

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1204 OF 2014

The Commissioner of Income
Tax-3, Mumbai .. Appellant.
Vs.
M/s. Axis Pvt. Equity Ltd. .. Respondent.

Mr. Ashok Kotangle with Mr.Arun Nagarjun with Ms.Padma
Divakar for the appellant.
Dr. K. Shivram, Senior Counsel with Ms. Rahul Hakani for the
respondent.

**CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.**

DATED : 30TH JANUARY, 2017

P.C. :

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 19th August, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2007-08.

2. This appeal urges the following question of law for our consideration :-

“(A) Whether on the facts and circumstances of the case and in law, the Tribunal was correct in allowing as a deduction the expenses claimed by the assessee in its Profit and Loss Account for the year ended 31st March, 2007 without appreciating that the business of the Assessee Company was not set up during the previous year relevant to Assessment Year 2007-2008 ?”

3. The Respondent - Assessee is an asset management company. During the assessment proceedings, the Assessing Officer noted that the respondent - assessee had shown the business loss of Rs.1.17 crores and Miscellaneous Income of Rs.24,720/- for the subject assessment year. The Assessing Officer disallowed the business loss (arising in view of expenditure) claimed by the respondent - assessee on the ground that business has not been set up during the year under consideration and no evidence in regard to the same was produced. So far as miscellaneous income of Rs.24,720/- is concerned, the Assessing Officer brought it to tax as income from other sources.

4. Being aggrieved the respondent - assessee carried matter in Appeal. By the order dated 13th December, 2011 the Commissioner of Income Tax (Appeal) [CIT (A)] upheld the order of Assessing Officer disallowing business loss of Rs.1.17 crores on the ground that the respondent - assessee had not furnished any evidence to prove that any activities of managing the investments or funds have been carried on during the year under consideration. So far as the grievance in respect of Miscellaneous Income of Rs.24,720/- was concerned, it was held that the same arises on account of interest on fixed deposit and is correctly assessed as income from other sources.

5. Being aggrieved the respondent filed further appeal to the Tribunal. The Tribunal by the impugned order recorded the fact that the expenses of Rs.1.17 crores was disallowed as business has not been set up in the year under consideration by the lower authorities. The impugned order also makes reference to the fact that the company was incorporated in the year 2006 and the Assistant Registrar of Companies has issued a certificate that the company had commenced business with effect from 1st October, 2006. Further the impugned order records the fact that from the balance sheet and profit and loss account filed which includes Director's report, it is clear that the company has taken steps for commencing business of venture capital fund. It has engaged legal and financial advisors. It had also incurred expenditure to decide the appropriate tax efficient structure for the funds and employed necessary personnel for purpose of running its business. The impugned order records the fact that human capital is key to the business of asset management. Further, the impugned order relied upon a decision of the Co-ordinate bench of the Tribunal is case of *HSBC Securities India Holdings Pvt. Ltd.* decided in ITA No.3181/M/1999 decided on 28th November, 2001 wherein it was held that the business would be held to be set up as and when assessee had taken business premises and has taken steps to recruit employees and

has incurred expenses for promoting its business activity. In fact the impugned order also records the fact that in subsequent assessment year 2009-10 similar expenditure as claimed in the subject Assessment Year have been allowed by the Assessing Officer as business expenses. In the aforesaid circumstances the Tribunal held that expenses incurred are to be allowed as business loss as same had been incurred after the business has been set up. So far as Miscellaneous Income of Rs.24,720/- is concerned, the impugned order records the fact that similar income claimed by the assessee has been categorised as income from other sources, by the Assessing Officer for subsequent assessment year 2009-10 and accepted by the assessee.

6. The grievance of the revenue before us is only with regard to the impugned order allowing the expenditure of Rs.1.17 crores as business loss. This conclusion of the Tribunal is premised on the fact that the business has been set up during the year under consideration. It is submitted by the Revenue that no evidence was produced by the assessee to show that any activities of management of funds have been taken by the respondent - assessee during the assessment year. Thus no expenditure resulting in business loss could be allowed as the business had not commenced. According to the Revenue, there is no distinction between setting up of business and commencement

of business. Therefore, no expenditure incurred before commencement of business can be allowed.

7. We note that a similar issue viz. distinction between setting up of business and commencement of business had come up for consideration before this Court in *Western India Vegetable Products Ltd. vs. Commissioner of Income Tax 1954 Vol. 26 ITR Page 151*. This Court had held that business is said to have been set up when it is established and ready to be commence. However, there may be an interval between a business which is set up and a business which is commenced. However, all expenses incurred during the interregnum between setting up of business and commencement of business would be permissible deductions. In this case the CIT (A) had disallowed the expenditure as business loss as on the ground only on the ground that it had not commenced business. However, the impugned order of the Tribunal on examination of facts found that the business of the respondent - assessee has been set up in the subject assessment year and consequently, the business loss arising on account of expenditure as claimed by the respondent - assessee was allowable. We also note that the impugned order of the Tribunal placed reliance upon the order of its Co-ordinate bench in *HSBC Securities India Holdings Pvt. Ltd.* (supra) wherein on similar facts it had held that when executives are employed and the

infrastructure is ready to commence business, it can be said that the business has been set up for carrying on business as share brokers.

8. Mr.Kotangale, learned counsel for the Revenue has not been able to show any distinction which would warrant taking a different view of meaning of business being set up, as understood by the Tribunal in *HSBC Securities India Holdings Pvt. Ltd.* (supra). Mr.Kotangale states that the revenue has accepted the decision of the Tribunal in *HSBC Securities India Holdings Pvt. Ltd.* (supra) with regard to business expenditure being allowed on setting up of business, even if the business is yet to commence. The determination of the issue of whether the business has been set up is essentially one of finding of fact. This finding of fact on the basis of the test laid down by this Court in *Western India Vegetable Products Ltd.* (supra) and the Tribunal in *HSBC Securities India Holdings Pvt. Ltd.* (supra) is not shown to be perverse.

9. In view of above, no substantial question of law arises for our consideration. Accordingly, Appeal is dismissed. No order as to costs.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)