

आयकर अपीलिय अधिकरण, 'बी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'B' BENCH, CHENNAI
श्री वी दुर्गा राव न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./I.T.A. Nos.3107, 3108, 3109 & 3110/Chny/2018
निर्धारण वर्ष/Assessment Years: 2003-04, 04-05, 05-06 & 2008-09

M/s. East Coast Consultants
and Infrastructure Ltd.,
"Bukharia Buildings", No. 4,
Moores Road, Chennai 600 006.
[PAN:AAACE9097J]

The Assistant Commissioner of
Income Tax,
Company Circle II(1),
Chennai 600 034.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri G. Baskar, Advocate &
Shri I. Dinesh, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri R. Boopathi, JCIT
सुनवाई की तारीख/ Date of hearing : 23.12.2021
घोषणा की तारीख /Date of Pronouncement : 05.01.2022

आदेश / O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

These four appeals filed by the assessee are directed against different orders of the Id. Commissioner of Income Tax (Appeals) 6, Chennai dated 30.08.2018 relevant to the assessment years 2003-04 and 2005-06, order dated 29.08.2018 for the assessment year 2004-05 and order dated 31.08.2018.

I.T.A. No. 3107/Chny/2018 [AY: 2003-04]

2. The grounds raised by the assessee are extracted as under:

- “1.1 The Commissioner of Income Tax (Appeals) erred in upholding the reopening of assessment when the same was clearly based on a change of opinion and the issue in question had already been examined in detail in the original assessment itself.*
- 1.2 The Commissioner of Income Tax (Appeals) erred in not appreciating that the fact that the Assessee had entered into a BOT agreement with the Government was well within the knowledge of the AO at the time of passing of the Original Assessment Order.*
- 2.1 The Commissioner of Income Tax (Appeals) erred in not considering the claim of depreciation on right to collect toll as the same is considered an intangible asset, merely because he claim was not made in the return of income.*
- 2.2 The Commissioner of Income Tax (Appeals) failed to appreciate that it is a settled principle that a fresh claim can be entertained at the time of re-assessment as per the provisions of the Act and decisions of various Courts.*
- 3. The Commissioner of Income Tax (Appeals) erred in holding that the Assessee is not eligible to claim depreciation on the right to collect toll is contrary to the decisions of Tribunals and High Courts in this regard.*
- 4. The Commissioner of Income Tax (Appeals) has erred in not considering the case laws filed by the Assessee in its support and arbitrarily rejecting them as not applicable to the facts of the case.”*
3. The assessee has assailed two solitary grounds, out of which, the first ground relates to reopening of assessment and second ground relates to allowability of depreciation. So far as reopening of assessment is concerned, the Assessing Officer has completed the assessment under section 143(3) of the Income Tax Act, 1961 [“Act” in short] by order dated 20.02.2008, wherein, the Assessing Officer has noted that the assessee has claimed depreciation on the Bridge @25%, applicable to Plant and Machinery. The Assessing Officer

further noted that the bridge is not a plant and the definition of plant has been modified in the Income Tax Act, wherein, it has been specifically stated that building will not be treated as plant. Accordingly, the Assessing Officer restricted the claim of depreciation on the bridge to 10% and the remaining 15% claim has been disallowed and brought to tax.

3.1 Subsequently, the Assessing Officer has issued notice under section 148 of the Act dated 18.03.2010, which is beyond four years, on the ground that the assessee has not fully and truly furnished all the facts and before completing the assessment under section 143(3) of the Act dated 20.02.2008. It came to the notice of the Assessing Officer from the return filed by the holding company of the assessee [East Coast Construction and Industries Ltd.] for the assessment year 2006-07, wherein, the said company had vide notes to accounts filed along with the return of income stated that on account of floods during November, 2005, the approach road, pathway and the footpath to the bridge were damaged and that the Karur Municipality cancelled the BOT agreement with the assessee vide their G.O. NS No. 165/166 dated 19.12.2005 and that after carrying out temporary repairs, the bridge has been declared as toll free since January, 2006. On the

basis of the above, the Assessing Officer came to a conclusion that the assessee is not the owner of the bridge and therefore, not eligible for depreciation. The above information was not furnished by the assessee during the course of assessment proceedings and accordingly, the Assessing Officer reopened the assessment by recording reasons.

