



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER**

ITA No.105/CTK/2020

Assessment Year : 2012-13

Asst. Commissioner of Income Tax, Circle-2(1), Cuttack	Vs.	M/s. Gopalpur Ports Ltd., OSL Tower, Link Road, Cuttack-12
PAN/GIR No.AACCG 6721 F		
(Appellant)	..	(Respondent)

C.O. No.01/CTK/2021

(in ITA No.105/CTK/2020)

Assessment Year : 2012-13

M/s. Gopalpur Ports Ltd., OSL Tower, Link Road, Cuttack-12	Vs.	Asst. Commissioner of Income Tax, Circle-2(1), Cuttack
PAN/GIR No.AACCG 6721 F		
(Appellant)	..	(Respondent)

Assessee by : Shri A.K.Sabat, AR

Revenue by : Shri Sovesh Chandra Mohanty, Sr (DR)

Date of Hearing : 28 /2/ 2022

Date of Pronouncement : 28/2/2022

ORDER

Per C.M.Gar, JM

This is an appeal filed by the revenue against the order of the CIT(A), Cuttack dated 5.11.2019 for the assessment year 2012-13 and the assessee has filed cross objection supporting the order of the Id CIT(A).

2. The revenue has raised the following grounds in its appeal:

"1. On the facts and in the circumstances of the case, the Id CIT(A) was not justified in deleting the disallowance made on account of claim of depreciation ignoring the section 32 of the I.T.Act where it is clearly stipulated that asset must be used for the purpose of business or profession during the relevant previous year.

2. On the facts and in the circumstances of the case, the Id CIT(A) failed to appreciate that the word "used" denotes actually used and not merely "ready for use". The benefit of "kept ready" is not available to the assessee. The decision of Bombay High Court in the case of Dinesh Kumar Gulapchand Agarwal vs CIT, 141 Taxmann 62(Bom), since affirmed by Hon'ble Supreme Court, supports this view."

3. Facts, as emanated from the CIT(A)'s order, are that the assessee company was incorporated on 24.7.2006 and entered into an agreement with the Government of Odisha on 14.9.2006 for the rehabilitation, expansion, development and operation of Gopalpur Port on a build, own, operate, share and transfer basis for a period of 30 years. Although the port was made operational on 16.1.2007 but due to major expansion work carried out during the financial year 2010-2011 to 2012-13, no cargo handling activity was carried out during the year under consideration. However, the expansion work was completed and the port was operational from May, 2013. In the return of income, the assessee claimed depreciation of Rs.1,25,06,766/-. During the course of assessment proceedings, the AO observed that the assets of the assessee had not been put to use in assessment year 2012-13, therefore, no depreciation was to be allowed and, accordingly, disallowed the same. On first appeal, the Id CIT(A), deleted the disallowance, by observing as under:

"I have perused the facts of the case and also examined the detailed submissions tendered by the assessee. It is seen from the audited accounts for AY.- 2012-13 that the assessee had incurred various expenses like rent, repair and maintenance, insurance, security and other basic administrative expenses in order to keep the fixed assets of the assessee in running order. These fixed assets included vessels/ships, mooring launch, dredging equipments, water barge, electrical lines, cranes, residential quarters for staff, stockyard, railway sidings and Godowns. to name just a few. It should be kept in mind that the assessee had been functioning as a 'fair weather port' since 2007 and had only been closed in AY's-2011-12 and 2012-13 for construction work to convert it into an 'All weather port'. Hence, the assessee was a going concern and it was necessary to keep the fixed assets in a state where they could be readily used once the port resumed normal operations.

Now, the prevailing judicial opinion also supports the assessee's contention that it is not necessary that the plant and machinery owned by the assessee should be actually put to use in the relevant accounting year to justify the claim of depreciation and that even if the plant and machinery is kept ready for use in the assessee's business, the assessee would be entitled for depreciation. The only condition is that the business should not have closed down once and for all and that there is evidence that not only would the business revive soon but also that the assessee is incurring expenditure and making efforts to keep the business in a running condition. This view has been endorsed by the Delhi High Court in CIT vs Integrated Technologies Ltd in ITA No. 530/2012 dt. 16/12/2011, Capital Bus Service Ltd v/s CIT (1980) 123 ITR 904 (Delhi) and in CIT v/s Refrigerator and Allied Industries Ltd (2001) 247 ITR 12 (Delhi).

- Hence, in view of the preceding observations, the addition made by the AO of Rs. 1,25,06,766/- on account of depreciation u/s. 32 is hereby deleted and the assessee's appeal is upheld."

4. At the time of hearing, Id S.R. DR supported the assessment order and submitted that since the assets were not used during the year, no depreciation is allowable. In support of this contention, reliance was placed on the decision of Hon'ble Bombay High Court in the case of Dinesh Kumar Gulapchand Agarwal vs CIT, 141 Taxmann 62(Bom).

5. On the other hand, Id A.R. of the assessee supported the impugned order and further submitted that initially, the port was operational and works were undertaken in the financial year 2011-12 but due to major expansion work undertaken by the assessee but it cannot be said that as cargo was not operational, the depreciation claimed by the assessee not allowable. He submitted that the assets were installed but the business of the assessee was not shut down.

6. On careful consideration of the rival submissions, we observe that there is no dispute to the fact that the assets had not been installed in the port during the year under consideration. Once the assets had been installed, the assessee must have been incurred various expenditures in order to keep the fixed assets of the assessee in running order. The assessee has reflected the assets in its profit and loss account, therefore, the depreciation on the assets should have been claimed. To claim depreciation, it does not contemplate that assets should be used for the whole of the assessment year. Once the plant and machinery is kept for use in the assessee's business, the assessee would be entitled for depreciation. Ld D.R. could not controvert the installation of the assets in the port except submitting that the assets had not been put to use. In the impugned order, the Id CIT(A) has referred to various decisions that since the assessee is incurring expenditure to keep the assets on running condition, the assessee would be entitled for depreciation. The off shoot of the above discussion is

that the assets have been duly installed and were in a working condition before the end of the previous year. In view of above, we do not find any flaw in the order of the Id CIT(A) to interfere. Accordingly, we confirm the order of the Id CIT(A) and reject the grounds of the revenue. Ld A.R. of the assessee sought to withdraw the cross objection filed by the assessee, which is acceded to.

7. In the result, appeal of the revenue and cross objection of the assessee are dismissed.

Order pronounced on 28/2/2022.

Sd/-
(Arun Khodpia)
ACCOUNTANT MEMBER

sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 28 /02/2022
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant :Revenue: Asst. Commissioner of Income Tax, Circle-2(1), Cuttack
2. The Respondent/Assessee: . V
3. The CIT(A)-, Cuttack
4. Pr.CIT-, Cuttack
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack