Assistant Commissioner of Income-tax, Circle-1***[7] in which claim of Assessee under Section 57(iii) of the Act was negatived when it was found that loan was secured for business of fiber and yarn and actually utilised by the Assessee for investment in the sister concern. He would rely upon judgment of this Court in ***Commissioner of Income-tax Versus. Mimraj Manmal Ruia***[8] in which the overdraft facility was actually used for speculation in shares. He would also rely upon judgment of this Court in ***Commissioner of Income-tax Versus. Jagmohandas J. Kapadia***[9] in which it is held that if the Assessee was engaged in the business of trading of shares, no expenditure can be set off under Section 57(iii) of the Act against the dividend earned since said investment was only for business purpose. Mr. Gupta would therefore submit that mere utilisation of some part of funds to earn interest income is insufficient to allow interest expenditure against interest received.

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7 [2017] 87 taxmann.com 317 (Kerala)

8 (1972) 84 ITR 673 (Bombay)

9 (1966) 61 ITR 663 (Bombay)

11) Mr. Gupta would submit that there was no principal business activity of the Assessee during the Assessment Year 1992-93 and therefore there was no possibility of any ancillary business activity. Secondly, it is submitted that the financier business has actually not commenced in the Assessment Year 1992-93 and its commencement in the subsequent financial year becomes irrelevant. That there is admission on the part of the Assessee before the Tribunal that the loan secured from the Citibank was not for incurring any capital expenditure and therefore the loan taken from the Citibank cannot be treated as the one for business purpose. That it is merely fortuitous circumstance that some money is found to have been lend by Assessee to its sister concern and the said activity does not constitute financier business of the Assessee for claiming the amount of interest paid to the Citibank as interest expenditure. Mr. Gupta would pray for dismissal of the Appeal.

12) Rival contentions of the parties now fall for our consideration.

13) The short issue that arises for consideration in the present Appeal is whether the interest paid by the Assessee to the Bank funds borrowed for business purposes can be adjusted as a set off against interest received by it by lending part of the said borrowed funds to its sister concerns ?

14) Perusal of the order passed by the ITAT would indicate that the Appeal of the Revenue is allowed and the order passed by CIT(A) is set aside essentially on three counts viz. (i) that the telecom center of the Assessee was not ready to commence the business during the relevant Assessment Year 1992-93; (ii) borrowing and lending monies (financiering) was not the part of the business for which the Assessee-Company was incorporated; and (iii) interest paid to the Bank did not constitute a deduction under Section 57(iii) of the Act, if the interest received is assessable under the Head 'other sources' and not under the Head 'business'.

15) So far as the first aspect of non-commencement of the business of the Assessee-Company is concerned, the CIT(A) had relied upon various judgments for the purpose of arriving at the conclusion that the interest spent on loan during construction period can be adjusted against interest earned by lending monies. The CIT(A) thus held that mere non-completion of construction of premises and non-commencement of actual business was not the relevant factor and he took into consideration views expressed in various judgments that the financial transactions during construction period can also be taken into consideration. The relevant findings recorded by the CIT(A) in this regard read thus :-

I have carefully gone through the judgment relied on by the Ld. Officer and the judgments relied on by the Ld. C.A. To begin with, it must be stated that in 189 ITR 670, the detailed facts of the case are not stated in the report. Be that as it may, the decision at 124 CTR 117 clearly applies to the facts of the present case. In the said case, the assessee had earned interest during the construction period. The assessee was in the process of construction of its plant and it had taken huge loan and was paying interest thereon. Part of the loan received not immediately required was deposited with the banks and the assessee earned interest thereon. The assessee had set off of such interest against the interest paid or payable. The Ld. Officer in the said case, assessed the interest received as income from other sources. It was held that the Ld. Officer was not justified. It was held that whole arrangement of obtaining the finance and its temporary utilisation formed one composite transaction and as such, the interest received by the assessee on account of temporary utilisation of the loans cannot be considered in isolation. It was also held that the assessee derived no income but only reduced its liability towards interest payable on loans. Therefore, it was held that the interest received by the assessee could not be assessed as income from other sources. The Hon'ble Court followed 171 IT 663 (AP). A similar situation has arisen in a recent judgment reported in 211 ITR 552 (Orr.). In the said case, the assessee was constructing a factory. It kept certain amount as deposits with the bank. It was held that the interest on fixed deposit was not assessable as income from other sources. The Hon'ble H.C. of Orrissa followed the decision in 171 ITR 663(AP) that is the judgment followed by the Bombay High Court. Even in 189 ITR 670, the Hon'ble Court has followed its earlier judgment reported at 156 ITR 542 (Mad.). In the said case, the assessee had earned interest on part of the borrowed funds and has adjusted the interest paid against the interest received. It has also lent its share capital and earned interest thereon. It was held that the interest received by the assessee on the amounts lent out of the borrowed funds was to be adjusted against the interest payment and that the interest earned on loans made out of the share capital was to be assessed as income from other sources. Therefore, it appears that the decision of the Hon'ble Madras

> High Court is also similar to the decision taken by the Bombay and the A.P. High Courts. Accordingly, following the judgments it is held that the interest payable by the assessee was to be adjusted against the interest received by the assessee. The balance, if any would be capitalised, since the business has not been set up.

16) The ITAT has however reversed the finding of the CIT(A) holding that the Assessee had agreed to lease out business center (Telecom Business Center) to Citibank for monthly rental of Rs.8,52,240/-. Under Clause-22 of the Lease Agreement, Citibank agreed to give line of credit to the Business Center (Assessee) for an amount of Rs.10.25 crores at the interest rate of 20.60% p.a. The ITAT further held that the loan given by Citibank was not utilised by the Assessee for the purpose of developing or putting up facilities/services in the business center, but the Assessee utilised the same to give interest bearing advances to the companies under the same management. The Assessee's Balance Sheet showed loans aggregating to Rs.7,14,83,827/- given to five companies under the same Management and accrued interest of Rs. 11,29,455/-. The ITAT observed that out of the loan disbursed by Citibank, amount of Rs.1.76 crores was used as a deposit with Telycom Industries Pvt. Ltd. which was the owner of the premises. The ITAT also observed that the companies under the same management were existing tenants of the premises and they had agreed to sublet the premises to the Assessee, which in

turn was to be leased out to Citibank. In the light of the above position, ITAT took up following issues for consideration :-

a) Can it be said that the company had set up its business during the year ?

b) Can it be said that the interest paid to the bank constituted a deduction u.s. 57(iii), if the interest received is assessable under "other sources" and not "business"?

c) Was the judgement of the Supreme Court in Tuticorin Alkali (supra) rightly applied by the departmental authorities?

17) The ITAT further observed that the only act performed by the Assessee during the relevant assessment year was to enter into agreement on 19 February 1992 with Citibank for leasing out portions of the business center, which act was held to be insufficient for concluding that the business was set up. The ITAT held that the business center was not fully equipped with facilities and services agreed under the Agreement. The ITAT also took note of the fact that formal agreements between the Assessee-Company and tenant-companies were entered into on 29 February 1992. The ITAT held that there was nothing on record to indicate that the Assessee-Company had obtained possession of the business centre. This is how ITAT held that the business centre was not ready for commencement of the business. Relevant findings of the ITAT read thus :-

10. On a careful consideration of the issue, in the light of the facts brought on record and the rival arguments, we are of the view that it cannot be said that the business of the company was set up during the year. The business as we have already seen was to acquire business centres and let them out on lease and to provide such facilities for the occupiers as are commonly provided in business centres. What the assessee has done in the year is only to enter into an agreement on 19-2-92 with Citibank for leasing out portions of the business centre. This by itself is not sufficient to reach the conclusion that the business has been "set-up". There is noting on record to show that the business centre has been fully equipped with the facilities and services agreed to under the agreement. The agreement is only a step towards the setting up of the business. In fact, there is nothing even to show that the assessee had taken possession of the premises. It may be recalled that certain companies were already the tenants of the premises. The assessee had entered into monthly tenancy agreements with them as recited in the preamble of the agreement. Those companies had been permitted by Telycom Industries Pvt. Ltd., the owner of the premises, to sub-let or assign the premises occupied by them to any third party, in the agreements of lease entered into with them. The preamble further records that Telycom Industries Pvt. Ltd. had been approached by the companies for permission to sub-let the respective portions occupied by them to the assessee-company and that in letters addressed to those companies Telycom had agreed to the proposal. However, formal agreements between the assessee-company and the tenant-companies were entered into only on 29-2-92. In this situation, it is difficult to accept the claim that the business was "set-up". All these steps carried out during the accounting period were only preliminary steps towards the setting up of the business of developing and leasing out business centres and by themselves do not have the effect of "setting up" the business. As already noted, there is nothing to show that the assessee-company had obtained possession of the business centre during the year. In Ramaraju Surgical Cotton Mills Ltd. (63 ITR 478), the Supreme Court held, after referring to the Bombay High Court judgment in Western India Vegetable Products Ltd. (26 ITR 151), that the proper meaning to be assigned to the words "set-up) is ready to commence business" and a unit cannot be said to have been

