

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'C' : NEW DELHI)
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH.ANUBHAV SHARMA, JUDICIAL MEMBER
ITA No. 3368/Del/2018, A.Y. 2013-14

M/s. Honda Access India Pvt. Ltd. Floor-1, C-8, Site-IV, Second Cross Avenue Road, Kasana, Gr. Noida PAN : AACCH9695K	Vs.	DCIT, Circle-1, Noida
Appellant		Respondent

Appellant by	Sh. Manuj Sabharwal, Sh. Shalini, Adv. & Ms. Chandandeep kaur, CA
Respondent by	Sh. Bhopal Singh, Sr. DR

Date of hearing:	05.06.2023
Date of Pronouncement:	14 .06.2023

ORDER

Per Anubhav Sharma, JM :

The appeal has been preferred by the Assessee against the order dated 28/02/2018 of CIT(A)-1, Noida (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 171/E-file/2016-17/Noida arising out of an appeal before it against the order dated 28.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the DCIT, Circle-1, Noida (hereinafter referred as the Ld. AO).

2. The facts in brief are that the appellant was incorporated on 17.07.2012 in India as a subsidiary of Honda Access Corporation, Japan ('Holding Company')

or “HAC”). The appellant is engaged in the business of manufacturing , trading etc. of automobile accessories, auto parts and fittings of all kinds. The return of income was filed at loss of Rs. 1,18,79,282/-. The case was selected for scrutiny under CASS and Ld. AO observed that as company has made additions in fixed assets for purchase of vehicle, computer software, furniture and other office equipment but not made in any investment for purchase of plant and machinery and in the profit and loss account. The assessee has shown interest income. Accordingly, Ld. AO concluded that company has not begin its business operation and it is still incorporation process. Accordingly, made disallowances of group commission, business promotion vehicle running expenses and R & D expenses to the extent of Rs. 12,25,073/- was done and the loss was reduced to 10,654,210/-.

3. In appeal before Ld. CIT(A) while upholding the observations and findings of ld. AO that assessee company has not commenced business during the year under consideration and addition was enhanced with following relevant findings in para no. 9 to 17 of the CIT order reproduced as under :

“9. The Ld. AO having determined that the appellant did not commence its business during the year could not have allowed the carry forward of unabsorbed business losses. An assessee can incur business losses only in the course of an existing business and not before the commencement of business. Once it is the finding of the revenue that the assessee has not commenced business, for obvious reasons such an assessee cannot have any business losses. The impugned assessment order is therefore wrong to that extent presuming that the finding of the Ld. AO that the appellant did not commence its business during the previous year relevant for AY 2013-14 which of course is being contested by the appellant.

10. The appellant was given an opportunity to corroborate its claim that the appellant has commenced its business during the previous year relevant for AY 2013-14 and was asked to produce the extracts from the books of accounts of the business partners of the appellant from whom the purchases were made by the appellant or to whom the supplies were made by the appellant. Considering the material fact that the appellant was that wholly

owned subsidiary of its Japanese parent for whose business the appellant was formed in the 1st place the same would not have been very difficult.

11. The Ld. Counsel for the appellant after availing sufficient opportunity and time Submitted that the appellant was not in a position to produce any evidence in this regard except producing its own books of accounts and submitted that this office may summon such information from the parties concerned.

12. It is trite that he so sets up the premise has to prove it. An appellate authority can only verify the correctness or otherwise of the evidence led before that authority and not go on collecting the evidence on behalf of the appellant. Since the appellant was making a claim that the findings of the Ld. AO that the appellant has not commenced its business during the previous year relevant for AY 2013-14 was incorrect it is incumbent upon the appellant to prove that correctness of its claim against the revenue and the appellant has to do the same on its own and not through the instrumentalities of this office.

12. As the appellant could not lead any independent third party evidence to corroborate its claim that it has commenced its business during the previous year relevant for AY 2013- 14 and the books of accounts being relied upon were only self-same evidence, the claim of the appellant that its business has commenced as claimed is held to be incorrect.

