

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 19.1.2021
CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Tax Case Appeal Nos.220 to 225 of 2018

The Commissioner of Income Tax,
Corporate Circle 3, Chennai-34 ...Appellant in all Cases

Vs

M/s.Tamilnadu Road Development
Company Ltd., Chennai-28.Respondent in all Cases

APPEALS under Section 260A of the Income Tax Act, 1961 against the common order dated 24.5.2017 passed by the Income Tax Appellate Tribunal, 'B' Bench, Chennai made respectively in I.T.A.Nos. 2874 to 2879/Mds/2016 respectively for the assessment years 2007-08 to 2010-11, 2012-13 and 2013-14 against the common order of the Commissioner of Income Tax (Appeals)-II, Chennai dated 22.06.2016 in ITA.Nos.396 & 398/14-15/C IT (A-II), ITA.813/13-14/CIT (A)II, ITA.NO.164/15-16/CII(A)II, ITA.NO.52/16-17, CTI(A)-II relevant to the Assessment Years 2007-2008 -2010-11 and 2012-2013 and 2013-14 against the order of Assistant Commissioner of Income Tax Corporate Circle-3(I), Chennai 34 dated 18.11.2013, 28/10/2011, 18.02.2013, 30.01.2015, 30.01.2015, 27.03.2015, 30.03.2016.

For Appellant in all Cases : Ms.V.Pushpa, JSC
For Respondent in all Cases: Mr.A.S.Sriraman

COMMON JUDGMENT

(Judgment was delivered by T.S.SIVAGNANAM, J)

These appeals have been filed by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) challenging the common order dated 24.5.2017 made respectively in I.T.A.Nos. 2874 to 2879/Mds/2016 on the file of the Income Tax Appellate Tribunal, Chennai, 'B' Bench ('the Tribunal' for brevity) respectively for the assessment years 2007-08 to 2010-11, 2012-13 and 2013-14.

2. The appeals were admitted on 12.6.2018 on the following substantial questions of law:

"1. Whether the Tribunal was right in holding that roads developed and maintained by the assessee by agreement with the Government on the State/National Highway were eligible for depreciation as 'building'? And 2. Whether the Tribunal is correct in holding that the provisions of Section 14A read with Rule 8D will have no applicability if there is no exempt income received?"

3. After hearing the submissions of the learned counsel on either side, we frame the following two other substantial questions of law also for consideration :

"1. Whether the Tribunal is legally right in holding that the assessee is eligible for depreciation under Section 32 (1)(ii) on lease hold rights obtained by the assessee for 99 years through lease agreement ? And

2. Whether the claim of depreciation on lease hold rights on land held by the assessee is allowable under Section 32(1) (ii) under the head 'intangible asset'?"

4. Accordingly, the substantial questions of law framed for consideration are renumbered as follows :

"1. Whether the Tribunal was right in holding that roads developed and maintained by the assessee by agreement with the Government on the State/National Highway were eligible for depreciation as 'building'?

2. Whether the Tribunal is legally right in holding that the assessee is eligible for depreciation under Section 32 (1)(ii) on lease hold rights obtained by the assessee for 99 years through lease agreement ?

3. Whether the claim of depreciation on lease hold rights on land held by the assessee is allowable under Section 32(1) (ii) under the head 'intangible asset'? And

4. Whether the Tribunal is correct in holding that the provisions of Section 14A read with Rule 8D will have no applicability if there is no exempt income received?"

5. We have elaborately heard Ms.V.Pushpa, learned Junior Standing Counsel appearing for the appellant/Revenue and Mr.A.S. Sriraman, learned counsel appearing for the respondent/assessee.

