

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, VP &
SHRI AMIT SHUKLA, JM**

आयकरअपीलसं./ I.T.A. No. 5805/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2011-12)

ITO – 6(3)(1), R. No. 506, 5 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400051	बनाम/ Vs.	M/s Indo Energy International Pvt. Ltd. 1 st floor, J. V. House, 2 nd floor, Dr. D. S. Babrekar Marg, Mumbai-400 028
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABCI1739A		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri R. P. Rastogi, Ld. DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Jitendra Jain, Ld. AR
सुनवाईकीतारीख/ Date of Hearing	:	14.06.2022
घोषणाकीतारीख / Date of Pronouncement	:	24.06.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The aforesaid appeal has been filed by the revenue against the impugned order dated 05.07.2018, passed by Ld. CIT(A)-12,

Mumbai for holding the order passed u/s 154 for AY 2011-12. The revenue has taken the following grounds of appeal:-

1. *"On the facts and circumstances of case and in law, the Ld. CIT (A) has erred in holding the order passed by the AO u/s. 154 of the Act on 27/03/2017 restricting the depreciation on the cost of the jetty to 15% treating it as plant & machinery instead of intangible asset, is not in accordance with the provisions of section 154 of Act and therefore, the same is not legally sustainable."*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the AO to delete the excess depreciation claimed at Rs. 1,38,50,874/- ignoring that the assets are entitled for depreciation only at the rate of 15% and not 25% as claimed by the assessee."*

3. *"On the facts and in the circumstances of the case and in law, ld.CIT(A) has erred in allowing the excess depreciation claimed by the assessee, ignoring the decision of the Bombay High Court in the case of West Gujarat Expressway Ltd. [73 taxmann.com 139 (Bom.)]"*.

4. *"The Appellant prays that the order of the CIT (Appeals) on the above grounds be set aside and that of the AO be restored."*

2. The facts in brief are that, the assessee company is engaged in the business of operating and maintaining a Jetty. It has procured a license /lease right to develop and operate a Jetty for 30 years by

entering into a lease agreement with Maharashtra Maritime Board, Mumbai. The assessee had incurred expenses aggregating to Rs. 15,51,44,809/- on developing and construction of Jetty in the earlier years which was capitalized in its books of account and the Jetty was put to use during the AY 2010-11. The assessee had capitalized the cost for Jetty under the block, '*Intangible Assets*' and claimed depreciation @ 25% which was accepted and allowed by the AO in the earlier, i.e., AY 2010-11.

3. The assessee had filed its return of income for AY 2011-12 on 30.09.11 declaring loss of Rs. 2,19,64,935/-. Under the scrutiny proceedings u/s 143(3), specific query was raised by the AO regarding the rate of depreciation claimed on the Jetty and a detail note was filed before the AO. Ld. AO accepted the claim of assessee and depreciation was allowed @ 25%.

4. Subsequently, AO issued a notice u/s 154 proposing to restrict the depreciation in respect of cost of Jetty @ 15% by treating the same as plant and machinery. The excess depreciation amounting to Rs. 1,38,50,874/- was disallowed and loss was revised to Rs. 71,08,007/- in the impugned order passed u/s 154.

5. Ld. CIT(A) after a detail discussion held that right to construct and operate Jetty constitute commercial /business right and is 'intangible asset' eligible for depreciation @ 25%. He further held that since this issue was examined by the AO in the original assessment proceedings, therefore the AO cannot rectify u/s 154 by restricting the depreciation 25% to 15%, as it is beyond the scope of section 154.

6. Before us, Ld. Counsel for the assessee submitted that in the subsequent assessment years, the depreciation @ 25% has been allowed from the appellate stage. He further pointed out that here in this case, assessment was reopened again u/s 147. Again in the order passed u/s 147, the same issue has been disallowed once again, wherein AO has he held that the cost of construction of development of infrastructure facility under BOOT projects is to be amortized and claimed as allowable business expenditure under the Act. The amortization allowable is to be computed at the rate which ensures that the whole of the cost incurred in creation of infrastructural facility is amortized evenly over the period of concessionaire agreement after excluding the time taken for

creation of such facility. In the instant case, the assessee has claimed deduction out of the initial cost of development of infrastructure facility in the earlier year i.e. A.Y.2010-11, thus the cost 'so reduced' shall be amortized equally over the remaining period of concessionaire agreement. Accordingly, AO worked out the amortized amount allowable to the assessee for the year under consideration over the period of 22 years. Thus, he submitted that in light of the subsequent order u/s 147/143(3) the present appeal filed by the department has become infructuous.

7. On the other hand, Ld. DR submitted that now the fresh assessment order passed u/s 147/143(3) wherein similar issue has been dealt with, therefore the grounds raised by the department has been rendered infructuous.

8. In view of the aforesaid fact that, subsequently the AO has passed the re-assessment order u/s 147/143(3) dated 05.12.18 wherein he has disallowed the cost of depreciation holding that same is allowable @ 25% and has amortized the expenses over the period of 22 years, therefore the present grounds raised by the department has been rendered infructuous.

9. In the result, the appeal filed by the revenue stands **dismissed.**

Orders pronounced in the open court on 24th June, 2022.

Sd/-
(Pramod Kumar)
Vice President

Sd/-
(Amit Shukla)
Judicial Member

मुंबई Mumbai;दिनांक Dated : 24/06/2022
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai