आयकरअपीलीयअधिकरण ,'सी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्यएवंश्री एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं/.I.T.A. Nos. 1431, 1432 & 1433/Chny/2016

निर्धारण वर्ष/Assessment Years : 2010-11, 2011-12 & 2012-13

Assistant Commissioner of Income Tax, Corporate Circle -2(1), Chennai – 600 034.	Vs.	M/s. East Coast Constructions & Industries Limited, No. 4, Buharia Buildings, Moores Road, Chennai – 600 006. **[PAN: AAACE 1662P]**
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

आयकर अपील सं/.I.T.A. No. 864/Chny/2015

निर्धारण वर्ष/Assessment Year : 2010-11

M/s. East Coast Constructions & Industries Limited, No. 4, Buharia Buildings, Moores Road, Chennai – 600 006. **[PAN: AAACE 1662P]**	Vs.	Assistant Commissioner of Income Tax, Corporate Circle -2(1), Chennai – 600 034.
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

Assessee by	:	Shri. G. Baskar, Advocate
Revenue by	:	Shri. D. PrabhuMukunthArun Kumar, Jr. Standing Counsel

सुनवाईकीतारीख/Date of Hearing	:	14.02.2018
घोषणाकीतारीख/Date of Pronouncement	:	14.02.2018

आदेश/ O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The Revenue filed these appeals against the orders of the Commissioner of Income Tax (Appeals)-6, in ITA Nos. 86, 135 & 138/CIT(A)-6/2013-14 & 2014-15 dated 17.03.2016 for assessment years 2010-11, 2011-12 & 2012-13, respectively. The assessee filed an appeal against the order passed u/s. 263by the PCITin ITA No. 864/2015 for assessment year 2010-11.

2. M/s. East Coast Constructions & Industries Limited, the assessee, is engaged in civil construction works like construction of fly over, under pass, sewerage, water supply and treatment etc., for various local bodies, railways and state/central governments. For this purpose, the assessee had entered into contract with the state/central governments and local authorities to execute the infrastructural works as per the contract agreement made and claimed deduction u/s. 80IA for the construction of above infrastructural works. For assessment years 2011-12 & 2012-13, the assessee claimed deduction u/s. 80IA, however, for the assessment year 2010-11 since its gross total income was negative figure, the assessee did not claim. In the earlier assessment years, the assessee's claim u/s 80IA was refused by the AO holding that the assessee is a mere contractor and not a developer. For these

assessment years also, the Assessing Officer elaborately discussed this issue and refused to allow the claim u/s. 80IA on the following grounds .

a) The income has not been derived from the development of infrastructural facilities.
b) The assesseee is not the developer of the project but a mere contractor
c) The assessseeis not the owner of the project.

3. Aggrieved, the assessee filed appeals before the CIT(A). The CIT(A) found that the same issue has been considered and decided in assessee's favour by the Chennai Tribunal for assessment year 2004-05. His predecessor has also allowed the claim in assessment year 2008-09 and 2009-10 following the decision of the Tribunal and following them , the CIT(A) directed the AO to allow the claim under section 80IA . Aggrieved, the Revenue filed these appeals againstthe decisions of the CIT(A) for these assessment years with the following grounds:

> *"1. The Order of the Commissioner of Income Tax(Appeals) is contrary to the Law and facts of the case.*
> *2. The CIT(A) erred in holding that the assessee is a developer and is eligible for deduction u/s.80IA.*
> *2.1 The CIT(A) ought to have appreciated the fact that the assessee cannot be termed as a 'developer' as the company was only executing the contract work for the Government authorities. According to the Explanation 2 to Sec.801A vide Finance Act 2007 (with retrospective effect from 01.04.2000, the assessee is only a works contractor.*
> *2.2 The CIT(A) erred in relying on the decision of the ITAT for the Asst.Year 2004-05 in the assessee's own case, in as much as the decision of the ITA T for the Asst.*

Year 204-05 has not been accepted by the department and further appeal has been preferred before the Hon'ble High Court of Chennai and the issue has not reached finality.

2.3. It is submitted that the ITAT's decision in the case of ACIT Vs. Indwell Linings P Ltd. reported in 122 TT J 137 is squarely applicable to the facts of the case wherein the ITAT has clearly distinguished the meaning of the words "Developer" and "Contractor" and in this case the assessee took contract work from the Gujarat Government and it being a contractor and not developer, benefit of deduction u/s.80 lA was not available to the assessee.

2.4 It is submitted that twin conditions of investment and execution of project are to be fulfilled. In the instant case, the assessee is not making any investments as it is carrying out the contract based on the periodical payments made by the Government authorities and the local authorities keep a portion of the contract amount as retention money which would be released after certification of the quality of work done by the contractor.