6. The following tabular column would show the relevant assessment year, in which, the respective issues arise :

AY	Depreciation on road	Depreciation on lease hold land	Disallowance u/s 14A
2007-08	2,75,51,087	19,29,341	-
2008-09	2,29,51,505	14,47,000	-
2009-10	68,61,960	-	-
2010-11	1,73,42,150	-	-
2012-13	1,85,59,715	-	97,11,917
2013-14	-	-	17,02,500

7. First, we take up for consideration question No.4.

8. Mrs.V.Pushpa, learned Junior Standing Counsel appearing for the appellant/Revenue has contended that the Tribunal committed an error in holding that the provisions of Section 14A of the Act read with 8D of the Income Tax Rules (for short, the Rules) would have no applicability if there was no exempt income received though the disallowance was linked to expenditure incurred on investment fetching exempt income. The argument of the learned Junior Standing Counsel is that the Tribunal ought to have appreciated that the disallowance under Section 14A of the Act did not depend upon the exempted income as Section 14A of the Act and Rule 8D of the Rules never link the disallowance with the exempted income earned.

9. She has referred to the concession agreement dated 22.12.2000 entered into between the State of Tamil Nadu and the respondent/assessee in order to focus before this Court as to the nature of work undertaken by the assessee. Therefore, it is submitted that the issue has not been correctly decided by the Tribunal. In fact, in the case of CIT Vs. M/s.Tamilnadu Industrial Development Corporation Limited [T.C.A.No.509 and 510 of 2018], the issue pertaining to disallowance under Section 14A of the Act was considered by a Division Bench of this Court, to which, one of us (TSSJ) was a party, and by a common judgment dated 07.7.2020, the appeals filed by the Revenue were allowed.

10. Rather, we had an occasion to consider a similar issue in the assessee's own case in TCA. No.485 of 2020 dated 05.1.2021, the relevant portions of which read thus :

"8. We need not labour much to decide the substantial question of law framed, as identical issue was considered in the case of Commissioner of Income Tax, Chennai vs

M/s.Celebrity Fashion Ltd. in T.C.A.No.26 of 2018 dated 21.09.2020. In the said appeal, which was filed by the Revenue, identical question of law was framed for consideration and the same was answered against the Revenue and in favour of the assessee on the following lines:

"24. We had an occasion to consider a similar question in the case of CIT, Corporate Circle-3, Chennai Vs. Visual Graphics Computing Services India Pvt. Ltd. [TCA.No. 414 of 2018 dated 19.8.2020]. In the said appeal, question of law No.5, which was framed for consideration, was as to whether the Tribunal was right in holding that the provisions of Section 14A of the Act read with Rule 8D of the said Rules will have no applicability if there is no exempt income earned or received during the previous year though the disallowance is linked to expenditure incurred on investment fetching exempt income. The said case was decided in favour of the assessee and against the Revenue and in doing so, we have followed the decision of the Hon'ble Division Bench of this Court in the case of CIT Vs. Chettinad Logistics Pvt. Ltd. [reported in (2017) 80 Taxmann.com 221]. This decision would come to the aid and assistance of the assessee.

.....
28. In fact, an identical argument was raised for consideration before the Hon'ble Division Bench of this Court in the case of Chettinad Logistics Pvt. Ltd., and such a contention was rejected by rendering the following findings:

"13. Mr.Senthil Kumar, seeks to distinguish the judgment in Redington (India) Ltd. case (supra) based on the fact that Rule 8D had not kicked-in by AY 2007-08, which was the AY being considered in the said case.

14. According to us, this was not the argument, put forth, before the Division Bench. As a matter of fact, the Revenue relied heavily on Rule 8D.

14.1 Mr.Ravikumar, who appeared for the Revenue, in that matter and who is present in this Court, informs us that he had in

fact argued that the Rule was clarifactory in nature and would apply retrospectively, and that, the Division Bench, therefore, discussed the impact of Rule 8D of the Rules.

15. However, it is, our view, as indicated above, independent of the reasoning given in Redington (India) Ltd. case (supra) that Rule 8D cannot be read in a manner, which takes it beyond the scope and content of the main provision, which is, Section 14 A of the Act.

15.1 Therefore, as adverted to above, Rule 8D, cannot come to the rescue of the Revenue.

15.2 In any event, the Tribunal, via, the impugned judgment has remitted the matter to the Assessing Officer.

15.3 Therefore, for the foregoing reasons, we are of the view, that no interference is called for qua the impugned judgment."

As against the decision of this Court in the case of Chettinad Logistics Pvt. Ltd., the Revenue preferred appeals before the Hon'ble Supreme Court and the special leave petitions were dismissed on the ground of delay as well as merits in the decision reported in (2018) 95 Taxmann.com 250."

9. Thus, by applying the above decision, this Tax Case Appeal is allowed and the substantial question of law is answered in favour of the appellant/assessee."

11. We do not find any justifiable reason to take a different view and the legal position in the assessee's own case wholly covers the said question. Further, the decision in the case of M/s.Tamilnadu Industrial Development Corporation Limited does not render assistance to the case of the Revenue. Accordingly, substantial question of law No.4 is answered against the Revenue.

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 Corridor (Road) considering the roads as 'plant and machinery'.

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%.

29. Substantial question of law Nos.2 and 3 are identical and virtually one and the same, questioning the correctness of the decision of the Tribunal in holding that the assessee is eligible for depreciation under Section 32(1)(ii) of the Act on the lease hold rights obtained by the assessee for a period of 99 years pursuant to an agreement entered into between themselves and the SIPCOT.

30. To be noted, neither the Assessing Officer nor the Tribunal had gone into the terms and conditions of the lease agreement. This issue arises for consideration only for the assessment years 2007-08 and 2008-09. In respect of the other assessment years, which are subject matter of consideration in these batch of appeals, viz., 2009-10, 2010-11, 2012-13 and 2013-14, the assessee had been granted a relief.

31. The issue would be as to whether the Tribunal was right in confirming the order passed by the Commissioner of Income Tax-III, Chennai dated 18.11.2013, granting the benefit of depreciation for the assessment year 2009-10 on the lease hold right obtained by the assessee from the SIPCOT.

32. The assessment for the years 2007-08 and 2008-09 was reopened by issuance of notice. One of the reasons for reopening the assessment was on the claim for depreciation amounting to Rs.19,29,341/- on the lease hold right of Rs.77,17,365/- for the assessment year 2007-08 and the claim for depreciation amounting to Rs.14,47,006/- on the lease hold rights of Rs.57,88,024/- for the assessment year 2008-09.

33. In the proposal to reopen, the Assessing Officer stated that a plain reading of Section 32 of the Act showed that to claim depreciation, the assessee must have owned, wholly or partly, the assets and should have used the same for the purpose of business of the assessee to be eligible for depreciation. The assessee was called upon to explain. By a common reply dated 25.6.2014, the assessee stated that they entered into an agreement with the SIPCOT, IT Park, Siruseri, over a land measuring 4.90 acres for a period of 99 years and such an agreement was executed on 21.9.2005 and registered as Doc. No.6285 of 2005 on the file of Sub Registrar, Tiruporur. The assessee reproduced one of the covenants contained in the said

agreement, viz., covenant No.8.

34. The Assessing Officer, after referring to the reply given by the assessee, extracted the said covenant and opined that the assessee, by his own admission, stated that the land in question was a lease land taken from the SIPCOT, that the assessee did not own the asset in question and that therefore, they failed to clear the qualifying benchmark for being eligible for depreciation. Accordingly, the claim for depreciation was rejected and the return of income was added back to the income of the assessee.

35. The assessee filed appeal before the CIT(A) stating that the assessee claimed depreciation at the rate of 25% on lease hold rights of land leased (20 years) by the SIPCOT. The assessee referred to Section 32 of the Act and submitted that it provided that the assessee should have owned, wholly or partly, the assets and should have used the assets for the purpose of business to be eligible to claim depreciation under the Act, which was rejected by the Assessing Officer without taking note of the fact that the assessee became the eligible owner of the lease hold land and would be entitled to claim depreciation. Further, the assessee contended that they paid Rs.20,15,000/- per acre for 4.90 acres and acquired the lease hold rights, which essentially qualified the assessee for an allowable revenue expenditure over a period of time as enumerated under law. Therefore, the assessee further contended that the conclusion arrived at by the Assessing Officer that the assessee was not the owner of the asset and not eligible for depreciation, was incorrect.

36. Further, the assessee stated that except the right of alienation of the said asset, the assessee was conferred with all rights of enjoyment in respect of the lease property and therefore, they would be entitled to claim depreciation. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. Vs. CIT [reported in (1997) 225 ITR 802] wherein it was held that the total amount of lease premium paid in respect of such agreements should be amortized over the period of lease and only the amount pertaining to the relevant previous year should be allowed as deduction. Further, the assessee relied on the decisions of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. Vs. CIT [reported in (1980) 124 ITR 1] and in the case of CIT Vs. Associated Cement Co. Ltd., [reported in (1988) 172 ITR 257] wherein it was held that the expenditure, which did not fall in the capital field, should be allowed as revenue expenditure.

37. Further, the assessee submitted that the assessee, on acquiring the land on lease for a period of 99 years, making payment of advance rent to the tune of Rs.48 Crores and paying a sum of Rs.40 lakhs per month as monthly rent, the advance lease rent paid by the assessee was allowable as revenue expenditure.

To support such contention, the assessee placed reliance on the decision of the Special Bench of the Mumbai Tribunal in the case of JCIT Vs. Mukund Ltd. [reported in (2007) 291 ITR (AT) 249]. Thus, the assessee pleaded before the CIT(A) that considering the nature of business of the assessee, it was essential to allow the expenditure incurred for operational purposes as revenue expenditure in the computation of total income. The assessee pointed out that the Assessing Officer neither allowed depreciation on the lease hold rights nor treated the same as revenue expenditure and in doing so, violated the principles of natural justice.

38. The CIT(A) took note of the submissions, but did not examine the nature of transaction between the assessee and the SIPCOT and more particularly, the terms and conditions contained in the agreement dated 21.9.2005. In fact, even the Assessing Officer did not go into the full contents of the agreement dated 21.9.2005, but appears to have been guided only by the reply given by the assessee dated 25.6.2014 in response to the notice issued under Section 148 of the Act wherein the assessee extracted Clause 8 of the agreement dated 21.9.2005.

39. In our considered view, there should have been a deeper examination of the conditions contained in the agreement to arrive at a correct conclusion with regard to the nature of transaction between the assessee and the SIPCOT.

40. The CIT(A) referred to Section 32(1)(ii) of the Act and observed that in terms of the said provision, depreciation was allowable for "any other business or commercial right of similar nature being intangible asset acquired on or after 01.4.1998". Further, the CIT(A) referred to Rule 5 of the Rules and Part-B of the Depreciation Table wherein the depreciation on intangible assets was allowable at 25%. The CIT(A) referred to the submission of the assessee that the right to develop the property as per the agreement was an intangible asset and therefore, the assessee was eligible for depreciation at 25%. The CIT(A) stated that the assessee relied on the decisions of the Hon'ble Supreme Court and following the said decisions, held that the assessee was entitled to depreciation on the lease hold right at 25%.

41. Aggrieved by the same, the Revenue was on appeal before the Tribunal contending that the CIT(A) erred in allowing the assessee's claim for depreciation on the ground that the lease hold land was an intangible asset without considering the fact that the lease hold right was not an intangible asset. In this regard, reliance was placed on the decision of the Bangalore Tribunal in the case of Cyber Park Development & Construction Ltd. Vs. DCIT, Circle 11/(2), Bangalore [reported in (2016) 71 taxmann.com 210].

42. The Tribunal noted the submissions of the Revenue by placing reliance on the decision of the Bangalore Tribunal in

the case of Cyber Park Development & Construction Ltd., and held that transferring an immovable property by way of lease created an interest in the land, as has been held in Cyber Park Development & Construction Ltd., and taking note of the definition of 'capital asset', as defined under Section 2(14) of the Act, the property need not be owned by the assessee, it was held that the definition 'capital asset' could not be given restrictive meaning.