> set up unless it is ready to discharge the function for which it is being set up. It is only when the unit has been put to such shape that it can start functioning as a business that it can be said that it has been "set-up". The evidence in the present case does not persuade us to come to the conclusion that the business centre was ready to commence business or to start functioning. We therefore reject the claim.

18) From findings recorded by the ITAT, it appears that the Tribunal expected actual commencement of the business after setting up of the necessary infrastructure and equipment. The ITAT appears to have ignored the issue as to whether financial transactions occurring during the period when the steps are initiated for commencement of the business could be taken into consideration for adjustment. As observed above, CIT(A) had relied upon several decisions in which it is held that the interest paid during construction period can be adjusted as set off against income received. Instead of distinguishing the said decisions, the ITAT went into the meaning of the term *'set up'* by relying on judgment of the Apex Court in ***CWT Versus. Ramaraju Surgical Cotton Mills Ltd***[10]. In the said case, meaning of the term 'set up' has been interpreted in the context of Section 5(1)(xxi) of the Wealth Tax Act. In our view, the ITAT erred in applying the meaning ascribed to the term 'set-up' under the Wealth Tax Act for deciding the issue arising out of the Income Tax Act. For taxation under the Wealth Tax Act, the industry needs to be fully established, whereas the business of letting

[10] 63 ITR 478

out premises on hire involves multiple stages, beginning from acquisition of property, repairing/furnishing the same and then letting it out to tenants. The business for Income Tax Act would commence right from the stage of repairing and furnishing of property for being rented out and cannot be treated as commenced only when the premises are actually let out to tenants. The judgment rendered in the context of setting up of an industry for taxation under the Wealth Tax Act would have no application for deciding the issue of commencement of business within the meaning of the Income Tax Act. The judgment has been held to be non-applicable to the issue of commencement of business under the Income Tax Act by the Gujarat High Court in *CIT Versus. Ramaraju Surgical Cotton Mills Ltd.* (supra), which is discussed in the latter part of the judgment.

19) The issue of adjustment of interest expenditure against income receipt during construction period appears to be squarely covered by judgment of the Apex Court in *CIT Versus. Sarabhai Management Corporation Ltd.* (supra). The case before the Apex Court involved challenge to the judgment of the Gujarat High Court in *Sarabhai Management Corporation Ltd. Versus. Commissioner of Income-tax, Gujarat*[11]. In case before the Gujarat High Court, the Assessee had purchased a property and it was at lookout for person to whom it could be let. The Assessee had

[11] (1976) 102 ITR 25

started carrying out repairs, rewiring, installation of lift and other steps in the process of getting the premises converted from residential house into business and storage accommodation. The Gujarat High Court held in paragraph 16 of the judgment as under :-

> 16. Applying the same reasoning to the facts of the case before us, **the business activities of the assessee-company can also be said to fall into three broad categories. The first business activity is to acquire either by purchase or by any other manner immovable property so that the property can be ultimately given out either on leave and licence basis or on lease to others together with the appurtenant services. The second category of the business activity is to put these buildings and building accommodation and lands and gardens into proper shape and set up the appurtenant services so that ultimately the property can be given out on leave and licence basis and the third business activity is actually to give out on lease or on leave and licence basis.** In the present case the property was acquired on March 28, 1964. Thereafter, for some time various types of 'alterations and additions were being carried out and the activity of getting this property ready for its licensees and making it serviceable for its licensees was attended to' and it is in the process of making this accommodation available to the intended lessees or licensees that the garden staff and other staff was engaged, pieces of equipment and gadgets, etc., were acquired by purchase or otherwise, lift was installed and ultimately with effect from May 1, 1965, a portion of the accommodation was actually given out on licence basis at the fee of Rs.27,000 per month. Therefore if???e have merely to look at giving out on licence as the business activity of the concern, then in a loose sense it can be said that the company commenced its business with effect from May 1, 1965, but that is not the only business activity of the company. **The business activity of the company consists of three broad categories which we have pointed out above and the objects clause of the memorandum of association**

