

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2017

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE M.SUNDAR

Tax Case (Appeal) No.261 of 2017

M/s.Chettinad Builders P Ltd.,
5th Floor, Rani Seethai Hall,
603, Anna Salai,
Chennai - 600 006. ... Appellant/Respondent

Vs.

The Deputy Commissioner of Income Tax,
Corporate Circle - 1(2)
Chennai - 600 034. ... Respondent/Appellant

PRAYER : Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "A" Bench, Chennai, dated 08.09.2016 passed in I.T.A.No.829/Mds/2016 against the order of the Commissioner of Income Tax(appeals)1 dated 29.12.2015 in I.A. No 32/14-15-A-1 and against the order of the Additional Commissioner of Income Tax Company Range I, dated 12.03.2014 in AACCC4133B, for the assessment years 2011-2012.

For Appellant : Mr.S.Sridhar

For Respondent : Mr.T.Ravi Kumar
Standing Counsel

JUDGMENT

(Delivered by the Hon'ble Chief Justice)

This appeal is directed against the judgment and order dated 08.09.2016 passed by the Income Tax Appellate Tribunal 'A' Bench, Chennai, allowing the appeal of the Revenue being ITA No.829/Mds/2016 relating to the assessment year 2011-2012.

2. The short substantial question of law involved in this appeal is:

"Whether additional depreciation of 20% on plant and machinery used for production of ready mix concrete under Section 32(1)(iia) of the Income Tax Act, 1961 could have been disallowed when the assessee was manufacturing ready mix concrete for the purpose of sale apart from use in construction of buildings and was being levied Central Excise duty on such manufacture?"

3. The appellant-assessee is a company, inter alia, engaged in civil and industrial constructions, including construction of IT Parks and Hotels. The appellant-assessee also carries on business of manufacture and sale of ready mix concrete.

4. On or about 30.09.2011, the appellant-assessee filed its Income Tax Return for the Assessment Year 2010-2011 returning total income of Rs.12,51,60,370/-. Subsequently, however on 23.12.2011, a revised return of income was filed showing total income of Rs.12,50,59,350/-.

5. A notice was issued under Section 143(2) of the Income Tax Act, 1961, pursuant to which, the authorised representative of the appellant-assessee appeared before the Assessing Officer.

6. The Assessing Officer passed an order of assessment on 12.03.2014, inter alia, rejecting the claim of the appellant-assessee to additional depreciation under Section 32(1)(iia) of the Income Tax Act, 1961, in respect of machinery used for production of ready mix concrete.

7. Being aggrieved, the appellant-assessee filed an appeal before the Commissioner of Income Tax (Appeals) - 1, being ITA No.32/14-15/A-1. The said appeal was allowed by an order dated 29.12.2015.

8. The relevant part of the order of the Commissioner of Income Tax (Appeals) - 1, is set out herein below for convenience:

"Issue No.2 : disallowance of additional depreciation on plant and machinery used for the manufacture of ready mix concrete (RMC) - Rs.62,63,733/- (Ground No.4)

9. The second issue pertains to disallowance of additional depreciation. The appellant claimed additional depreciation for a sum of Rs.62,63,733/- with respect to additions made for Rs.3,41,98,133/- being plant and

machinery - RMC. The AO denied the claim by stating that the appellant is in the business of civil construction and not manufacturing. The appellant has replied to the AO that it is engaged in manufacturing of ready mix concrete and stated that once the raw materials mixed cannot be reconverted into their original shape and character and the resultant product known as RMC is with totally varied character, the process involved a manufacturing activity and hence the appellant has claimed additional depreciation for RMC. The AO denied the claim stating that the production of RMC cannot be stated to be that of manufacturing and relied on the decision of Hon'ble Supreme Court in the case of CIT v. N.C.Budharaja & Co (204 ITR 412) (SC). He has also relied on the following decisions -

- (i) Builders Association of India v. UoI and others (209 ITR 877) (SC)
- (ii) Ansal Housing & Constructions Ltd. (320 ITR 420) (Delhi HC)
- (iii) Jayprakash Associates P Ltd. (155 Taxman 392) (Allahabad HC)
- (iv) Mewara Constructions (119 Taxman 225) (M.P. HC)

10. Assailing the action of AO, the appellant has reiterated the arguments made at the assessment stage. Primarily the appellant relied upon its own case for the AY 2009-10, wherein the issue was decided in favour of the appellant by the then CIT (A) (Central-II) vide order in ITA No.373/13-14 dated 25.11.2013.

