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

INCOME TAX APPEAL NO. 1149 OF 2015

ALD Automotive Pvt. Ltd., .. Appellant.
v/s.
Deputy Commissioner of Income Tax-15(1)
& Another .. Respondents.

Mr. K. Gopal with Mr. Tanmay Phadke, for the Appellant.

CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE,JJ.
DATE : 5th MARCH, 2018.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 17th April, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 17th April, 2014 is in respect of Assessment Year 2005-06.

2 Revenue urges the following questions of law, for our consideration:

> *"(a) Whether the Tribunal was right in law in disallowing the returned loss of Rs.36,63,262/- by holding that the assessee's business has not been set up?*
> *(b) Whether the order of the Tribunal is perverse as the same is passed ignoring the relevant evidence available on record?"*

3 The Appellant-Assessee was incorporated on 11th February, 2005. Its object was to carry out business as operators of carriers, transport vehicle, agricultural vehicles, commercial vehicles and to provide services and facilities of letting on hire vehicles etc.

4 In its return of income for the Assessment Year 2005-06, the Appellant claimed business loss of Rs.31.16 lakhs and depreciation at Rs.5.46 lakhs. Thus, seeking a carry forward loss of Rs.36.62 lakhs. The expenses claimed were:

(i) on school fees of the children of the Director;

(ii) rent paid for the Director's residence; and

(iii) commission paid to the broker for rental premises.

The Appellant-Assessee also purchased two cars namely – Mercedes and Innova within one month of its incorporation. However, the Assessing Officer states that no evidence of commencing business had been led. Thus, Assessing Officer disallowed business loss declared by the Respondent-Assessee on the ground that no business had been set up in the previous year relevant to the subject Assessment Year.

5 In appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] by an order dated 17th April, 2014 dismissed the Assessee's appeal.

6 On further appeal, the Tribunal by the impugned order, on examination of the facts notes as under:-

> *"5.2:- Coming to the facts of the case, the company claims to have appointed MD as well as Chief Operations Manager, putting the infrastructure in place by acquiring office premises, staff furniture and fittings etc. No grant of any operational lease by the year end should not, therefore, be of any consequence. We agree, so that if the infrastructure has indeed been set up and the company is in position or is ready to grant operational leases, which is to comprise its principal business and that toward the commencement of which line of business efforts were, as stated, being made, it can be said to have set up its business. However, as also noted by both the authorities below,*

the assessee's case is wholly unsubstantiated. The only material on record is toward the appointment of MD, even though there is some doubt in its respect inasmuch as the resolution by the Board of Directors of the company confirming his appointment is dated 17.02.2007 (PB pg.12). Even so, when did the Chief Operation Manager join? When was the other staff, along with their names and reference to the different positions/ functions they are to discharge? When was the office premises purchased or taken on rent or hire? What is the furniture and fixture -without which the premises cannot be put to use, acquired and when? We say so as the company's financial statements (PB pgs. 16-24) do not reflect the same. Has the company procured the necessary hardware in terms of computer systems or has it only made some preliminary purchases thereof, i.e. in the process of setting up its infrastructure? Has the company procured the necessary software for operating its computer systems, even assuming the same to have been purchased in the numbers necessary to complete a transaction observing the operating guidelines? Have the operating licenses/ permits, as required from the regulatory authorities, been obtained? Whether, the firm arrangements for capital – both owned as well as borrowed (by way of lines of credit) for either operational leases or fleet management (which is its other principal business), both being highly capital incentive, been formalized? Has the company entered into a relationship with any vehicle supplier in-as-much as, as distinct from a financial lease, the risk and reward of the ownership in case of an operating lease tests with the lessor, so that the terms of the lease could not be agreed upon (with the customers) unless it has a complete understanding of the product, the risks associated with the ownership and management thereof, including by way of insurance, costs, applicable taxes. Why, even a financial lease or arrangement would require an arrangement/s or tie up with the vehicle supplier or manufacturer, enabling competitive offers to the customers through their preferred financial channels. Then, again, has the company undertaken study of the legal issues incident on its business, in the absence of which it is doubtful that the business could be commenced? So on and so forth. No answers emanate from either the material on record or the assesssee's explanations, with the expenses as incurred itself revealing the state of preparedness of the company toward commencing its business. In our clear view, the company is clearly in the setting up stage. Besides, clearly, it is only the expenditure, post *set-up, that could be claimed as a business expenditure, while admittedly the company has claimed the entire expenditure incurred by it since inception, including as it appears expenditure on its' incorporation itself, which are only, like wise, capital cots. Alternatively speaking, the implication of no incorporation expenses or the company being established on the very date of its incorporation, are both unsupported as well as bizarre propositions. No case for allowance of the assesssee's claim u/s. 37(1) or section 32(1), as the case may be, is accordingly made out."*

7 The grievance of the Appellant is that the business has been set up as it evident from the fact that the Appellant had purchased two vehicles and also taken office on hire. In support, he has relied upon the decision of the Apex Court in ***CIT v/s. Sarabhai Management Corporation 192 ITR 151.***

8 Our Court in ***Western India Vegetable Products Ltd., v/s. CIT 26 ITR 151*** has observed that the unit cannot be said to have been set up unless it is ready to discharge its functions for which it has been set up. It is only when the unit has been put into such a shape that it can start functioning be it trading or a manufacturing operations that it can be said that the unit has been set up. This is to be determined on the basis of the facts found. In this case, all the authorities under the Act have found on facts that the Appellant's business had not been set up inasmuch necessary evidence in support of its claim that the business has been set up and is ready to commence, had not been led by the Appellant. The test applied by the Tribunal viz: was the company in a position to commence its business by having the operational infrastructure in place. On facts, it was found that operational infrastructure was not in place to conclude that the business had been set up. This after the Tribunal noticing the difference between setting up of business and commencement of business.

9 The reliance upon the decision of the Apex Court in Sarabhai Management Corporation (supra) is not appropriate as the Assessee therein had purchased property and found a customer to whom the property was let. It 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. In the aforesaid facts, the Court held though acquisition of a property for being let out could be only a preparatory stage such as acquisition of buildings, plant and machinery in a manufacturing business, yet the other activities of finding a customer and carrying out renovation would establish that business has commenced. In the present facts, the purchase of two cars was preparatory to setting up of business. However, in the absence of necessary permission for operating license as required from the Regulatory Authorities, was not produced before the Authorities and the absence of various other requirement to conclude has been set up was found on facts by all the Authorities under the Act, to be lacking.

10 In these circumstances, finding of fact arrived at by the Authorities under the Act, cannot be said to be perverse. Therefore, the question framed does not give rise to any substantial question of law.

11 Accordingly, **Appeal dismissed.** No order as to costs.

(SANDEEP K. SHINDE,J.) **(M.S.SANKLECHA,J.)**