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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29.06.2021

CORAM

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

Tax Case Appeal Nos.355 to 358 of 2011

Commissioner of Income Tax-I
Chennai. ...Appellant in all the Appeals

Vs.

M/s.L & T Transportation infrastructure Ltd.,
Post Box No.979,
Mount Poonamallee Road,
Chennai - 600 089. ...Respondent in all the Appeals

COMMON PRAYER: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai "A" Bench, dated 30.11.2010 passed in I.T.A.Nos.1692, 1693, 1694 and 1695/Mds/2010 for the assessment years 2002-2003, 2003-2004, 2004-2005 & 2006-2007.

against the order passed by the Commissioner of Income Tax (Appeals) III, Chennai 34 dated 30/07/2010, 30/07/2010, 07/07/2009 made in I.T.A.Nos.569, 570/2009-2010/A-III, 339/2008-2009-A-III for the Assessment year 2004-2005, 2003-2004 for the 2006-2007, 2006-2007 against the order by the Income Tax Officer, Company Ward II(1), Chennai 34 dated 18/12/2009, 17/12/2009, 08/12/2008 made in PAN No. AAACC1912F for the Assessment year 2004-2005, 2003-2004, 2002-2003, 2006-2007.

For Appellant in all the Appeals : Mr.Karthik Ranganathan Senior Standing Counsel

For Respondent in all the Appeals : Mr.V. Balaji

C O M M O N J U D G M E N T

(Common Judgment of the Court was delivered by R.HEMALATHA, J.)

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These four appeals of the Revenue are directed against the orders dated 30.11.2010 passed by the Income Tax Appellate Tribunal Bench-A, Chennai.

2. The matter in issue pertains to disallowance of depreciation of project assets being road and bridge during the assessment years 2002-2003, 2003-2004, 2004 - 2005 and 2006-2007 by the Assessing Officer on the ground that the assessee is not the owner of the project assets and hence is not eligible for claiming depreciation of such assets. However, taking into account the fact that the entire cost of the project has to be owned by the assessee and such cost has to be recovered from the users of the project by way of toll fees prescribed by the Government, the entire cost was amortized over the period of concession. Since the assessee has claimed huge depreciation more than amortization value for the assessment years 2002-2003, 2003-2004 and 2004-2005, notices under Section 148 were issued stating that the depreciation claimed was far and excess of the amortization to be allowed as per the decision taken in the assessment year 2006-2007. Thereafter, returns for those three years were filed by the assesee and after hearing the assessee, the assessments were finalised which were challenged in appeals before the Commissioner of Income Tax (Appeals). The Appeals were allowed by the Commissioner of Income Tax (Appeals). Aggrieved over the same, the Revenue filed an appeal before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal, after considering the rival submissions of both the parties dismissed the appeals. Now the present appeals are filed on the following substantial question of law:-

> "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the assessee was entitled claim depreciation at the rate of 10% applicable to buildings on the roads and bridge developed and maintained by the assessee under the terms of "Build, Operate and Transfer (BOT) agreement with the Government even though as per the terms of the agreement the assessee could not be considered as the owner of the assets?".

3. Heard Mr.Karthik Ranganathan, learned Standing Senior Counsel for the appellant and Mr.V. Balaji, learned counsel for the respondent.

4. Both the counsels contended that the Hon'ble Supreme Court in the decision in Principal Commissioner of Income Tax Vs. GVK Jaipur Expressway Ltd., reported in [2018] 100 taxmann.com 96 (SC) has settled the present substantial question

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of law in favour of the assessee. The relevant portions of the decision of the Hon'ble Supreme Court is extracted hereunder.

> "14. In our opinion, the term owned as occurring in Section 32 (1) of the Income-tax Act, 1961 must be assigned a wider meaning. Any one in possession of property in his own title exercising such dominion over the property as would enable other being excluded therefrom and having right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings though a formal deed of title may not have been executed and registered as contemplated by Transfer of Property Act, Registration Act, etc. 'Building owned by the assessee' the expression as occurring in Section 32(1) of the Income-tax Act means the person who having acquired possession over the building in his own right uses the same for the purposes of the business or profession though a legal title has not been conveyed to him consistently with the requirements of laws such as Transfer of Property Act, and Registration Act, etc. but nevertheless is entitled to hold the property to the exclusion of all others.
>
> 15. Generally speaking depreciation is an allowance for the diminution in the value due to wear and tear of capital asset employed by an assessee in his business. Black's Law Distionary (Fifty Edn.) defines depreciation to mean, inter alia:
>
> A fall in value, reduction of worth. The deterioration or the loss or lessening in value, arising from age, use, and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property.... Consistent gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings...........
>
> 19. It is well-settled that there cannot be two owners of the property simultaneously and int he same sense of the term. The intention of the Legislature in enacting Section 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time-being vests the dominion over the building and who is entitled to use it in his own right and is using

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> the same for the purposes of his business or profession. Assigning any different meaning would not subserve the legislative intent. To take the case at hand it is the appellant-assessee who having paid part of the price, has been placed in possession of the houses as an owner and is using the buildings for the purpose of its business in its own right. Still the assessee has been denied the benefit of Section 32. On the other hand, the Housing Board would be denied the benefit of Section 32 because inspite of its being the legal owner it was not using the building for its business or profession. We do not think such a benefit-to-none situation could have been intended by the Legislature. The finding of fact arrived at in the case at hand is that though a document of title was not executed by Housing Board in favour of the assessee, but the houses were allotted to the assessee by the Housing Board, part payment received and possession delivered so as to confer dominion over the property on the assessee whereafter the assessee had in its own right allotted the quarters to the staff and they were being actually used by the staff of the assessee. It is common knowledge, under the various scheme floated by bodies like housing boards, houses are constructed on large scale and allotted on part payment to those who have booked. Possession is also delivered to the allottee so as to enable enjoyment of the property. Execution of document transferring title necessarily follows if the schedule of payment is observed by allottee. If only the allottee may default the property may revert back to the Board. That is a matter only between the Housing Board and the allottee. No third person intervenes. the part payment made by allottee are with the intention of acquiring title. the delivery of possession by Housing Board to allottee is also a step towards conferring ownership. Documentation is delayed only with the idea of compelling the allottee to observe the schedule of payment."

5. After discussing the various decisions, the Hon'ble Supreme Court clearly held that the assessee is entitled to claim depreciation of public roads, treating the same as building.

6. In view of the decision of the Hon'ble Supreme Court, the substantial question of law is answered against the Revenue.

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7. In the result, the appeals are dismissed. There shall be no order as to costs.

s/d-
Assistant Registrar(CS-IX)

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Sub-Assistant Registrar

gv

To

1. The Commissioner of Income Tax-I
Chennai.

2. The Commissioner of Income Tax (Appeals)III
Chennai 34.

3. The Income Tax Officer
Company Ward II(1)
Chennai 34.

+1 CC to Mr.N.V. Balaji, Advocate sr 30168.

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KV(CO)
SP(20/07/2021)

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