4. The assessee has challenged the reopening of assessment before the Id. CIT(A) on the ground that there is no tangible material came to the notice of the Assessing Officer and the material is already available in the file of the Assessing Officer and therefore, the reopening of assessment is change of opinion and thus, the reopening is invalid. After considering the explanation of the assessee as well as reasons for reopening of assessment, the Id. CIT(A) has observed that the assessee did not file all the facts in the return filed pertaining to its status as a contractor of the Tamil Nadu Government and thus failed to disclose fully and truly the relevant facts material for the assessment. Thus, the Id. CIT(A) has held that it cannot be said that the assessment was reopened on the basis of change of opinion and confirmed the reassessment order.

5. On being aggrieved, the assessee is in appeal before the Tribunal. The Id. Counsel for the assessee has reiterated the submissions as made before the Id. CIT(A).

6. On the other hand, the Id. DR strongly supported the orders of authorities below.

7. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the assessee has claimed depreciation at 25% by treating the bridge as Plant and Machinery. The Assessing Officer treated the bridge as only a building and allowed depreciation at 10%. Subsequently, the return filed by the holding company of the assessee i.e., East Coast Construction and Industries Ltd., wherein, the said company had vide notes to accounts filed along with the return of income stated that on account of floods during November, 2005, the approach road, pathway and the footpath to the bridge were damaged and that the Karur Municipality cancelled the BOT agreement with the assessee vide their G.O. NS No. 165/166 dated 19.12.2005 and that after carrying out temporary repairs, the bridge has been declared as toll free from January, 2006. On the basis of the above information, it is

clear that the assessee is only a contractor and is not owner of the bridge and therefore, the assessee is not entitled to claim depreciation. The Assessing Officer came to the above conclusion on the ground that these facts were not disclosed at the time of original assessment and the above information was gathered from the note filed by the assessee's holding company i.e., East Coast Construction and Industries Ltd. and therefore, there is an escapement of income to the extent of depreciation allowed by the Assessing Officer at 10% on the basis of claim made by the assessee as if the assessee is the owner of the bridge for claiming the depreciation. The Assessing Officer has reopened the assessment under section 147 of the Act by issuing notice under section 148 of the Act on the ground that there is failure on the part of the assessee to disclose fully and truly all the material facts to complete the assessment. We have gone through the reasons recorded by the Assessing Officer and also considered the entire facts of the case. We find that there is a failure on the part of the assessee to disclose all the information before the Assessing Officer and therefore, the Assessing Officer has reopened the assessment by issuing notice under section 148 of the Act dated 18.03.2010, which is beyond four years, in our opinion, the reopening of assessment is valid

and it is in accordance with law. Thus, the ground of appeal raised by the assessee is dismissed.

8. So far as 2nd ground of depreciation claimed by the assessee is concerned, the Id. CIT(A) has held that the assessee is not the owner of the property and therefore, not eligible for depreciation as per the provisions of section 32(1)(ii) of the Act. However, by following the CBDT Circular No. 09/2014 dated 23.04.2014, the Id. CIT(A) has held that the expenditure incurred for construction and development of the bridge is to be treated as having been incurred for the purposes of the business of the assessee and directed the Assessing Officer to be allowed to be amortized during the tenure of the agreement.

