

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.5451/Del/2018

निर्धारणवर्ष/Assessment Year: 2014-15

M/s SKE & C-KCT Joint Venture, 85A, 3 rd Floor, Rishyamook Building, Panchkuian Road, New Delhi.	बनाम Vs.	DCIT Circle 24(2) New Delhi.
PAN No. AADAS9266L		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

&

आ.अ.सं./I.T.A Nos.4202 to 4204/Del/2019

निर्धारणवर्ष/Assessment Years: 2011-12 to 2013-14

M/s SKE & C-KCT Joint Venture, Thapar House, Central Wing, 3 rd Floor, 124 Janpath, New Delhi.	बनाम Vs.	DCIT Circle 23(2) New Delhi.
PAN No.		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Shri Upvan Gupta, CA
राजस्वकीओरसे /Revenue by	Shri Abhishek Kumar, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	20.06.2022
उद्घोषणाकीतारीख/Pronouncement on	03.08.2022

आदेश /ORDER

PER BENCH

These four appeals are filed by the assessee against different orders of the Ld. Commissioner of Income Tax (Appeals)-22, New Delhi for the assessment years 2011-12 to 2014-15 in sustaining the order of

the Assessing Officer who denied the claim for 100% depreciation on temporary structures constructed by the assessee in the project sites.

2. Briefly stated the facts are that the assessee company was set up as a Joint Venture between SK Engineering and Construction Co. Ltd. (SK E&C), Korea and Karamchand Thapar & Bros. Ltd. (KCT) of India in the ratio of 60:40 respectively. The joint venture was set up to execute construction contracts awarded by Indian Strategic Petroleum Reserves Ltd. (ISPRL). The assessee joint venture the SKE&C-KCT JV was awarded two contracts by ISPRL viz. Mangalore Project and Padur Project for the construction of underground crude oil, reservoir which was signed and executive a preliminary joint venture agreement on 07.01.2009 and 22.01.2010 the initial JV agreement respectively setting out the rights, duties, obligations and liabilities as among themselves with respect to various stages involved in the project at Mangalore and Padur which, inter-alia, included the pre-qualifying bid, final bid and execution of work in case of Mangalore Project and Padur Project awarded to parties.

3. The assessee filed its return of income for AY 2011-12 on 30.09.2011 declaring income of Rs.6,97,55,810/- which was revised later on 30.11.2012 declaring income of Rs.8,11,83,020/- which was processed u/s 143(1) of the Act. The assessment was completed u/s 143(3) read with section 144C of the Act determining the income of the assessee at Rs.8,70,63,553/- while completing the assessment the Assessing Officer

noticed that assessee claimed depreciation amounting to Rs.58,80,533/- being 10% in respect of addition to buildings amounting to Rs.5,88,05,330/- made during the assessment year. The assessee was required to file evidence in support of its claim such as valuation report, completion certificate regarding construction, etc. The assessee submitted before the Assessing Officer that the expenditure was incurred on temporary erection of structures and such temporary structures are entitled for 100% depreciation, however, inadvertently the assessee had claimed depreciation only at 10%. The assessee also furnished a certificate from S. Maitra Company, the Government approved valuer who had certified that they have inspected both Mangalore and Padur Project sites and the assessee erected temporary construction/temporary site facilities for the completion of the projects at Mangalore and Padur and the temporary structures relate to site offices, store, work shop and canteen. However, the Assessing Officer not convinced with the submissions made by the assessee denied claim for depreciation on such temporary structures observing that the certificate nowhere certifies the value and the nature of construction, complete description of the temporary structures and the details of material used for such construction and the cost of labour deployed for such temporary construction.

3.1 The AO also observed in the assessment order that for the AY 2010-11 assessee has made a similar claim and the same was denied as

the assessee could not produce any evidence in support of its depreciation claim for on such building which was disallowed. Therefore, observing that the assessee has not been able to furnish any evidence to substantiate its claim of temporary construction, the AO denied the claim for 100% depreciation on such temporary structures and accordingly completed the assessment.

3.2 Before the Ld. CIT(A) the assessee made elaborate submissions as to why the construction made by the assessee are purely temporary structures and allowable for 100% depreciation. The assessee also requested for admission of the following additional evidences: -

1. Copy of ledger maintained by the assessee in its books of account for the temporary structures.
2. Copy of vouchers along with payment invoices for constructing temporary structures.
3. The photographs of the temporary construction.