justifies such a conclusion. Therefore, when the company actually let out on leave and licence basis a portion of these particular premises with effect from May 1, 1965, the earlier preceding part of its activities were also part of the business activities of the company, for example, engaging the garden staff, kitchen staff or other staff, buying the equipment and getting the equipment ready, making the staff familiar with the working of that equipment, etc. They are all part of the business activities of the company so that ultimately when the licensee or lessee came to occupy the premises, everything would be in shape for use of the licensee or lessee, as the case may be. Under these circumstances, following the principle laid down by the Division Bench of this court in Commissioner of Income-tax v. Saurashtra Cement & Chemical Industries Ltd.[1973] 91 ITR 170, 175 (Guj), it must be held that it is only in a loose sense that the business of the company can be said to be to give out on leave and license basis residential or office accommodation together with the appurtenant services. The business of the company was of a three-fold category as mentioned above after a proper analysis and once that analysis is made, it is clear that from October 1, 1964, the company was carrying on the second category of its business, namely, the business activity of making the residential accommodation with all the appurtenant services available to the intended lessees or licensees. We find from the order of the Tribunal that though the decision of this High Court in Commissioner of Income-tax v. Saurashtra Cement & Chemical Industries was cited, the Tribunal did not think that it had any application to the facts of the case. We are unable to see how the principles laid down in Saurashtra Cement & Chemical Industries Ltd.'s case cannot be said to have any bearing on the facts of the present case. In our opinion, the desirability of avoiding thinking in a loose sense and clearly analysing the nature of the business activity of the assessee was essential for the purpose of arriving at the correct decision in this case. Under the circumstances, the Tribunal, in our opinion, has not applied the correct tests and has consequently arrived at an erroneous conclusion regarding the commencement of the business activity of the assessee-company.

(emphasis added)

20) Thus, the Gujarat High Court in *Sarabhai Management Corporation Ltd.* (supra) held that since the business of the Assessee was in three categories viz., of acquisition of property, making the property good for being let out and the third category of letting out the premises on license, the business of the company can be treated to have commenced, it was not necessary that the licensee / tenant to actually start occupying the premises. The Apex Court has upheld the judgment of Gujarat High Court in *CIT Versus. Sarabhai Management Corporation Ltd.* (supra), in which it is held as under :-

> There can be no quarrel with the proposition put forward by Dr. Gauri Shankar. However, the High Court has pointed out rightly, in our opinion, that, in this case, the Tribunal has proceeded on a misapprehension regarding the nature of the assessee's business. It has analysed the various component activities of the assessee's business and pointed out that two categories of the activities of the business had been carried on during the previous year in question. The assessee had purchased a property; it was on the look out for persons to whom it could be let out; it had been able to get a customer; and it had carried out repairs, rewiring, installation of lift and other steps in the process of getting the premises converted from a residential house into a business and storage accommodation conforming to the requirements of the customer. **Even if, as submitted by Dr. Gauri Shankar, the first category of activity referred to by the High Court, viz., the acquisition of a property for being let out can be said to be only a preparatory stage (analogous to the acquisition of buildings, plant and machinery in a manufacturing business), the subsequent activities certainly constitute activities in the course of the carrying on of the assessee's business. It would not be correct, as**

> **rightly pointed out by the High Court, to treat the assessee as having commenced its business only when the licensee or lessee occupied the premises or started paying rent.** In these circumstances, we are of the opinion that the High Court was right in interfering with the finding of the Appellate Tribunal which was based on a misdirection in law.
>
> *(emphasis added)*

21) Thus the Apex Court in ***CIT Versus. Sarabhai Management Corporation Ltd.*** held that even if the first stage of acquisition of property cannot be treated as commencement of business, atleast the second stage of making the property ready for being rented out constitutes the activity of commencement of business. The judgment, in our view, squarely covers the issue at hand.

22) We proceed to examine few more decisions on the issue. In ***Commissioner of Income-tax Versus. Dhoomketu Builders and Development P. Ltd.***[12], the issue before the Delhi High Court was whether mere act of depositing earnest money while participating in tender floated by the Official Liquidator and the act of borrowing monies for that purpose could be construed as acts constituting setting up of business of real estate development. The Revenue had contended that until the Assessee had actually acquired land for the purpose of carrying on its business as per the objects clauses of the MoA,

[12] 2013 SCC OnLine Del 1561

the business could not have been said to be set up within the meaning of Section 3 of the Act. The Delhi High Court disagreed with the Revenue's contention and held that commencement of real estate business would normally start with acquisition of land or immovable property and once the Assessee is in a position to perform certain acts towards acquisition of land, such act would clearly show that the Assessee was ready to commence the business and as a corollary, the business was already set up. The actual acquisition of the land was held to be result of such efforts put in by the Assessee. The Delhi High Court has accordingly upheld the view taken by the Tribunal that Assessee's act of applying for tender and borrowing money showed that the Assessee's business had been set up and that it was ready to commence the business.

23) In *CIT Versus. Club Resorts P. Ltd.,* the Assessee was in the business of time sharing of tourist cottages. The Assessing Officer had rejected the claim of the Assessee for expenses incurred at the stage of development of the project. The Madras High Court however held that the time share resort business involved various stages of development. It was held that the various steps taken for commencement of business like setting up of office, hiring of staff etc. was held to be an act of commencement of the business.

24) In *CIT Versus. E. Funds International India* (supra), the Assessee-Company was incorporated on 14 July 1997 and had claimed losses during the relevant previous year. The Assessing Officer had rejected the claim of losses holding that the Assessee was yet to commence business activities. The Assessee was in the business of developing software which was held to be not an overnight exercise. Though the Assessee had not earned any income during the relevant previous year, it was noticed that the Assessee had taken steps to obtain business. The Delhi High Court accordingly concurred with the findings of the ITAT that the Assessee had commenced the business in the relevant previous year.

25) In *CIT Versus. L. G. Electronic (India) Ltd.* (supra), the Assessee had claimed various expenses during the course of setting up of business but before actual commencement thereof. The Delhi High Court took into consideration use of the term 'set up' in Section 3 of the Act and held that the act contemplates two different dates of setting up of business and commencing the business and that the two dates need not necessarily overlap.

26) In *CIT Gujarat I Versus. Saurashtra Cement and Chemical Industries Ltd.* (supra) the issue before the Gujarat High Court was as to whether the expenditure, depreciation and

development rebate in respect of extraction of limestone from mines could be allowed as business expenditure. The said expenditure was allowable as permissible deduction only if it could be shown that the Assessee had commenced its business when it had started extraction of limestone. The issue before the Gujarat High Court was whether extraction of limestone marked the commencement of business of the Assessee. In the light of the position that extraction of limestone did not constitute a distinct or independent business of the Assessee, the Gujarat High Court took into consideration the judgment of the Apex Court in *CIT Versus. Ramaraju Surgical Cotton Mills Ltd.* (supra). The Gujarat High Court distinguished the said judgment of the Apex Court and held in paras-9 and 11 as under :-

> 9. The argument of the revenue based on these observations was that extraction of limestone by quarrying leased area of land was merely in the nature of preparation for the establishment of the business of the assessee and the business of the assessee could be said to have been set up only in June, 1960, when the installation of the plant and machinery was completed and the unit was ready to discharge the function for which it was being set up, namely, manufacture of cement. **This argument is, however, fallacious because it overlooks that these observations were made by the Supreme Court while considering the question as to when a unit of an industrial undertaking can be said to have been set up and they were not intended to refer to a totally different question as to when a business can be said to have been set up or when it can be said to have commenced** Here in the present case also if the question had been as to when the industrial undertaking or factory of the assessee could be

> said to have been set up, the answer would have undoubtedly been that it was set up only when the plant and machinery were installed and it was ready to discharge the function for the which it was set up, namely, as to when the business of the assessee could be said to have commenced and on that question no light is thrown by this decision of the Supreme Court.
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> 11. **We must, therefor, hold that the assessee commenced its business when it started the activity of extraction of limestone by quarrying the leased area of land.** Since extraction of limestone commenced form April, 1958, it must be held that the assessee was carrying on business during the relevant years of account and the Tribunal was right in taking the view that the expenditure incurred by the assessee in carrying on the activity of extraction of limestone as also depreciation allowance and development rebate in respect of the machinery employed in extracting limestone were deductible in computing the trading profits of the assessee for the assessment years 1960-61 and 1961-62. We, accordingly, answer the first question referred to us in the affirmative. On this view of the first question taken by us, it becomes unnecessary to consider the second question and we do not, therefore, propose to answer it. The Commissioner will pay the costs of the reference to the assessee.
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> *(emphasis added)*

27) We are also not impressed by the submission made by Mr. Gupta that the company was incorporated on 17 February 1992 and that it was impossible for it to commence the business of lending monies prior to 31 March 1992. This submission is misplaced considering the factual background of the case where the transactions of lending monies and receipt of interest thereon took place prior to 31 March 1992 as the Balance Sheet as on 31 March 1992 indicated advances of Rs.7,14,83,827/- given to five companies and payment of interest by them of Rs.11,29,455/-.

28) Coming to the second aspect of the Assessee's act of lending of monies to its sister concerns forming part of its business activity, the ITAT found that grant of advances by the Assessee in the same year of disbursement of loan by Citibank was a mere fortuitous circumstance and the same did not make lending money as business activity of the Assessee. The MoA indicates financiering as one of the business activities of the Assessee. Furthermore, in the subsequent Assessment Year 1993-94, the Tribunal has made a detailed analysis of various activities of the Assessee and has held that the activities of lending monies to sister concerns and others had not only continued, but had intensified after completion of the business center. Thus, in the subsequent Assessment Year 1993-94 also, the Assessee continued the activity of lending monies to sister concerns and others. The ITAT also did not take into consideration various clauses of MOA under which financing/money lending business was also included as one of the objects behind setting up of the company. The clauses of MOA have been taken into consideration and appreciated by the ITAT in the subsequent Assessment Year. Therefore, the finding of the ITAT in respect of the relevant Assessment Year 1992-93 that lending monies to sister concerns was a fortuitous circumstance is clearly perverse.

29) If we accept the contention of the Revenue and uphold the Tribunal's order by dismissing the present Appeal, the same would lead to an incongruous situation where the activities of lending monies to sister concerns would not be treated as business activity of the Assessee for Assessment Year 1992-93 whereas the very same activity is treated as business activity of the Assessee in respect of subsequent years. This is particularly true because the same loan transaction of Citibank continued in subsequent years and the monies were also advanced by the Assessee *interalia* to the same sister concerns. It would therefore be necessary to bring the assessment in respect of the Assessment Year 1992-93 in harmony with assessment made in the year 1993-94 and subsequent years. We therefore do not agree with the finding recorded by the ITAT that lending monies to sister concerns was not the business activity of the Assessee.

30) Coming to the third aspect of necessity to prove incurring of expenditure for the purpose of earning the income, it is seen that the main thrust of the arguments of Mr. Gupta revolve around the provisions of Section 57(iii) of the Act. It is contended by him that unless expenditure is incurred for the purpose of earning income, deduction under Section 57(iii) is impermissible.

31) The Revenue has relied upon judgment of the Apex Court in ***Tuticorin Alkali Versus. Commissioner of Income-tax***[13] in which the Assessee-Company had invested funds borrowed for the purpose of setting up factories in short term deposits with bank and earned interest thereon before commencement of manufacturing activities. Investment of funds and earning income therefrom was not a part of business of the Assessee before the Apex Court. Also, the case involved admitted eventuality of non-commencement of business. In the present case, the funds were borrowed by the Assessee for business purposes and financiering was one of its business activity. We have held that both the businesses of the Assessee viz. leasing out premises and lending monies had commenced in the relevant Assessment Year. If financiering was not the business activity of the Assessee, and the borrowed funds were temporarily parked in interest bearing deposits or lent on interest, the ratio of the judgment in *Tuticorin Alkali* would have squarely applied to the present case. Since the facts of the present case are different, the judgment of the Apex Court has no application to the facts of the present case. Same is the position in respect of the judgments relied on by Mr. Gupta in *CIT Versus. Mimraj Manmal Ruia* (supra), *CIT Versus. Jagmohandas J. Kapadia* (supra), ***Commissioner of Income-tax Versus. Tamil Nadu***

13 [1997] 227 ITR 172 (SC)

Industrial Development Corporation Ltd.[14], *Additional Commissioner of Income-tax Versus. Madras Fertilisers Ltd.*[15] and *Mathew Joseph Versus. ACIT* (supra) and *Commissioner of Income-tax (Central), Kanpur Versus. Smt. Swapna Roy*[16].