13. As during the year the appellant has gross receipts of Rs. 17,04,184/- being the interest earned on deposits and the exchange rate fluctuations income, the same is to be taxed in terms of the law laid down by Hon'ble Apex Court in the case of "Tuticorin Alkali Chemicals & Fertilizers Pvt. Ltd. Vs. Commissioner of Income Tax, (1997) 141 CTR 387 SC subject to the provisions of Section 57(iii) of I.T. Act, 1961 and the losses claimed as business loss was to be disallowed not admissible to be carried forward. As the appellant has not done the same in the return of income and as the Ld. AO also failed to correctly apply the provision of law to the case of the appellant, the notice u/s 251(2) of I.T. Act, 1961 read with the provisions of Section 251 (1)(a) of I.T. Act, 1961 were issued to the appellant asking it to show cause vide a receipt of Rs. 17,04,184/- should not be treated as income from other sources and subjected to tax and the loss claimed as business loss should not be disallowed to be carried forward as business loss. The Ld. Counsel for the appellant accepted the said notices in the course of the hearing itself.

14. *The Ld. Counsel for the appellant contested the same on merits holding that the business of the appellant has duly commenced during the previous year relevant for AY 2013-14 but without prejudice as an alternate staked claim for allowance of expenses to the extent of Rs. 16,48,006/- as admissible expenses u/s 57(iii) of I.T. Act, 1961.*

16. *The said expenses were claimed being 100% of the banking charges and 20% of various expenses incurred by the appellant.*

17. *There is no denying that certain expenses would have been necessary for earning of income from other sources being the interest income on bank deposits and the exchange rate fluctuations. However, the same cannot be 20% or 15% of the expenses being incurred by the appellant to set up its business. The earning of interest of bank deposits or exchange rate fluctuation is not the business of the appellant but only peripheral to its main activity of setting up of its business. Therefore, the ends of justice would meet if the 25% of the income from other sources is considered to be the expenses relatable to the earning of the income from other sources and 25% of Rs. 17,04,184/- being Rs. 4,26,046/- is held to be the expenses admissible under the provisions of Section 57(iii) of I.T. Act, 1961 and the difference of Rs. 12,78,138/- is determined as income of the appellant for AY 2013-14. The Ld. AO is directed to issue the necessary demand notice and enforce the demand.”*

4. The assessee is in appeal raising following grounds :-

1. *“On the facts and in the circumstances of the case the order passed by the Ld. CIT(A) is perverse as he failed to consider the voluminous and relevant evidence like purchase orders and confirmations by the vendors etc.*

2. *On the facts and circumstances of the case Ld. CIT(A) erred in law in holding that the assessee had not commenced the business in the relevant previous year.*

3. *That on the facts and in circumstances of the case Ld. CIT(A) erred in enhancing the assessed income by making further addition of Rs. 12,78,138 as income from other sources u/s 57 of the Act and by disallowing the loss of Rs. 1,06,54,210/-, which was allowed to be carried forward by the Assessing Officer.*

4. *On the facts and circumstances of the case the Ld. CIT(A) erred in not deleting the following addition :-*

(a). *Addition on account of brokerage and commission of Rs. 3,21,942/-*

(b). *Addition on account of business promotion of Rs. 4,44,300/-*

(c). Addition on account of vehicle running expenses of Rs. 3,33,976/-

(d). Addition on account of Research and development

Expenses of

Rs. 1,24,855/-

Total

Rs. 12,25,073/-

5. On the facts and in the circumstances of the case the Ld. Gif (A) erred in giving incorrect finding of fact that the vendors from whom the assessee purchased goods were "business partner" of the assessee company.

6. On the facts and circumstances of the case Ld. CIT(A) has erred in not exercising power u/s 131 or u/s 133(6) of the Act on the ground that appellant should have produced the entries of purchases recorded in the books of A/c of the third parties, despite the fact that the purchase orders placed on the vendors and confirmations were duly submitted to him.

7. CIT(A) had erred in treating Foreign Exchange Gain as 'Gross Receipt' of Appellant Company even without giving any notice to the assessee.

8. On the facts and circumstances of the case Ld. CIT (A) erred in initiating penalty proceeding under section 27 l(l)(c) of the Act.

9. The appellant craves leave to amend, alter or add fresh grounds of appeal during the course of proceedings before your good self.

5. Heard and perused the record.

6. Ld. Counsel for the assessee submitted that that Ld. Tax Authorities have fallen in error in not appreciating that the assessee was under process of setting up of the business during the year under consideration. He relied the license agreement dated 19.07.2012 with HAC available at page no. 129 of the paper book and referring to Article 10.2 submitted that assessee was required to submit inspection report to HAC with regard to quality of accessories or part and for that purpose assessee was required to enter to exercise of negotiations with the suppliers and that was integral part of the business activity which had began during the year. It was also submitted that purchase order was placed with V-access and which was supplied to the assessee on 02.04.2013. It was

confirmed by V- access as work in progress. He also referred to transactions effected with other vendors like Galio Graphics. Ld. counsel submitted that evidence was produced before Ld. CIT(A) as part of the submissions dated 28.09.2017 and other submissions during the appellate proceedings having details about appointment of MD, sharing of e-mail with regard to design and drawings and placing of purchase order however, the same were all left out of consideration by the Ld. CIT(A). It was submitted that setting up of business has not been defined under the Act and that set up of a business connotes of situation where the assessee is in a state of readiness to undertake its business which was very much established in the case of assessee. Ld. Counsel placed reliance on the judgments of Hon'ble Delhi High Court in *Carefoul WC & C India (P.) Ltd.* 368 ITR 692, *CIT vs. Samsung India Electronics Ltd.* [2013] 356 ITR 354 (Delhi) and *Dhoomketu Builders and Developmen (P) Ltd.* 216 *Taxman* 27 for aforesaid contentions.

7. On the other hand, Ld. DR relied the findings of Ld. Tax Authorities below.

8. Appreciating the matter on record, it can be observed that primarily the Ld. AO was pleased to draw conclusion that assessee is in the state of incorporation only because assessee company has not made any investment in the purchase of plant and machinery. The Bench is of considered view that while dealing with the question as to if assessee has set up its business, the nature of business activity need to be examined by Ld. Tax authorities and without examining the same on the nature of expenditure alone the question cannot be sufficiently answered.

8.1 It appears that Ld. Tax Authorities below have fallen in error in construing the nature of business of the assessee company. In this context, the license agreement available at page no. 129 to 142 of the paper book shows

that the very purpose of establishing the subsidiary in the form of assessee was to procure and having manufactured and assembled within India and neighboring countries and selling world wide certain accessories developed by HAC for installation on such Honda products. Thus, the nature of business activity of the assessee did not require immediate installation of any plant and machinery.

9. At the same time, the evidence on record makes it apparent that assessee initiated the process of negotiations for the procurement of the parts from various vendors. The confirmation of business activity given by V Access India Pvt. Ltd. available at page no. 262 to 266 being part of the submissions made before Ld. CIT(A), establish that the assessee company had placed the purchase order on 21.03.2013 for supply of certain car covers and car floor mats which were appearing under the head WIP as part of closing stock in the books of accounts of the vendor for the year ending 31.03.2013 and which were supplied by invoice dated 02.04.2013.

10. The brokerage and commission expenses were paid to property consultants for taking apartment on lease for the director or recruitment of employees. The business promotion expenses were towards vendor selection and development. While the vehicle running expenses are in the nature of fuel and maintenance of the vehicles own by the appellant company and use for the business purpose. The research and development expenses were towards samples of products/ accessories for testing purpose before placing a purchase order and all this are intricate to the nature of business activity of the assessee.

11. Hon'ble Delhi High Court in the case of *CIT vs. Samsung India Electronics Ltd. [2013]356 ITR 354 (Delhi)* in para no. 7 has observed as follows :-

“7Relying on the decision of CIT v. ESPN Software India (P.) Ltd. [2008] 301 ITR 368 [2009] 184 Taxman 452 (Delhi) wherein it has been held that a business will "commence" with the first purchase of stock-in-trade and the date on which the first sale is made is immaterial. Similarly, for manufacturing, several activities in order to bring or produce finished products have to be undertaken, but business commences when the first of such activities is taken. ”

11.1 At the same time in the case of ***CIT vs. Saurashtra Cement & Chemical Industries Ltd.***[1973] 91 ITR 170, Hon’ble Gujarat High Court had taken into consideration the argument of Revenue, based on the decision of Hon’ble Supreme Court in **Commissioner of wealth Tax V. Ramaraju Surgical Cotton Mills Ltd.** [1967]63ITR478, that in the absence of plant and machinery being installed the business cannot be said to be set up had observed as follows :-

“8. 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”.

12. Thus, the bench is of considered opinion that Ld. Tax Authorities below fallen in error in concluding that assessee’s business was not ‘set up’ during previous year, to deny the claim of loss or to categorize certain expenses as pre-operative expenses. The grounds raised are sustained. **The appeal of assessee is allowed.** The impugned disallowance made by the Ld. AO in the assessment order and the enhancement made by Ld. CIT(A) are both set aside.

Order pronounced in the open court on 14th June, 2023.

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Date:- 14 .06.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI

Date of dictation	31.05.2023
Date on which the typed draft is placed before the dictating Member	31.05.2023
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	