

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.652/M/2017  
Assessment Year: 2013-14**

M/s. EA Infrastructure Operations Pvt. Ltd., Plot No.34, Deonar Ancilliary Inds. Complex, Deonar, Mumbai - 400 043 <b>PAN: AAACE8218R</b>	Vs.	ITO 14(1)(1), 5 <sup>th</sup> Floor, Earnest House, NCPA Marg, Nariman Point, Mumbai - 400 021
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri S.S. Phadkar, A.R.  
Shri K.S. Turalkar, A.R.

Revenue by : Shri M. Rajguru, D.R.

Date of Hearing : 27.06.2018

Date of Pronouncement : 24.07.2018

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The present appeal has been preferred by the assessee against the order dated 04.10.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2013-14.

**2. The various ground raised by the assessee are as under:**

"i) On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in disallowing the depreciation of Rs.7,81,693/- on the ground that the plant was not use during the year under consideration it was to be handed over to MCGM on finalization of Arbitration Proceedings.

ii) On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) ought to have held that as per the Agreement with MCGM to conduct the Plant and Machinery on BOOT basis in working condition on completion of the contract on 20.05.2010 and, therefore, the appellant has to maintain the Plant and Machinery

installed at GTB Hospital, Sewree, in the course of Arbitration proceedings.

iii) The appellant craves leave to add, alter, amend or delete any ground(s) of appeal either before or during the course of hearing of the appeal.”

3. At the outset, the Ld. Counsel submitted before the Bench that there is a delay of three days in filing the appeal. The Ld. Counsel while trying to explain the delay with reference to the affidavit filed by the assessee submitted that due to the intense litigation going on between the assessee and the Municipal Corporation of Greater Mumbai, the order received in the office on 28.11.2016 got mixed and mingled with other court papers and thereafter as soon as the staff of the assessee found the said order, the same was immediately handed over to the counsel of the assessee for taking the necessary action. The Ld. A.R. submitted that the whole process has taken some time which caused the delay of three days. The Ld. Counsel submitted that since there existed a reasonable and sufficient cause for the delay which has been explained hereinabove, the delay of three days should be condoned and the appeal may kindly be heard on merit and decided accordingly. The Ld. A.R. relied on a series of decisions in the case of National Thermal Power Company Ltd. vs. CIT 229 ITR 383 (SC), CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom.) and Jute Corporation India vs. CIT (1991) 187 (ITR) 688.

4. The Ld. D.R. objected to the late filing of appeal by the assessee and prayed for the dismissal of the same in lumini as being time barred.

5. We have heard the rival submissions of both the parties and perused the material on record. We find that there is a delay of three days in filing the appeal which has been explained by the assessee by filing affidavit citing reasons which appear to genuine and germane. We, therefore, considering the law laid down by the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. vs. CIT (supra), CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (supra) and Jute Corporation India vs. CIT (supra), condone the delay and admit the appeal for adjudication.

6. The only issue in the ground raised by the assessee is against the confirmation of Rs.7,81,693/- on the ground that the plant was not used during the year under consideration as it was to be handed over to the MCGM on finalization of arbitration proceedings.

7. The facts in brief are that the assessee successfully bade for treating the Bio Medical Waste for a period of 10 years with MCGM on Build, Operate, Own and Transfer basis. The assessee established a plant at Sewree, Mumbai. As per the contract with MCGM, the waste treatment plant was to be handed over to the MCGM in a working condition after the end of 10<sup>th</sup> year. Accordingly, the assessee installed waste treatment plant and commenced the actual operation of treating the Bio Medical Waste from November 2001 and also started receiving the payments as agreed. Under the agreement with MCGM, the assessee was to be provided Bio Medical Waste of 5 tons per day and in the event the MCGM

fails to provide the requisite quantity of waste, the said authority still has to pay the assessee for treatment of 5 tons of Bio Medical Waste per day. Due to the objections by the local people due to pollution in the area because of treatment of Bio medical waste , the MCGM directed the assessee to stop the operation of the said plant. The matter went to Hon'ble Bombay High Court to appoint sole arbitrator in terms of the agreement to resolve the issue regarding non payment of treatment charges up the end of the 10<sup>th</sup> year besides claiming compensation from the MCGM. During the course of assessment proceedings, the AO noticed that assessee has shown total income of Rs.58,31,428/- under the head "Income from other sources" whereas the net income offered to tax was only Rs.21,96,240/-. Accordingly, the assessee was issued a show cause notice as to why the expenses should not be disallowed as there was no nexus between the income earned by the assessee and the expenditure incurred. The assessee replied vide letter dated 23.01.2016 that the expenses were incurred to the tune of Rs.34,99,525/- which is inclusive of depreciation of Rs.7,81,693/- in order to upkeep and maintain the plant which was to be handed over to the MCGM in a running condition as the same could not be handed over to the MCGM pending the arbitration proceedings. The AO rejecting the contention of the assessee disallowed the said expenses to the tune of Rs.34,99,525/- and added the same to the income of the assessee by framing the assessment under section 143(3) vide order dated 02.03.2016.

8. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee by observing and holding as under:

“5.6 I find that the various Hon'ble High Courts have consistently held that in the case of corporate assessee certain expenditure to keep itself afloat and have its continued existence have to be allowed as deduction irrespective of whether or not the assessee is engaged in active business and even if assessee has only passive incomes. The Hon'ble Calcutta High Court in the case of CIT v. Ganga Properties Ltd. (1993) 199 ITR 94 (Cal) held that even when company has only earnings of income from other sources, the expenditure incurred by the company for its continued existence and for retaining clerical staff, secretary and accountant and other incidental expenses, are allowable deduction. The Hon'ble Allahabad High Court in the case of CIT V. Rampur Timber and Turnery Co. Ltd. also held that the expenditure incurred by a company, for retaining its status as company and for its continued existence as such, is allowable deduction, even after discontinuation of business in certain circumstances. In the instant case, the appellant has not closed its business and also has a contractual obligation to maintain the plant as the same has not yet been handed over to MCGM due to non finalisation of arbitration proceedings. In view of these facts and the legal position on the issue as held by various courts, though there was no business income during the year, the expenses incurred for the upkeep of the plant and its continued existence are to be allowed as deduction. It is seen from the computation of income that the appellant had computed business loss of Rs.34,99,525/- including depreciation of Rs,7,81,693/- which was set off against the income from other sources. Since the plant was not used during the year under consideration and was to be handed over to MCGM on finalisation of arbitration proceedings (the contract period being over), depreciation on the same will not be allowable. The disallowance of Rs.34,99,525/- by the Assessing Officer is confirmed to the extent of claim of depreciation of Rs.7,81,693/-. The appellant's grounds of appeal are partly allowed.”

9. The Ld. A.R. vehemently submitted before us that the Ld. CIT(A) has grossly erred in confirming the disallowance on account of depreciation on the said plant to the extent of Rs.7,81,693/- by observing that the plant was not used during the year under consideration and was to be handed over to the MCGM upon finalization of the arbitration proceedings and thus justified the disallowance of depreciation. The Ld. A.R.

submitted that when the assessee is allowed all the expenses incurred by the assessee in connection with upkeep and maintenance of the plant to the extent of Rs.28,53,496/- by observing that the said expenses were incurred under a contractual obligation to maintain the plant and thus the assessee has not closed its business but due to litigation it was suspended. The Ld. Counsel submitted and argued that the depreciation is admissible expense because the plant is owned and maintained by the assessee for the purpose of transferring the same to the MCGM. The Ld. A.R. relied on a series of decisions, namely;

- i) CIT vs. Integrated Technology Ltd. (ITA No.530/M/2011
- ii) CIT vs. Refrigeration and Allied Industries Ltd. (2000) 113 taxman 103 (Delhi)
- iii) CIT vs. Kotak Mahindra Finance Ltd. (2010) 191 taxman 280 (Bom.)

10. The Ld. A.R. prayed that in view of the above decisions in which the similar issue has been decided in favour of the assessee, the appeal of the assessee should be allowed.

11. The Ld. D.R., on the other hand, relied heavily on the order of authorities below. The Ld. D.R. contended that since the plant has not been used and was lying idle as there was no operation of the said plant for treating the Bio Medical Waste and therefore the depreciation was rightly disallowed by the AO and affirmed by the Ld. CIT(A).

12. We have heard the rival submissions of both the parties and perused the material on record including the decisions

cited by the Ld. A.R. The undisputed facts are that the assessee constructed bio waste treatment plant under an agreement with MCGM which was to be handed over to the MCGM on the expiry of 10<sup>th</sup> year in a running condition. Accordingly, the assessee constructed a bio waste treatment plant and started operating the same. However, the plant has to be shut down following a protest by the local people and thereafter the MCGM directed the assessee to stop the operation of the said plant. The matter went into arbitration proceedings. The plant could not be handed over to the MCGM pending the arbitration proceedings and assessee has to incur expenditure on running and maintenance of the said plant as it was to be handed over to the MCGM in a running condition. During the year the assessee incurred expenses to the tune of Rs.36,35,188/- which is inclusive of depreciation of Rs.7,81,690/-. The assessee incurred expenses by way of labour charges, diesel expenses etc. The AO disallowed the entire expenditure on the ground that there is no nexus between the income shown by the assessee under the head "income from other sources" to the expenses incurred on the ground that there was no business activity during the year. The first appellate authority allowed the expenses to the tune of Rs.28,53,496/- by holding that even though the assessee has not done any business during the year, the assessee was doing running the maintenance, however the depreciation of the plant of Rs. Rs.7,81,690/- was sustained. Now the issue before us is whether the said depreciation was admissible or not. After examining the facts on record, we find that the

assessee has to maintain the plant which was to be handed over to the MCGM in a running condition and thus is entitled to claim the expenses on the said up keep and maintenance. However, we fail to understand as to how the Ld. CIT(A) allowed the part of the expenditure to the tune of Rs.28,53,496/- and disallowed only Rs.7,81,693/- by holding that the plant was not operational as there was no processing of bio medical waste in the said plant. Having considered the facts of the case, we are not in agreement with the conclusion drawn by the Ld. CIT(A) on this issue especially when the Ld. CIT(A) observed that the expenses incurred on maintenance and upkeep were admissible as the plant was to be maintained by the assessee during the pendency of arbitration proceedings and disallowed only the depreciation part. In our view, the assessee is entitled to the said amount of depreciation also on the same analogy as qua the other expenses which were allowed by the Ld. CIT(A). The case of the assessee also finds supported by the various decisions as relied upon by the assessee. In view of the discussion as above and ratio laid down by the judicial forms, we set aside the order of CIT(A) and direct the AO allow the depreciation.

13. The appeal of the assessee is allowed.

**Order pronounced in the open court on 24.07.2018.**

**Sd/-  
(C.N. Prasad)  
JUDICIAL MEMBER**

**Sd/-  
(Rajesh Kumar)  
ACCOUNTANT MEMBER**

Mumbai, Dated: 24.07.2018.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.