

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “VIRTUAL COURT A” KOLKATA*

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.1438/Kol/2018
Assessment Year: 2010-11

Dy. Commissioner of Income Tax, Circle-3(1), Aaykar Bhawan, 4 th Floor, Room No. 19, Kolkta-69	बनाम / V/s.	M/s Dozco Infratech Pvt. Ltd., 6, Waterloo Street, 3 rd Floor, Kolkata-69 [PAN No.AACCD 3819 M]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Dhruvajyoti Ray, JCIT-SR-DR
प्रत्यर्थी की ओर से/By Respondent	Shri A.K.Tibrewal, FCA
सुनवाई की तारीख/Date of Hearing	01-10-2020
घोषणा की तारीख/Date of Pronouncement	21-10-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue’s appeal for assessment year 2010-11 arises against the Commissioner of Income Tax (Appeals)-7, Kolkata’s order dated 28.03.2018 passed in case No.232/CIT(A)-7/Kol/Ward.3(1)/17-18 involving proceedings 143(3) r.w.s. 263 of the Income Tax Act, 1961; in short ‘the Act’.

Heard both the parties. Case file(s) perused.

2. With the consent of both the learned representative(s) and in view of the Revenue’s averments in its condonation petition / affidavit dated 04.07.2018, we

condone the fifteen days' delay in filing of the case. The case is now taken up for adjudication on merits.

3. The Revenue's sole substantive grievance raised in the instant appeal challenges correctness of the CIT(A)'s action partly reversing the Assessing Officer's action disallowing the assessee's depreciation claim @ 30% on excavators, bull dozers and wheel loaders as under:-

“I have carefully considered the facts of the case and the submissions made by the Appellant. I am guided in this case by the judgment of the Jurisdictional Tribunal in the case of Bothra Shipping Services V. ACIT IN ITA. Nos. 58-59/Ko1/2013 and C.O. Nos. 25&26/Kol/2013, which decision has followed the earlier decision of the Hon'ble Kolkata ITAT in the case of same assessee which was later upheld by the Hon'ble Calcutta High Court in its order dated 5th September, 2016 in ITAT no.144 of 2015. In the judgment of Bothra Shipping Services v ACIT IN ITA. Nos. 58-59/Ko1/2013 and C.O. Nos. 25&26/Ko1/2013, the Hon'ble Jurisdictional Tribunal had laid down the law that the matter of allowance of depreciation at a lower of higher rate is a debatable matter/issue which cannot be made subject of a proceeding and/or order passed under section 154 of the Income Tax Act, 1961. Moreover I have seen from documents filed before me that the Appellant Assessee had withdrawn its petition filed under section 154 before passing of the Assessment Order dated 06.11.2015. The judicial discipline binds me to concur with the view taken by the Hon'ble Calcutta High Court in the cases of SAIL DSP VR Employees Association 1998 vs. Union of India (2003) 128 Taxman 704 (Calcutta) and Utanka Roy Vs. Director of Income Tax, International Taxation Transfer Pricing, Kolkata & Ors in W.P No 369 of 2014, Judgment dated 15th December, 2016 that admission of the Assessee does not make an income taxable which is otherwise not taxable. I also refer to the recent unreported judgment of Hon'ble Mumbai bench of the Tribunal in the case of Sajjan India Limited v Additional Commissioner of Income Tax, Range-7(2), Mumbai [IT Appeal Nos. 5550 & 5751 (mum.) of 2015 and 6865. (MUM.) of 2016], Order dated 28.11.2017] wherein the Tribunal has held as under:

We find merit in the contention of the assessee that once tribunal has adjudicated matter in assessee's favour then merely because disallowance was made in return of income voluntarily under a wrong belief, the assessee cannot resile from its position is not acceptable. The mandate of the 1961 Act is to tax real income and not an income which was never the income chargeable to tax in the hands of the assessee but was declared under a wrong belief or notion. The mandate of the 1961 Act is to tax real income and tax can only be levied under the authority of law. Thus, if after verifications and following the ratio of law decided by the tribunal in the instant case, if the disallowance falls below the

disallowance u/s 14A offered by the assessee in return of income, be it may the Revenue cannot charge tax on income which never was the income of the assessee chargeable to tax within the mandate and provisions of the 1961 Act as the tax can only be levied by the authority of law.

*I find that as was the case before the Hon'ble Mumbai bench in the case of Sajjan India limited (supra) the issue in hand is covered in the favour of the Assessee by the decision of the jurisdictional Tribunal in Bothra Shipping Services vs. CIT in ITA No. 586/Kol/2010, which had been approved and upheld by the Hon'ble Calcutta High Court in its order dated 5th September, 2016 in ITAT no.144 of 2015. A perusal of the said judgments and other judgments referred to by the Assessee shows that depreciation claimed by the Assessee @ 30% on Excavators, Bull dozers and Wheel Loaders has been rightly claimed and should be allowed in full as against @ 15% allowed by the Assessing Officer. However, the other two assets viz. Rock Breaker and Motor Grader in my opinion does not fall within the ambit of the expression "**Motor Lorries**" as provided in Income Tax Rules, 1962 and are also not covered in the Judgments cited before me and thus depreciation claimed on the said two assets had been rightly reduced by the Assessing Officer to 15% as against the claim of 30% made in the return of the Assessee."*

4. Learned departmental representative vehemently contended during the course of hearing that the Assessing Officer had rightly disallowed the assessee's impugned higher depreciation claim on the ground that it was not a transporter so as to be entitled for higher rate of 30% depreciation on the above stated machinery.

5. We find no merit in the Revenue's sole substantive grievance. It has come on record that the CIT(A) has gone by the hon'ble jurisdictional high court's decision (supra) to hold that all the above stated three categories of the corresponding plant and machinery items i.e. excavators, bull dozers and wheel loaders carry depreciation relief of @ 30% than @ 15% canvassed at the Revenue's behest. Learned authorized representative further pin-pointed the fact that this tribunal's decision in Bothra Shipping Services (supra) had also followed CIT vs. Gaylord Construction 190 Taxmann.com 406 (Kerala) & Gujco Carriers vs. CIT 250 ITR 50 (Guj) deciding the similar issue against the department. We hold in this factual backdrop that the CIT(A)'s lower appellate discussion granting higher rate of depreciation @ 30% in case of foregoing three categories of machinery thereby treating them akin to "**Motor**

Lorries” under the Motor Vehicles Act & Rules ; are liable to be affirmed. We order accordingly.

6. This Revenue’s appeal is dismissed.

Order pronounced in open court on 21/10/2020

Sd/-
(लेखा सदस्य)
(J.Sudhakar Reddy)
Accountant Member

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 21/10/2020 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT, Cir-3(1), Aaykar Bhawan, 4th Floor, Room No.19
Chowringhee Square, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Dozco Infratech Pvt. Ltd., 6, Waterloo Stsreet, 3rd Floor
Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।