

आयकर अपीलार्थ आधिकरण, राजकोट ँयायपीठ, राजकोट ।
IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
MS. MADHUMITA ROY, JUDICIAL MEMBER

Sr. No.	ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
1.	110/Rjt/2016	2011-12	Deputy Commissioner of Income-tax, Gandhidham Circle, Gandhidham-Kutch	M/s. H.D. Enterprise, 1 st Floor, Pooja Complex, Station Road, Bhuj-Kutch
2.	205/Rjt/2016	2012-13	Assistant Commissioner of Income-tax Gandhidham Circle, Gandhidham-Kutch	-do-
3.	237/Rjt/2016	2013-14	-do-	-do-

(अपीलार्थ /Appellant)	..	(ँयथ / Respondent)
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अपीलार्थ ओर से / Appellant by :	Shri M. N. Maurya, CIT DR
ँयथ क ओर से/Respondent by :	Shri D. M. Rindani, AR

सुनवाई क तारख / Date of Hearing	25/02/2020
घोषणा क तारख /Date of Pronouncement	28/02/2020

आदेश / O R D E R

PER BENCH:

These appeals filed by the Revenue are directed against the orders dated 11.01.2016, 03.03.2016 & 25.04.2016 passed by the Ld. CIT(A)-3, Rajkot arising out of the orders all dated 24.03.2014 passed by the

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Assessing Officer, Gandhidham under sections 143(3) of the Income Tax Act, 1961(hereinafter referred to as 'the act') for A.Ys. 2011-12, 2012-13 & 2013-14 respectively. Since all the appeals relate to the same assessee, and the issues are identical, these are heard analogously and are being disposed by a common order.

ITA No. 110/Rjt/2016 A.Y. 2011-12 is taken as the lead case.

2. The appeal relates to higher rate of depreciation on dumpers. The appellant, engaged in the business of heavy earth moving equipments and vehicles for excavation of over burden (earth) and minerals and transporting the same to the specified place and also transportation of minerals from mines to power plants, transportation of ash from power plant to outside the plant. During the F.Y. 2010-11 relevant to A.Y. 2011-12, the appellant has also used tippers for transportation of over burden minerals and ash for Gujarat Industries Power Ltd., South West Mining Ltd., KSK Mineral Resource Pvt. Ltd. & VS Lignite Power Pvt. Ltd. etc.

The assessee has claimed higher rate of depreciation on dumper at 30% to the tune of Rs. 2,02,01,944/-. The Ld. AO by and under an order sheet dated 23.12.2013 asked the assessee as to why depreciation should not be allowed at 15% as against 30% claimed. By and under a reply dated 14.02.2014 the assessee submitted their reasons for admissibility of higher rate of depreciation at 30% on dumper. It is relevant to mention that the assessee also cited certain case laws including the order passed by the Honøble Tribunal of Bombay in the case of CIT vs. S.C. Thakur & Co. and Bros (2010)322ITR 463 (Bombay) in support of his case where

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the order passed by the Ld. Tribunal allowing higher rate of depreciation following the CBDT Circular No. 652 dated 14.06.1993 holding that trucks/dumpers used by assessee civil contractor to transport the earth (which earth did not belong to the assessee) amounted to use in the business of transportation of goods on hire has been upheld. However, such submission filed by the assessee was not found acceptable by the Ld. AO. He was of the opinion that the assessee had shown only an income of Rs. 1.36 crores as receipt from transportation of lignite and income of Rs. 183.38 crores from business of mining which includes excavation, blasting, overburden removal & stacking, dumping the overburdened material at dumping site, transporting the mined material from mines to stacking place, from which it appears to the Ld. AO that more than 99.25% of receipt of the assessee is from the mining work. According to the Ld. AO the 30% rate of depreciation available to the assessee only if motor lorries are used for running there on hire, but the assessee's business is basically mining for which the assessee do use the excavators, dumpers etc. which is different from vehicle running them on hire. The assessee since received a small sum of Rs. 1.36 crores for transportation of lignite and fly ash which is less than 0.75% of the total receipt, according to the Ld. AO by no stretch of imagination the same can be said to be a business of transportation. Ultimately in the business of no receipt for hire from motor lorries and also only 0.75% receipt from so called transportation which according to the Ld. AO does not prove the assessee is in transportation business. According to the Ld. AO transportation is ancillary to mining only for which assessee is getting payment on per ton basis rather than monthly basis as a case for giving the lorries on hire. He, therefore, denied the claim of 30% of

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depreciation and the same has been restricted to 10,01,00,972/- as against the depreciation claimed by the assessee at Rs. 20,02,01,944/-. In appeal the said disallowance was deleted by the Ld. CIT(A). Hence, the instant appeal before us.

3. At the time of hearing of the instant appeal the Ld. Advocate appearing for the assessee submitted before us that the scope of contract was basically for transportation of material (lignites) by hiring the equipments of the appellant. The Ld. AR further pointed out the letter of intent issued by various contractee, which is appearing at Page 59 of the order passed by the Ld. CIT(A).

Apart from that he has further relied upon the judgment dated 29.08.2017 passed by the Co-ordinate Bench passed in the matter of DCIT vs. M/s. National Construction Co., DCIT vs. M/s. P.C. Patel & Co. and ACIT vs. M/s. Gaurav Contracts Co. and DCIT vs. M/s. Durga Construction Co. More so, it was submitted by the Ld. AR that the said judgment passed by the Co-ordinate Bench has been upheld by the Honorable Jurisdictional High Court in Tax Appeal No. 414 to 425 of 2018. He, therefore, relies upon the order passed by the Ld. CIT(A) in allowing the entire 30% depreciation on the vehicle/dumper as claimed.

On the other hand, the Ld. DR relied upon the order passed by the Ld. AO.

4. We have heard the rival submissions made by parties, we have also carefully considered the relevant materials available on record including

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the judgment passed by the Co-ordinate Bench and the judgment passed by the Hon'ble Jurisdictional High Court as well.

It appears that the Ld. CIT(A) while dealing with the issue relied upon the order passed by the Ld. CIT(A) in the matter of M/s. P.C. Patel & Co. for the A.Y. 2012-13 wherein the identical mode of business the assets were given on hire by the appellant which was used by those who took them on hire for some activity has been held to be in the nature of transportation. According to the Ld. CIT(A) in the same set of facts higher rate of depreciation is allowable and ultimately the disallowance of 15% depreciation has been deleted. We have carefully considered the judgment passed by the Co-ordinate Bench in the case of DCIT vs. M/s. National Construction Co. wherein the identical set of facts particularly where the assessee is having identical mode of business depreciation @30% has been allowed by the Ld. CIT(A) have been upheld. The relevant portion dealing with the identical issue is reproduced herein below:-

"10. We have heard both the sides and perused the material on record carefully. The assessing officer has disallowed the claim of the assessee of depreciation @ 30% and reduced the same to 15% on the reasoning that the assessee was in the business of mining and not in the business of running motor lorries on hire. We observe that the assessee firm has earned its income from following contract awarded under tender procedure during financial year under consideration:-

(a) Tender Notice No. NCL/SGR/CMC/BLB/10/585 dated 27.1.2010(Excavation of OB by hiring of equipments such as excavators, tippers/dumpers, drills, dozers graders etc Loading, transportation of broken soil/rocks etc. (Awarded by Northern Coalfields Limited, Singruali (M.P) (Copy of Work order attached)

(b) Tender Notice No. 284/dat d 31.7.2010 by SECL, HQ, for Hiring of HEMM for excavation of OB, loading in to tippers, transportation, unloading the excavated materials etc. (Awarded by South Eastern Coalfields Limited, Kasmundra Area, Dist. Korba (C.G.) (Copy of Work order attached)

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(c) Tender Notice No. 20I/dated 4.11.2009 by SECL, HQ, for Hiring of HEMM for excavation of OB, loading in to tippers, transportation, unloading the excavated materials etc. (Awarded by South Eastern Coalfields Limited, Kasmundra Area, Dist. Korba (C.G) (Copy of Work order attached)

(d) Tender Notice No. 200/dated 30.10.2009 by SECL, HQ, for Hiring of HEMM for excavation of OB, loading in to tippers, transportation, unloading the excavated materials etc. (Awarded by South Eastern Coalfields Limited, Kasmundra Area, Dist. Korba (C.G) (Copy of Work order attached)

(e) Work Order No. SECL /GM /RGH/ Dy.GM/WO/93 / 09/1006 dated 31.8.2008 for Hiring of HEMM for excavation of OB, loading in to tippers, transportation, unloading the excavated material etc. (Awarded by South Eastern Coalfields Limited, Raigarh area, CG. (Copy of Work order attached)

We further observe that copies of tenders inviting bid furnished in the paper books during the course of appellate proceeds contain the objectives for which they were invited for as under :-

"Tender for hiring of Crawler mounded shovels/Hydraulic Excavators, Backhoes, Dumpers for removal of Overburden." "Tender No.12/2008-2009 Hiring of equipments such as HEMM, tippers, Drills, Dozors, Grader etc. for all kind of strata excavator and Hiring of above referred equipments for excavation and transportation of coal -Awarded by Western Coalfields ltd. ", "Tender No.1412009-JO dated 24.6.2009 Hiring of equipments such as HEMM, tippers, Drills, Dozors, Grader etc. for removal of all kind of strata excavation and transportation-Awarded by western Coal Fields Ltd. "

We have noticed that the tenders invited for hiring of equipments relate to the following kind of work :-

- i) Excavation of over burden;
- ii) Transportation of such excavated O.B./mineral;
- iii) Excavation of mineral
- iv) Transportation of mineral from mines to pit head, stock piles of any other place.
- v) The transportation of over burden mineral and extracted minerals were done by running motor vehicles such as tippers, dumper etc.

Further Circular no.652 of the Board makes it clear that motor/lorries must be hired to some other persons whether the use of the same in the assessee's business of transportation of goods on hire would suffice then Circular No.609 clarifies that higher depreciation will also be admissible on motor lorries used in the assessee's business of transportation of goods on hire. We also find that the assessee was not having any ownership of mines and materials excavated or transported. We observe that the equipment / vehicles were given on hire by the assessee during the course of the year under consideration in pursuance of tender to principal for intended use which includes transportation. Assessee-firm was required to provide stipulated equipments and vehicles for hiring work. They were not allowed to remove any equipments, vehicles provided under hiring contract without prior permission of the Principal/Principal Contractor. The business of the assessee firm itself was equipment & motor vehicles owners and providing them on hire. Assessee has received income from contract which includes various operations including

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transportation. We observe that facts and issue in the case of *Balani Ores Ltd. etc. vs. State of Orissa AIR 17, 1975 SCR (2) 138* that dumpers and rokers though registrable under the Motor Vehicle Act are not taxable under the Taxation Act of the Orissa Govt. as long as they are working solely within the premises of the respective owner are distinguishable from the case of the assessee wherein the issue is that higher rate of depreciation to be available on giving the motor vehicle on hire. We find the fact of the case of the assessee are distinguishable from the fact of the case of *Gupta Global Exim P.Ltd.* which pertained to the test of user when facts point out that the assets were used in assessee's own business. whereas in the case of the assessee the vehicles were given on hire in response to an open tender. We observe that the decision of the Hon'ble High Court of Andhra Pradesh High Court in case of *CIT Vs. Progressive Engg. Co* that JCB, earth Moving machineries are though registered as Motor Lorries in Motor vehicles Act, same are not road transport vehicles is applicable to JCB only and cannot be stretched to its applicability to dumpers, tippers etc motor vehicles. The referred case law is completely distinguishable in respect of fact, circumstances and subject matter of the case. We find that the Punjab and Haryana High Court in the case of *CIT-III Vs Rakesh Jain 20 taxmann.com 404* has held that tippers, vibrator and vibrator soil compactor are commercial vehicle. In this case it was also stated whether Tippers, Vibrator and Vibrator Soil Compactor would be covered by the expression 'commercial vehicle' or such vehicles have to be regarded as plant and machinery to attract less percentage of depreciation. It was stated that the reasoning adopted by the Tribunal would not suffer from

any legal infirmity because the Tippers are registered under the Motor Vehicles Act, 1988 (for brevity 'the 1988 Act') as road transport vehicle as would be vibrator and vibrator soil cornpactor. Gujarat High Court had held in *Commissioner v. Shiv Constructions (1987) 165 ITR 159Guj.*) that dumpers were road transport vehicles . The High Court held in the decision at page 160 that the Department could not take contradictory stands. The decision of Bombay High Court in the case of *Shah Construction Ltd. Bombay High Court in Shah Construction Co. Ltd. v. Commissioner (1991) 188 ITR 537 (Born.)* relates to development rebate in the case of dumpers. It has been specifically observed in the aforesaid decision that it was the assessee's case that dumpers had been purchased to secure an "efficient system of transport". It was found in said decision as a fact, that dumpers were identical to trucks except for some minor variation. It was because of these findings that the dumpers were held to be road transport vehicles in said decision and development rebate was denied. The judgment of the Supreme Court in *CIT v. Gupta Global Exim (P.) Ltd. [2008] 171 Taxmann 474* pertain to the correct test which the authorities below had to apply pertain to whether the appellant was in the business of transportation and whether the vehicles were used in the said business. It may please be noted that as per circular no. 652, in order to derive the benefit of higher depreciation, motor lorries must be hired out of some other person and whether the use of the same in the assessee's business of transportation of goods on hire would suffice. In this regard Board's Circular No. 609, dated 29-7-1991 [SI No. 272], it was clarified that where a tour operator or travel agent uses motor buses or motor taxis owned by him in providing transportation services to tourists, higher rate of depreciation would be allowed on such vehicles. It is further clarified that higher depreciation will also be admissible on motor lorries used in the assessee's business of transportation of goods on hire. The higher rate of depreciation, however, will not apply if the motor buses, motor lorries, etc. are used in some other non-hiring business of the assessee.