4. The assessee also contended before the Ld.CIT(A) that the AO did not ask for any specific evidence to be produced such as vouchers, bills/invoices which were available with the assessee made disallowance of depreciation claimed. The assessee relied on the following decisions in support of its contention that depreciation is allowable at 100% on purely temporary structures:

1. Shalivahana Constructions Ltd. Vs. DCIT (2007) 12 SOT 406 (Hyd.)
2. DCIT Vs. Win Medicare Ltd. (2011) 11 ITR (Trib.) 66 (Del.)
3. CIT Vs. Print Systems & Products 203 CTR 247 (Mad.).

5. The Ld. CIT(A) following the order of his predecessor in assessee's own case for the AY 2012-13 and 2013-14 held that the assessee is not entitled for 100% deduction but however, depreciation was allowed at 10% on such temporary structures.

6. The Ld. Counsel for the assessee submits before us that the erections made by the assessee in the project sites at Mangalore and Padur are purely temporary structures to enable the assessee to carry on the projects awarded by ISPRL for the construction of underground crude oil, reservoir. The Ld. Counsel for the assessee referring to page 1 of the Paper Book submits that assessee had obtained certificate from S. Maitra & Company who is the Government approved valuer who also certified that the assessee had erected the site offices, store, workshop and canteen at the project sites of both Mangalore and Padur Projects. The Ld. Counsel submits that the Government approved valuer also certified that these structures are purely temporary structures and they are erected for the purpose of completion of the projects by the assessee. The Ld. Counsel referring to page 2 of the PB submits that this is a site clearance certificate which shows that the assessee has completed the civil works for underground rock, covens for strategic storage of crude oil project at Padur and site allotted/occupied areas by the assessee during the course of work have been cleared of its tools, tackles construction equipment, temporary facilities/materials, etc. on 31.10.2014 and thereby handed over to the client M/s ISPRL for their

undisputed custody and position. The Ld. Counsel submits that this site clearance certificate was signed by the Deputy Manager Indian Strategic Petroleum Reserves Ltd., Padur. The Ld. Counsel for the assessee referring to page 3 of the PB, submits that a contractor demobilization checklist was also issued by ISPRL certifying that the assessee has removed temporary facilities, site office, temporary water/power connection and also cleared the site viz. debris construction material tool and tackles equipment etc. at the project site Mangalore. Therefore, the Ld. Counsel submits that whatever the temporary structures erected by the assessee for the purpose of execution of the projects at Mangalore and Padur sites were cleared and the land is handed over to the client namely ISPRL. The Ld. Counsel therefore submits that these structures are purely temporary structures and they are entitled for 100% depreciation as provided in the schedule of depreciation in support of his above contention reliance was placed on the following decisions:

1. *Shalivahana Constructions Ltd. Vs. DCIT: (12 SOT 406, Hyd.)*
2. *DCIT Vs. Win Medicare Limited: (17 taxmann.com 104, Delhi)*
3. *CIT Vs. Print Systems & Products: (285 ITR 337, Mad.)*
4. *DCIT Vs. Mitsubishi Heavy Industries Ltd.: (61 TTJ 656, Delhi)*
5. *Comfort Living Hotels (P) Ltd. Vs. CIT: (363 ITR 182, Delhi)*

7. The Ld. DR strongly supported the orders of the authorities below. The Ld. DR further submits that similar disallowance was made while completing the assessment for the AY 2010-11 which was also accepted by the assessee. The Ld. DR submits that the claim of the assessee was

denied in the absence of any evidence furnished by the assessee in support of its claim for depreciation.

8. In reply the Ld. Counsel for the assessee submits that even though similar disallowance was made while completing the assessment for AY 2010-11 which is the first year of operations as the project commenced in the year 2009, in view of the smallness of the disallowance the assessee did not contest the issue in appeal.

9. We have heard the rival contentions, perused the orders of the authorities below and the decisions relied on. On perusal of the assessment order for the AY 2011-12, we noticed that the claim for depreciation on temporary structures at 100% was denied by the AO for the reason that except the certificate issued by S. Maitra & Company the assessee did not furnish the details of temporary structures erected by the assessee. We also observed from the assessment order for AY 2011-12 that it is the observation of the Assessing Officer that similar claim was denied to the assessee while completing the assessment for the AY 2010-11 as the assessee could not produce any evidence in support of its depreciation claimed. We have also perused the assessment order for the AY 2010-11 which is placed at page 36 of the PB and noticed that the claim for 100% depreciation on temporary structures was denied by the AO observing that the assessee failed to substantiate its claim by filing valuation report and completion certificate of building. Except these observations the AO did not discuss anything in the assessment order.

While completing the assessments for subsequent assessment years the AO merely followed the order passed by him for the AY 2010-11. The Ld. CIT(A) while disposing off the appeal for the AY 2011-12 followed the order of his predecessor passed for the assessment years 2012-13 & 2013-14. On perusal of the order of the Ld. CIT(A) for the AY 2012-13, we noticed that the Ld.CIT(A) observed that the assessee had constructed site office, labour quarters, mobile toilets, DG sheds, fencing drain and retain wall, ventilation frame, godown, office medicare centre, diesel dispensation unit, canteen, parking shed, dispensary, etc. In the opinion of the Ld.CIT(A) these structures are not apparently temporary structures nor they rendered useless after the project is commissioned. Therefore, the Ld. CIT(A) while disposing off the appeals for the assessment years 2012-13 and 2013-14 denied the claim for 100% depreciation on temporary structures. However, he directed the AO to allow depreciation at 10%. We further noticed that in the appeal proceedings for the AY 2014-15 before the Ld. CIT(A) the assessee made detailed submission and also furnished evidences in the form of ledger, vouchers, indicating various payments made to various contractors, sub contractors for construction of various structures, etc. However, the Ld.CIT(A) denied the claim for depreciation observing that in the tax audit report the assessee claimed depreciation at 10% and the same was enhanced to 100% in the computation of income and the enhanced claim for depreciation at 100% in the computation of income is an afterthought.

10. The evidences produced by the assessee in the form of certificate from S. Maitra & Co., Government approved valuer, site clearance certificate and contractor demobilization, checklist clearly suggest that the assessee made temporary site facilities by constructing site offices, store, work shop and canteen for the projects to be executed at Mangalore and Padur Projects and these are temporary construction/facilities and these temporary constructions and facilities were later on demolished and removed from the sites after completion of the projects.

11. In the case of Shalivahana Constructions Ltd. Vs. DCIT (supra) the Hyderabad Bench of the Tribunal had considered the identical situation and held as under:

“7. In the case of contractors, certain structures are put up at project site on land given temporarily by the contractee. These structures are meant for the use by the contractor as his project office and also for housing labour as well as employees of the contractor. The land is neither owned by the contractor nor is it held by the contractor as leasehold. In this view of the matter, the structures put up on such land, of whatever nature, are purely temporary structures. The assessee might have used material which gives longer life to the structures in question, but the fact remains that the assessee is neither the owner of the land nor has it any claim over the structures after completion/termination of the contract. In fact, when such structures are put up on land not belonging to the person, the expenditure is of revenue nature in view of the judgment of the Hon’ble Supreme Court in the case of CIT Vs. Madras Auto Service (P) Ltd. (1998) 233 ITR 468. The same view has been taken by this Bench of the Tribunal in the case of Premlatha Vs. ITO 63 ITD 69 (sic). We are of the considered opinion that the CIT has overlooked this issue of ownership of land.”

12. The Delhi Bench of the Tribunal in the case of DCIT Vs. Mitsubishi Heavy Industries Ltd. (supra) had to consider whether temporary bridges and roads constructed by the assessee for transportation of goods from port of work sites fall under temporary structures eligible for 100% depreciation or not and the Tribunal held as under:

“3.3 Ground No. 3 - relating to allowing deduction in respect of construction of bridges amounting to Rs.1,17,21,284/- as revenue expenditure.

The Assessing Officer has discussed the facts relating to this point in paras 26 to 29 at pp. 15 to 17 of the assessment order.

3.3 *(i) The assessee debited an expenditure of Rs.92.05 lakhs on construction of bridges for transportation of goods from Khandla port under the head IT. A further sum of Rs.25,16,284 was spent on the civil works in regard to the construction of these bridges. The assessee claimed the aforesaid expenditure as revenue expenditure. It was stated by the assessee vide letter dated 5.8.1991 that this temporary bridge was washed away by floods and another bridge was constructed. Subsequently, vide letter dated 28.8.1991 submitted to the AO, it was submitted that the said expenditure has been incurred towards civil works attributable to the construction of bridges, maintenance and removal of bye-pass or debtor, upgrading and maintenance of roads, and removing and restoration of the miscellaneous obstacles on the way to site from Khandla. It was further stated on behalf of the assessee that bridge constructed on a temporary basis which were subsequently demolished did not result in any benefit of enduring nature and such an expenditure was necessary business expenditure for carrying out the execution of contract work. It was also submitted that such temporary construction, even if it is treated as capital expenditure will be eligible for grant of depreciation @ Rs.100 per cent. The Assessing Officer treated the said expenditure as of a capital nature and disallowed the same in view of the judgment of Hon'ble Allahabad High Court in the case*

of *CIT Vs. Bazpur Cooperative Sugar Factory Ltd.* (1982) 30 CTR (All) 266: (1983) 142 ITR 1 (All.).

- 3.3 (ii) The CIT(A) held that the bridge over river Yamuna was constructed by the assessee-company for the transportation of over-dimensional consignment of the work site without which the project could not have been completed. It is also clear from the certificate of the Uttar Pradesh Public Works Department that the bridge over river Yamuna and the bye-pass roads constructed for the said transportation were of temporary nature and were to be demolished after the necessary use. The CIT(A) considered the judgments of the Hon'ble Supreme Court in the case of *Bombay Steam Navigation Co. (P) Ltd. vs. CIT* 91965) 56 ITR 52 (SC) : judgment in the case of *Empire Jute Co. Ltd. vs. CIT* (1980) 17 CTR (SC) 113 (1980) 124 ITR 1 (SC) and judgment in the case of *Bikaner Gypsum Ltd. vs. CIT* (1990) 89 CTR (SC) 176 : (1991) 187 ITR 39 (SC). He further observed that the assessee had to incur expenditure on the construction of bye-pass road and temporary bridge on river Yamuna for the purposes of carrying on its business because without incurring this expenditure it could not have transported the relevant machinery to the work site for the execution of the project. The assessee had to demolish the bridge after the use of the transportation and, therefore, no benefit of enduring nature or capital asset was acquired by the assessee. He, therefore, deleted the said addition.
- 3.3 (iv) The Ld. Departmental Representative relied upon the reasons mentioned in the assessment order. The Ld. Counsel for the assessee supported the order of the CIT(A).
- 3.3 (v) We have carefully gone through the orders of the Ld. Departmental authorities and have considered the submissions made by the Ld. Representative.
- 3.3 (vi) In our view, the CIT(A) has rightly directed the Assessing Officer to grant deduction in respect of the aforesaid expenditure of Rs.1,17,21,284/-. The expenditure incurred by the assessee for construction of temporary bridges and bye-pass roads was a

necessary expenditure, without which it was impossible for the assessee-company to transport the required machinery and other material to the work site. Such findings of facts recorded by the CIT(A) has not been disputed by the Ld. Sr. Departmental Representative before us. The assessee had to demolish the bridge after its use for transportation of the required material. The assessee had no right, title or interest whatsoever over the said bridge of over the bye-pass roads. The certificate issued by the U.P. Public Works Department also confirms the fact that the bridge and bye-pass roads constructed for the said transportation were of temporary nature. The assessee, therefore, either acquired any capital asset nor derived any benefit of enduring nature by incurring such expenditure. The expenditure was incurred because of a business necessity and, therefore, is clearly allowable as revenue expenditure. The allowability of such expenditure is fully supported by the aforesaid judgments referred to in the order of the CIT(A). We, therefore, do not find any justification to interfere with the view taken by the CIT(A) in relation to ground No. 3.”

13. The Hon’ble Delhi High Court in the case of Comfort Living Hotels (P) Ltd. Vs. CIT (supra) held as under:

7. “The second question, i.e., depreciation at 100% of roofing was claimed by the assessee on the basis that the construction was temporary in nature. The Assessing Officer disallowed this on the assumption that the construction included two sets of toilets and that it involved the use of marble and false ceiling. The Tribunal was persuaded to uphold this view more or less on the strength of the same reasoning, i.e., use of marble glaze tiles and false ceiling. This court is of the opinion that the materials on record show that the construction was not authorized and appears to have been put up only for the convenience of workers who were engaged by the assessee. The record also indicates that the constructions were subsequently demolished although after the Commissioner’s order. In these circumstances, the depreciation claimed to the tune of 100% cannot be termed as unreasonable as to warrant reversal of the Commissioner of Income-tax (Appeals)’s view.”