3. The CIT(A) ought to have appreciated that the relied upon decisions in the case of M/s. East Coast Constructions and Industries Ltd (assessee's own case) and M/s. Brilliant Tutorials P. Ltd. are distinguishable as the former relates to the taxability of retention money not offered by the assessee and the latter with regard to the allowance of advertisement expenditure.

4. We heard the rival submissions. We find that this tribunal in the assessee's case for ay 2004-05 in ITA 544/2010 dt 13.09.2011 on same set of facts and law held in favour of the assessee and the CIT(A) has followed such decision and hence we uphold the orders of the CIT(A) on this issue. The Corresponding grounds of the Revenue are dismissed.

5. Depreciation on UPS:

5.1 While making the assessment for assessment years 2010-11, 2011-12 & 2012-13, the AO found that the assessee claimed depreciation on UPS @

60% based on the decision of the Delhi High Court in the case of CIT vs Bonanza Portfolio Limited, wherein it has been held that computer peripherals are also entitled to depreciation @ 60%. However, the AO treated the UPS procured during the impugned assessment yearsas not part of computers but as Plant & Machinery and restricted the depreciation. Aggrieved, the assessee filed appeals before the CIT(A) and the CIT(A) relying on this Tribunal decision in the case of Sundaram Asset Management Co. Ltd., vs SCIT in ITA No. 1774/Mds/2012 dated 19.07.2013 directed the AO to allow depreciation @ 60% as claimed by the assessee. Aggrieved, the Revenue filed these appeals against such decisions pleading that the CIT(A) erred in not considering the fact that UPS is not an integral part of the computer, computer can function without UPS and at best it can be considered as a charger to protect the unsaved data when there is a power failure etc.

5.2 We heard the rival submissions. Since the CIT (A) applied this tribunal decision in Sundaram Asset Management Co. Vs CIT, we do not find any infirmity in his decision and hence the Revenue's grounds of appeal on this issue are dismissed .

6. On the disallowance u/s14A :

6.1 The assessee earned dividend income at Rs. 78,210/-, 78,210/- & 65,820/- for assessment years 2010-11, 2011-12 & 2013-14, respectively.

The AO disallowed Rs. 51,84,351/-, Rs.12,28,691/-&Rs 12,87,194/- u/s. 14A rw rule 8D for assessment years 2010-11, 2011-12 & 2012-13, respectively. Aggrieved, the assessee filed appeals before the CIT(A). The CIT(A) following his predecessor order in ITA No. 641/11-12/A-III dated 11.12.2012 for assessment year 2009-10 held that no disallowance under Rule 8D(ii) is called for as the interest that can be attributed to specific loans are not to be considered for the purpose of disallowance. However, the CIT(A) held that the disallowance made under limb (iii) of the Rule is correct and accordingly he restricted the disallowance to Rs. 7,86,224/-, 7,53,072/- & Rs.11,91,699/- ,respectively , for assessment years 2010-11, 2011-12 & 2012-13. Aggrieved, the Revenue filed these appeals pleading that the CIT(A) has relied on the decision in assessee's own case for Asst. year 2009-10 wherein the assessee had submitted additional evidences before the CIT(A), whereas in the year under consideration, no such break up was furnished. The CIT(A) ought to have considered the break-up details of interest expenditure with regard to the term loan and other loans in respect of the year under consideration before giving relief etc

6.2 The DR argued the case on the lines of the order of the AO and on the grounds of appeals . Per contra, the AR submitted that the assessee earned dividend income of Rs. 78,210/- & 78,210/- for assessment years 2010-11 &2011-12 , respectively. No borrowed funds were used for earning the

dividend income. The assessee did not claim exemption of this dividend income in the computation statements of the respective ay and pleaded that the disallowances, if any , may be restricted to dividend income earned as per the decision of Joint Investment vs CIT (2015) 372 ITR 694, Delhi. He has also pleaded that since the assessee has not claimed the dividend income as an exemptincome inthe computation statements of the respective ay, even the restriction of the disallowances in accordance with the ratio of the Delhi HC, supra, is also not required . However, if it is held that disallowances are required , then the AO may be directed to allow the impugned dividend income as anexempt income in the ays 2010-11& 11-12, respectively.

6.3 We heard the rival submissions. The assessee earned dividend income of Rs. 78,210/-, 78,210/- & 65,820/- for assessment years 2010-11,2011-12& 2012-13 , respectively. No borrowed funds were used for earning the dividend income. Thus, the disallowances, if any , has to be restricted to the dividend income earned as per the decision of Joint Investment vs CIT (2015) 372 ITR 694, Delhi. Since, the assessee pleads that it did not claim the dividend income as an exempt income in the computation statements of the ays 2010-11 & 11-12, respectively, we direct the AO to verify the facts and if it is found correct as canvassed , he shall exempt such dividend income and then make appropriate restrictions in accordance with the above decision, after affording

adequate opportunity to the assesse. Thus, the Revenue's grounds are treated as allowed partly.