11. I have carefully considered the facts in issue, the view taken by the AO, the arguments advanced by the appellant and material on record. Similar issue was considered by my predecessor in the case of the appellant for the AY 2009-10 in ITA No.373/13-14 dated 25.11.2013. Since the facts obtaining in the case of the appellant in the appeal under consideration are same. I do not find any reasons to take different view in the matter as taken in AY 2009-10. Respectfully following the same, the AO is directed to modify the order by deleting the addition of Rs.62,63,733/-. This ground of appeal is allowed."

9. Being aggrieved, the Revenue filed an appeal, being ITA No.829/Mds/2016, before the Income Tax Appellate Tribunal 'A' Bench, Chennai, which has given rise to the order dated 8.9.2016 under appeal before us, whereby the appeal of the Revenue has been allowed.

10. The learned Tribunal held as under:

"4.5 We heard the rival submissions, perused the material on record and judicial decisions cited. The assessee is in the business of Civil construction works and has claimed additional depreciation on ready mix concrete as the activity of assessee company cannot be manufacture or production to allow additional depreciation. We perused the order of ld. Assessing Officer and activity of the assessee company engaged in the Business of manufacturing of ready mix concrete and once the raw material is mixed which cannot be reconverted in shape. The Hon'ble Apex Court in the case of CIT v. N.C.Budharaja & Company 204 ITR 412 (SC) has held that ready made mixed concrete cannot be in the nature of manufacture. We also find similar issue dealt in the case of CIT v. Agra Construction Corpn. (2005) 146 Taxmann 31 (All) and M/s.Cherian Varkey Construction Co. (P) Ltd v. ACI in ITA No.25/Coch/2014, dated 20.03.2015 at para 20 & 21 of order as under:-

"20. I have heard the rival submissions and perused the record. It is common knowledge that an uneducated mason does the work of preparation of readymix concrete for construction of houses and it is never treated as manufacturing activity either in the common parlance or in the commercial parlance. The readymix concrete can be produced in huge volume with the help of machines with less man power but merely because there is increase in volume, it cannot automatically be treated as manufacturing activity. At any rate, the end product is only an intermediate product which is used for construction of buildings, roads, dams etc. and when the end product is not considered as manufacturing activity, then it is difficult to hold that the intermediate product can be classified as manufacture or production of article or thing.

21. As rightly observed by the Hon'ble Supreme Court in the case of N.C.Budharaja & Co. (cited supra) a statute cannot always be construed with dictionary in one hand and the statute in the other hand. (pg 204 ITR 434). Regard must also be had to the scheme, context and to the legislative history of the provision. Having regard to the ratio laid down by the Hon'ble Apex Court, bearing in mind the fact that the end product should amount to manufacture or production of an article or thing, the ready mix concrete manufactured by the assessee, which is also engaged in the construction activity, cannot be said to be a manufacturing activity."

11. Being aggrieved by the disallowance of its claim to additional depreciation in respect of the machinery used for production of ready mix concrete, the appellant-assessee has filed this appeal before us.

12. Section 32(1)(iia) of the Income Tax Act, 1961 provides as follows:-

"Depreciation

32. (1) In respect of depreciation of -

(i) buildings, machinery, plant, or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998,

owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed.-

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed.

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed.

Provided

.....

(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of

March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing (or in the business of generation, transmission or distribution) of power, a further sum equal to twenty per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii):

Provided that where an assessee, sets up an undertaking or enterprise for manufacture or production of any article or thing, on or after the 1st day of April, 2015 in any backward area notified by the Central Government in this behalf, in the State of Andhra Pradesh or in the State of Bihar or in the State of Telangana or in the State of West Bengal, and acquires and installs any new machinery or plant (other than ships and aircraft) for the purpose of the said undertaking or enterprise during the period beginning on the 1st day of April, 2015 and ending before the 1st day of April, 2020 in the said backward area, then, the provisions of clause (iia) shall have effect, as if for the words 'twenty per cent', the words 'thirty-five per cent' had been substituted.

13. Proviso (D) to second proviso to Section 32 (iia) reads thus:

"Provided further that no deduction shall be allowed in respect of -

(A)

(B)

(C)

(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year."

14. It is nobody's case that proviso (D) is attracted. The cost of plant/machinery in this case was neither claimed nor allowed as deduction for computing income chargeable under the head "profits and gains of business or profession".