14. The Delhi Bench of the Tribunal in the case of DCIT Vs. Win Medicare Ltd. (supra) held as under:

4. *“After narrating the facts, the Ld. Departmental Representative relying upon the grounds of appeal submitted that the wooden partition and work stations could not be treated as temporary structures and these were in the nature of furniture and fixtures. Thus, it was contended by the Ld. Departmental Representative that the Assessing Officer was right in allowing depreciation at 10%. It was submitted that wooden partitions and work stations erected by the assessee were of permanent nature and they cannot be called temporary structures. It was submitted that the decision relied upon by the Ld. CIT(Appeals) in the case of Print Systems & Products (supra) is not applicable as the nature of the asset itself is in dispute. Thus, it was pleaded by the Ld. Departmental Representative that the order of the CIT(Appeals) on this issue should be set aside and that of the Assessing Officer be restored.*
5. *On the other hand, it was submitted by the Ld. Authorised Representative that the very nature of the asset was temporary structure and according to Appendix I to the Income-tax Rules, 1962 item 4 (purely temporary erections such as wooden structure), are eligible at 100%. He submitted that the annexure has been reproduced in the order of the Commissioner of Income-tax (Appeals) in paragraph 2.4. He submitted that the case law relied upon by the Ld. Commissioner of Income-tax (Appeals) clearly supports the case of the assessee and thus, he pleaded that the order of the Commissioner of Income-tax (Appeals) should be upheld.*
6. *We have carefully considered the rival submissions in the light of material placed before us. The nature of alterations/changes/maintenance made by the assessee was in the nature of wooden partition and work stations and is made in the premises which were not owned by the assessee. These modifications are stated to be made for the optimum utilization of the space and for better and more efficient working of the office staff. No material had been brought on record to suggest that such statement of the assessee is incorrect. If it is so, the work done by the assessee will fall under item 4 which describes the rate of depreciation of 100%*

in respect of “purely temporary erection such as wooden structure”. In this view of the situation, we do not find any infirmity in the order of the CIT(Appeals) vide which the necessary relief has been given to the assessee, we decline to interfere.”

15. The Hon’ble Madras High Court in the case of CIT Vs. Print Systems & Products Ltd. (supra) held as under:

11. “In respect of the second question, the Tribunal has given a finding that the assessee has made temporary partitions, false ceiling and given the walls a coat of paint. The only objection of the Revenue was that since the property was acquired by the assessee and not taken on lease, the temporary erection would have to be treated as revenue expenditure. The Revenue is not in a position to point out any rule or section to substantiate its claim that the assessee is not entitled to 100% depreciation on temporary erection. The ownership or taking the property on lease is of no consequence, so far as the construction of a temporary partition is concerned. So, the Tribunal, considering the relevant materials and evidence came to the conclusion that the assessee was entitled to 100% depreciation in respect of the addition on temporary erection. This view has also been taken by the Tribunal in respect of the earlier assessment orders. In view of the foregoing conclusion, we do not find any error or infirmity in the order of the Tribunal and hence the same does not warrant any interference and no substantial questions of law arise for consideration of this court. Hence, we dismiss the above tax case.”

16. The ratio in all the above decisions is that when the assessee constructed temporary structures such temporary structures are entitled for 100% depreciation. On reading of all the assessment orders and CIT(Appeals) orders and the submissions made by the assessee in all these assessment years, we noticed that the assessee has not completely furnished all the details in respect of the temporary structures before the Assessing Officer.

17. Before the Ld. CIT(A) the assessee furnished various evidences in the form of additional evidence. However, the Ld. CIT(Appeals) neither admitted nor given any finding on such additional evidences filed by the assessee. The Ld. CIT(Appeals) could have called for the remand report from the AO on the evidences furnished by it. However, he chose not to do so.

18. Before us the assessee furnished copies of Government approved valuers report, site clearance certificate, contractor demobilization, checklist to buttress the agreement that the assessee has erected only temporary structures and those structures were later on demolished after completion of the projects. These evidences go to show that the assessee erected temporary structures and later on demolished those structures in which case depreciation at 100% is allowable. The evidences furnished before us in the form of site clearing certificate and the contractor demobilization check list which were dated 24.07.2015 and 12.10.2015 respectively appears to have not produced before the authorities below. Therefore, taking the totality of facts and circumstances into consideration in the interest of justice, since these evidences were not furnished before the Assessing Officer, we restore the issue of allowance of depreciation on temporary structures in all these appeals to the file of the Assessing Officer and AO shall examine the evidences and decide afresh in accordance with law in the light of our above observations and the case laws after providing adequate

opportunity of being heard to the assessee. The assessee is at liberty to furnish all these evidences before the Assessing Officer to substantiate its claim. Thus, we restore the issue in all these appeals to the AO for *de novo* adjudication in accordance with law.

19. In the result, appeals of the assessee are allowed for statistical purpose.

Order pronounced in the open court on 03/08/2022

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 03/08/2022

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi