

In the High Court of Judicature at Madras

Dated: 07.03.2017

Coram

The Honourable Mr.JUSTICE RAJIV SHAKDHER  
and  
The Honourable Mr.JUSTICE R.SURESH KUMAR

Tax Case (Appeal) No.82 of 2017

Commissioner of Income Tax  
Chennai

..... Appellant

Vs.

M/s.Anand Transport  
No.1, 9th Street,  
Dr.Radhakrishnan Salai,  
Mylapore, Chennai - 34.

..... Respondent

APPEAL filed under Section 260A of the Income Tax Act, 1961 against the order dated 14.08.2015 made in I.T.A.No.737/Mds/2014 on the file of the Income Tax Appellate Tribunal, 'A' Bench, Chennai for the assessment year 2005-06. preferred against the order dated 16.12.2013 made in I.T.A.No.136/2013-2014 on the file of the commissioner of Income - Tax Appeals Central) 5, Chennai 34 for the Assessment year 2005-2006 and against the order dated 05.02.2013 made in PAN/GIR No.AAAFA137D order of the Assessing officer under Section 143(3) of the Income Tax Act, on the file of the Assistant Commissioner of Income Tax Circle I, Chennai, for the Assessment year 2004-2005.

For Appellant : Mr.T.Ravikumar  
Standing Counsel for Income Tax  
For Respondent : Mr.M.P.Senthil Kumar

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1. This appeal is directed against the order of the Income Tax Appellate Tribunal (in short 'the Tribunal'), dated 14.08.2015, qua the Assessment Year (A.Y) 2005-06.

2. The following questions of law have been raised in the

appeal for our consideration:

"1. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in granting depreciation on "Jetty" at 100% under the head "Building - Temporary Structure" instead of allowing depreciation at 25% under the head "Plant"?

2. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in holding that the Jetty was a temporary structure, without appreciating the fact that the structure had enduring benefit to the assessee?

3. Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in relying on the decision of the Delhi Tribunal, when the law is settled in favour of the department by the decision of the Chennai Tribunal?"

3. Mr.T.Ravikumar, counsel for the Revenue, at the outset, says that, question No.3 does not arise from the impugned judgment of the Tribunal and, therefore, in any case, does not require any discussion by this Court.

4. A perusal of the first question would show that, essentially, the issue, which arose for consideration before the Tribunal, was, whether, the Jetty, erected by the assessee, was entitled to 100% depreciation or, was to be treated as a plant and, therefore, allowed depreciation, at the rate of 25%.

5. A perusal of the record shows that the following findings of fact have been returned by the Tribunal:

(i) That the Jetty was a structure, which was temporary in nature, as against a "permanent establishment".

(ii) The Assessee was required to dismantle and remove all equipment and structures, installed at the Jetty, at its own cost.

(iii) That, even though, the option was given to the Assessee to continue to use the Jetty for a period beyond the tenure of the contract, i.e., till 31.03.2010, that, by itself, did not convert the Jetty into a permanent structure.

5.1. To be noted, the aforesaid findings of fact, which were returned by the Tribunal arose, in the background of the following circumstances:

5.2. The Assessee had filed a return for A.Y.2005-06, on 30.01.2006, whereby, it had admitted a total income of Rs.4,53,88,570/-. The said return, filed by the Assessee, was processed, on 28.03.2007 and, after passing a rectification order, under Section 154 of the Income Tax Act, 1961 (in short 'the Act'), refund, in the sum of Rs.6,670/- was ordered, in favour of the Assessee.

5.3. It appears that, the return of the Assessee was examined, along with the depreciation schedule appended thereto.

5.4. A perusal of the depreciation schedule revealed that the Assessee had claimed depreciation, in the sum of Rs.8,86,66,504/-. Out of this amount, the Assessee had claimed 100% depreciation, qua a loading platform (i.e., the Jetty), amounting to Rs.6,94,59,742/-.

5.5. It is, in these circumstances, that notice, under Section 148 of the Act, was issued to the Assessee, on 28.03.2012. The Revenue appeared to be of the view that, the Jetty was in the nature of a "plant" and not a temporary structure, on which, 100% depreciation could be claimed.

5.6. In respect of the said notice, a reply was filed by the Assessee vide communication dated 25.04.2012.

5.7. Via this reply, the Assessee indicated to the Revenue that, its original return filed on 30.01.2006, should be treated as a return, in response to the notice, issued under Section 148 of the Act.

6. The record shows that due to the change in Officers, a notice under Section 129 of the Act was issued to the Assessee, along with the Show Cause Notice (in short SCN), calling upon the Assessee to explain, as to why excess depreciation claimed, ought not to be disallowed.

7. The Assessee via its authorised representative, gave the following explanation to the Revenue.

7.1. That the Assessee was, essentially, in the business of loading and unloading of bulk cargo, relating to exports and imports, transportation of cargo, both within and outside the ports and by sea and, attending to all works, incidental to the works connected with the main business.

7.2. The Assessee was awarded a contract by MMTC, on 06.05.2004.

7.3. The subject Jetty/loading platform was erected, albeit, temporarily, to facilitate loading of iron ore onto vessels, in furtherance of the contract awarded by MMTC, in favour of the Assessee.

7.4. The Assessee further explained that, the loading platform consisted of a belt conveyor (along with electrical and panels). It was the Assessee's case that, in this behalf, it had incurred, on the whole, a sum of Rs.6.95 crores, approximately, which, as indicated above, was the amount claimed as depreciation.

7.5. Furthermore, the Assessee took the stand that, upon completion of the contract, it was required to dismantle the loading platform/Jetty, which, as indicated above, was constructed at its own cost.