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It is demonstrated from the above facts and findings that assessee has received from contracts which includes various operation including transportation. We observe that to claim higher depreciation it is required that goods transported must belong to someone else and use of motor vehicles for transportation is a key to claim higher depreciation. After perusal of material on record we find that the assessee is engaged in providing equipment and motor vehicle on hire. After considering the above facts, judicial pronouncements, elaborate findings of the Ld. CIT(A) we do not find any reason to interfere in the findings of the Ld. CIT(A). Therefore, the appeal of the revenue is dismissed.”

We have further carefully considered the judgment passed by the Jurisdictional High Court whereby and whereunder the order passed by the Ld. Tribunal in upholding the 30% depreciation as claimed has been confirmed. Thus, respectfully relying upon the same in the absence of any changed circumstances in the matter we find no infirmity in the order passed by the Ld. CIT(A). Hence, the ground of appeal preferred by the Revenue is found to be devoid of any merit and thus dismissed.

ITA No. 205/Rjt/2016 (A.Y. 2012-13):-

5. The sole ground relating to the higher rate of depreciation at 30% on dumpers as claimed by the assessee is identical to that of the issue as decided in ITA No. 110/Rjt/2016 for A.Y. 2011-12 and in the absence of any changed circumstances the same shall apply *mutatis mutandis*. Hence, this ground of appeal preferred by the Revenue is dismissed.

ITA No. 237/Rjt/2016 (A.Y. 2013-14):-

6. The first ground is relates to the higher rate of depreciation at 30% on dumpers as claimed by the assessee is identical to that of the issue already decided in ITA No. 110/Rjt/2016 and in the absence of any changed circumstances the same shall apply *mutatis mutandis*. Hence, this ground of appeal preferred by the Revenue is dismissed.

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7. The second ground relates to deletion of addition of Rs. 10 lakh made by the Ld. AO on account of lumpsum disallowance of non-verifiable expenses.

During the course of assessment proceeding upon perusal of the P&L Account and submission filed by the assessee it was found that the assessee has debited various expenses under the head side expenses, mining work expenses, mess expenses, transportation expenses, staff welfare and incentive expense, repairs expenses, labour expenses which were made in cash also. Since some of the payment vouchers submitted by the assessee found defective according to the Ld. AO, those were not verifiable and, therefore, in order to put check on cash payment of expenses, lumpsum addition to the tune of Rs. 10 lakh has been made by the AO which was in turn deleted by the Ld. CIT(A) in appeal. Hence, the instant appeal before us.

Heard the parties, perused the records.

8. As it appears from the records that no specific defects in those vouchers of payment have been pointed out by the AO. He has only made reference to the fact that these expenses are in cash, vouchers are not reflecting complete details or that the rate or weight or that the name and address of the payee is not legible. While doing so, the Ld. AO failed to consider the nature of expenses which were made in cash particularly when those vouchers are prepared by the appellant for on-site expenses for the contractual hiring of machineries for removal of excavation and removal of earth materials. Neither it has been pointed out that claim of such expenses has distorted the profit ratio of the

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appellant in comparison to the earlier years, which particular aspect of the matter, has been duly taken care of the Ld. CIT(A) while deleting such addition which according to us, is just and proper and without any ambiguity so as to warrant interference. Hence, the order is passed in the affirmative i.e. in favour of the assessee and against the Revenue. The appeal preferred by the Revenue is, thus, found to be devoid of any merit and thus dismissed.

9. In the combined results, all the appeals of the Revenue are dismissed.

This Order pronounced in Open Court on	28/02/2020
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Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

Dated 28/02 /2020

Tanmay Datta, Sr. PS

TRUE COPY

आदेश का प्रत/ Copy of the Order forwarded to :

1. अपीलार्थ / The Appellant
2. प्रत्यर्थ / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)- II, Rajkot
5. व्रभागीय प्रत, आयकर अपील अाधिकरण, राजकोट/DR,ITAT, Rajkot
6. गाडफाईल / Guard file.

आदेशानुसार / BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपील अाधिकरण, राजकोट / ITAT, Rajkot