15. Learned standing counsel appearing on behalf of the Revenue strenuously contended that production of ready mix concrete did not constitute manufacture. He argued that the assessee was in construction business. It is, however, not in

dispute that the Assessing Officer himself observed and held that the nature of business of the assessee was civil construction, mainly industrial construction, construction of IT Parks and Hotels and manufacture of ready mix concrete for sale to various construction sites.

16. In the assessment order, the Assessing Officer has quoted a note on additional depreciation in respect of machineries used for production of ready mix concrete, which stated that the assessee was engaged in manufacture of ready mix concrete for which the assessee procured necessary raw materials such as sand, crushed stone, cement fly-ash and gypsum. These were poured into the batching plant in the desired proportion and properly mixed by using water. The product produced was altogether a different product from the materials out of which it was produced. The product produced is known by name ready mix concrete and was sold as such in the market.

17. The Assessing Officer, rejected the claim on reference to the decision of the Supreme Court in Commissioner of Income Tax v. N.C.Budharaja & Co. and another, reported in [1993] 204 ITR 412 (SC) and also the decision of the Supreme Court in the case of Builders Association of India v. Union of India and others, reported in [1994] 209 ITR 877 (SC), the judgment of the Delhi High Court in Ansal Housing & Constructions Limited, reported in [2010] 320 ITR 420 (Delhi), the judgment of the Allahabad High Court in Commissioner of Income Tax v. Jai Prakash Associates (P) Limited, reported in [2006] 155 Taxmann 392 (Allahabad) and the judgment of the Madhya Pradesh High Court in Commissioner of Income Tax v. Mewara Construction, reported in [2002] 253 ITR 58 (MP).

18. The judgment of the Supreme Court in N.C.Budharaja & Co. (supra) is clearly distinguishable, as pre-fabricated piles were bored solely for the purpose of construction of a dam, and not sold in the market.

19. In Builders Association of India (supra), the Supreme Court opined that sub-clause (iii) of clause (b) of sub-section (2) of Section 32A of the Income Tax Act, 1961 does not comprehend within its ambit construction of a dam, a bridge, a building, a road, a canal and other similar constructions.

20. In Jai Prakash Associates (P) Limited (supra), the Court upheld the finding of the Commissioner (Appeals) rejecting a claim of deduction under Section 32A of the Income Tax Act, 1961 relying on N.C.Budharaja and Co. (supra). In the aforesaid case too, it appears that there was no manufacture for the purpose of sale.

21. In Mewara Construction (supra), the assessee was engaged in the construction of roads. It was contended that manufacturing activities involved in the construction of roads attracted the provisions of Section 32A of the Income Tax Act, 1961. The Court, however, referred to N.C.Budharaja and Co. (supra) and negatived the contention observing that construction of road did not involve manufacture of any articles. In this case, as observed earlier, the assessee manufactured and sold concrete separately.

22. The word "manufacture" has been defined in Section 2 (29BA) of the Income Tax Act, 1961 as under:

"(29BA) "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing.-

(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or

(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."

23. There can be no doubt that preparation of ready mix concrete results in transformation of stone chips, sand, cement, flyash and other articles into a new and distinct object having a different name, character and use. Once the ready mix concrete is prepared, the ingredients used lose their original character and can never be restored to their original character. It is not in dispute that the appellant-assessee is registered under the Central Excise Act and has been paying inter alia excise duty for manufacture of concrete ready mix, which is sold by the appellant-assessee to other civil contractors.

24. The judgment and order of the learned Tribunal cannot be sustained to the extent that the additional depreciation claimed by the appellant-assessee on the machinery used for manufacture of ready mix concrete has been disallowed, and the same is set aside. We restore the order of the Commissioner of Income Tax (Appeals) - 1 in this regard.

25. The appeal is accordingly allowed, and the question formulated is answered against the Revenue, in favour of the appellant-assessee. No costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

bbr

To:

1. The Registrar
Income Tax Appellate Tribunal
"A" Bench, Chennai.
2. The Commissioner of Income Tax (Appeals)-1
Chennai - 600 034.
3. The Addl. Commissioner of Income Tax,
Company Range-I,
Chennai-34.

Copy to

1. The Deputy Commissioner of Income Tax
Corporate Circle I(2), Chennai 34.
 2. The Assistant Commissioner of Income Tax Appellate Tribunal
IIIrd Floor, Rajaji Bhavan, Besant Nagar, Chennai 90.
- +1 CC to Mr.S. Sridhar, advocate sr 57567.
+1 CC to Mr.T. Ravikumar, advocate sr 57282

WEB COPY

Tax Case (Appeal) No.261 of 2017

SP(08/12/2017)