7.6. In sum, it was the Assessee's case that the loading platform/Jetty was a temporary structure set up for commercial consideration and, not for securing any capital asset. The Assessee emphasized the fact that the entire project had a life of only three years and, therefore, being a temporary structure,

it was entitled to 100% depreciation, as per the provisions of Section 32 of the Act, read with Rule 5 framed thereunder.

8. The Assessing Officer, however, relying upon the judgment of the Allahabad High Court in the matter of Tulsi (SK) & Sons V. CIT, (1991) 187 ITR 685, applied the "functional test" and came to the conclusion that, the Jetty/platform was a plant, as it was an apparatus/tool, which only enabled the Assessee to carry on its business.

8.1. The Assessing Officer's observation was that the Jetty consisted mainly of a belt conveyor and electrical support, and that, the civil work was negligible. The Assessing Officer further held that the conveyor belt could be dismantled and reused.

8.2. Therefore, for all these reasons, the Assessing Officer held that the Jetty/loading platform was really in the nature of a plant and not a temporary structure, as contended by the Assessee.

8.3. Accordingly, the Assessing Officer allowed depreciation on the Jetty/loading platform, at the rate of 25%. Excess depreciation, claimed by the Assessee, was, consequently, disallowed.

9. Being aggrieved, the Assessee carried the matter in appeal to the Commissioner of Income Tax (Appeals) [in short, 'the CIT(A)]. The CIT(A) sustained the reasoning given by the Assessing Officer.

10. As indicated right at the outset, the Tribunal has returned a finding of fact that the Jetty/Loading platform was a temporary structure. It cannot, but be submitted that, if, Jetty/Loading platform is held to be a temporary structure, then, the Assessee would be entitled to depreciation at the rate of 100%.

11. Therefore, to appreciate the contours of the issue at hand, one may have to set out the relevant entry incorporated in the appendix No.1 appended to the Act, as obtaining in the relevant A.Y., i.e., A.Y.2005-06.

11.1. In paragraph 7 of the judgment of the Tribunal, the relevant Entry has been extracted. For the sake of convenience, the same is extracted hereunder:

"..... 7. .... For the assessment year 2005-06, under "Part-A" heading "tangible asset", and sub-heading I "Building" temporary erections such as wooden structure are falling 5 I.T.A. No.737/Mds/2014 under the classification "building" and 100% depreciation was prescribed. Old Appendix-1 Part A (1) (4) reads as follows:-  
"purely temporary erection such as wooden structure"....."

(emphasis is ours)

12. We have examined the record. According to us, the matter would turn on what is the nature of the structure, purpose for which it is erected, the periodicity for which, it is put in place, and lastly, the use to which the structure is put by the person/entity responsible for its erection.

12.1. Therefore, first and foremost, one needs to discern is, what exactly is a "Jetty". The dictionary meaning of Jetty, as found, in the Oxford English Dictionary, is, as follows:

"a landing stage or small pier at which boats can dock or be moored; a bridge or staircase used by passengers boarding an aircraft; a breakwater constructed to protect or defend a harbour, stretch of coast or riverbank."

12.2. A bare perusal of the meaning of the word Jetty would show that, it is, in the nature of a construction, which is used, either as a landing stage, a small pier, bridge, staircase or a construction, built into the water to protect the harbour.

12.3. The utility of a Jetty is limited by its construct. It is used to obtain either access to a Vessel, or, protect the harbour.

13. The provisions of the contract, as quoted by the Tribunal, would show that, the Jetty/loading platform was constructed, in this particular case, by the Assessee, on BOT basis, for a period of three (3) years, from the date of commencement of the vessel loading operation.

13.1. This was the initial arrangement between the Assessee and the MMTC, which was modified, to enable operation of the Jetty, till such time, the Ennore Port allowed operations, or, for a period of three months from 24.06.2009. In addition thereto, under the terms of the contract, MMTC, as it appears, could use the Jetty, till 31.03.2010, on the same terms and conditions as per mutually agreed terms arrived at between parties.

14. Quite clearly, the Jetty/loading platform, in this case, was erected by the Assessee, in order to effectuate its business under the contract, entered into with MMTC, which was tenure based, and, therefore, could not have been treated as anything else, but a temporary erection. Upon completion of the contract, the Assessee was required to dismantle it. The fact that the Jetty had other contraptions attached to it, such as, a conveyor belt, to facilitate the process of loading, cannot convert such a structure into a plant. Therefore, even, if, the functional test is employed, the main function of a Jetty, in the facts of the instant case, was to provide a passage or, a platform to ferry articles onto the concerned Vessels. This could have been done manually. That it was done by using a conveyor belt, would not, to our minds, convert a Jetty into a

plant.

15. In sum, the Tribunal has reached the same conclusion and, thus, reversed the decision of the Assessing Officer and CIT(A) by allowing depreciation at the rate of 100%.

16. For the foregoing reasons, we agree with the conclusions reached by the Tribunal, which, according to us, is a pure finding of fact, reached on the basis of the appreciation of the material placed before the Tribunal.

17. Therefore, in our view, no question of law arises for consideration, much less a substantial question of law.

18. The appeal is, accordingly, dismissed. However, there shall be no order as to costs.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1 The Income Tax Appellate Tribunal,  
'A' Bench, Chennai.

2 The Commissioner of Income Tax,  
Appeals (Central) I, 46 Mahatma Gandhi Road,  
Nungambakkam  
Chennai 34

3 The Asst. Commissioner of Income Tax,  
Circle I, Chennai 34

+1cc to Mr.T. Ravi Kumar, Advocate, S.R.No.14527

br(CO)  
md(17/04/2017)

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