32) The most striking factor for outrightly rejecting reliance by Revenue on provisions of Section 57(iii) of the Act is the orders passed by the ITAT in subsequent years. In respect of Assessment Year 1992-93, the ITAT has referred to the provisions of Section 57(iii) of the Act for holding that the interest earned by the Assessee on lending funds must be treated as revenue receipt for the purpose of taxation without any set-off or deduction in absence of any specific provision under the Act. In the subsequent year however, the ITAT has allowed the claim of the Assessee for similar adjustment. Here again, there appears to be inconsistency between the findings recorded by ITAT in respect of two succeeding years. In respect of Assessment Year 1993-94, the ITAT held that the activity of lending monies to sister concerns and others had not only continued but had also intensified and constituted one of the main business activities of the Assessee. We are therefore not impressed by the submission made on behalf of the Revenue that under Section 57(iii), only such of the expenditure can be deducted which is incurred for the purpose of earning of

14 [1991] 189 ITR 670 (Madras)
15 [1980] 122 ITR 139 (Madras)
16 [2010] 331 ITR 367 (Allahabad)

particular income. The ITAT cannot treat the income earned for the Assessment Year 1992-93 as 'other sources' while treating the similar income in the succeeding Assessment Year 1993-94 under the head 'business'. It would therefore be necessary to bring the interest incomes in respect of all years under the same head of 'business'.

33) In our view, it is not necessary to delve deeper into the aspect of provisions of Section 57(iii) of the Act for the simple reason that in respect of the subsequent Assessment Year 1993-94, both CIT(A) as well as ITAT have allowed deduction of expenses incurred towards interest paid by Citibank against income earned from loan advances to sister concerns. The Revenue has not challenged the order of the ITAT dated 29 July 2004 relating to Assessment Year 1993-94. It is contended by the Assessee that even in respect of successive Assessment Years, the same loan transaction as well as transaction of lending monies to sister concerns continued and adjustment of expenses earned on payment of interest to Citibank against interest earned by lending funds to sister concerns has been allowed. During the course of arguments, Mr. Raichandani has taken us through the figures of interest earned on loans to sister concerns and interest paid on loans secured by the Assessee during Assessment Years 1994-95 and 1995-96. If the adjustment of interest paid to Citibank is allowed

as deduction from income earned by lending funds to sister concerns during Assessment Years 1993-94, 1994-95 and 1995-96, we do not see any reason why different view needs to be taken in respect of the Assessment Year 1992-93. The Revenue has not challenged the orders passed by the ITAT in the subsequent Assessment Years. We are therefore not inclined to accept the contention raised on behalf of the Revenue, selectively for Assessment Year 1992-93, that the purpose of obtaining loan from Citibank and disbursing the loan to sister concerns being different, deduction is not allowable under Section 57(iii) of the Act. It is therefore not necessary to discuss the ratio of each of the judgments cited by Mr. Gupta.

34) Mr. Raichandani has relied on judgment of the Apex Court in ***M/s. Radhasoami Satsang*** (supra) in which it is held that though principle of *res-judicata* does not strictly apply to income tax proceedings and what is decided in one year may not apply to the following year, but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be appropriate to allow the position to be changed in subsequent year. Ordinarily, ratio of the judgment in ***M/s. Radhasoami Satsang,*** would mean impermissibility to record different findings in respect of subsequent assessment year

than the one recorded in previous assessment year. However, in the present case, though subsequent years' findings are sought to be made applicable in respect of previous year, the fact still remains is that inconsistent findings are recorded by the Tribunal in orders relating to different assessment years based on same material. It would defeat the ends of justice if Tribunal is permitted to take one view upon perusal of material on record *qua* a particular year and record a diagonally opposite findings after perusing the same material in the subsequent year. In our view therefore, the Tribunal's order for Assessment Year 1992-93 needs to be brought in tune with its orders passed for subsequent years, which have attained finality.

35) Considering the overall conspectus of the case, we are of the view that the order passed by the ITAT is indefensible and liable to be set aside. The substantial question of law is accordingly answered in favour of the Assessee and against the Revenue. The order passed by the ITAT on 28 January 2003 is accordingly set aside and the order passed by the CIT(A) is restored. The Appeal is **allowed** in the above terms.

[SANDEEP V. MARNE, J.] **[CHIEF JUSTICE]**