9. Before us, the Id. Counsel for the assessee has reiterated the submissions as made before the Id. CIT(A).

10. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. First of all, the assessee could not controvert the fact that the assessee is only a contractor and not owner of the bridge and thereby, the assessee is not entitled to claim depreciation. Secondly, the claim of depreciation on the expenditure incurred on development and construction of

infrastructural facilities including bridges on BOT basis with right to collect toll has been clarified by the CBDT that the assessee do not hold any right in a BOT project except recovery of toll free to recoup the expenditure incurred and therefore, the assessee cannot be treated as the “owners” of the property and cannot be allowed depreciation under section 32(1)(ii) of the Act. By considering the above notification of the CBDT, considering all the facts and provisions of the Act, we find that the Id. CIT(A) has rightly directed the Assessing Officer to allow amortization of the expenditure incurred during the tenure of the agreement and thus, no interference is called for in the order passed by the Id. CIT(A). Thus, the ground raised by the assessee stands dismissed.

I.T.A. No. 3108/Chny/2018 [AY: 2004-05]

11. The first ground raised in the appeal of the assessee is relating to reopening of assessment. In this case, the return filed by the assessee was processed under section 143(1) of the Act on 16.12.2005. Subsequently, the assessment was reopened on the ground that the assessee is not owner of the bridge and this fact was came to the notice of the Assessing Officer from the records of M/s. East Coast Construction and Industries Ltd., (which is the holding company of the

assessee) and therefore, the assessee is not entitled for any depreciation at all. Accordingly, after recording reasons, the assessment was reopened and completed the assessment under section 143(3) r.w.s. 147 of the Act by disallowing the entire claim of depreciation on bridge. On appeal, the Id. CIT(A) confirmed the reopening of assessment.

12. On being aggrieved, the assessee is in appeal before the Tribunal. The Id. Counsel for the assessee has reiterated the submissions as made before the Id. CIT(A).

13. On the other hand, the Id. DR strongly supported the orders of authorities below.

14. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. In this case, the assessment was completed under section 143(1) of the Act based on the information available on record and the Assessing Officer had no occasion to form an opinion for reopening of assessment. Subsequently, from the return filed by the holding company of the assessee i.e., East Coast Construction and Industries Ltd., the Assessing Officer came to a conclusion that the assessee is not the

owner of the bridge and not eligible for even 10% of depreciation. Accordingly, the assessment was reopened by issuing notice under section 148 of the Act on 17.03.2011. In this case, the original assessment was completed under section 143(1) of the Act. Subsequently, the assessment was reopened under section 147 of the Act by issuing notice under section 148 of the Act on the ground that there is a failure on the part of the assessee to disclose fully and truly all the materials to complete the assessment. Subsequently, the assessment was completed under section 143(3) r.w.s. 147 of the Act. In this case, the assessment was originally completed under section 143(1) of the Act, though, subsequently, reopened beyond four years, the change of opinion does not arise for the reason that under section 143(1) of the Act, it is a simple process of the return of income and therefore, there is no application of mind by the Assessing Officer. Apart from the above, the assessee failed to disclose all the material facts before the Assessing Officer to complete the assessment. Therefore, the Assessing Officer has correctly reopened the assessment under section 147 of the Act and thus, the ground raised by the assessee is dismissed.

15. So far as merits of the case are concerned, we have decided the

issue of depreciation claim hereinabove in the assessment year 2003-04 in ground No. 2 raised by the assessee and the above order is squarely applies to the assessment year 2004-05 also and accordingly, the claim of depreciation stands dismissed.

I.T.A. No. 3109/Chny/2018 [AY: 2005-06]

16. The first ground raised in the appeal of the assessee is relating to reopening of assessment. In this case, the return filed by the assessee was processed under section 143(1) of the Act on 29.06.2006 accepting the income returned by the assessee. Subsequently, the assessment was reopened by issuing notice under section 148 of the Act dated 02.07.2008 on the ground that there is escapement of income, which is within four years of processing the return filed by the assessee. The facts and circumstances of the case are similar to that of the assessment year 2003-04 narrated hereinabove and in view of our decision for the earlier assessment years, we hold that the assessment order passed under section 143(3) r.w.s. 147 of the Act dated 21.12.2009 is valid.

17. So far as merits of the case are concerned, we have decided the issue of depreciation claim hereinabove in the assessment year 2003-04 in ground No. 2 raised by the assessee and the above order is

squarely applies to the assessment year 2005-06 also and accordingly, the claim of depreciation stands dismissed.

18. The next ground raised in the grounds of appeal relates to confirmation of claim of deduction under section 80IA of the Act. At the time of hearing, the Id. Counsel for the assessee has submitted that the ground raised by the assessee is not pressed and accordingly, the ground raised by the assessee stands dismissed as not pressed.

I.T.A. No. 3110/Chny/2018 [AY: 2008-09]

19. In this appeal, the first ground raised by the assessee relates to reopening of assessment. In this case, the assessee filed its return of income on 29.09.2008 for the assessment year 2008-09 declaring total loss of ₹.53,47,001/-. The return of income was processed under section 143(1) of the Act on 02.11.2009. Subsequently, the assessment was reopened on the ground that the assessee is not owner of the bridge and this fact was came to the notice of the Assessing Officer from the records of M/s. East Coast Construction and Industries Ltd., (which is the holding company of the assessee) and therefore, the assessee is not entitled for any depreciation at all. Accordingly, after recording reasons, the assessment was reopened

and completed the assessment under section 143(3) r.w.s. 147 of the Act dated 31.10.2011 by disallowing the entire claim of depreciation on bridge. The return filed by the assessee was processed under section 143(1) of the Act and the Assessing Officer had no occasion to form an opinion for reopening of assessment and therefore, the change of opinion does not arise. In this case also, we find that there is failure on the part of the assessee to disclose fully and truly all material facts for completing the assessment and therefore, the Assessing Officer has rightly reopened the assessment and the same was confirmed by the Id. CIT(A). Thus, we find no infirmity in the order passed by the authorities below.

20. So far as merits of the case are concerned, we have decided the issue of depreciation claim hereinabove in the assessment year 2003-04 in ground No. 2 raised by the assessee and the above order is squarely applies to the assessment year 2008-09. Accordingly, the claim of depreciation stands dismissed.

21. The next ground raised by the assessee relates to confirmation of disallowances of other expenses of ₹.26,42,583/- and the Assessing Officer has disallowed the same on the ground that the assessee has

not carried out any business. In the financial year 2005-06 itself, the Tamil Nadu Government vide its G.O.MS No. 165/166 dated 19.12.2005 cancelled the BOT agreement and therefore, the assessee has not carried out any business. Subsequent to the cancellation of agreement by the Tamil Nadu Government, the Assessing Officer has held that no expenditure can be allowed and the same was confirmed by the Id. CIT(A).

22. The Id. Counsel for the assessee has submitted before us that the assessee has not stopped the business and it was only temporary lull in the business and therefore, it was argued that the expenditure incurred by the assessee was for the purpose of the business and the same may be allowed.

23. On the other hand, the Id. DR strongly supported the orders of authorities below.

24. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. It is an admitted fact that the Tamil Nadu Government vide its G.O.MS No. 165/166 dated 19.12.2005 cancelled the BOT agreement between the assessee and the Tamil Nadu Government. The assessment year

under consideration before us is 2008-09. There is no material placed before us as to what business the assessee carried out during the year under consideration. The assessee has failed to furnish any details either before the Assessing Officer or before the Id. CIT(A) or even before the Tribunal. Therefore, we are of the opinion that the argument of the Id. Counsel that there is only a temporary lull in the business has no merit. When the BOT contract itself is cancelled and there exists no business, there is no question of allowing any expenses. Under the above facts and circumstances, the Id. CIT(A) has rightly dismissed the ground raised by the assessee. We find no infirmity in the order passed by the Id. CIT(A) and thus, the ground raised by the assessee stands dismissed.

25. In the result, all the appeals filed by the assessee are dismissed.

Order pronounced on 05th January, 2022 at Chennai.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Chennai, Dated, 05.01.2022

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/ Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.