43. The Tribunal referred to the decision of this Court in the case of A.R.Krishnamurthy and A.R.Rajagopalan Vs. CIT [reported in (1982) 133 ITR 922], the decision of the Calcutta High Court in the case of in A.Gasper Vs. CIT [reported in (1979) 117 ITR 581] and the decision of the Hon'ble Supreme Court in the case of R.K. Palshikar (HUF) Vs. CIT [reported in (1988) 172 ITR 311] and held that transfer by way of lease was to be treated as a transfer of capital asset, as the lease created an interest in the land and therefore, to that extent, it extinguished the right of the transferor.

44. With regard to the assessee's case, the Tribunal held that when the assessee transferred his lease hold rights in the land in his occupation by way of lease to another person, it amounted to extinguishing his rights in the property and since his lease hold rights had created an interest in the land, i.e. an enjoyment and possession, it would fall within the definition of 'capital asset' as defined under Section 2(14) of the Act. Thus, the Tribunal came to the conclusion that transfer of lease would amount to a transfer of capital asset and hence, the assessee was eligible to claim depreciation on the asset, which was transferred to them by way of a lease deed. On the said ground, the appeal filed by the Revenue was dismissed.

45. As pointed out earlier, the factual aspect has not been analysed by the Assessing Officer though the assessment was primarily reopened for the reason to consider the correctness of the claim for depreciation on the lease hold right enjoyed by the assessee. Unfortunately, the Assessing Officer was solely guided by the reply given by the assessee dated 25.6.2014, in which, they have extracted condition No.8 of the agreement dated 21.9.2005. On a plain reading of the said condition, at the first blush, one gets an impression that the assessee was also a beneficiary of a common facility, which the SIPCOT was obliged to provide all entrepreneurs, who have been allotted sites/units in the IT Park.

46. Even before us, the copy of the agreement dated 21.9.2005, styled as a "lease deed" has not been placed for consideration. The CIT(A) did not examine the obligations, which were to be fulfilled by the assessee under the lease agreement. In fact, in the strict sense, terming it as a lease agreement itself may be a misnomer because, such agreement is bound to contain various conditions, which the assessee had to fulfil.

47. After hearing Mr.A.S.Sriraman, learned counsel appearing for the assessee, we come to know that the land, on which, the facility has been developed by the assessee, is owned by the SIPCOT and it appears that the development consists of providing roads inside the IT Park, establishment of a multi-level car parking, etc. Under the said agreement, the assessee had to develop these facilities and maintain them and the period is stated to be 99 years, which is virtually perpetual. Therefore, a deeper examination of the factual issue would have given a quietus to the matter even at the level of the Assessing Officer.

48. Before the Tribunal, the argument appears to have been whether the lease hold right would qualify as a 'capital asset' as defined under Section 2(14) of the Act. In our considered view, such issue would not arise for consideration in the facts of the present case because what was required to be examined was the type of transaction between the assessee and the SIPCOT.

49. Interestingly, the assessee, in their appeal petition before the CIT(A), made an alternate prayer while they would state that their claim for depreciation on lease hold right was allowable and alternatively they would state that it was essential to allow the expenditure incurred for operational purposes as revenue expenditure. Their argument was that the Assessing Officer could not have denied both the reliefs.

50. One more interesting fact is that such depreciation has been allowed on the lease hold land for the assessment years 2009-10, 2010-11, 2012-13 and 2013-14. It is not clear as to whether in those years, there was any detailed consideration with regard to the factual aspect, which is now being agitated before us.

51. In our considered view, the decision in the case of Cyber Park Development & Construction Ltd., was couched on a different set of facts and would not be of assistance to the case of the Revenue.

52. Ms.V.Pushpa, learned Junior Standing Counsel for the Revenue would place reliance on the decision of the Hon'ble Supreme Court in Mother Hospital (P.) Ltd., vs. CIT, Trichur [reported in (2017) 79 Taxmann.com 375]. In the said decision, it has been held that in terms of Explanation 1 to Section 32(1) of the Act, it is only when the assessee holds a lease right or other right of occupancy and any capital expenditure is incurred by it on construction or renovation or improvement of building, the assessee would be entitled to depreciation to the extent of such expenditure incurred. It is the submission of the learned Junior Standing Counsel that this decision will fully support the argument of the Revenue.

53. On the contrary, Mr.A.S.Sriraman, learned counsel for the assessee would submit that the decision of the Hon'ble Supreme Court in the case of Mother Hospital (P.) Ltd., would

support the case of the assessee and in this regard, referred to paragraph 10 of the judgment wherein it has been stated that from the plain language of Explanation 1 to Section 32(1) of the Act, it was clear that when the assessee held a lease right or other right of occupancy and any capital expenditure was incurred by the assessee on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension or improvement to the building and the expenditure on construction was incurred by the assessee, then the assessee would be entitled to depreciation to the extent of any such expenditure incurred.

54. In our considered view, these decisions cannot be straight away applied to the cases on hand without taking note of the factual position, which, as already been pointed out, was not done by the Assessing Officer or the CIT(A) or for that matter, the Tribunal. In fact, the assessee has to be partially blamed for not submitting an effective reply to the notice issued under Section 148 of the Act.

55. Further, we find that the decision of this Court in the case of A.R.Krishnamurthy and A.R.Rajagopalan was in respect of a lease-cum-licence granted by the State Government for conducting mining activities in favour of the assessee company and it appears to be an exclusive right and the question was as to whether such a transaction would amount to transferring a capital asset and thereby attracting capital gains. This being not the case of the assessee, this decision is wholly inapplicable.

56. The decision of the Calcutta High Court in the case of A.Gasper was in respect of right conferred on a statutory tenant and the question was when the right got extinguished on account of a sublease, would it amount to extinguishment of the rights in a capital asset to attract capital gains. This being not the case of the assessee herein, this decision cannot be made applicable.

57. Similarly, in the decision of the Hon'ble Supreme Court in the case of R.K.Palshikar, the question, which arose, was as to whether the transaction effected by the assessee would amount to transferring a capital asset warranting capital gains tax.

58. In our considered view, the Tribunal need not have taken the matter thus far to render a verdict in favour of the assessee especially when the Lower Authorities did not know the factual position. Thus, we are of the firm opinion that the matter has to be re-adjudicated by the Assessing Officer, for which purpose, the Assessing Officer has to threadbare analyse the agreement dated 21.9.2005 entered into between the assessee and the SIPCOT and not go merely by the nomenclature or the title of the document. But, the Assessing Officer should examine the contents. It would also be well open to the assessee to raise the alternate plea, which they raised before the Assessing Officer stating that the expenditure incurred for operational

purposes ought to have been allowed as a revenue expenditure.

59. For the above reasons, the finding rendered by the Tribunal, the CIT(A) and the Assessing Officer with regard to the disallowance of depreciation on lease hold rights for the assessment years 2007-08 and 2008-09 is set aside and the matter is remanded to the Assessing Officer to take a fresh decision on merits and in accordance with law, after due opportunity to the assessee.

60. In the result, the tax case appeals are partly allowed to the extent indicated hereinbelow:-

(i) Substantial question of law No.1 is 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%.

(ii) Substantial question of law Nos.2 and 3 are left open, as the issue has been remanded to the Assessing Officer for a fresh consideration; and

(iii) Substantial question of law No.4 is answered against the Revenue following the decision rendered by us in the assessee's own case in T.C.A.No.485 of 2020 dated 05.1.2021.

No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

सत्यमेव जयते

To

THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH, CHENNAI.

2.THE COMMISSIONER OF INCOME TAX (APPEALS)-II, CHENNAI

3.THE COMMISSIONER OF INCOME TAX III, CHENNAI 34

4.THE ASSISTANT COMMISSIONER OF INCOME TAX CORPORATE CIRCLE-3
(I), CHENNAI

+1cc to Mr.M.Swaminathan, Advocate SR.No. 2447

TCA.Nos.220 to 225 of 2018

A.SK(23.03.2021)