7. Disallowance on expenses pertaining to retention money:

7.1 In the assessment made for assessment year 2011-12, the AO held that the assessee has retention money in withheld projects. However, corresponding expenditure has not been excluded by it in accordance with matching principle and expenditure. In view of that the AO disallowed 97.44% out of withheld amount as retable expenditure based on the analogy that the assessee has earned 2.31% & 2.56%, respectively, as net profit in the impugned assessment years. Aggrieved, the assessee filed appeals before the CIT(A). The CIT(A) relying on the Madras High Court decision in 292 ITR 399, 252 ITR 802, CIT vs East Coast Constructions and Industries Limited, 283 ITR 297 etc., held that the expenditure needs to be allowed in terms of mercantile system of accounting followed by the assessee as they have accrued in the regular course of business. The "matching principle" has no applicability in the present context. Hence, he deleted the disallowances made by the AO. Aggrieved, the Revenue filed these appeals.

7.2 We heard the rival submissions. Since, the assessee relied on decision of this tribunal in ITA Nos. 1176 & 1180/Mds/2016 for ays 2011-12 & 2009-10

dated 30.11.2016 in the case of M/s. East Coast Consultants & Infrastructure Ltd. The relevant portion of the order is extracted as under:

> *"2. The only common issue raised in both the Revenue's appeal is with regard to deletion of disallowance made on the expenses pertaining to the retention of moneys withheld.*
>
> *3. After hearing both the parties, similar issue came before this Tribunal in the case of M/s Consolidated Construction Consortium Ltd., in/.I.T.A.Nos. 1824/Mds/2011, 875, 701 & 702/Mds/2014 vide order dated 06.01.2016 wherein held that:-*
>
> > *"12. We have heard both the parties and perused the material on record. Generally, the expenditure which is actually incurred or is incurred in a relevant year would be allowed as deduction while computing the income from business. Such a liability has to be in praesenti. However, at the same time, it relates to the works undertaken by the assessee, completed contract method of accounting is followed which is consistent with the Accounting Standards and these Accounting Standards also laid down the norms indicting the particular point of time when the provisions for all known liabilities and losses have to be made. The making of such a provision by the assessee appears to be justified more so when the assessee had recognized gain as well on such project during the assessment year under consideration. This appears to be in consonance with the principle of matching cost and revenue as well. The reason given by the Department is that the retention money which is receivable was not recognized as income as such, retention payment also cannot be allowed as deduction while computing the income of the assessee. As rightly argued by the assessee, both these are governed by different Accounting Standards. Retention payment is governed by AS-7 issued by ICAI, New Delhi. On the other hand, retention money receivable is governed by AS-9. What is applicable to retention money receivable cannot be applied to retention money payable as these are governed by different Accounting Standard. Further it is undisputed that whenever assessee incurred expenditure on the project it is admissible for deduction. The only dispute raised by the Revenue is regarding the year of liability of expenditure. Considering that the assessee-company is assessed at uniform rate of tax, the entire exercise of seeking to disturb the year of allowability of expenditure is, in any case, revenue neutral. We are*

reminded of the classic observation made by the Bombay High Court in the case of CIT vsNagri Mills Co. Ltd, 33 ITR 681 which reads as under:

" We have often wondered why the income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other."

12.1 *The aforesaid observation of the Bombay High Court was reiterated by the Delhi High Court in the case of CIT vsShri Ram Pistos and Rings Ltd, 220 CTR 404, as under:*

> *"Finally, we may only mention what has been articulated by the Bombay High Court in CIT v. Nagri Mills Co. Ltd. [1958] 33 ITR 681 (Bom) as follows : . . .*
>
> *In the reference that is before us there is no doubt that the assessee had incurred an expenditure. The only dispute is regarding the date on which the liability had crystallized. It appears that there was no change in the rate of tax for the assessment year 1983-84 with which we are concerned. The question, therefore, is only with regard to the year of deduction and it is a pity that all of us have to expand so much time and energy only to determine the year of taxability of the amount."*

12.2 *Further, in our opinion, the provision for accrued liability which has to be discharged at a future date by the assessee is an allowable expenditure. In the case of CIT vs Micro Land Ltd, 347 ITR 613[Karnataka*

High Court], the assessee claimed deduction u/s 37 of the Act for provision for future warranty. The Assessing Officer opined that provision for future warranty is contingent liability and cannot be allowed. The Supreme Court in the case of Rotork Controls India Pvt. Ltd vs CIT, 314 ITR 62, held that the provision made by the assessee for warranty claims on the basis of past experience is allowable deduction u/s 37 of the Act. In the case of Bharat Earth Movers vs CIT, 245 ITR 428, the Supreme Court held that where the assessee has incurred expenditure which is more than the provision for warranty obligation made in the books of account, it cannot be said that the provision made by the assessee is not capable of being estimated with the reasonable certainty though actual quantification was not possible and therefore, the Tribunal was justified in allowing the deduction. The Delhi High Court in the case of CIT vsEricssion Communications P. Ltd, 318 ITR 340, held that provision for warranty claims on scientific basis which is consistently applied by the assessee for its business was allowable as deduction. The Madras High Court in the case of CIT vsLuk India Pvt. Ltd, 239 CTR 440, held that provision for warranty claimed by applying the settled principles of having regard to the fact that claim was based on a scientific approach and it was worked out on the average of previous year's warranty settlement is allowable expenditure. Same view was taken by the jurisdictional High Court in the case of Kone Elevator India Pvt. Ltd vs ACIT, 340 ITR 46. Further, the Supreme Court in the case of Calcutta Co. Ltd vs CIT, 37 ITR 1, held that where the assessee was following the mercantile system of accounting is entitled for deduction of the expenditure which is incidental to the business on accrual basis though it was not actually incurred during the relevant accounting year. The Kerala High Court in the case of CIT vs Indian Transformers Ltd, 270 ITR 259, held that provision created by the assessee for after sales services based on warranty was towards a definite and ascertained liability. On the basis of relevant facts the provision cannot be treated as a contingent liability and therefore, the same was allowable as deduction. Same view was taken by the Delhi High Court in the case of CIT vs Whirlpool of India Ltd, 242 CTR 245, wherein held that the assessee consistently making provision for warranty on the basis of actuarial valuation in respect of machines sold during the year could not be precluded from revising this provision after taking into consideration that warranty period of the goods sold under warranty was exceeding and provision already

provided in a particular year is falling short of the expected claim that may be received. Such a provision is based on scientific study and actuarial basis and to be allowed as a business expenditure. Hence, in our opinion, the provision for payment made by the assessee towards sub-contract is allowable expenditure as the assessee recognized the revenue from the said contract as income in the assessment year under consideration. Further, we make it clear that the assessee cannot claim the same expenditure on actual payment basis, otherwise it amounts to double deduction – one on the basis of accrual and another on the basis of actual payment. Hence, we direct the Assessing Officer to allow this retention money payment only on accrual basis and not on actual payment basis. With these observations, we remit this issue to the file of the Assessing Officer for quantification. This ground is partly allowed."

In view of the above order of the Tribunal, we remit the issue to the file of AO on similar line."

Following the same, we remit the issue to the AO on the similar lines. The grounds of appeal of the Revenue are partly allowed for statistical purposes.

8. For assessment year 2012-13, the AO made an addition of Rs. 157,27,760/- belated remittance of employees' contribution to PF & ESI. Aggrieved, the assessee filed an appeal. The CIT(A) relying on the decision of the Madras High Court in the case of CIT vs Industrial Security and Intelligence India Pvt. Ltd., in Mds. 585 & 586 of 2015 and MP No. 1 of 2015 dated 24.07.2015 and the ITAT decision in the case of ACIT vs SCM Micro Systems (India) Limited reported on 26 ITR(T) 178 allowed the appeal. Aggrieved, the Revenue filed an appeal for assessment year 2012-13.

8.1 We heard the rival submissions. Since, the CIT(A) has relied on the ratio of the Jurisdictional High Court and this tribunal decision, we do not find any reason to interfere in his order. The grounds of appeal filed by the Revenue are dismissed.

9. ITA NO. 864/2015 assessee's appeal for ay 2010-11:

9.1 The assessee filed an appeal against the order u/s. 263 passed by the PCIT-2, Chennai for assessment year 2010-11. At the time of hearing, the assessee pleaded to withdraw the appeal and hence the assessee's appeal is dismissed as withdrawn.

10. In the result, the Revenue's appeal in ITA No. 1431/16 is dismissed, ITA Nos. 1432/2016 & 1433/2016 are partly allowed for statistical purpose and the assessee's appeal in ITA No. 864/2015 is dismissed as withdrawn.

Order pronounced on Wednesday, the 14th day of February, 2018 at Chennai.

Sd/-	**Sd/-**
(जॉर्जमाथन)	**(एसजयरामन)**
(GEORGE MATHAN)	**(S. JAYARAMAN)**
न्यायिकसदस्य/Judicial Member	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 14th February, 2018
JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF