IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 29.06.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA

T.C.A.Nos.678, 679 of 2009 and 446 & 447 of 2010

T.C.A.Nos.678 & 679 of 2009:
The Commissioner of Income Tax,
Chennai. ... Appellant in both TCAs

Vs.

M/s.Tamil Nadu Road Development
Company Ltd.,
Sindhur Pantheon Plaza,
346, Pantheon Road,
Chennai - 600 008. ... Respondent in both TCAs

T.C.A.Nos.678 & 679 of 2009 were preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "C" Bench, dated 24.10.2008 in I.T.A.No.2082/Mds/2008 and I.T.A.No.817/Mds/2007 for the Assessment Years 2003-04 and 2004-05.

TCA 678,679 of 2009:
Against the Commissioner of Income-Tax (Appeals) III, Chennai 600 034 and made in ITA No.591/2005-06-A(III)/470/2006-2007-A III, dated 14.07.2006, 19.02.2007, for the Assessment year 2003-04, 2004-05 preferred against the Assistant Commissioner of Income Tax company circle (iii)(i)(i/c) Chennai, Income Tax officer (OSD) company circle III(i), Chennai and made in GIR No./PAN 31202-T/AABC13389H, and GIR No./PAN31203-T/AABCT3389H, dated 17.10.2006 and 13.10.2006 for the Assessment year 2003-04 and 2004-05.

T.C.A.Nos.446 & 447 of 2010:
The Commissioner of Income Tax-I,
Chennai. ... Appellant in both TCAs

Vs.

M/s.Tamil Nadu Road Development
Co. Ltd.,
Sindhur Pantheon Plaza, II Floor,
No.346, Pantheon Road,
Egmore, Chennai - 600 008. ... Respondent in both TCAs

T.C.A.Nos.446 & 447 of 2010 were preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "D" Bench, dated 25.08.2009 in I.T.A.Nos.660 & 661/Mds/2009 for the Assessment Years 2002-03 and 2005-06.

TCA 446,447 of 2010

Against the Commissioner of Income-Tax (Appeals) VIII,121,Mahatma Gandhi Road, Chennai 600 034 and made in ITA No.241/2007-08,240/2007-2008, dated 10.02.2009, for the Assessment year 2002-03, 2005-06 preferred against the Assistant Commissioner of Income Tax company circle (iii)(i)(i/c) Chennai, dated 13.11.2007 and 14.11.2007, made in GIR No./PAN AABCT3389H/31213-T and AABCT3389H/31203-T for the Assessment year 2002-03 and 2005-06.

For Appellant : Ms.V.Pushpa,
(in all 4 TCAs) Junior Standing Counsel

For Respondent : Mr.Kaushik
(in all 4 TCAs) for Mr.S.Sridhar

COMMON JUDGMENT

(Judgment was delivered by M.DURAISWAMY, J.)

Challenging the order passed in I.T.A.No.2082/Mds/2008 on the file of the Income Tax Appellate Tribunal, “C” Bench, Chennai, the Revenue has filed the appeal in T.C.A.No.678 of 2009. Challenging the order passed in I.T.A.No.817/Mds/2007 on the file of the Income Tax Appellate Tribunal, “C” Bench, Chennai, the Revenue has filed the appeal in T.C.A.No.679 of 2009. Challenging the order passed in I.T.A.No.660/Mds/2009 on the file of the Income Tax Appellate Tribunal, “D” Bench, Chennai, the Revenue has filed the appeal in T.C.A.No.446 of 2010. Challenging the order passed in I.T.A.No.661/Mds/2009 on the file of the Income Tax Appellate Tribunal, “D” Bench, Chennai, the Revenue has filed the appeal in T.C.A.No.447 of 2010.

2.The assessee is engaged in the business of improvement and development of roads. The assessee claimed depreciation on roads in the category of plant and machinery. The Assessing Officer held that the assessee is not eligible for depreciation on roads either as plant and machinery or as building. Aggrieved over the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who dismissed, holding that neither is the road a plant or machinery nor is it owned by the assessee, since the roads on which depreciation was claimed were State Highways. Aggrieved over the order passed by the Commissioner of

Income Tax (Appeals), the assessee filed appeals before the Income Tax Appellate Tribunal and the Tribunal held that although the road is certainly not a plant or machinery, it can still be eligible for depreciation as a building, as per the Appendix prescribing rate of depreciation which says building includes roads. Challenging the orders passed by the Income Tax Appellate Tribunal, the Revenue has filed the above appeals.

3.The above appeals were admitted on the following substantial question of law:

> "Whether on the facts and circumstances of the case, the Tribunal was right in holding that roads developed and maintained by the assessee by agreement with the Government on the State/National Highway is eligible for depreciation as "building"?"

4.When the appeals were taken up for hearing, Ms.V.Pushpa, learned standing counsel for the appellant-Revenue fairly submitted that the question of law that has been raised in the above appeals was already decided, against the Revenue and in favour of the assessee, by the Division Bench of this Court in the judgment made in T.C.A.Nos.220 to 225 of 2018 dated 19.01.2021 [The Commissioner of Income Tax, Corporate Circle 3, Chennai-34 Vs. M/s.Tamil Nadu Road Development Company Ltd., Chennai - 600 028] wherein the Division Bench held as follows:

> "...
>
> 12.Next, we take up for consideration the issue pertaining to the claim for depreciation on the roads, which have been developed and maintained by the assessee pursuant to the agreement entered into with the State Government.
>
> 13.The assessee is a joint venture company formed by the Tamil Nadu Industrial Development Corporation Limited and the Tidel Park for creation of infrastructural facility such as road systems, highways, bridge system by bringing private resources in the development of the said projects. The assessee was granted right to implement the East Coast Road project. The assessee, while filing the return of income for the relevant assessment years, claimed depreciation at the rate of 15% on improvement to the IT Carridor (Road) considering the roads as 'plant and machinery'.
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> 14.The Assessing Officer did not accept the said claim, but allowed depreciation at the rate of 10% considering the roads to be a 'building' in terms of the definition contained in the Notes to New Appendix I in the Income Tax Rules, 1962.

15.Aggrieved by the same, the assessee preferred appeals before the Commissioner of Income Tax (Appeals)-11, Chennai-34 [for brevity, the CIT(A)] by contending that the depreciation should be granted at the rate of 15% by treating road as 'plant and machinery' for the assessment years 2007-08 to 2010-11. For the assessment year 2013-14, the assessee claimed depreciation at 25% by treating investment in road as an intangible property. The CIT(A) partly allowed the appeals and directed the Assessing Officer to allow depreciation at 10% on the road by treating it as a 'building'. The claim made by the assessee for grant of depreciation at 25% by treating investment in road as an intangible property was rejected.

16.The Revenue carried the matter by way of appeals before the Tribunal. However, the Tribunal, by the impugned common order, rejected the appeals and in doing so, followed its earlier decision dated 24.10.2008 in the assessee's own case for the assessment years 2003-04 and 2004-05 respectively made in ITA.Nos.2082/Mds/2008 and 817/Mds/2007. In paragraph 6 of the impugned common order, the said decision of the Tribunal has been referred to. 17.The learned Junior Standing Counsel appearing for the appellant/Revenue has contended that the said decision of the Tribunal has not been accepted by the Revenue and an appeal has been filed before this Court against the same. In fact, such a submission was made before the Tribunal, when the Tribunal heard the present appeals. However, there was no material produced by the Revenue before the Tribunal to show that the common order dated 24.10.2008 passed for the earlier assessment years namely 2003-04 and 2004-05 has been reversed or modified by this Court. Therefore, the Tribunal chose to follow its earlier decision.

18.Hence, before us, the learned Junior Standing Counsel submits that she will make her submissions on merits and this Court may take a decision notwithstanding the fact that the Revenue has not accepted the decision of the Tribunal dated 24.10.2008 in the assessee's own case for the earlier assessment years namely 2003-04 and 2004-05. Based on the said submission, we have heard the matter on merits.

19.The learned Junior Standing Counsel appearing for the appellant - Revenue has pitched her case by placing strong reliance on the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd. Vs. CIT [reported in (2014) 51 Taxmann.com 214]. It is submitted by the learned Junior Standing Counsel that when the assessee was engaged in the business of infrastructural development in execution of agreement with the National Highways Authority or as in the present case, with the State Government and had constructed a road on Build, Operate and Transfer (BOT) basis on the land owned by the Government, the assessee could not claim depreciation on the toll road so constructed and operated by treating it as a building under Section 32 of the Act.

20.The learned Junior Standing Counsel has also placed reliance on the decision of the High Court of Delhi in the case of Moradabad Toll Road Co. Ltd. Vs. ACIT [reported in (2014) 52 Taxmann. com 21] to support the proposition that toll road would not qualify as a plant so as to entitle the assessee a higher rate of depreciation.

21.In the instant case, the assessee has not challenged the decision of the CIT(A) or that of the Tribunal granting depreciation at the rate of 10%. Therefore, we are not required to decide as to whether the assessee is entitled to a higher rate of depreciation. What is required to be decided in the instant case is as to whether the CIT(A) and the Tribunal were right in holding that the development done by the assessee by forming the road would qualify as a plant so as to be entitled to depreciation under Section 32 of the Act. 22. On a careful perusal of the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd., and more particularly the finding rendered in paragraph 47 of the said judgment, it is clear that the Court has pointed out that they were not concerned in the said case with the ownership of a building or a land beneath which was not conveyed and sold or transferred by execution of a conveyance or a sale deed. It was further pointed out that depending upon the facts and circumstances in each case, the claim of ownership could be made, that it was not that in every case the principles referred to by the Hon'ble Supreme Court would apply and that depending on the nature of the claim, the context and the circumstances, in which, it arose, these principles would have to be invoked and applied. It was also pointed out that there was no general rule, which could be said to be laid down. Ultimately, in the said decision, the Court held that the assessee definitely invested in the project of construction development and maintenance of the National Highway and such of the assets in the form of building and plant and machinery etc., and that the claim for depreciation could be validly raised and granted.

23.In fact, the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd., would lend support to the case of the assessee as argued by the assessee before the Assessing Officer by claiming it as plant and machinery. However, since the assessee is not on appeal against the said finding, we are of the view that the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd., does not advance the case of the Revenue before us.

24.On this issue, it would be beneficial to refer to the decision of the Rajasthan High Court in the case of PCIT Vs. GVK Jaipur Expressway Ltd. [reported in (2018) 100 Taxmann.com 95]. This decision was rendered by the Court on 10.10.2017, which was much after the decision of the Bombay High Court in the case of North Karnataka Expressway Ltd., which was rendered on 14.10.2014.

25.In the decision of the Rajasthan High Court in the case of GVK Jaipur Expressway Ltd., the Court has taken into consideration all the decisions and more particularly the decisions of the (i) Delhi High Court in the case of Moradabad Toll Road Co. Ltd.; (ii) Allahabad High Court in the case of CIT Vs. Noida Toll Bridge Co. Ltd. [reported in (2013) 30 Taxmann.com 207]; (iii) Madras High Court in the case of CIT Vs. VGP Housing (P) Ltd [reported in (2016) 66 Taxmann.com 354]; (iv) Rajasthan High Court in the case of CIT Vs. Jawahar Kala Kendra [reported in (2014) 43 Taxmann.com 159]; and (v) Rajasthan High Court in the case of CIT Vs. Mohd. Bux Shokat Ali [reported in (2001) 118 Taxman 712], and it was held that while considering the issue as to whether the national highway was a road or not, one had to go by the common parlance of road where public at large had an access. As in the case on hand, the assessee therein was granted licence for construction, against which, they had a right to use and collect licence fee to use the land, that in that view of the matter, they had a right to restrict the people without non payment of toll tax and that if the definition, which was given under the Act was looked into, even a development made while occupying the premises and development of a road was the main agreement between the parties and that therefore, the argument of the Revenue that it would not qualify for depreciation was not sustainable. Accordingly, the view taken by the Tribunal was confirmed. 26.The special leave petition filed by the Revenue against the decision of the Rajasthan High Court in the case of GVK Jaipur Expressway Ltd., was dismissed by the Hon'ble Supreme Court as reported in (2018) 100 Taxmann.com 96.

27.So far as decision of the Bombay High Court in the case of North Karnataka Expressway Ltd. is concerned, the said decision was followed in the decision of the Bombay High Court in the case of CIT-10 Vs. West Gujarat Expressway Ltd. [reported in (2017) 82 Taxmann.com 224] and the appeal filed by the Revenue was allowed against which, the assessee preferred an appeal to the Hon'ble Supreme Court, which has been entertained, leave granted and tagged with other appeals, which are pending as reported in (2016) 73 Taxmann.com 150 (SC).

28.In the light of the above legal position, we are of the considered view that the reasons assigned by the Tribunal in dismissing the appeals filed by the Revenue call for no interference. Accordingly, substantial question of law No.1 is also answered against the Revenue and in favour of the assessee and it is held that the assessee is entitled for depreciation at the rate of 10%."

5.Mr.Kaushik, learned counsel appearing for the respondent-assessee submitted that in view of the ratio laid down by the Division Bench of this Court in the judgment made in T.C.A.Nos.220 to 225 of 2018 dated 19.01.2021, cited supra, the appeals may be dismissed.

6.The 1st question of law that was decided by the Division Bench in T.C.A.No.220 to 225 of 2018 is the same question of law that has been raised in the above appeals. The Division Bench decided the said question of law against the Revenue and in favour of the assessee.

7.Having regard to the submissions made by the learned counsel on either side, following the ratio laid down by the Division Bench of this Court made in T.C.A.Nos.220 to 225 of 2018 dated 19.01.2021 [The Commissioner of Income Tax, Corporate Circle 3, Chennai-34 Vs. M/s.Tamil Nadu Road Development Company Ltd., Chennai – 600 028] , the question of law is decided against the Revenue and in favour of the assessee. Accordingly, the Tax Case Appeals are dismissed. No costs.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal, Chennai, "C" Bench

2.The Income Tax Appellate Tribunal, Chennai, "D" Bench

3.The Commissioner of Income-Tax Appeals-III, Chennai 600 034.

4.The Assistant Commissioner of Income Tax company circle (iii)(i)(i/c) Chennai.

5.The Commissioner of Income Tax Appeal VIII, 121, Mahatma Gandhi Road, Chennai 600 034.

+1CC to Mr.M.Swaminathan Advocate, SR No.29906

T.C.A.Nos.678, 679 of 2009 and
446 & 447 of 2010

JP (CO)
B.VC (16/08/2021)